SUPREME COURT OF QUEENSLAND

CITATION:	*Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175
PARTIES:	**KATHY MICHELLE PINGEL** (applicant/respondent) **v** **TOOWOOMBA NEWSPAPERS PTY LTD** ACN 009 820 035 (respondent/appellant)
FILE NO/S:	Appeal No 11799 of 2009 SC No 9056 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2010
JUDGES:	Fraser JA and Fryberg and Applegarth JJ Separate reasons for judgment of each member of the Court, Fraser JA and Fryberg J concurring as to the orders made, Applegarth J dissenting
ORDERS:	**1. Grant the respondent leave to file the notice of contention dated 23 March 2010.** **2. Allow the appeal, set aside the orders made in the trial division, and instead order that the respondent's application under s 32A of the *Limitation of Actions Act* 1974 (Qld) be dismissed with costs.** **3. Order the respondent to pay the appellant's costs of and incidental to the appeal.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – OTHER CAUSES OF ACTION AND MATTERS – where the appellant published an article in *The Chronicle* on 21 June 2008 which reported alleged misconduct by an unnamed person and the respondent considered that the article defamed her – where the respondent applied under s 32A of the *Limitation of Actions Act* 1974 (Qld) for an extension of time within which to pursue an action for defamation – where s 10AA of the Act provides that an action for defamation must be brought within one year of the date of the publication – where the primary judge ordered that the limitation period

for the respondent's cause of action be extended pursuant to s 32A(2) of the Act – where the primary judge concluded that it was not reasonable in the circumstances for the respondent to have commenced an action for defamation before the expiry of the limitation period – whether the primary judge erred in finding that it was not reasonable for the respondent to have commenced an action for defamation against the appellant within one year of the date of publication of the article

DEFAMATION – ACTIONS FOR DEFAMATION – OTHER PROCEEDINGS BEFORE TRIAL – OTHER MATTERS – whether s 19 of the *Defamation Act* 2005 (Qld) renders evidence of an offer to make amends made under Division 1 of Part 3 inadmissible in an application under s 32A of the *Limitation of Actions Act* 1974 (Qld) – whether evidence of a prospective plaintiff's reason for not commencing proceedings within the limitation period is admissible in an application under s 32A

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – GENERAL PRINCIPLES – FUNCTIONS OF APPELLATE COURT – GENERALLY – whether the principles regulating appellate review of discretionary decisions apply in an appeal under s 32A(2)

Acts Interpretation Act 1954 (Qld), s 14A
Defamation Act 2005 (Qld), s 3(d), s 12, s 13, s 14, s 15, s 16, s 17, s 18, s 19, s 40(2)(a), s 40(3)
Limitation of Actions Act 1974 (Qld), s 10AA, s 32A, s 32A(2)
Uniform Civil Procedure Rules 1999 (Qld), r 765, r 766, r 981

Adams v Lambert (2006) 228 CLR 409; [2006] HCA 10, cited
Adams v The Queen (2008) 234 CLR 143; [2008] HCA 15, cited
Ahmed v Harbour Radio Pty Ltd [2010] NSWSC 676, cited
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; [2009] HCA 41, cited
Allesch v Maunz (2000) 203 CLR 172; [2000] HCA 40, cited
Amos v Monsour Pty Ltd (2009) 2 Qd R 303; [2009] QCA 65, cited
A V Jennings Construction Pty Ltd v Maumill (1956) 30 ALJR 100, cited
Betfair Pty Ltd v Racing New South Wales and Another (No 7) (2009) 181 FCR 66; [2009] FCA 1140, cited
Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424; [2001] FCA 1833, cited

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Burke v TCN Channel Nine Pty Ltd, unreported, Levine J, Supreme Court of NSW, No 10688 of 1989, 16 December 1994
Carey v ABC [2010] NSWSC 709, cited
Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47, cited
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44; [1993] HCA 31, cited
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2, cited
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26, applied
Ettingshausen v Australian Consolidated Press Ltd (1991) 23 NSWLR 443, cited
Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd (1981) 146 CLR 336; [1981] HCA 4, cited
Field v Commissioner for Railways (1957) 99 CLR 285; [1957] HCA 92, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Fraser v The Irish Restaurant & Bar Coompany P/L [2008] QCA 270, cited
Golosky v Golosky [1993] NSWCA 111, cited
Harrington v Lowe (1996) 190 CLR 311; [1996] HCA 8, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
J v L & A Services Pty Ltd (No 2) [1995] 2 Qd R 10; [1993] QCA 12, cited
Jomal P/L v Commercial and Consumer Tribunal & Ors [2009] QCA 326, cited
Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd [2001] 1 Qd R 276; [1999] QCA 276, cited
Muller v Linsley & Mortimer (a firm) [1996] PNLR 74, cited
New South Wales v Betfair Pty Ltd and Others (2009) 180 FCR 543; [2009] FCAFC 160, cited
Noonan v MacLennan & Anor [2010] QCA 50, applied
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492; [1985] HCA 34, cited
Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd (2005) 220 ALR 211; [2005] FCAFC 131, cited
Schweppes' Ltd v Archer (1934) 34 SR (NSW) 178, cited
Singer v Berghouse (1994) 181 CLR 201; [1994] HCA 40, cited
Unilever PLC v The Procter & Gamble Co[2000] 1 WLR 2436; [1999] EWCA Civ 3027, cited
Walker v Wilsher (1889) 23 QBD 335, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

COUNSEL: R Traves SC, with R Anderson, for the appellant
D J S Jackson QC, with C Fitzpatrick, for the respondent

SOLICITORS: Rostron Carlyle Solicitors for the appellant
Russell and Company Solicitors for the respondent

[1] **FRASER JA:** The appellant is the publisher of *The Chronicle*, a newspaper which has its main circulation in Toowoomba and surrounding areas. On 21 June 2008 the appellant published an article in *The Chronicle* which reported alleged misconduct by an unnamed person. The respondent considered that this article defamed her.

[2] Section 10AA of the *Limitation of Actions Act* 1974 (Qld) provides that the limitation period for an action for defamation expires after the end of one year from the date of the publication. On 18 August 2009, the respondent applied under s 32A of the *Limitation of Actions Act* for an extension of that period. Section 32A provides:

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

[3] On 22 September 2009 P Lyons J ordered under s 32A(2) that the limitation period for the respondent's cause of action for defamation against the appellant be extended to 6 October 2009. The primary judge concluded that it was not reasonable in the circumstances for the respondent to have commenced an action for defamation before the expiry of the limitation period on 21 June 2009 for these reasons: the parties had embarked upon the procedures in Div 1 of Pt 3 of the *Defamation Act* 2005 (Qld) for the resolution of civil disputes without litigation; it would not have been reasonable for the respondent to have commenced proceedings until those procedures have been brought to a conclusion; to do so would have been inconsistent with the clear intent of the legislation to promote non-litigious resolution of such matters; and the commencement of proceedings might have exposed the respondent to orders for costs and a proceeding in the face of a defence created by the appellant's offer to make amends.

[4] In a judgment delivered after the primary judge's decision, *Noonan v MacLennan & Anor*,[1] this Court held that s 32A(2) requires a prospective plaintiff to demonstrate

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1 [2010] QCA 50.

more than that it was reasonable to commence the proceeding after the expiry of the limitation period; the prospective plaintiff must demonstrate that it was not reasonable to commence an action during the limitation period.[2] Only in "relatively unusual" circumstances[3] or "special" or "compelling" circumstances [4] would a court be satisfied that it is not reasonable to commence proceedings within the limitation period. The Court also held that the test in s 32A(2) is an objective one.[5]

[5] The question in this appeal is whether the primary judge erred in finding that it was not reasonable in the circumstances for the respondent to have commenced an action for defamation against the appellant within one year from the date of publication of the article. The appeal raises three further questions**:**

1. Does s 19 of the *Defamation Act* render evidence of the occurrence or content of an offer to make amends made under Div 1 of Pt 3 of the *Defamation Act* inadmissible in an application under s 32A of the *Limitation of Actions Act*?

2. Is evidence of a prospective plaintiff's reason for not commencing proceedings within the limitation period admissible in such an application?

3. Do the principles expressed in *House v The King*[6] which regulate appellate review of discretionary decisions apply in an appeal from a decision under s 32A(2) of the *Limitation of Actions Act*?

[6] I will address those questions and the merits of the appeal after I have summarised the effect of the relevant provisions in Div 1 of Pt 3 of the *Defamation Act* and referred to the parties' unsuccessful attempt to resolve their dispute without litigation.

Part 3, Division 1 of the *Defamation Act* 2005 (Qld)

[7] Part 3 of the *Defamation Act* is headed "Resolution of civil disputes without litigation". Division 1 (ss 12 to 19) concerns "Offers to make amends". Subsection 12(2) provides that Div 1 may be used instead of any rules of court or other law in relation to payment into court or offers of compromise. Subsection 12(3) provides that nothing in Div 1 prevents a publisher or "aggrieved person" from making or accepting a settlement offer in relation to the publication of the matter in question otherwise than in accordance with Div 1.

[8] Section 13 empowers the publisher to make an "offer to make amends" to the aggrieved person. Such an offer may relate to the matter in question generally or in relation to any particular defamatory imputations. Subsection 13(4) provides that an offer to make amends is taken to have been made "without prejudice", unless the offer provides otherwise. Section 15 specifies necessary and permissible content of such an offer: it may include any kind of offer (s 15(1)(g)), but it must include an offer to publish or join in publishing a reasonable correction of the matter in question or any particular defamatory imputation (s 15(1)(d)). Subsection 15(3) provides that if an offer to make amends is accepted a court may on the application of the aggrieved person or publisher determine the amount of compensation to be

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2 [2010] QCA 50 per Keane JA at [8], [15], [18]; per Holmes JA at [30]; per Chesterman JA at [48], [50], [51], [58], [65].
3 [2010] QCA 50 per Keane JA at [15].
4 [2010] QCA 50 per Chesterman JA at [50] –[51].
5 [2010] QCA 50 per Keane JA at [20]; per Chesterman JA at [65].
6 (1936) 55 CLR 499 at 504-505.

paid under an offer where the offer provides for such a determination, and any other question that arises about what must be done to carry out the terms of the offer.

[9] Subsection 14(1) provides that an offer to make amends cannot be made if (a) 28 days have elapsed since the publisher was given a concerns notice by the aggrieved person, or (b) a defence has been served in an aggrieved person's action against the publisher in relation to the matter in question. Subsection 14(2) identifies as the necessary elements of a "concerns notice" that it must be in writing and it must inform the publisher of the defamatory imputations (the "imputations of concern") that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question. Subsection 14(3) empowers the publisher to give the aggrieved person a "further particulars notice" requesting the aggrieved person to provide reasonable further particulars about the imputations of concern which, under s 14(4), must be provided within 14 days or any further period agreed by both parties. The failure of an aggrieved person to do so has the effect, under s 14(5), that the aggrieved person is taken not to have given a concerns notice. Under ss 16(2) to (4), a publisher who has withdrawn an offer to make amends may make a renewed offer within the original time limit under s 14; and under s 16(5) that time limit does not prevent the making of a renewed offer that is not in the same terms as the withdrawn offer if the renewed offer "represents a genuine attempt by the publisher to address matters of concern raised by the aggrieved person about the withdrawn offer" and if the renewed offer is made within 14 days (or any other period agreed between the publisher and the aggrieved person) after the withdrawal of the withdrawn offer.

[10] It is apparent that one effect of those provisions is that in some circumstances the parties may agree to lengthy extensions of the s 14(1) time limit for the making of an offer to make amends, either in the defined circumstances identified in ss 14(3) to (5) or more generally under ss 16(2) to(5).

[11] It also appears that there are no proscriptive time limits for further proceedings under the Division which, like negotiations for a settlement, might occur before or after the commencement of litigation. Subsection 16(1) provides that an offer to make amends may be withdrawn before it is accepted, by notice in writing to the aggrieved person. Section 17 regulates the effect of acceptance of an offer to make amends. If the publisher carries out the terms of an accepted offer the aggrieved person cannot "assert, continue or enforce an action for defamation" against the publisher in relation to the matter in question even if the offer was limited to any particular defamatory imputations: s 17(1). A court may order the publisher to pay expenses reasonably incurred by the aggrieved person as a result of accepting the offer and may order any costs forming part of those expenses to be assessed on an indemnity basis: s 17(2). Subsection 17(3) provides that those powers are exercisable by any court in which the aggrieved person has brought proceedings against the publisher for defamation and otherwise by the Supreme Court. Section 18 creates a defence to an action for defamation. Subsection 18(1) provides that an offer to make amends in relation to the matter in question which is not accepted is a defence if the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory, at any time before the trial the publisher was ready and willing on acceptance of the offer to carry out its terms, and in all the circumstances the offer was reasonable.

[12] Section 19 provides:

> "(1) Evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends is not admissible as evidence in any legal proceedings (whether criminal or civil).
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> (2) Subsection (1) does not prevent the admission of evidence in any legal proceedings in order to determine—
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> (a) any issue arising under, or relating to the application of, a provision of this division; or
>
> (b) costs in defamation proceedings."

The attempt at a non-litigious resolution

[13] After the appellant published the article in *The Chronicle* on 21 June 2008 the respondent sought advice from solicitors on or about 2 July 2008. On 9 February 2009, the respondent's solicitor wrote a letter to the appellant complaining that the article defamed the respondent. The letter asserted that it constituted a concerns notice under Div 1 of Pt 3 of the *Defamation Act*, and that in the light of certain facts the article identified and defamed the respondent as the unnamed person the subject of the article. The respondent sought an apology, a retraction, and an undertaking that the newspaper would not publish statements to similar effect in the future. She reserved her rights to claim compensation and legal costs and she required a response within 14 days.

[14] By letter dated 25 February 2009 the appellant's solicitor suggested that the article did not identify the respondent but that the appellant was nevertheless willing to investigate the contrary proposition if the respondent articulated a proper basis for it. By letter dated 13 March 2009 the respondent's solicitor again argued that the article identified the respondent and sought an offer to make amends within 14 days. The appellant's solicitor responded by letter dated 1 April 2009 arguing, amongst other things, that the article would have made no difference to those persons who might have understood the article to refer to the respondent and she was unlikely to have been harmed by it. The appellant's solicitor again indicated a preparedness to discuss the position with the respondent's solicitor. The respondent's solicitor replied by letter dated 7 April 2009, arguing that the appellant's irresponsible reporting had resulted in allegations in the article about the respondent which were baseless, defamatory and of a nature likely to cause the respondent harm: the respondent sought an offer to make amends which should include the wording of an apology and an estimate of compensation, by no later than 9 April 2009, failing which the respondent's solicitor was instructed to commence proceedings without further notice. On 8 April 2009 the appellant's solicitor telephoned an employed solicitor in the firm representing the respondent and they "discussed" (the word used in the respondent's solicitor's affidavit) that it would be in both their respective clients' interests to resolve the matter without instituting proceedings. By the respondent's solicitor's letter dated 9 April 2009, the respondent sought from the appellant, by 15 April 2009, an offer to make amends including the terms and publication details of an apology and an estimate of the compensation the appellant was willing to pay.

[15] The appellant objected to the evidence of the subsequent correspondence on the ground that it was rendered inadmissible by s 19 of the *Defamation Act*. The

primary judge ruled that that the evidence of the occurrence of the correspondence was admissible but that its content was inadmissible.

[16] By letter dated 16 April 2009 the appellant's solicitor made what purported to be an offer to make amends under Div 1 of Pt 3 of the *Defamation Act*. Both parties thereafter treated the letter as an offer to make amends and they maintained that stance in this litigation. That was followed by correspondence in which the parties combined attempts at non-litigious resolution under or purportedly under the process in Div 1 of Pt 3 and attempts at settlement outside that process: the respondent's solicitor letters dated 18 and 26 May 2009 and the appellant's solicitor's letter dated 29 May 2009. On 3 June 2009 the respondent's solicitor had a telephone conversation with the appellant's solicitor regarding, amongst other things, the latter's letter of 29 May 2009.[7] There was then further correspondence about a possible non-litigious resolution: the respondent's solicitor wrote letters dated 4 and 12 June 2009; the appellant's solicitor responded by letter dated 17 June 2009; and (after expiry of the limitation period on 21 June 2009), the respondent's solicitor replied by letter dated 22 June 2009. By the appellant's solicitor letter dated 7 July 2009 the appellant withdrew its offer to make amends of 16 April 2009 pursuant to s 16 of the Act. The position did not change despite further correspondence, which concluded on 6 August 2009.

[17] The respondent swore that she did not commence proceeding claiming damages for defamation against the respondent prior to 21 June 2009 because, "the respondent had indicated a willingness to resolve the matter without the institution of proceedings, and I had accepted that a resolution could be reached on that basis." The primary judge overruled the appellant's objection to the admissibility of that evidence.

Objection under s 19 of the *Defamation Act* 2005 (Qld)

[18] The appellant argued that the primary judge erred in admitting evidence of the occurrence of the correspondence. The respondent contended that the evidence was admissible and also argued[8] that s 19(1) does not apply in an application under s 32A of the *Limitation of Actions Act* which is brought upon the ground that the parties' participation in procedures under Div 1 of Pt 3 of the *Defamation Act* rendered it not reasonable for the aggrieved person to have commenced proceedings before expiry of the limitation period. She contended that s 19 applies only to proceedings (whether civil proceedings or criminal proceedings under s 365 of the *Criminal Code*) to determine whether publication of the relevant matter was defamatory. In an alternative contention, she argued that s 19(1) does not apply because such an application is a proceeding "to determine … any issue … relating to the application of a provision of this Division" within the meaning of s 19(2)(a).

[19] The fact that s 19(2) qualifies the operation of s 19(1) by reference to the purpose of the admission of particular evidence in specific cases supports the broad construction of s 19(1) advocated for the respondent. I also accept the appellant's argument that the contentious evidence does not fall within an exception in s 19(2)(a). Reference to earlier provisions in Div 1 of Pt 3 illuminates the intended

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7 There was no evidence of the content of that telephone conversation. Before the hearing in the trial division the respondent abandoned reliance upon the paragraphs in the affidavit which described the respondent's solicitor's recollection of the conversation. At the hearing of the appeal senior counsel for the respondent understandably disclaimed any attempt to re-instate that evidence.

8 At the hearing of the appeal the appellant ultimately did not oppose the Court granting leave to file the amended notice of contention which raised these further contentions.

content of that exception. An issue might directly arise under a provision of Div 1 in an application made pursuant to s 15(3). The exception in s 19(2)(a) presumably also includes the application of s 17 in relation to an accepted offer to make amends and the application of s 18 in relation to an unaccepted offer to make amends. An issue arising under those provisions might itself give rise to a further issue relating to the application of another provision of the Division. Those issues might include, for example, whether an offer to make amends was made within the time limit prescribed by s 14, whether a purported concerns notice was a concerns notice under s 14(2), whether a purported "*further particulars notice*" under s 14(3) did not constitute such a notice such as to deprive it of effect under s 14(5) and to extend the time limit under s 14(1), whether a purported offer to make amends did not qualify as such an offer for non-compliance with s 15(1), and whether s 16(5) operated to extend the time limit in s 14(1) for making an offer to make amends.

[20] No such issue was litigated in this application. I do not accept the respondent's argument that the contentious evidence was relevant to an issue relating to the application of s 14 or s 18, including whether the offer to make amends was reasonable and therefore should have been accepted. No issue was raised in the application about the question whether the offer to make amends was made within the time limits specified in s 14 or any other matter it regulates. As to s 18, neither party raised any issue whether or not the offer to make amends was reasonable or should have been accepted. I explain later in these reasons why I consider that the period of time reasonably required for the respondent to consider whether or not to accept the offer might be relevant in an application under s 32A but that is not relevant to any issue relating to the application of s 14 or s 18, or any other provision in Div 1.

[21] However various matters favour the construction of 19(1) preferred by the primary judge. An interpretation of s 19 which will best achieve the purpose of the *Defamation Act* is to be preferred to any other interpretation.[9] Section 19 is an aspect of the scheme in Div 1 of Pt 3 which is designed to give effect to the generally stated object in s 3(d) "to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter". Though there are significant differences between the effect of s 19 and the common law without prejudice privilege (most notably that s 18(1) permits a publisher to rely upon an unaccepted offer to make amends as a defence) the common law privilege serves the similar object of promoting the settlement of disputes without recourse to litigation by excluding evidence of admissions made during the course of the settlement negotiations.[10] Under the common law privilege, evidence may be received for some purposes of the fact that without prejudice communications occurred where that fact is itself relevant.[11] One example of that principle is that (subject to any contrary statute) the fact that without prejudice communications have occurred is admissible to explain delay in commencing or prosecuting litigation.[12]

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9 *Acts Interpretation Act* 1954 (Qld), s 14A.

10 *Field v Commissioner for Railways for New South Wales* (1957) 99 CLR 285 at 291; *Harrington v Lowe* (1996) 190 CLR 311 at 323.

11 See *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 per Pincus JA (McMurdo P agreeing) at [13], *Betfair Pty Ltd v Racing New South Wales and Another (No 7)* (2009) 181 FCR 66 at 92 – 95, at [65] – [74], and the cases there cited.

12 *Unilever PLC v Procter & Gamble Company* [2000] WLR 2436 per Robert Walker LJ, (Wilson J and Simon Brown LJ agreeing) at 791 (quoting from Hoffmann LJ's judgment in *Muller v Linsley & Mortimer* (a firm) [1996] PNLR 74 at 79-80) and at 792(5) (citing *Walker v Wilsher* (1889) 23 QBD 335 per Lindley LJ at 338); Heydon J (Ed), *Cross on Evidence* (7th Australian ed, 2004), at p 864 [25385].

[22] In *CIC Insurance Limited v Bankstown Football Club Limited*,[13] Brennan CJ, Dawson, Toohey and Gummow JJ observed that:

> "Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy [*Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315.] Instances of general words in a statute being so constrained by their context are numerous."

[23] The relevance of the common law context in the exercise of construing s 19(1) is emphasised by s 13(4), which attaches the without prejudice privilege to an offer to make amends which does not exclude it. Reference to the existing state of the common law then illuminates an ambiguity in the reference in s 19(1) to evidence of "any statement or admission made in connection with" the making or acceptance of an offer. Those words do not seem particularly apt to exclude evidence of the fact that an offer to make amends was made or responded to on a particular date where the evidence is adduced to explain delay in commencing a proceeding. Although such evidence must draw upon the content of the relevant communication in order to characterise it as being or relating to an offer to make amends under Div 1 of Pt 3, the meaning of the text is not so clear as to preclude a construction under which that evidence is admissible.[14]

[24] The exclusion of all evidence relating to an offer to make amends might give rise to injustice in particular cases. That would most obviously be so where the relevant communications constituted a contract under which the publisher promised not to rely upon a limitation point or included a representation giving rise to an estoppel to similar effect. In my opinion s 19 would be inapplicable in such cases, either because the same matter would estop the publisher from invoking s 19 as an objection to the evidence which established the contract or estoppel or because a construction of s 19 which precluded such evidence would be so manifestly absurd and produce such obvious injustice as to demand its rejection in favour of an alternative construction.[15] The respondent adopted the appellant's concession that the evidence would be admissible in such cases as justifying a further exception to the literal effect of s 19 for the contentious evidence in issue in this case, but putting the extreme examples aside there remains a potential for injustice in the broad construction propounded by the appellant in a case in which participation in the Div 1 Pt 3 process might render it not reasonable for an aggrieved person to sue before expiry of the limitation period. (I refer to an example of such a case in paragraph 43 of these reasons.) The prospect of such injustice may be taken into account in resolving the ambiguity in s 19(1) because it renders it objectively unlikely that the meaning which would produce such injustice reflects the

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13 (1997) 187 CLR 384 at 408.

14 Compare *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [17]-[18] per Hayne, Heydon, Crennan and Kiefel JJ.

15 See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321; *Adams v Lambert* (2006) 228 CLR 409 at [21].

legislative purpose.[16]

[25] In light of the context, the better construction of s 19(1) is that preferred by the primary judge. It does not exclude evidence of the fact that an offer to make amends was made or responded to on a particular date where the evidence is adduced for the purpose of explaining an aggrieved person's delay in commencing proceedings in an application under s 32A of the *Limitation of Actions Act*.

[26] The respondent argued that the content of the correspondence is also admissible having regard to the same contextual matters. In *Unilever Plc v Procter & Gamble Company*,[17] Robert Walker LJ referred to Lindley LJ's statement in *Walker v Wilsher*[18] that the exception which permits evidence of negotiations to be given in order to explain delay or apparent acquiescence was limited to "the fact that such letters have been written and the dates at which they were written". Robert Walker LJ added that, "occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay." The ambiguity in s 19(1) identified earlier does not extend to analogous evidence of the substance of or response to an offer to make amends. The text of s 19(1) is too clear to allow for the admission of such evidence.

[27] The primary judge reserved the different question whether the reference in s 19(1) to "any legal proceedings (whether criminal or civil)" should be construed as connoting only legal proceedings, criminal or civil, relating to defamation. In the respondent's argument under her notice of contention she contended that it should be construed yet more narrowly as confining s 19(1) to proceedings which involve the determination whether the publication of the relevant matter is defamatory. However the admission in evidence of the substance of an offer to make amends would offend the terms of s 19 in an application for an extension under s 32A of the *Limitation of Actions Act* in the same way that it would offend in a proceeding which involves the determination whether the publication of the relevant matter is defamatory. There are many cases in which the generality of statutory expressions have been confined by the context in which they appear, but the context of s 19(1) is insufficiently persuasive to justify the suggested qualification of the statutory text, particularly in light of the emphasis that the exclusion of evidence applies in "any" legal proceedings.

[28] In summary, whilst s 19 of the *Defamation Act* renders inadmissible in an application under s 32A of the *Limitation of Actions Act* evidence of the content of an offer to make amends under Div 1 of Pt 3 of the *Defamation Act* it does not exclude evidence of the occurrence of such an offer and related communications. I would reject the appellant's contention that the primary judge erred in admitting such evidence.

Objection to the respondent's evidence

[29] In my respectful opinion the primary judge correctly overruled the objection to the respondent's evidence that she did not commence proceedings prior to 21 June 2009 "as the [appellant] had indicated a willingness to resolve the matter without the institution of proceedings, and I had accepted that a resolution could be reached on

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16 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305, 320-321; *Mills v Meeking* (1990) 169 CLR 214 at 242-243.

17 [2001] 1 All ER 783 at 792(5).

18 (1889) 23 QBD 335 at 338.

that basis". The admission of this evidence was not inconsistent with the conclusion of the majority in *Noonan v MacLennan & Anor* that the test under s 32A(2) is an objective one. In response to a submission that the reference to "the circumstances" includes "the subjective understandings of the plaintiff even if those understandings are mistaken, and unreasonably so, in an objective sense",[19] Keane JA observed that when s 32A(2) refers to "the circumstances", it means "the circumstances as they appear objectively to the court and not "the circumstances" which the plaintiff believed, however unreasonably, to exist." That is not to deny that a prospective plaintiff's reason for not suing in time is itself an objective and relevant circumstance. In my opinion evidence of a prospective plaintiff's reason for not commencing proceedings within the limitation period is admissible in an application under s 32A.

[30] As the primary judge observed, the respondent's evidence was very vague. In particular, she did not disclose whether or not she was aware that the limitation period expired on 21 June 2009 and she did not identify any particular communication in support of her understanding of the appellant's attitude to non-litigious resolution. However other evidence identified the relevant communications, the appellant's counsel decided not to cross-examine the respondent, and her evidence did convey her reason for not starting proceedings. Although the evidence had little weight it was admissible.

The correct approach to appellate review of a decision under s 32A(2) of the *Limitation of Actions Act* 1974 (Qld)

[31] The respondent argued that in view of the evaluative nature of a decision under s 32A(2) the correct approach to appellate review is that expressed in *House v The King*.[20] That was an appeal to the High Court against a sentence of imprisonment imposed in the exercise of a judicial discretion. Dixon, Evatt and McTiernan JJ expressed the principles in terms which limited the grounds of appellate review in such a case to an error of law or fact, taking into account an irrelevant consideration or failing to take into account or to give sufficient weight to a relevant consideration, or making a decision that was so unreasonable and unjust as to show that the judge must have made some such error. In *Singer v Berghouse*[21] the High Court decided that the same principles govern appellate review of a decision on the jurisdictional question under the *Family Provision Act* 1982 (NSW) whether the applicant for provision out of a deceased's estate has been left without adequate provision for his or her proper maintenance, education and advancement in life. The Justices observed[22] that such a decision is not discretionary in the usual sense of that term but that it does involve the making of value judgments. Gaudron J concluded that "where a subjective assessment or value judgment is concerned, appellate review depends on essentially the same considerations as those which apply in cases involving the exercise of a discretion."[23] The majority judgment expressed the principle in narrower terms. Mason CJ, Deane and McHugh JJ explained that the principles governing the review of a decision on the jurisdictional question in the context of family cases were not settled, referred to decisions about that question, and said:[24]

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19 [2010] QCA 50 at [19] - [20].
20 (1936) 55 CLR 499 at 504-505.
21 (1994) 181 CLR 201.
22 (1994) 181 CLR 201 per Mason CJ, Deane and McHugh JJ at 211; per Gaudron J at 226.
23 (1994) 181 CLR 201 at 226. I have omitted the footnote.
24 (1994) 181 CLR 201 at 212. I have omitted the footnotes.

> "Kirby P, by contrast, has held that the principles that govern appellate review of discretionary decisions should apply. In our view, this is the correct approach. In this respect we should express our agreement with the following comments of his Honour in *Golosky v Golosky*:
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> > 'Unless appellate courts show restraint in disturbing the evaluative determinations of primary decision-makers they will inevitably invite appeals to a different evaluation which, objectively speaking, may be no better than the first. Second opinions in such cases would be bought at the cost of diminishing the finality of litigation in a troublesome area and, sometimes at least, with a burden of costs upon the estate which should not be encouraged.'"

[32] The general terms in which Gaudron J expressed the principle support the respondent's argument but the majority judgment limited the application of the principles in *House v The King* to decisions upon the jurisdictional question in family provision cases. In my respectful opinion those principles do not apply in appellate review of a decision under s 32A(2) of the *Limitation of Actions Act.*

[33] The appeal to this Court is an appeal by way of rehearing in which the Court has all the powers and duties of the primary judge, may drawn inferences of fact, and may make any order the nature of the case requires.[25] In *Warren v Coombes*[26] the High Court resolved a dispute about the applicable principles where the statutory function and powers of the appeal court were materially indistinguishable. The issue for the trial judge was whether or not the defendant driver was negligent. A majority of the Justices rejected the proposition that the mere fact that judges may differ often and markedly about what in particular circumstances might be expected of a reasonable person justified adoption of a narrow view of the appellate function.[27] The majority concluded that "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it."[28]

[34] Under s 32A the answer to the question whether it was not reasonable in the circumstances for the plaintiff to have sued within the limitation period determines the result of an application for an extension of time. *Noonan v MacLennan & Anor*[29] established that the test is an objective one. No element of judicial discretion is involved in the decision whether or not an extension should be granted. (The selection of the period of any extension is discretionary, but that is not relevant in this appeal). The decision does involve an evaluation but that was also true in *Warren v Coombes*: trial judges are routinely called upon to evaluate the relative weight to be afforded to competing circumstances in the course of deciding whether the defendant failed to act with reasonable care. In relation to the principles

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25 *Uniform Civil Procedure Rules* 1999 (Qld), rules 765 and 766.

26 (1979) 142 CLR 531. The majority's exposition of the applicable principles has been consistently followed and applied. See, for example, *Fox v Percy* (2003) 214 CLR 118 at [25].

27 (1979) 142 CLR 531 per Gibbs ACJ, Jacobs and Murphy JJ at 552-553.

28 (1979) 142 CLR 531 at 551.

29 [2010] QCA 50.

governing appellate review it is not easy to identify any significant conceptual difference between that task and the task under s 32A.

[35] Other decisions which have been found to attract limitations upon appellate review similar to those in *House v The King* include decisions about the quantum of costs,[30] an apportionment of damages in a negligence case (regarded for this purpose as a discretionary decision[31]) and a valuation (where an appellate tribunal is not justified in substituting its own opinion unless the valuation was invalidated by error of law or was "entirely erroneous"[32]). In decisions of that kind, as in discretionary sentencing decisions, the approach of the law is that there is a range of valid answers to the question in issue. Those kinds of decisions may be contrasted with a decision under s 32A, where the touchstone of reasonableness allows for a single correct answer just as it does in a decision whether a defendant failed to take reasonable care.

[36] It does not follow that the evaluative character of the decision under s 32A is irrelevant in appellate review. Under the appeal provisions mentioned earlier an appellant can succeed only by establishing that the decision appealed against resulted from factual, legal or discretionary error.[33] As Allsop J observed in *Branir v Owston Nominees (No 2) Pty Ltd*[34] "demonstration of error may not be straight-forward where findings or conclusions involve elements of fact, degree, opinion or judgment." The evaluative character of a decision is one of the matters which must be borne in mind by an appellate court in fulfilling its obligation to give respect and weight to the decision appealed against; but if after conscientiously fulfilling that obligation the appellate court concludes that the decision is wrong, it must give effect to that conclusion.

The merits of the appeal

[37] Defamation claims should ordinarily be pursued very promptly. Of course it was appropriate for the respondent first to make a sustained effort to achieve a consensual resolution, especially because litigation would likely result in a much wider publication of the alleged defamation and one which unequivocally identified her as the subject of the article. But the chronology set out earlier in these reasons reveals a surprisingly desultory approach on the respondent's behalf. In some cases, weeks elapsed before the respondent's solicitors responded to correspondence from the appellant's solicitor. A notable example is the lapse of about a month before the respondent's solicitor responded to the appellant's offer to make amends. Even more notable is that some seven months passed between the respondent's discovery of the alleged defamation and her concerns notice which, so far as the evidence reveals, was the respondent's first complaint to the appellant. The respondent's solicitor attributed much of the delay to delay by counsel in settling the concerns notice and in settling proposed forms of apology and retraction, but the submissions for the respondent in this litigation did not seek to draw any distinction between the respondent's responsibility and the responsibility of any of her lawyers. For present purposes the delays must be attributed to the respondent. The effect of the delay

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30 *Schweppes' Ltd v Archer* (1934) 34 SR (NSW) 178 at 183-184; *Amos v Monsour Pty Ltd* [2009] 2 Qd R 303 at [8] – [10].

31 *A V Jennings Construction Pty Ltd v Maumill* (1956) 30 ALJR 100; *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at [8].

32 *Federal Commissioner of Taxation v St Helens Farm* (1981) 146 CLR 336 at 381 per Mason J.

33 *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23] per Gaudron, McHugh, Gummow and Hayne JJ.

34 (2001) 117 FCR 424 at [24].

was artificially to compress the time available both for completion of the processes under Div 1 of Pt 3 of the *Defamation Act* and for any settlement of the litigation before expiry of the limitation period. The appellant was content to participate in those processes despite the delays, but it was not suggested that it encouraged the respondent to delay or that the appellant waived reliance upon a limitation defence. In so far as the respondent's explanation for her failure to commence action within the limitation period relied upon the incompleteness of the process under Div 1 of Pt 3, the evidence suggests that the respondent must be regarded as the author of her own misfortune. However, although the chronology upon which the appellant relied revealed the delays, the appellant did not submit that the appeal should be resolved on this basis. Accordingly I would not decide the appeal on that ground.

[38] There was no suggestion that the respondent's delay in starting proceedings prejudiced the appellant or might render a fair trial unlikely but those matters do not themselves show that it was not reasonable for the respondent to start proceedings within the limitation period. The respondent's argument emphasised the 8 April conversation, but it occurred more than two months before expiry of the limitation period and in the context of the respondent's threat to commence litigation immediately. The vague evidence of the respondent's solicitor about that conversation suggests only an accord that it would be in both parties' interests if they could reach a mutually satisfactory resolution without litigation. They attempted to do so and failed during the following two months before expiry of the limitation period. There was no evidence that the appellant gave the slightest encouragement for the respondent to delay the commencement of litigation until after expiry of the limitation period.

[39] Before receiving the offer to make amends the respondent had about seven months to investigate the efficacy of her potential claim for defamation and the parties had been corresponding about it for about two months. The plaintiff articulated what she claimed were the defamatory imputations in her concerns notice, more than four months before expiry of the limitation period. The fact that the article did not name the respondent was a potential complexity, but the early correspondence demonstrates that the respondent had investigated and apparently formed a clear view upon that question many months before expiry of the limitation period. There was no evidence and the respondent did not submit that before the expiry of the limitation period on 21 June 2009 the respondent lacked a reasonable period of time or the necessary materials for a comprehensive assessment of her threatened litigation, including as to the reasonableness of the appellant's offer to make amends.

[40] The primary judge nevertheless considered that for the respondent to have sued whilst the procedures envisaged by Div 1 of Pt 3 were incomplete would have been inconsistent with the statutory policy and might potentially have exposed the respondent to a proceeding in the face of a defence created by the offer to make amends and an order for costs. The appellant submitted that these conclusions were incorrect. On the evidence in this case I respectfully consider that the submission must be accepted.

[41] In *Noonan v MacLennan & Anor*[35] Chesterman JA observed that s 32A gives no hint as to the sorts of cases that might be thought appropriate for an extension of time and the circumstances which might justify it are left at large. In my opinion

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35 [2010] QCA 50 at [51].

reference to the broader statutory scheme does provide some such indication. As Keane JA observed:[36]

> "Some assistance in understanding the legislative intention which informs s 32A(2) may be gleaned from Div 1 of Pt 3 of the *Defamation Act* 2005 (Qld) ("the Defamation Act") which provides for procedures involving "an offer to make amends" by a potential defendant to a defamation claim in response to the giving of a "concerns notice" by a potential plaintiff. These procedures are intended to resolve civil disputes without recourse to litigation. In this context one can understand that s 32A(2) of the Act is apt to encompass a case where the plaintiff has been engaged in the pursuit of non-litigious processes to vindicate his or her rights. In such a case, it may well be unreasonable to disrupt those processes and to incur needless expense by commencing proceedings."

[42] Whether or not it is not reasonable for a plaintiff to commence an action within the limitation period in circumstances in which the parties have invoked the statutory process must depend upon the evidence in the particular case. I do not understand Keane JA to have suggested otherwise. Given that the one year limitation period in s 10AA of the *Limitation of Actions Act* was introduced as part of the same statutory scheme which introduced the non-litigious process in Div 1 of Pt 3 of the *Defamation Act*, it should not be assumed that the mere fact that the parties participate in that process of itself necessarily renders it not reasonable for the aggrieved person to start litigation within the limitation period; rather, that period should to be taken to allow sufficient time for the operation of so much of that process as should occur before the commencement of litigation, in the absence of some unusual circumstance. The expressed object in s 3(d) of the *Defamation Act* favours "speedy and non-litigious" resolution of defamation claims, not speedy or non-litigious resolution. The legislature has evidently identified a public interest in the prompt commencement of proceedings for defamation.[37] That is evidenced also by the relative shortness of the limitation period and the relatively unusual strictness of the test in s 32A(2). As Chesterman JA observed in *Noonan v MacLennan & Anor*,[38] that public interest should not be undermined by too ready an acceptance that it was not reasonable to start the proceedings within one year.

[43] I accept that in a particular case the parties' participation in the Div 1 process may be one of the "circumstances" mentioned in s 32A which result in it not being reasonable for the plaintiff to sue within the limitation period. Most significantly, one novel feature of the legislative scheme is that a defence to a defamation claim might be created by a publisher's offer to make amends which is made after the limitation period has started running. The effect of s 18 is that the viability of any claim for defamation might depend upon the content of an offer to make amends which, in a particular case, might be incapable of reasonable assessment or response within the limitation period. That might make it not reasonable for an aggrieved person to commence proceedings before expiration of the limitation period. However, that should happen only in an unusual case because Div 1 of Pt 3 encourages a prompt offer to make amends if it is to qualify as a defence.

[44] Where there was no suggestion that before expiry of the limitation period the

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36 [2010] QCA 50 at [16].

37 See [2010] QCA 50 per Keane JA at [22], per Chesterman JA at [67].

38 [2010] QCA 50 at [67].

respondent faced any difficulty in starting proceedings or in assessing the viability of her threatened litigation, including the merits of a defence based upon the April offer to make amends, the risks that she was wrong in her assessment, that she would fail in the litigation, and that she would be ordered to pay costs (which might be assessed on the indemnity basis[39]) were no more than the usual risks of defamation litigation. The realisation of those risks would represent no more than consequences of the intended operation of the statute. The timely commencement of this litigation would not have been inconsistent with the statutory policy.

[45] The respondent submitted that of the four broad rationales for the enactment of limitation periods referred to by McHugh J in *Brisbane South Regional Health Authority v Taylor*[40] only the fourth rationale, the public interest requirement that disputes be settled as quickly as possible, resonates in the present case where a written publication promptly became the subject of a concerns notice and an application for an extension of time was made less than two months after expiry of the limitation period. It may be questionable whether the effect of delay on the quality of justice was not also an influence which motivated the change to the limitation period, notwithstanding that the period is much shorter than was formerly the case. Another rationale identified by McHugh J was that it is oppressive, or even "cruel" to a defendant to allow an action to be brought on after the circumstances which gave rise to have passed. Those expressions are not apt here but there is the different and important object expressed in s 3(b) of the *Defamation Act*, of ensuring, "that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance." The potentially chilling effect upon free speech of protracted defamation litigation may underlie both that object and the object in s 3(d) of promoting speedy resolution of disputes.

[46] It remains as true in this case as it was in *Brisbane South Regional Health Authority v Taylor*[41] that the limitation provision is the general rule and the extension provision is an exception to it. The onus lay upon the respondent to bring herself within the exception by demonstrating that it was not reasonable for her to start her threatened litigation within the limitation period. The primary judge did not identify any unusual feature of this case which would justify treating it as an exception to the general operation of the limitation period and I have found none.

[47] The respondent may have faced a difficult decision whether to commence proceedings, especially because to do so might identify her as the target of the alleged defamation to a much wider audience and because the remedies available at trial would not extend to correction and apology. However, even where a publication names a plaintiff these are amongst the usual disincentives to defamation litigation. They are to be weighed against the advantage of starting proceedings with a view to securing a legal remedy. Further, the *Defamation Act* does not assume that the non-litigious process should necessarily be completed prior

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39 The effect of s 40(2)(b) in Div 4 of Pt 4 of the *Defamation Act* 2005 (Qld) is that if costs are to be awarded to the defendant where a plaintiff fails in defamation proceedings then, unless the interests of justice require otherwise, a court must order the costs to be assessed on an indemnity basis "if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant." The expression "settlement offer" is defined in s 40(3) to include an offer to make amends, whether made before or after the proceedings are commenced, that was a reasonable offer at the time it was made.

40 (1996) 186 CLR 541 at 552-553.

41 (1996) 186 CLR 541 to 553.

to commencement of litigation. On the contrary, it clearly contemplates that the non-litigious process might continue after the commencement of litigation.[42] There was no evidence which suggested that the appellant might cease to participate in a non-litigious resolution if the respondent had started proceedings to avoid a limitation defence. Nor did the respondent's expressed reason for her failure to start proceedings include that possibility. The respondent expressed optimism that the dispute would be resolved without litigation, but that was speculation. There was no submission that the appellant in any way contributed to the respondent's failure to sue in time or lulled the respondent into thinking that the appellant would improve its April offer to make amends or would keep that offer open longer that it did remain open after expiry of the limitation period. In these circumstances, to regard the mere possibility of a future non-litigious resolution of a defamation dispute as itself constituting a ground for extending the limitation period would run counter to the statutory policy expressed in the *Defamation Act* and reflected in the unusually strict terms of s 32A of the *Limitation of Actions Act*.

[48] In my respectful opinion, there was no sufficient basis in the evidence for concluding that it was not reasonable for the respondent to institute proceedings.

Proposed orders

[49] In my opinion the appropriate orders are:

1. Grant the respondent leave to file the notice of contention dated 23 March 2010.

2. Allow the appeal, set aside the orders made in the trial division, and instead order that the respondent's application under s 32A of the *Limitation of Actions Act* 1974 (Qld) be dismissed with costs.

3. Order the respondent to pay the appellant's costs of and incidental to the appeal.

[50] **FRYBERG J:** It is unnecessary for me to repeat the statutory provisions and the evidence set out in the reasons for judgment of my colleagues.

Section 32A

[51] Section 32A(2) of the *Limitation of Actions Act 1974* (Qld) ("LAA") requires the court to be satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action "within 1 year". There is an inherent ambiguity in that expression. Semantically, it might mean at any one time during the year; or it might mean at all times during the year. The ambiguity is semantic only. An interpretation which permitted satisfaction of the subsection by demonstrating that there was a least one time during the year when it was not reasonable to have commenced an action would deprive the section of any scope for meaningful operation. It must require the court to be satisfied that at no time during the year following publication was it reasonable for the applicant to have commenced an action.

The period to 9 February 2009

[52] In *Noonan v McLennan*, Chesterman JA approved a dictum of Noud DCJ at first instance to the effect that an applicant does not have to account for every day or

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[42] See ss 14(1)(b), 15(4)(a), 17(1), and 17(3).

week in the limitation year.[43] With respect, I agree. However the applicant's evidence must at least in broad terms deal with the whole of the year and must demonstrate why there was no significant period in which it would have been reasonable to have commenced an action. A would-be litigant who could reasonably commence an action postpones doing so at his or her own peril. If supervening events make it difficult or unreasonable to do so at a later time, they will not be sufficient to satisfy the requirements of the subsection.

[53] These matters seem to have escaped the parties' attention at first instance. Doubtless for that reason they also remained unmentioned in his Honour's reasons for judgment. They did not escape *The Chronicle's* attention in the appeal, although it must be conceded or that they were at some remove from the central focus of its submissions. Relevantly, it submitted (emphasis added):

> "(h) lastly, the reasons demonstrate his Honour misapplied the test under s 32A of the LAA. That section requires an examination of the circumstances and a determination whether, having regard to them, it was not reasonable to commence proceedings within one year of the date of publication. His Honour's reasoning was to the effect that 'once' Division 1 of Part 3 of the Defamation Act had been engaged it was no longer reasonable to commence proceedings until they had been brought to a conclusion. In doing so his Honour has ignored each of the other circumstances (as to which, see below) *and critically, the fact that the statutory regime requires an assessment of whether it was not reasonable to have commenced inside that entire one year period*."

That submission evoked no particular response from Ms Pingel, either in oral submissions or in any of the three successive outlines of submissions filed on her behalf.

[54] In these circumstances I am content to assume that Ms Pingel would not have been able to add significantly to the evidence had these matters been raised at first instance.

[55] The evidence relevant to the reasonableness or otherwise of Ms Pingel's commencing proceedings between the date of publication, 21 June 2008, and 9 February 2009, when her solicitors first wrote to *The Chronicle*, is sparse indeed. Ms Pingel did not identify the date when she first became aware of the publication. She must have been aware of it by 2 July 2008, for on that day she sought advice from her solicitors. A conference was held that day, but the evidence does not disclose whether she received advice, then or later. Whatever the position, some 2½ months later her solicitors briefed counsel to draw and settle a concerns notice in respect of the publication. Nothing then happened for over four months. On 27 January 2009 counsel advised that commitments would not permit preparation of the notice. On 30 January the solicitors briefed other counsel to draw and settle a notice. Such a notice was embodied in the letter of 9 February already referred to.

[56] Obviously, it is not possible for a person to commence proceedings for defamation if she is unaware of the fact of publication or the identity of the publisher. Plainly, s 32A is not limited to such cases. Ordinarily a would-be litigant might be expected to seek legal advice before commencing an action. This might well include advice

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[43] [2010] QCA 50 at [49].

from counsel on prospects and quantum and advice from solicitors about the likely cost of litigation and the wisdom of undertaking it.[44] Sometimes it may be reasonable to make further enquiries or to gather evidence or seek funding support before doing so. Sometimes it may be reasonable not to commence an action because the would-be plaintiff is under a disability. Sometimes it may be reasonable not to commence an action because (at least in the first part of the year) the dispute is likely to be settled without the need to do so or because commencing an action would impede a likely compromise. Sometimes it might even be reasonable not to commence an action simply to afford time for the would-be plaintiff to calm down. The LAA does not attempt to categorise or limit circumstances and the statutory test is very broadly expressed.

[57] In the present case the evidence does not enable any conclusion to be drawn as to why Ms Pingel did not commence proceedings before February 2009. It may not have been strictly necessary for her to present such evidence; there is no express requirement in the Act for an applicant to demonstrate that the omission to commence an action was *caused* by the circumstances making it reasonable not to do so. But Ms Pingel did not even demonstrate the existence of such circumstances during this period. For all that is known she may have received all the necessary advice on 2 July 2008. There is no suggestion that she was under any sort of disability. The only fact which she has chosen to reveal about the period 2 July 2008 to 27 January 2009 is that on 23 September 2008 her solicitors briefed counsel to draw and settle a concerns notice.

[58] Can it be said that it is reasonable for an aggrieved person to refrain from commencing proceedings simply in order to prepare and give a concerns notice? I doubt it very much. It has long been accepted that an aggrieved person should ordinarily send a publisher a letter before action for defamation. A concerns notice may easily be incorporated in such a letter if there is a desire to limit the publisher's opportunity to make an offer to make amends. By itself, giving a notice would not seem to justify any additional delay. Whether that be correct or not, the fact that it was not reasonable to commence an action throughout a period of about seven months is not proved simply by showing that counsel was briefed to settle a concerns notice about one-third of the way through the period.

[59] Whatever view be taken of the nature of the appeal process on an appeal from an order under s 32A, this appeal must be allowed, the decision below set aside and the application dismissed.

The period from 9 February 2009

[60] I turn to the main point argued. For the purposes of the discussion I shall assume for the time being that all evidence tendered by Ms Pingel was admissible.

[61] Part 3 of the *Defamation Act 2005* (Qld) ("DA") is entitled "Resolution of civil disputes without litigation". It is presumably intended to be the principal part of the DA embodying the fourth of its objects, "to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter".[45] It contains only two divisions. Contrary to what one might expect, neither division directly promotes or facilitates any method of alternative dispute resolution. Division 2 contains only one section, the effect of which is to make evidence of an

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44 Compare *Ahmed v Harbour Radio Pty Ltd* [2010] NSWSC 676 at para 52 per Simpson J.

45 DA s 3(d).

apology inadmissible as evidence of fault or liability. Presumably the idea is to enable a defendant to apologise without damaging its position. Presumably again an apology may make some plaintiffs more willing to compromise a dispute. It may therefore be said that the section indirectly promotes dispute resolution by negotiation.

[62] Division 1 is more opaque. It operates to confer on publishers an option to create two new defences. A publisher may exercise that option by making an offer to make amends under s 13. Failure by the aggrieved person to accept such an offer creates a conditional defence under s 18. Acceptance of an offer bars proceedings against the publisher even in respect of imputations excluded from the offer. An offer may be made at any time before a defence is served; an aggrieved person may advance the cut-off date for making an offer by giving a concerns notice, but this may be negated if it is held that he or she failed to provide sufficient further particulars of the imputations. A concerns notice has the effect of terminating the option unless an offer is made within 28 days of the notice. An aggrieved person is unable to compel the making of an offer and no unavoidable penalty is imposed on the publisher for unreasonably failing to make an offer (the costs consequences under s 40(2)(a) of the Act could largely be circumvented by a subsequent offer under the *Uniform Civil Procedure Rules*).

[63] Division 1 thus confers substantial tactical advantages upon publishers with corresponding disadvantages to aggrieved persons. From the publisher's point of view, there is probably little to be gained by exercising the option before proceedings are commenced unless the publisher perceives its own position to be weak. The aggrieved person can encourage the publisher to make an earlier decision by giving a concerns notice. If in that case the publisher fails to exercise its option, some uncertainty is removed from the point of view of the aggrieved person; but the publisher may yet keep the aggrieved person on tenterhooks first by demanding further particulars and then by making an offer which is not plainly unreasonable.

[64] Presumably the intention of the legislation is to increase the pressure on aggrieved persons to accept a negotiated settlement and by that mechanism indirectly promote dispute resolution by negotiation rather than litigation.

[65] The respondent relied on the findings of the judge at first instance:

> "It is clear that the intent of the Defamation Act is to promote the non-litigious resolution of disputes about the publication of defamatory matter. To achieve that end it identifies significant potential consequences which might result from the making of an offer to make amends and even more significant consequences where such an offer has been accepted.
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> In my view, given the policy which is apparent in Division 1 of Part 3 of the Defamation Act, once the applicant had engaged its provisions by the issue of a 'concerns notice' it would not have been reasonable for her to have commenced proceedings until the procedures envisaged by Division 1 had been brought to a conclusion.
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> To do so would have been inconsistent with the clear intent of the legislature to promote non-litigious resolution of such matters and it

> may have potentially exposed her to orders for costs as well as resulted in proceeding in the face of a defence created by the offer to make amends. I therefore propose to grant the application."

[66] If his Honour's reasons are read narrowly, I do not agree with them for two reasons. First, for reasons already discussed, the mere giving of a concerns notice should not ordinarily delay the commencement of proceedings; and nothing extraordinary appears in the evidence in this case. Second, whatever the solicitors may have thought at the time (one suspects a degree of disingenuousness on both sides), most of the dealings between the solicitors had nothing to do with the procedures referred to in Division 1.

[67] Ms Pingel's concerns notice would presumably have been received by *The Chronicle* in the ordinary course of the post on or about 11 February. Consequently *The Chronicle's* option to make an offer expired about 11 March. Section 14 of the DA is unambiguous: an offer to make amends *can not be made* if 28 days have elapsed since the publisher was given a concerns notice by the aggrieved person. By a letter received on 2 March, *The Chronicle's* solicitors purported[46] to give a further particulars notice; the information requested was supplied by e-mail on 13 March. Assuming the request was a valid further particulars notice, the provision of the particulars averted the cancellation of the concerns notice: s 14(5). *The Chronicle* did not make an offer to make amends by that date. Consequently, the procedures referred to in Division 1 then came to an end. Ms Pingel could have commenced an action after about 13 March without fear of exposure to the new statutory defences or to adverse orders for costs.

[68] That conclusion has an important corollary: *The Chronicle's* purported offer to make amends dated 16 April 2009 was not an offer under s 13 of the DA. I revert to this point below.

[69] His Honour's reasons were delivered ex tempore and should not be read narrowly. His Honour identified the intent of the DA as being to promote the non-litigious resolution of disputes, and it may reasonably be supposed that he had in mind the full course of negotiations between the parties. They continued to negotiate until August 2009. The negotiations proceeded with reasonable dispatch (albeit without any sense of the urgency which might have been expected as the end of the limitation period approached). It does not matter whether Division 1 was engaged or not. Were there evidence of a substantial possibility that a negotiated settlement might have been reached, together with evidence that in the circumstances, there was a significant risk that commencing an action would prejudice that settlement, it might have been possible to uphold his Honour's conclusion.[47]

[70] However the evidence discloses little sign that the parties were close to a settlement. On the contrary it suggests that the solicitors for *The Chronicle* were negotiating with one eye on the clock. I do not mean by that that they were negotiating in bad faith or that they misled Ms Pingel's solicitors in any way. The correspondence simply does not justify any confidence that a settlement would be achieved, let alone that it was close. Moreover even on a sanguine view of it, there is no reason

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46 The letter sought information about how Ms Pingel would be identified by any reasonable reader. It is unnecessary to decide whether such a request is one for "further particulars about the imputations" within the meaning of s 14(3).

47 *Noonan v McLennan* [2010] QCA 50 at [16] per Keane JA.

to think that any settlement would have been impeded by the commencement of an action. The proposed defendant was a newspaper company and its solicitors were doubtless experienced defamation lawyers. They would hardly have viewed the commencement of an action as other than a normal step which would be expected on competent advice in the situation.

[71] It follows that in my judgment Ms Pingel did not demonstrate that it was not reasonable for her to have commenced an action in the period from February to June 2009.

Section 19

[72] I turn to the questions of admissibility under s 19. I have already concluded that *The Chronicle's* purported offer to make amends dated 16 April 2009 was not an offer under s 13 of the DA.[48] No such offer was ever made. Section 19 renders statements or admissions made in connection with the making or acceptance of an offer to make amends inadmissible, with some exceptions. In this case no question of inadmissibility under that section arose because there never was such an offer.

[73] Neither party evinced any interest in analysing the dealings between them by reference to the provisions of the DA, either at first instance or on appeal. Both were prepared to present the case as though a statutory offer had been made. Such an approach brings an air of artificiality to the submissions. It seeks to have the Court resolve difficult questions of statutory interpretation when in reality the parties have no legal interest in that resolution. It is an approach which in my opinion this Court ought to resist. Otherwise we would be pressed into the position of offering advisory opinions on facts which have not occurred. The High Court has emphasised the need to found decisions firmly in the facts underlying a dispute.[49] It is not appropriate for this Court to undertake the task of construing the section if on the facts it has no application, whatever fictions the parties might wish to impose.

[74] My colleagues are of a different view. I express my opinion, *obiter*, in deference to that view.

[75] I take as a starting point the proposition that the section cannot be interpreted literally. Consider the situation which arises when an offer to make amends leads to an agreement between the parties to the dispute. How is the agreement to be enforced against a party who subsequently resiles from it? To the extent that subsequent proceedings lie under s 15(3) or s 17, evidence of a statement made in connection with the acceptance of an offer to make amends would be admissible under s 19(2). However those sections do not include provision for the *enforcement* of an agreement. To enforce the agreement the wronged party would commonly have to commence an action in contract. In such an action, s 19 would on a literal interpretation prohibit evidence of a statement to the effect "I accept your offer". To construe it in such a manner would produce manifest absurdity.[50] It is inconceivable that the Act did not intend agreements to be capable of enforcement. It follows that the section must not be read literally. Counsel for *The Chronicle* conceded as much in oral argument.

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48 Paragraph [68].

49 *Adams v The Queen* [2008] HCA 15 at para 17 and note 14.

50 See para [24] and the cases there cited by Fraser JA.

[76] Another example of such absurdity is cited in the reasons for judgment of Fraser JA.[51]

[77] The essence of the absurdity lies in the fact that the literal construction of s 19 would defeat an essential purpose of the legislation. Section 32A of the LAA forms part of the statutory scheme introduced with the DA. Section 32A(2) mandates an extension of the limitation period in the circumstances set out in it. It requires an examination of the "circumstances". A literal construction of s 19 would frequently deny the court knowledge of all of the circumstances which it is required to consider. That too would defeat an essential purpose of the legislation. It would be equally manifestly absurd.

[78] In my judgment it is not possible to draw a coherent distinction between evidence of the fact of acceptance of an offer and evidence of the statement constituting the acceptance. An offer or an acceptance will frequently be identifiable only by reference to its terms. More importantly, the purpose of the legislation may still be defeated if all that is admissible is evidence of the fact of offer or acceptance without knowledge of the terms of what was said. I would therefore go further than my colleagues and rule that none of the evidence was inadmissible under s 19 of the DA.

Other matters

[79] I agree with my colleagues, for the reasons which they have given, that Ms Pingel's evidence in para 9 of her affidavit was relevant and admissible. I add as authority in support of this view the decision in *Carey v ABC*.[52]

[80] It is unnecessary to determine the nature of an appeal from a decision under s 32A of the LAA. The outcome must be the same regardless of whether the principles in *House v The King* apply or not.

Orders

[81] I agree with the orders proposed by Fraser JA.

[82] **APPLEGARTH J:** The appellant publishes *The Chronicle* newspaper. The respondent claims to have been seriously defamed by an article that was published in the 21 June 2008 edition of *The Chronicle*. The article did not identify her by name. The respondent engaged solicitors who on 9 February 2009 served a "concerns notice". On 16 April 2009 the appellant's solicitors sent an "offer to make amends" pursuant to Division 1 of Part 3 of the *Defamation Act* 2005 (Qld) ("Division 1"). Communications continued between the parties' solicitors about resolution of their dispute.

[83] The respondent deposed that she did not commence proceedings for defamation prior to 21 June 2009 (the date the one year limitation period expired) as the appellant "had indicated a willingness to resolve the matter without the institution of proceedings" and the respondent had accepted that a resolution could be reached on that basis.

[84] The appellant withdrew its offer to make amends on 7 July 2009, and the respondent applied for an extension of time pursuant to s 32A of the *Limitation of Actions Act* 1974 (Qld) ("the *LAA*") to commence an action for defamation.

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51 *Ibid.*

52 [2010] NSWSC 709 at para 48 per McCallum J.

[85] The principal issue in this appeal is whether the learned primary judge erred in concluding that he was satisfied that it would not have been reasonable in the circumstances for the respondent to have commenced an action by 21 June 2009. An associated issue is whether the primary judge erred in having regard to the fact that certain communications had occurred. His Honour interpreted s 19(1) of the *Defamation Act* 2005 ("the Act") as restricting proof of the content of statements or admissions made in those communications, as distinct from the fact that the communications had occurred. The appellant challenges this interpretation of s 19 and contends that evidence of the making of those communications is inadmissible by reason of s 19 of the Act. It also contends that the respondent's evidence that explained why she did not commence proceedings prior to 21 June 2009 was inadmissible.

Section 32A of the *Limitation of Actions Act*

[86] Section 10AA of the *LAA* provides that an action for defamation must not be brought after the end of one year from the date of the publication of the matter complained of. Section 32A(1) of the *LAA* allows a person claiming to have a cause of action for defamation to apply for an order extending the limitation period. Section 32A(2) provides:

> "(2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 10AA to a period of up to 3 years from the date of the publication."

A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in s 32A(2).[53]

[87] The following propositions may be drawn from the recent decision of this Court in *Noonan v MacLennan*:[54]

1. The burden is on the applicant for an extension of time to point to circumstances which make it not reasonable in the circumstances to have commenced an action within one year from the date of the publication.[55]

2. The circumstances that might give rise to an extension are left at large.[56]

3. The test posed by s 32A(2) is an objective one. It is not satisfied by showing that the applicant believed that he or she had good reason not to sue.[57]

4. If the court is satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within the one year period, then it must extend the limitation period. Unlike other extension of time provisions, there is no discretion whether or not to extend time. A discretion exists as to the length of the extension to be granted which, in any event, may not exceed three years from the date of the defamatory publication.[58]

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53 *LAA*, s 32A(3).
54 [2010] QCA 50.
55 Ibid at [15], [51].
56 Ibid at [17], [51].
57 Ibid at [20], [65].
58 Ibid at [47] and see s 32A(4) of the Act.

5. The section requires more of an applicant than to show that it would have been reasonable not to commence an action until after the one year period had expired: the court must be satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within the one year period.[59]

6. The circumstances must be sufficiently compelling to satisfy the court that it was not reasonable in the circumstances to commence an action within the one year period the law ordinarily requires litigants to commence proceedings.[60]

7. Section 32A of the Act proceeds on the assumption that there may be circumstances where it will not be reasonable for a plaintiff to commence an action to vindicate his or her legal rights in accordance with that time limit.[61]

[88] Keane JA (as his Honour then was) observed that some assistance in understanding the legislative intention which informed s 32A(2) may be gleaned from Division 1 which provides for procedures involving "an offer to make amends" by a potential defendant to a defamation claim in response to the giving of a "concerns notice" by a potential plaintiff. These procedures are intended to resolve civil disputes without recourse to litigation. Keane JA stated:

> "In this context one can understand that s 32A(2) of the Act is apt to encompass a case where the plaintiff has been engaged in the pursuit of non-litigious processes to vindicate his or her rights. In such a case, it may well be unreasonable to disrupt those processes and to incur needless expense by commencing proceedings."[62]

Neither Holmes JA nor Chesterman JA expressed a different view.

[89] The appellant submits that the *obiter dicta* of Keane JA that I have quoted should not be followed. However, I respectfully agree with it. His Honour did not state that the pursuit of the processes in Division 1 or other non-litigious processes to vindicate rights was itself sufficient to meet the statutory test in s 32A(2). Whether it will be unreasonable to disrupt those processes and to incur expense by commencing proceedings must depend on the circumstances of the particular case, having regard to the policies the Act seeks to advance.

[90] The Act does not list the kinds of cases that might fall within s 32A(2) or the factors that might be taken into account in determining the issue of reasonableness under s 32A(2).[63] The legislature having not created such a list, a court should not attempt to do so. Some cases are obvious and others come to mind. An obvious case is where the applicant was not aware of the defamatory publication and could not have reasonably known of it within the one year limitation period. Keane JA in *Noonan v MacLennan*[64] referred to other cases which "might fall within s 32A(2)". These were cases where:

> "... a plaintiff is not able to establish the extent of the defamation or is without the evidence necessary to establish his or her case during

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59 Ibid at [8], [30].
60 Ibid at [15], [51].
61 Ibid at [15].
62 Ibid at [16].
63 Ibid at [17], [51].
64 Ibid at [17].

> the year after the publication. An action brought in such circumstances might be said to be speculative or irresponsible. In such cases it might be said that the commencement of proceedings and the incurring of costs would be so disproportionate to the prospects of success or to the quantum of damages which might have been expected to be recoverable as to render the commencement of proceedings unreasonable."

The resolution of defamation disputes without litigation

[91] One of the objects of the Act is "to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter."[65] The resolution of civil disputes without litigation is advanced by the "Offers to make amends" provisions of Division 1. A publisher may make "an offer to make amends" to the aggrieved person. An offer to make amends is taken to have been made without prejudice, unless the offer provides otherwise.[66] An offer to make amends cannot be made if:

(a) 28 days have elapsed since the publisher was given "a concerns notice" by the aggrieved person; or

(b) a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.[67]

[92] A "concerns notice" informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question. Provision exists for a publisher to give a notice to the aggrieved person requesting reasonable further particulars about the imputations of concern.[68]

[93] Section 15 of the Act provides that an offer to make amends must include certain specified matters. The mandatory elements of an offer to make amends include an offer to publish, or join in publishing, a reasonable correction of the matter in question. It must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer. An offer to make amends may include other matters. Section 15(1)(g) provides that it may include an offer to publish, or join in publishing, an apology, or an offer to pay compensation for any economic or non-economic loss.

[94] The Act does not fix maximum or minimum periods within which an offer to make amends may remain open for acceptance. Section 16(1) provides that an offer to make amends may be withdrawn before it is accepted by notice in writing given to the aggrieved person. A publisher who has withdrawn an offer to make amends may make a renewed offer, subject to the provisions of s 16.

[95] Section 17 addresses the effect of acceptance of an offer to make amends. If the publisher carries out the terms of an offer to make amends that is accepted, the aggrieved person cannot assert, continue or enforce an action for defamation against the publisher in relation to the matter in question even if the offer was limited to any particular defamatory imputations.

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65 The Act, s 3(d).
66 The Act, s 13(4).
67 The Act, s 14(2).
68 The Act, s 14(3).

[96] Section 18 addresses the effect of a failure to accept a reasonable offer to make amends. If an offer to make amends is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if:

> (a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory; and
>
> (b) at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer; and
>
> (c) in all the circumstances the offer was reasonable.

[97] Section 19 is in the following terms:

"Inadmissibility of evidence of certain statements and admissions

> (1) Evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends is not admissible as evidence in any legal proceedings (whether criminal or civil).
>
> (2) Subsection (1) does not prevent the admission of evidence in any legal proceedings in order to determine –
>
> > (a) any issue arising under, or relating to the application of, a provision of this division; or
> >
> > (b) costs in defamation proceedings."

[98] Three features of the "Offers to make amends" provisions of Division 1 assume significance for present purposes.

[99] First, engagement of the processes contained in Division 1 is not mandatory. A potential plaintiff may commence proceedings without giving a "concerns notice". A potential defendant is not required to make an "offer to make amends".

[100] Second, the processes are not exclusive of other dispute resolution procedures. Nothing in Division 1 prevents a publisher or aggrieved person from making or accepting a settlement offer in relation to the publication of the matter in question otherwise than in accordance with its provisions.[69] The parties may engage in separate without prejudice negotiations or make open offers of settlement.

[101] Third, as noted, Division 1 does not prescribe times within which an offer must remain open for acceptance, or the time within which it must be accepted or "not accepted" (the term used in s 18(1)). There appears to be no reason why an offer to make amends may not be expressed to remain open for acceptance for a limited period. Section 18(1)(b) contains as an element of the defence that "at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer". That provision does not mandate that an offer to make amends must remain open for acceptance until trial.

[102] Leaving an offer to make amends open for acceptance for an unreasonably short period may prevent a defendant from establishing a s 18 defence because the offer

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[69] The Act, s 12(3).

will not have been reasonable in all the circumstances.[70] A defendant may choose to leave an offer to make amends open for an undefined period, or seek to bring resolution of the matter to an early conclusion by fixing a reasonable time within which it will remain open for acceptance. In the latter case, if the offer is not accepted within the specified time then it will have been "not accepted" or "refused",[71] potentially engaging a s 18 defence. In the former case, an offer to make amends may be "not accepted" by words or conduct, or both. It is arguable that conduct in commencing proceedings will indicate that an offer is "not accepted". If it does not have this effect, or if the defendant is in any doubt about the matter, then the offer may be withdrawn pursuant to s 16(1).

[103] The offer to make amends process established by Division 1 does not envisage a process of negotiation. In practice, and in circumstances in which the Division 1 process is not exclusive, offers to make amends and responses to them may form part of potentially complex without prejudice negotiations. For example, without prejudice negotiations may canvass a variety of resolutions. A letter containing an offer to make amends under Division 1 may also contain, or may prompt, communications about the strength and weaknesses of the parties' cases. Without prejudice communications made before a notice to make amends is accepted or refused may contain assertions and counter-assertions about these matters. A potential defendant may seek to cast doubt on aspects of the potential plaintiff's case or foreshadow substantive defences. To decide whether to accept or reject the offer, a plaintiff may be required to investigate such matters and collect evidence. In such a situation, the observations of Keane JA in *Noonan v MacLennan*[72] are apposite. Uncertainty as to whether the plaintiff has sufficient evidence to defeat a foreshadowed defence might make it irresponsible to commence proceedings and for both parties to incur expense in circumstances in which further investigation is required by the plaintiff in order to gather the evidence necessary to defeat the foreshadowed defence.

[104] In summary, in the absence of time limits imposed by the Act or time limits imposed by one of the parties, an offer to make amends may generate protracted negotiations. These negotiations may be brought to an end by formal acceptance or rejection of the offer, the commencement of proceedings (which may be interpreted as a rejection of the offer) or the withdrawal of the offer. Division 1 does not require parties to conclude negotiations within a specified time. However, a potential plaintiff who chooses to continue negotiations rather than to commence an action within time runs a substantial risk that the court will not be satisfied that an extension of time should be granted.

The relationship between the policy of resolution without litigation and the policy of the *Limitation of Actions Act*

[105] The policy of resolution without litigation and the policy of requiring litigants to commence litigation in a timely way may comfortably co-exist. The expiry of the limitation period may provide an incentive for a plaintiff to either accept or refuse an offer to make amends under Division 1 or any other offer that remains open. This may serve one of the Act's objectives which is "to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter".

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70 The Act, s 18(1)(c); s 18(2)(b)(ii).

71 An alternative term to "not accepted" that is used in s 18(2)(b)(i).

72 Supra at [17].

[106] On some occasions, however, a tension or conflict exists between the policy of encouraging non-litigious methods of resolving disputes and the policy of requiring proceedings to be commenced within a year. As Keane JA observed in *Noonan v MacLennan*, in a case where the plaintiff has been engaged in the pursuit of non-litigious processes to vindicate his or her rights, it may well be unreasonable to disrupt those processes and to incur needless expense by commencing proceedings.[73] I do not interpret that observation as any kind of invitation to allow negotiations to drift to the detriment of the policies that underlie the Act, including the policies that underlie the limitation period enacted by it. The Act is intended to provide effective remedies.[74] Therefore, the early vindication of reputation should be encouraged. The timely resolution of disputes in a defendant's favour may remove what would otherwise be excessive self-censorship on the further publication and discussion of matters of public interest and importance. Such self-censorship may be inconsistent with another of the Act's objects, which is "to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance".[75]

[107] To the extent that the policy of promoting non-litigious methods of resolving disputes conflicts with the policy of requiring actions to be commenced in a timely way, neither policy can be said to have an obvious priority over the other. In the context of the pursuit of non-litigious methods of resolving disputes, including the processes established by Division 1, s 32A of the *LAA* strikes a balance between competing policies. As Gleeson CJ observed in *Carr v Western Australia*[76] "Legislation rarely pursues a single purpose at all costs". In such a situation a court should not construe such legislation as though it pursued one purpose to the fullest possible extent.[77]

[108] The legislation does not encourage non-litigious methods of resolving disputes to the fullest possible extent by permitting negotiations to continue indefinitely. However, in making provision for an extension of time within which to commence proceedings, the legislation does not pursue the object of commencing proceedings within 12 months to the fullest possible extent. The resolution of competing interests in the non-litigious resolution of disputes and in the timely commencement of proceedings does not turn on the legislation having given a priority to one interest over the other. It depends on the circumstances of the particular case, and the applicant for an extension of time must satisfy the court that it was not reasonable in those circumstances to have commenced an action within one year from the date of the publication.

Evidence of the circumstances

[109] In a case in which an applicant seeks an extension of time, one would ordinarily expect the evidence of the circumstances to include when the applicant learned of the publication, what he or she did about it and what the potential defendant did in

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73 Supra at [16].

74 The Act, s 3(c).

75 The Act, s 3(b).

76 (2007) 232 CLR 138 at 143; see also *Jomal Pty Ltd v Commercial and Consumer Tribunal* [2009] QCA 326 at [29], [50].

77 Ibid. For present purposes the limitation provisions in s 10AA and s 32A of the *LAA* may be treated as being in the same piece of legislation as Division 1, since they were enacted by Schedule 4 of the *Defamation Act* 2005.

response. The *obiter* of Keane JA does not state that the mere fact that an offer to make amends remains open for acceptance at the date of expiry of the limitation period is sufficient to discharge an applicant's onus under s 32A. More may be required to be disclosed about the course of negotiations. The disclosure of the course of negotiations and their contents on such an application may be constrained by without prejudice privilege and the provisions of s 19. The appellant goes so far as to contend that s 19 renders inadmissible on an application under s 32A the fact that an offer to make amends has been made.

[110] At the hearing of the appellant's objections on the basis of s 19, the primary judge determined that s 19(1) restricted proof of the contents of statements or admissions made in certain communications, as distinct from the fact that the communications had occurred. Such a distinction broadly reflects the common law's approach to the admissibility of without prejudice communications. In *Unilever plc v The Procter & Gamble Co*[78] Robert Walker LJ (as his Lordship then was) stated that there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. Amongst the important instances listed by his Lordship was:

> "Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335 at 338, noted this exception but regarded it as limited to 'the fact that such letters have been written and the dates at which they were written'. But occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay."[79]

[111] The respondent did not argue before the primary judge that s 19(2) excluded the operation of s 19(1). By Notice of Contention the respondent advances this and an additional ground concerning the meaning and operation of s 19. For reasons that appear later in this judgment, I conclude that the primary judge did not err in receiving evidence of the fact that certain communications had occurred.

Evidence of the respondent's reasons for not commencing an action before 21 June 2009

[112] The reason or reasons why a potential plaintiff did not commence an action within the one year period would seem to be one of the "circumstances" that is relevant to the determination of an application under s 32A. The appellant contends otherwise and objected to the primary judge admitting into evidence paragraph 9 of the respondent's affidavit which gave reasons for not commencing proceedings prior to 21 June 2009.

[113] The respondent's affidavit earlier referred to the offer to make amends dated 16 April 2009 and the fact that her solicitors responded to that offer, and provided forms of apologies and other terms. The respondent also deposed to the fact that the appellant withdrew its offer to make amends on 7 July 2009 and that, the appellant having withdrawn its offer to make amends, the respondent wished to commence proceedings against it claiming damages for defamation. Paragraph 9 of her

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78 [2000] 1 WLR 2436 at 2444. See also *Cross on Evidence*, Australian edition, Looseleaf [25385].

79 Ibid at 2444-2445.

affidavit continued:

> "I did not do so prior to 21 June 2009 as the Respondent had indicated a willingness to resolve the matter without the institution of proceedings, and I had accepted that a resolution could be reached on that basis."

The learned primary judge admitted this sentence on the basis that it appeared to be relevant to s 32A. The appellant contends that the sentence should have been ruled inadmissible. Its first contention in that regard is that the sentence concerns the reason why she did not commence proceedings, and that her reasoning "was not relevant nor was her subjective assessment of the situation". The appellant relies upon the following passage from the judgment of Keane JA in *Noonan v MacLennan*:[80]

> "When s 32A(2) refers to "the circumstances", it means the circumstances as they appear objectively to the court and not "the circumstances which the plaintiff believed, however unreasonably, to exist"."

[114] That passage occurred in the context of a submission on behalf of the respondent in that appeal that when s 32A(2) refers to "the circumstances" it means to include "the subjective understandings of the plaintiff even if those understandings are mistaken, and unreasonably so, in an objective sense". This argument was held to not reflect the correct interpretation of s 32A(2). Keane JA stated "The test posed by s 32A(2) is an objective one."

[115] I do not interpret the judgment of Keane JA as supporting the proposition contended for by the appellant in this case, namely that the reasons why the applicant did not commence proceedings are not relevant in determining whether it was not reasonable in the circumstances for the plaintiff to have commenced an action within time. The passage in the judgment of Keane JA upon which the appellant relies precludes reliance upon circumstances which an applicant may mistakenly and unreasonably believe to exist but which do not exist as a matter of objective fact. It does not preclude reference to an applicant's reasons or to objective circumstances that informed those reasons.

[116] In this matter the circumstances which informed the respondent's conduct in not commencing proceedings prior to 21 June 2009 were that the appellant had indicated a willingness to resolve the matter without the institution of proceedings. The appellant does not submit that her understanding in that regard was mistaken or unreasonable, or that those circumstances did not exist as a matter of objective fact. The appellant did not rely on evidence to the contrary or cross-examine the respondent with a view to establishing that her understanding was mistaken or unreasonable.

[117] The respondent's evidence that sought to explain her conduct based upon her understanding of the circumstances was relevant in demonstrating why it was not reasonable for her to have commenced proceedings prior to 21 June 2009.

[118] The appellant further submits that the sentence that was objected to should have been ruled inadmissible because of its form, being a conclusionary statement that

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[80] Supra at [20].

did not make clear the basis for her understanding. The sentence might have made clearer the communications in which the appellant had indicated a willingness to resolve the matter without the institution of proceedings. However this did not make her evidence inadmissible.

[119] I am not persuaded that the learned primary judge erred in admitting the sentence. The reasons given by the respondent along with other circumstances may have been insufficient to discharge her burden of proof. That relates, however, to the weight of her evidence, not its admissibility.

Other circumstances considered by the primary judge

[120] The evidence to which no objection was taken included the following. On 2 July 2008 the respondent consulted solicitors in respect of the offending publication. On 23 September 2008 her solicitors briefed counsel to draw and settle a concerns notice. The counsel briefed is not identified by name, but it was neither of the counsel who appeared for the respondent on the application or on this appeal. Extraordinarily, on or about 27 January 2009 and four months after receiving the brief to draw and settle a concerns notice, counsel who was originally briefed advised the respondent's solicitors that "commitments would not permit preparation of the concerns notice". Accordingly, another counsel was briefed to draw and settle a concerns notice.

[121] The appellant did not place particular reliance in the appeal on the four month delay of the counsel who was originally briefed, and it is unnecessary to consider the extent to which the consequences of such delay should be visited upon the respondent personally. However, delay in making complaint about a defamatory publication or in prosecuting proceedings can be devastating on the quantum of an award for defamation, at least where the delay is unexplained, since it is consistent with an indifference to the effect of the publication on the plaintiff's reputation.[81] No explanation is given by the respondent's solicitors as to why the brief to counsel was not withdrawn prior to the end of January 2009.

[122] The concerns notice settled by new counsel was served on 9 February 2009. On 2 March 2009 the respondent's solicitors were served with a letter from the appellant's solicitors requesting further particulars of the concerns notice. On 13 March 2009 the respondent's solicitors provided the requested particulars. On 1 April 2009 the appellant's solicitors sent another letter that advised that the respondent was willing to consider any reasonable material from the respondent for publication and would be happy to discuss the position with the respondent's solicitors. On 7 April 2009 the respondent's solicitors wrote in response.

[123] On 8 April 2009 the solicitors for the parties had a telephone conversation in which they discussed "that it would be in both (their) respective clients' interests to resolve the matter without instituting proceedings".

[124] On 9 April 2009 the respondent's solicitors sent another letter to the appellant's solicitors. It expressed the belief that the appellant could retract the allegations made in the article and apologise without identifying the respondent by name, but stated that if the appellant considered that naming the respondent was unavoidable, she would consider a form of apology that included her name. The respondent's solicitors reiterated a request for the appellant to make an offer to make amends that

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81 *Burke v TCN Channel Nine Pty Ltd* unreported NSWSC Levine J, 16 December 1994 at p 14.

included the terms of an apology, the date it would be published, the page upon which it would be published and "the estimate of compensation" that the appellant was willing to pay.

[125] The evidence to which objection was taken by the appellant before the primary judge, but which the primary judge permitted, included the following.

[126] On 16 April 2009 an offer to make amends was made. The parties do not take issue with the validity of the offer, and I am prepared to proceed on the basis that an offer to make amends pursuant to Division 1 was made on 16 April 2009, notwithstanding the passage of time since the concerns notice of 9 February 2009 and the fact that the request for further particulars of 2 March was not a request of the kind contemplated by s 14(3) of the Act.

[127] On 30 April 2009 the respondent's solicitors briefed counsel to settle a retraction and apology for publication in *The Chronicle* and a letter of apology to be given to the respondent by the appellant. On 18 May 2009 the respondent's solicitors responded by letter to the offer to make amends. On 26 May 2009, the respondent's solicitors requested a response, and received one on 29 May.

[128] On 3 June the solicitors for the parties had a telephone conversation about, amongst other things, the appellant's solicitors letter dated 29 May 2009. On 4 June 2009 the respondent's solicitors wrote about the offer to make amends and resolution of the dispute. On 12 June 2009, having received no response to their letter dated 4 June 2009, the respondent's solicitors asked for a response by 16 June. On 17 June 2009 the appellant's solicitors sought clarification as to whether the appellant's offer to make amends had been rejected and responded to the respondent's proposal of 4 June 2009.

[129] On 22 June 2009, the respondent's solicitors confirmed that the appellant's offer to settle had not been rejected, and sought clarification of the respondent's position regarding resolution of the matter. A telephone conversation between solicitors occurred on 30 June 2009.

[130] On 7 July 2009 the appellant withdrew its offer to make amends.

[131] The primary judge did not have reference to the contents of communications that occurred after 16 April 2009 and to which the appellant objected in reliance on s 19 of the Act. Instead, regard was had to the fact that an offer of amends had been made on 16 April 2009, that the parties' solicitors communicated with each other during the two months prior to expiry of the limitation period about resolution of the matter and that at the date the limitation period expired (21 June 2009) the offer to make amends remained open for acceptance. For reasons to be given by me in relation to the application of s 19, I conclude that the primary judge was entitled to have regard to these matters.

The primary judge's reliance on the policy of promoting non-litigious resolution of defamation disputes

[132] The application was heard in the Applications List and an *ex tempore* judgment was given. The primary judge referred to the policy of promoting the non-litigious resolution of disputes that is apparent in Division 1 and the significant potential consequences that follow from accepting or not accepting an offer of amends. In

view of the identified policy, the primary judge concluded that once the applicant engaged the provisions of Division 1 it would not have been reasonable to have commenced proceedings until "the procedures envisaged by Division 1 had been brought to a conclusion". In their context, the quoted words meant the acceptance, rejection or withdrawal of an offer to make amends. His Honour concluded that to have commenced proceedings:

> "…would have been inconsistent with the clear intent of the legislature to promote non-litigious resolution of such matters and it may have potentially exposed her to orders for costs as well as resulted in proceeding in the face of a defence created by the offer to make amends."

[133] The principal reason given by the primary judge invoked the policy of promoting non-litigious resolution of defamation disputes. That policy is recognized in s 3(d) of the Act. The public interest is served by the resolution of disputes without litigation. As Byrne SJA stated in *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd*:[82]

> "Although "as a means of resolution of civil contention litigation is certainly preferable to personal violence ... it is not intrinsically a desirable activity". Compromise fosters substantial public and private benefits: the disputants avoid the uncertainties, trouble and expense of trials; they, their witnesses and the wider community are spared the opportunity costs of the diversion of human and other resources from more useful activities into litigation; public funding for courts is reduced; and, less tangibly, social harmony is promoted. It is in the public interest that civil disputes be settled without resort to judicial decision."

The resolution of defamation disputes without resort to litigation also tends to serve the interests of potential plaintiffs and defendants.

[134] In commencing an action for defamation in the hope of achieving eventual vindication of reputation by an award of damages, a plaintiff is required to place the contents of the defamatory publication on the public record by pleading it. The pleadings are accessible to the public by search.[83] Interlocutory hearings and any trial are held in public with the potential for the contents of the defamatory matter to be reported, fairly or otherwise, to the general public. The reporting of proceedings may bring the contents of a defamatory publication that was originally communicated to a limited number of persons to a vastly larger readership. Even in a case in which a plaintiff is defamed in a newspaper or magazine, the reporting of the defamation proceedings may reach many more persons than the original defamation.[84]

[135] The paramount interest in open justice requires plaintiffs to be identified by name in court proceedings, save for exceptional circumstances.[85] Where, as in this case, the potential plaintiff is not identified by name in the original publication, the reporting of defamation proceedings inevitably supplies the plaintiff's identity to persons who did not identify the plaintiff when they read the offending publication.

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82 [2001] 1 Qd R 276 at 288 [27]. Footnotes omitted.

83 *Uniform Civil Procedure Rules* 1999 (Qld) r 981.

84 See, for example, *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443.

85 *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10.

[136] In theory, eventual success at trial serves to vindicate reputation, repair harm done and console the plaintiff for personal distress. These are the purposes of an award of compensatory damages for non-economic loss.[86] In practice, and ignoring the statutory cap on damages for non-economic loss,[87] a damages award may not adequately serve an aggrieved person's interests. A plaintiff seeking vindication must pursue "a form of redress not precisely adjusted to their needs".[88] As Lord Hoffmann once observed:

> "What most plaintiffs want is the immediate publication of a correction with or without some modest compensation. What they get is three or four years of anxious and obsessional waiting, followed by a trial which, even if it ends in success, may reopen injuries everyone else had forgotten, and stamp them indelibly on the public mind."

[137] The remedies for a successful plaintiff do not include a court-ordered correction. Professor Fleming described the preoccupation of defamation law with damages as "a crippling experience over the centuries".[89] He also wrote:

> "At present, however, the law offers no other means for wringing a retraction from a defamer. The latter, it is true, may mitigate his damages by timely apology, and in some cases may even escape all liability by retracting. … But nowhere retraction can be forced on a recalcitrant defendant, nor has the plaintiff any right of reply in the defendant's media."[90]

[138] A potential plaintiff who genuinely wants a correction, retraction or apology is well-advised to negotiate one. None of these things may be forthcoming from the defendant at the end of an eventual trial.

[139] Where, as here, a potential plaintiff is not identified by name in the publication complained of, the negotiation of a resolution prior to litigation that includes a correction, retraction or apology may be in a form that does not identify the plaintiff by name, and does not thereby exacerbate the defamation.

[140] In short, the negotiation and resolution of defamation disputes without resort to litigation serves the interests of many potential plaintiffs.

[141] The interests of many potential defendants to defamation proceedings also may be served by resolution without resort to litigation. The commencement of proceedings requires the filing within 28 days of a defence that explains why the defendant does not admit or denies the allegations of fact in the plaintiff's statement of claim, and which pleads substantive defences. Substantial costs are usually incurred in defending proceedings. A defendant may wish to publicly defend its own reputation against pleaded and publicised claims of carelessness, recklessness or malice. The course of negotiating a settlement after proceedings are commenced is less attractive than doing so beforehand, lest the defendant gain a reputation, deserved or otherwise, for settling actions once they are commenced.

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86 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61.

87 The Act, s 35.

88 Fleming JG, "*The Law of Torts*" 9th ed, Law Book Company Limited, Sydney, 1998, p 656.

89 Fleming JG, "*Retraction and Reply: Alternative Remedies for Defamation*" (1977) 12 UBCL Rev 15, 15.

90 Fleming JG, "*The Law of Torts*" 9th ed, Law Book Company Limited, Sydney, 1998, p 656.

[142] In summary, the policy of promoting the resolution of defamation disputes without litigation serves the public interest for the reasons identified by Byrne SJA. It also serves the interests of potential plaintiffs, especially in a case in which the potential plaintiff has not been identified by name. It also may serve the interests of potential defendants. It saves both plaintiffs and defendants the substantial costs incurred in litigation in general, and the costs of defamation litigation in particular. Despite reforms to procedure and to the substantive law, defamation proceedings often involve costly disputes over pleadings. The incurring of such costs at an early stage of proceedings may delay, if not defeat, a settlement.

The commencement of defamation proceedings and its effect on negotiations

[143] The appellant submits that a decision not to sue, in the hope or even the expectation that the matter will settle without suit, does not make it "not reasonable to commence" in time. It submits that short of a contract or an estoppel based on a promise or representation that the mater would be resolved without litigation, it is difficult to imagine conduct by it that would be sufficient to justify a decision by the respondent not to commence within time.

[144] It further submits that:

> "The commencement of proceedings protects the plaintiff's action, and preserves its bargaining position in the event of negotiations. It is reasonable to commence whether or not the matter might resolve."

The focus of this submission is on the plaintiff's bargaining position assuming negotiations take place after the action is commenced. The focus of attention in the present case, however, is on negotiations that are in progress before an action is commenced and whether the commencement of proceedings may disrupt them. Naturally, it is possible that the commencement of proceedings will bring negotiations to a head. Commencing proceedings certainly increases the stakes in any negotiation. However, commencing proceedings carries the substantial risk of bringing negotiations to an end. To say the least, it may disrupt the negotiation process and generate additional costs for both parties that must be factored into any negotiated settlement.

[145] The commencement of proceedings brings what might otherwise be a private dispute into the public arena, and once this occurs one or both parties may wish to litigate until judgment, lest settlement of proceedings be publicly interpreted as an act of capitulation. Starting proceedings may strengthen a plaintiff's bargaining position in any negotiations compared to his or her bargaining position once a limitation period has expired. However, starting proceedings may ensure that negotiations do not continue, particularly in circumstances in which the potential defendant has signalled a preparedness to resolve the matter without the need to commence proceedings. Given the public interest in the resolution of defamation disputes without litigation, "it may well be unreasonable to disrupt (non-litigious) processes and to incur needless expense by commencing proceedings."[91]

Alleged errors in the primary judge's reasons

[146] The appellant advanced three substantial grounds in submitting that the primary judge erred in concluding that it was not reasonable in the circumstances for the respondent to have commenced an action by 21 June 2009.

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91 *Noonan v MacLennan* [2010] QCA 50 at [16].

[147] The first was that the primary judge gave too much weight to the policy of promoting the non-litigious resolution of defamation disputes. The appellant notes that resort to Division 1 is not compulsory, and that the policy advanced by Division 1 could be satisfied by engaging its operation in the year following the publication. It further submits that the issue of reasonableness under s 35A could not be addressed without considering the competing policies behind the limitation period.

[148] Whilst resort to Division 1 is not compulsory, the parties chose to resort to it. An important circumstance in weighing competing interests in the determination of reasonableness is the uncontested fact that the parties' solicitors discussed that it was in both their respective clients' interests to resolve the matter without instituting proceedings. The respondent understood this fact and did not commence proceedings because of it.

[149] The processes contemplated by Division 1 started late in the limitation period, but both parties were content to pursue them. As the primary judge noted, those processes had not been brought to a conclusion. Contrary to another of the appellant's submissions, the primary judge's reasons do not support the proposition that the issuing of a "concerns notice" would have the effect of extending time. It was not simply that a concerns notice had been issued. The processes under Division 1 had not been concluded by the respondent accepting or rejecting the offer to make amends, or the appellant withdrawing its offer.

[150] In circumstances in which the appellant was prepared to negotiate, kept its offer to make amends open for acceptance and the respondent was given to understand the fact that the appellant had indicated a willingness to resolve the matter without the initiation of proceedings, the policy of promoting the non-litigious resolution of defamation disputes warranted substantial weight being given to it by the primary judge. I am not persuaded that the primary judge accorded it too much weight.

[151] The appellant next challenges the primary judge's reference to the fact that the commencement of proceedings "may have potentially exposed (the respondent) to orders for costs". It is not clear to what costs the primary judge was adverting by this reference. The costs associated with discontinuing an action if and when negotiations fail to resolve a dispute come to mind, and there was no error in referring to exposure to a costs order as a relevant circumstance.

[152] Finally, the appellant challenges the primary judge's reference to the fact that the commencement of proceedings may have resulted in "proceeding in the face of a defence created by the offer to make amends". The commencement of proceedings may expose a plaintiff to a range of defences that the plaintiff would not have faced if negotiations had concluded with a settlement. However, the commencement of proceedings may be taken to constitute a rejection of an offer to make amends that remains open for acceptance, and thereby trigger a possible s 18 defence. The primary judge's reference to the defence created by s 18 is unexceptional.

Appellate review of a s 32A order

[153] The appeal is against a finding of fact, not an exercise of discretion. The respondent relies on *Singer v Berghouse*[92] concerning appellate restraint in disturbing evaluative determinations. That case involved the "two-stage inquiry" on a testator's family maintenance application. The first stage requires the court to be

92 (1994) 181 CLR 201.

satisfied that the applicant has been left without *adequate* provision for his or her *proper* maintenance. Mason CJ, Deane and McHugh JJ stated that this jurisdictional question involved the making of "value judgments" but was a question of fact.[93] Their Honours held, however, that the principles that govern appellate review of "discretionary decisions"[94] should apply. Their Honours agreed with the following comments of Kirby P (as his Honour then was):

> "Unless appellate courts show restraint in disturbing the evaluative determinations of primary decision-makers they will inevitably invite appeals to a different evaluation which, objectively speaking, may be no better than the first. Second opinions in such cases would be bought at the cost of diminishing the finality of litigation in a troublesome area and, sometimes at least, with a burden of costs upon the estate which should not be encouraged."[95]

[154] Gaudron J in a separate judgment stated that where a subjective assessment or value judgment is concerned, appellate review depends on essentially the same considerations as those which apply in cases involving the exercise of discretion.[96]

[155] The issue under s 32A of the *LAA* of whether it was "not reasonable in the circumstances" involves a value judgment, as do many findings of fact that involve a legal category of indeterminate reference such as reasonableness. This application did not involve the evaluation of oral evidence. Accordingly, the primary judge did not enjoy advantages in evaluating evidence not enjoyed by this court.

[156] The appeal is by way of rehearing, but the court does not deal with the case as if it was determining the matter at first instance. The appellant needs to show error by the primary judge.[97] Where a determination of fact involves "elements of degree, opinion or judgment, a simple preference in the appellate court for a view different from that taken by the trial judge may not carry with it the conclusion of error".[98] The appellate court might conclude that there could not be said to be only one possible correct determination. If, however, the appellate court is persuaded that the evaluative judgment reached by the primary judge is wrong, it thereby identifies error.[99]

[157] The issue is whether the primary judge was in error in determining that it was not reasonable in the circumstances to have commenced a defamation action by 21 June 2009.

The primary judge's determination of the issue under s 32A

[158] The fact that a concerns notice had been belatedly sent and an offer to make amends was sent in response to it were not the only circumstances that arose for

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93 Ibid at 210-211.

94 Ibid at 212. An earlier passage at 211 indicates that "discretionary decisions" may include the kind of determination that a primary judge makes when making "a sound discretionary judgment in personal injury cases when he or she assess the quantum of damages say for pain and suffering, and for loss of amenities of life."

95 *Golosky v Golosky* [1993] NSWCA 111 at 13-14.

96 Supra at 226.

97 *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23]; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 432-438.

98 *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* (2005) 220 ALR 211 at 220 [46].

99 Ibid at 221 [46].

consideration. The offer of amends remained open for acceptance. The appellant did not promise to consent to an extension of time order if negotiations did not conclude in a settlement. However, the respondent was given to understand that the appellant had indicated a willingness to resolve the matter without the institution of proceedings.

[159] Beyond the particular circumstances of the case is the fact, reflected in the observations of Keane JA in *Noonan v MacLennan*, that where parties are engaged in the process of resolving their dispute by non-litigious processes, "it may well be unreasonable to disrupt those processes and to incur needless expense by commencing proceedings". Such a view accords with one of the policies of the Act of promoting the non-litigious resolution of defamation disputes. Such a policy may conflict on occasions with the policy of requiring actions to be commenced within 12 months of the date of publication. Section 32A of the *LAA* permits these competing policies to be weighed in the circumstances of a particular case.

[160] In the circumstances of this case, the policy of promoting the non-litigious resolution of defamation disputes had substantial weight. The publication did not identify the respondent by name. The commencement of proceedings would have carried the potential to identify her and injure her reputation amongst many more persons than identified her upon reading the article. In circumstances in which an offer to make amends was open for acceptance, and the appellant was open to a resolution without the need to institute proceedings, the commencement of proceedings was a major step. It threatened to disrupt, if not terminate, negotiations. The continuation of negotiations for a suitably-worded correction, retraction or apology that did not identify the respondent by name offered a form of resolution that was not available by way of remedy at the conclusion of defamation proceedings.

[161] I am not persuaded that the primary judge was in error in determining that it was not reasonable in the circumstances to have commenced a defamation action by 21 June 2009.

The primary judge's ruling on s 19

[162] The appellant objected to the admission into evidence of a number of paragraphs of the affidavit of a solicitor who acted on behalf of the respondent and to correspondence exhibited to her affidavits,[100] and to paragraphs 7-9 of the respondent's affidavit on the grounds that the evidence was inadmissible by reason of s 19 of the Act. In general terms, the paragraphs of the solicitor's affidavit refer to the making of an offer to make amends dated 16 April 2009 and to correspondence between the parties' solicitors which continued in the following months in relation to it. Paragraph 7 of the respondent's affidavit referred to the offer to make amends. Paragraph 8 referred to the appellant's withdrawal of the offer on 7 July 2009. The appellant identifies the key issue in respect of the objection based upon s 19 as whether "evidence of the fact of and contents of the appellant's offer to make amends was admissible having regard to s 19".[101] The learned primary judge ruled that s 19(1) restricted proof of the content of statements or admissions, as distinct from the fact that communications had occurred for the

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100 Paras 13-29 and pp 16-43 of the exhibits to the affidavit of Ms Woolley filed 18 August 2009 and Exhibit VJW02 to the affidavit of Ms Woolley filed 1 September 2009.

101 Appellant's submissions para 29.

purposes of Division 1. As a consequence, the content of the communications was ruled inadmissible, but the fact that they were made was not made inadmissible by s 19(1).

[163] If the appellant's objections had been upheld, then the fact that an offer to make amends had been made and that communications continued between the solicitors for the parties over the following months in relation to it would not have been received. On the appellant's argument, evidence that an offer of amends has been made, and evidence that the offer had not been accepted, rejected or withdrawn in the weeks and months that followed it would not be admissible by virtue of s 19(1). I do not consider that such a conclusion is supported by the terms of s 19(1), the context in which it appears or the purposes of the legislation in which it is contained.

[164] The terms of s 19(1) do not make inadmissible evidence of the making of an offer to make amends. They make inadmissible evidence of "any statement or admission made in connection with the making or acceptance of an offer to make amends". The appellant correctly notes that the words "in connection with" in s 19(1) are of wide import,[102] and that "any" statement or admission made in connection with the making or acceptance of an offer to make amends is inadmissible. The appellant acknowledges that the broad interpretation of s 19(1) contended for by it would exclude reference to the fact of the offer being made, but submits that the words should be interpreted to produce such a result, and that such a result is not absurd.

[165] I do not agree that such a result flows from the language of s 19(1). If the legislature intended evidence of the making of an offer to make amends to be inadmissible then s 19(1) probably would have commenced with additional words, such as "evidence of *the making of an offer to make amends or of* any statement or admission made in connection with the making or acceptance of an offer to make amends is not admissible ...". The terms of s 19(1) suggest a distinction between the *fact* that such an offer has been made, and the *contents* of the communication that contains the offer, and a like distinction between the fact that such an offer has resulted in further communications and the contents of those further communications. The distinction between evidence of the fact that without prejudice communications have occurred and evidence of statements made in the course of them as evidence by way of admission is well-established.[103]

[166] The terms of s 19(1) must be construed in their statutory context, and the appellant correctly submits that there is no basis to simply import the common law position in respect of without prejudice privilege. The statutory context, however, encourages a similar distinction between, on the one hand, the fact that an offer to make amends was made and the fact that negotiations occurred as a result of it, and, on the other hand, statements contained in those communications that constitute admissions. The terms of s 19(1) do not unambiguously render inadmissible evidence of the fact that an offer to make amends was made or the fact that it prompted other communications.

[167] The parties argued the admissibility issue before the primary judge on the assumption that s 19(2) did not create an exception in the present circumstances. I

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102 *Fraser v The Irish Restaurant & Bar Co Pty Ltd* [2008] QCA 270.

103 *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* (supra) at [13]; *Betfair Pty Ltd v Racing New South Wales (No 7)* (2009) 260 ALR 538 at 562-565 [65] – [74]; reversed on other grounds *State of New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543.

am not convinced of the correctness of that view. The issue for determination on the application, namely whether it was not reasonable to have commenced an action in circumstances in which an offer to make amends remained open for acceptance, arguably would be an issue "relating to" the application of the provisions of Division 1. If this is so, then the exception created by s 19(2)(a) would be engaged.

[168] If, however, the exception in s 19(2)(a) does not apply, then the fact that the legislature made provision for exceptions in s 19(2) does not compel the broad interpretation of s 19(1) contended for by the appellant. Those exceptions are consistent with the legislative scheme in which a court may be required to consider the contents of an offer of amends to determine, for example, whether the offer was reasonable in the circumstances so as to establish one of the elements of a defence under s 18 of the Act. The operation of the exceptions in s 19(2) in other contexts does not require that a broad interpretation of s 19(1) should be adopted in the present context. That context is one in which an applicant under s 32A of the *LAA* seeks to demonstrate that it was not reasonable to commence proceedings in circumstances in which an offer to make amends remained open for acceptance, and that the offer had prompted ongoing negotiations. In that context s 19(1) is to be interpreted having regard to its application in the context of s 32A which, as Keane JA observed, "is apt to encompass a case where the plaintiff has been engaged in the pursuit of non-litigious processes to vindicate his or her rights". In such a case "it may well be unreasonable to disrupt those processes and to incur needless expense by commencing proceedings". It would be odd in such a context to construe s 19(1) as rendering inadmissible evidence of the making of an offer to make amends and the fact that such an offer prompted pursuit of negotiations to resolve the dispute without recourse to litigation.

[169] The interpretation of s 19(1) adopted by the learned primary judge advances the purpose of s 19(1) and the Act in general by preventing the admission into evidence of statements and admissions contained in communications that are made in pursuing the resolution of civil disputes without litigation pursuant to Division 1, whilst permitting reference to the fact of such communications if that fact is relevant. In the context of s 32A of the *LAA* the fact of such communications is admissible because they may be relevant to the issue of whether it was "unreasonable to disrupt those processes and to incur needless expense by commencing proceedings." Precluding the admission into evidence of the contents of those communications encourages parties to make frank concessions in an offer to make amends and in communications that follow it, safe in the knowledge that such statements and admissions will not be used in evidence against them, even on an application of the present kind.

[170] The learned primary judge did not err in finding that s 19(1) did not render inadmissible evidence of the fact that an offer to make amends had been made and the fact that communications had occurred for the purposes of Division 1.

The respondent's notice of contention

[171] My conclusion makes it unnecessary to address the respondent's notice of contention. However, the interpretation of s 19 having been argued I shall address the issues raised by the notice of contention.

[172] At the hearing of the appeal, the respondent was granted leave to file a notice of contention in relation to the meaning and application of s 19. Her first contention is

that s 19 applies only "in proceedings which determine whether publication of matter was defamatory". This contention is not supported by the language of the section. Subject to the exclusions created by s 19(2), s 19 makes evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends inadmissible "in any legal proceedings (whether criminal or civil)". An interpretation that gives the quoted words their ordinary meaning is consistent with the statutory context in which s 19(1) appears. The promotion of negotiations and the early resolution of defamation disputes is advanced by making the contents of statements and admissions made in those communications not admissible in any legal proceedings, not simply defamation proceedings. The promotion of the resolution of defamation disputes is advanced if parties are encouraged to make frank concessions about the weaknesses of their cases and other statements against their interests, safe in the knowledge that such statements will be inadmissible in any proceedings. These include proceedings that determine whether the matter is defamatory and whether any defence applies[104] and proceedings which determine whether the publication was false, misleading, careless or malicious. It would be inconsistent with the policy of resolving disputes without resort to litigation to construe s 19 as precluding the use of admissions in a defamation trial, but as not precluding their use in a proceeding for injurious falsehood, a proceeding for a contravention of s 52 of the *Trade Practices Act* 1974 (Cth) or other proceedings. The legislature might have left the admissibility of such statements in other proceedings to be governed by without prejudice privilege. Instead, by clear words it provided for s 19 to affect the admissibility of certain statements and admissions in any legal proceeding.

[173] The respondent's first contention should not be accepted since it is not supported by the words of the section and would undermine the policy of promoting the non-litigious resolution of disputes.

[174] Had I not reached the conclusion that s 19(1) permits evidence to be given on an application under s 32A of the fact that an offer to make amends was made and the fact that further communications had occurred as a result, then there would have been much to commend the respondent's further contention that s 19(2)(a) applies in circumstances in which the procedure under Division 1 was not complete.

[175] If s 19(1) operated to preclude any reference to the fact that an offer to make amends had occurred or that it had not been accepted at the date the limitation period expired, then a wide interpretation of s 19(2)(a) would be required to avoid absurd and apparently unintended consequences. These consequences would include evidence not being admissible on an application under s 32A that an offer to make amends was accompanied by or was followed by a statement from the publisher that it promised to not oppose such an application if the aggrieved person was still considering the offer at the date the limitation period expired. It would preclude evidence that the publisher stated in the course of communications prompted by the offer that it was content for the potential plaintiff to not commence proceedings until the processes under Division 1 were concluded. Such an interpretation would deter potential plaintiffs from delaying the commencement of proceedings and responding to an offer to make amends that was sent close to the expiry of the limitation period. It would deter the continuation of negotiations prompted by an

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104 The word "defamatory" in the notice of contention was used in the sense of indefensibly defamatory, and the word "defamatory" in s 18(1)(a) of the Act may have a similar meaning, lest the defence created by s 18 lose much of its utility.

offer to make amends with a view to resolving matters without the institution of proceedings. Such a result would not achieve one of the purposes of the Act, namely the resolution of disputes without litigation, whilst doing little to advance any of the Act's other purposes.

[176] If s 19(1) had applied in the way the appellant contends, then I would have upheld the respondent's contention about the operation of s 19(2)(a). However, for the reasons that I have given, the primary judge did not err in relation to s 19(1).

[177] Given my view about the operation of s 19(1), I do not intend to dwell on the contents of the relevant communications, which would not be made inadmissible by s 19(1) if the respondent's contention about s 19(2) was upheld. However, even if s 19 did not apply, the contents of these communications may be inadmissible, being statements or admissions made in without prejudice communications. If contrary to the view taken by me, and by the trial judge, the contents of the communications are admissible, then they add little to the determination of reasonableness under s 32A. The contents of the communications are unedifying, but characteristic of the way in which many parties negotiate about the terms of apologies and compensation in defamation disputes.

Conclusion

[178] Both plaintiffs and defendants have much to lose once defamation proceedings commence. They face the inherent uncertainty of litigation and substantial legal costs. Their resources and energies are diverted from more productive activity. A party who succeeds at trial may have lost more than the legal costs that are not fully indemnified by the losing party, and the opportunity costs associated with being embroiled in litigation.

[179] Defamation litigation is a costly means to vindicate reputation. The reputations of all parties may be injured in the process of litigation. A successful plaintiff is not guaranteed an apology at the end of a trial, since courts do not order corrections, retractions or apologies by way of remedy.

[180] The policy of encouraging parties to resolve the terms of corrections and apologies and to otherwise settle their differences without resort to litigation serves the interests of most litigants and the public interest. The primary judge did not err in according the policy substantial weight.

[181] I would order that the appeal be dismissed with costs.