

# SUPREME COURT OF QUEENSLAND

CITATION: *Argus Probity Auditors and Advisors Pty Ltd & Ors v Queensland Rail Ltd* [2014] QSC 161

PARTIES: **ARGUS PROBITY AUDITORS AND ADVISORS PTY LTD**  
ACN 127 606 606  
(first plaintiff)  
**LINDSEY CLAUDE ALFORD**  
(second plaintiff)  
**ROBERT WALTER GEORGE HUME**  
(third plaintiff)  
v  
**QUEENSLAND RAIL LTD**  
ACN 132 181 090  
(defendant)

FILE NO: SC No 787 of 2013

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 23 July 2014

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2014

JUDGE: Flanagan J

ORDER: Pursuant to s 32A of the *Limitation of Actions Act* 1974, the first, second and third plaintiffs be granted an extension of time in which to commence proceedings for defamation in relation to the matters complained of in exhibits “LCA-10” and “LCA-11” to the affidavit of Lindsey Claude Alford sworn 20 June 2014 and pleaded in the proposed amended statement of claim.

CATCHWORDS: LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – GENERALLY – POWER OF COURT TO EXTEND LIMITATION PERIOD – where the plaintiffs sued the defendant on 29 January 2013 alleging it had, by its employees, defamed the plaintiffs in the dissemination of a file note dated 31 January 2012 – where the plaintiffs subsequently engaged in a Right to Information process that produced additional documents relating to the original alleged defamation – where those additional documents were statute barred from being the subject of a defamation suit pursuant to s 10AA of the *Limitation of Actions Act* 1974 – where the plaintiffs applied pursuant to s 32A of the

*Limitation of Actions Act 1974* for the limitation period for a defamation suit be extended – where the plaintiffs delayed applying for an extension of time for over a year – whether it was not reasonable for the plaintiffs to commence the defamation action arising from the RTI documents within 1 year of the date of publication – whether there is discretion to determine the amount of time a limitation period is to be extended for – whether an extension of the limitation period should be granted to a future date given the plaintiffs’ delay in applying to the court

LIMITATION OF ACTIONS – GENERAL MATTERS – AMENDMENT OF ORIGINATING PROCESSES AND PLEADINGS OUTSIDE LIMITATION PERIOD – AMENDMENTS INTRODUCING A NEW CAUSE OF ACTION OR PARTICULARISING CAUSE OF ACTION – where the plaintiffs sued the defendant on 29 January 2013 alleging it had, by its employees, defamed the plaintiffs in the dissemination of a file note dated 31 January 2012 – where the plaintiffs subsequently engaged in a Right to Information process that produced additional documents relating to the original alleged defamation – where those additional documents were statute barred from being the subject of a defamation suit pursuant to s 10AA of the *Limitation of Actions Act 1974* – where the plaintiffs applied pursuant to s 32A of the *Limitation of Actions Act 1974* for the limitation period for a defamation suit be extended – where the plaintiffs delayed applying for an extension of time for over a year – whether the additional documents arise out of the same facts or substantially the same facts as the original alleged defamation – whether rule 376(4) of the *Uniform Civil Procedure Rules 1999* has any bearing on any discretion to determine the length of an extension to a limitation period

*Limitation of Actions Act 1974*, s 10AA, s 32A  
*Uniform Civil Procedure Rules 1999* (Qld), r 376(4)

*Jamieson v Chiropractic Board of Australia* [2011] QCA 56, cited

*Mowen v The Morning Bulletin/APN and Ors* [2013] QCA 36, cited

*Noonan v MacLennan & Anor* [2010] QCA 50, applied  
*Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, applied

*Ritson v Gay & Lesbian Community Publishing Ltd & Ors* [2012] NSWSC 483, considered

COUNSEL: D C Spence for the plaintiffs  
 B S Cook (*sol*) for the defendant

SOLICITORS: Neumann & Turnour Lawyers for the plaintiffs  
 Clayton Utz for the defendant

## **Introduction**

- [1] By amended application filed 4 July 2014 the first, second and third plaintiffs sought the following order:
1. that pursuant to s 32A *Limitation of Actions Act* 1974 (Qld), the first, second and third plaintiffs be granted an extension of time in which to commence proceedings for defamation in relation to the:
    - (a) further publication of the materials set forth in the statement of claim to additional recipients; and
    - (b) publication of further defamatory material arising out of the same or substantially the same set of facts as the cause of action originally pleaded.
- [2] Further orders were sought pursuant to r 377 of the *Uniform Civil Procedure Rules* 1999 (Qld) (“UCPR”) for the grant of leave to amend the claim. The defendant/respondent consented to these orders and an amended claim was filed by leave.
- [3] By paragraph 1 of the amended claim each plaintiff seeks damages (including aggravated damages) for defamation.

## **The original statement of claim**

- [4] The proceedings were commenced by claim on 29 January 2013. At the time the plaintiffs were aware of a single allegedly defamatory publication namely a file note dated 31 January 2012 published by Samantha Mathers (an employee of the defendant) to various other employees. Paragraph 18 of the original statement of claim identifies the persons to whom the file note was published. Paragraph 19 pleads the material parts of the 31 January 2012 file note. Paragraphs 46 to 60 of the original statement of claim plead the defamatory imputations that are said to arise in respect to each of the plaintiffs from the file note of 31 January 2012.
- [5] Given that the proceedings were commenced on 29 January 2013 in respect of the publication of the 31 January 2012 file note, the action on a cause of action for defamation had, in accordance of s 10AA of the *Limitation of Actions Act* 1974 been brought before the end of one year from the date of the publication of the matter complained of.

**Events subsequent to the commencement of proceedings**

- [6] After the proceedings had been commenced on 29 January 2013 the second plaintiff, on behalf of the applicants/plaintiffs, decided to seek further relevant documents relating to the termination of an agreement referred to in the plaintiffs' submissions as "the Probity Agreement" through the Right to Information process. The RTI process was difficult and it proved necessary to exhaust all appeal processes available pursuant to the RTI legislation to achieve disclosure. The obtaining of documents pursuant to the RTI process extended over 14 months from 27 April 2012 to 26 June 2013.
- [7] It is common ground that it was only through the RTI process that the plaintiffs obtained access to documents revealing the further causes of action for defamation for which the plaintiffs are seeking the extension of time.<sup>1</sup> More specifically, the documents exhibited as "LCA-10" and "LCA-11" to the affidavit of Mr Alford sworn on 20 June 2014 formed part of the bundles of RTI documents released on 5 and 7 June 2013. LCA-10 is a series of emails that evidence that the file note of 31 January 2012 was published to persons additional to those identified in the original statement of claim. This is reflected in paragraphs 34 and 35 of the proposed amended statement of claim. Ms Spence who appeared for the applicant/plaintiffs identifies each of these publications of 31 January 2012 file note as a separate causes of action which arose at or about the date of such publication being 1 February 2012.
- [8] LCA-11 is a email from Ms Mathers to others dated 27 January 2012. The contents of the email of 27 January 2012 deals in substance with the same subject matter as the file note of 31 January 2012. The publication of this email by Ms Mathers on or about 27 January 2012 is relied on by the applicant/plaintiffs as constituting a separate cause of action for defamation. The email of 27 January 2012 is pleaded in paragraph 28 of the proposed amended statement of claim and the defamatory imputations said to arise from this email are pleaded in paragraph 53.
- [9] The limitation period for the matters complained of in "LCA-10" and "LCA-11" expired on or about 1 February 2013.

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<sup>1</sup> Affidavit of Mr Alford sworn 20 June 2014 at [13] and [14].

- [10] On the material it is clear that the RTI documents constituting “LCA-10” and “LCA-11” were not released to the applicant/plaintiffs until on or about 5 and 7 June 2013. The limitation period had therefore expired prior to the applicant/plaintiffs actually receiving the documents relied on for the additional causes of action for defamation.
- [11] The application seeking an extension of time pursuant to s 32A of the *Limitation of Actions Act* 1974 was originally filed on 23 June 2014. The applicant/plaintiffs seek an extension from on or about 1 February 2013 to 25 July 2014.
- [12] The written submissions of the respondent/defendant correctly identifies there has been a substantial delay on the part of the plaintiffs seeking an extension of time in circumstances where the relevant RTI documents were released on 5 and 7 June 2013. The period taken by the plaintiffs to seek an extension of the limitation period is in excess of the one year limitation period which applies from the date of the publication in accordance with s 10AA of the *Limitation of Actions Act* 1974.
- [13] The delay is sought to be explained by the plaintiffs by reference to the following events:
- 26 June 2013 – a final decision was received from the Information Commissioner, but no further documents were received on that date as the last tranche of RTI documents were released on 7 June 2013.
  - 27 June 2014 – the plaintiff’s solicitors delivered copies of certain documents requested pursuant to r 222 of the *UCPR* by the defendant’s solicitors.
  - Early August 2013 – the second plaintiff commenced studying the documents disclosed under the RTI process but overlooked what the second plaintiff has subsequently found to be key documents.
  - Early August 2013 to 4 October 2013 – the second plaintiff located new chambers in the new office of the first plaintiff, negotiated a lease of same, engaged removalists, arranged the fit-out of the new premises, and purchased and arranged the installation of new equipment. During the relocation all documents in the second plaintiff’s former chambers and the office of the first plaintiff were packed and placed in storage.

- October 2013 – the second plaintiff was told that he required surgery on his right knee.
- November 2013 – the second plaintiff’s surgery took place followed by two weeks of rehabilitation and physiotherapy.
- August 2013 to December 2013 – seemingly in spite of the matters referred to above as affecting the first and second plaintiffs during the period from August 2013 to January 2014, the second plaintiff submitted on behalf of the first plaintiff 14 proposals – tenders to provide probity advisory and/or auditing services, being those submitted for the period 2 August 2013 to 2 December 2014.
- December 2013 to January 2014 – the second plaintiff required a further period off work to recuperate from surgery. During that period of recuperation the second plaintiff realised the significance of the documents exhibited as “LCA-10” and “LCA-11”.
- 23 June 2014 – the plaintiffs filed the application seeking extension of time pursuant to s 32A of the *Limitation of Actions Act 1974*.

[14] There has therefore been considerable delay in bringing the application for an extension of time.

### **Section 32A *Limitation of Actions Act 1974***

[15] Section 32A deals with defamation actions and 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 publication, extend the limitation period mentioned in section 10AA to a period of up to 3 years from the date of the publication.
- (3) A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).
- (4) An order for the extension of the limitation period, and an application for an order for the extension of the limitation period, may be made

under this section even though the limitation period has already ended.”

[16] Section 32A has been the subject of judicial consideration by the Queensland Court of Appeal.

[17] In *Noonan v MacLennan & Anor* [2010] QCA 50, Keane JA (as his Honour then was) at [15] considered s 32A(2) as follows:

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

His Honour, at [17], sought to identify circumstances in which the test propounded by s 32A(2) would be satisfied:

“One cannot seek to give an exhaustive list of the kinds of cases which might fall within s 32A(2) of the Act, but other cases which come to mind are 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 the year after the publication.”

[18] The fact that a plaintiff may not be aware of the alleged defamatory publication was also a circumstance identified by Fryberg J in *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 at [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.”

[19] The statements of Keane JA in *Noonan* and of Fryberg J in *Pingel* were cited with approval by White JA in *Jamieson v Chiropractic Board of Australia* [2011] QCA 56 at [21].

## **Discussion**

[20] In the present case Mr Alford swears in paragraph 11 of his affidavit sworn 20 June 2014 that:

“The further republications took place prior to the expiry of the limitation period. The plaintiffs, however, had no knowledge or

means of knowledge of such republications until after the expiry of the limitation period.”

- [21] Mr Alford’s affidavit is silent as to whether any steps were taken to seek disclosure of the documents from the defendant. In any event it would appear to be the situation that the documents, constituting the alleged new causes of action for defamation, did not come into the applicant/plaintiffs’ possession until after the expiry of the limitation period. The present case therefore falls within the unusual circumstance identified by Keane JA in *Noonan* and Fryberg J in *Pingel* namely where the plaintiff is unaware of the fact of publication.
- [22] If I am satisfied that it was not reasonable in the circumstances for the applicant/plaintiffs to have commenced an action within the one year period then I must extend the limitation period. This is because s 32A(2) uses mandatory language, namely “a court must”. Such a construction is consistent with the observations made by Applegarth J in *Pingel* at [87] and Dalton J in *Mowen v The Morning Bulletin/APN and Ors* [2013] QCA 36 at [6].
- [23] Having decided that I am required to extend time because the defamatory publications were unknown to the applicant/plaintiffs prior to the expiry of the limitation period, the question arises as to the period for which such an extension should be granted.
- [24] Section 32A(2) permits the court to extend the limitation period to a period up to three years from the date of the publication. The extension sought in the present case by the applicant/plaintiffs is from 1 February 2013 to 25 July 2014 and falls within the permissible three year period. There has however been considerable delay from when the applicant/plaintiffs first came into possession of “LAC-10” and “LAC-11” namely 5 or 7 June 2013 to the date of bringing the application for an extension of time being 23 June 2014.
- [25] Chesterman JA in *Noonan* at [47] suggested that there was a discretion as to the length of the extension to be granted. His Honour discussed the application of such a discretion at [66]:
- “Even if one assumes, contrary to my opinion, that it would have been unreasonable for the respondent to commence proceedings while the university’s grievance procedures were being pursued the conclusion would not assist the respondent. He lost, on that ground,

six months. Assuming that the court was satisfied of what s 32A(2) required, time had to be extended. The length of the extension was a matter for discretion. It would not have been a proper exercise of discretion to extend time beyond the period within which it was thought unreasonable to have sued. In this case that would have produced an extension of time of six months, to October 2008. Such an extension would not assist the respondent who did not commence proceedings until a further eight months had elapsed.”

- [26] These observations of Chesterman JA in *Noonan* were considered by Beech-Jones J in *Ritson v Gay & Lesbian Community Publishing Ltd & Ors* [2012] NSWSC 483 at [25]:

“The language of s 56B(2) does not readily lend itself to being described as a discretion in any respect. However, it may be that the discussion in the above cases used the phrase discretionary in the sense of involving a normative judgment as to the period of extension. Chesterman JA in *Noonan* at [66] stated that the extension allowed could not extend beyond the period in which was unreasonable for the plaintiff to commence proceedings. If this aspect of the function conferred by s 56B(2) was discretionary that would constitute the outer limit of the period that could be fixed. On that approach a shorter period might be selected if, say, the prospective defendant could demonstrate the occasioning of prejudice in the interim. However, if this aspect of s 56B(2) only involves a normative judgment than the period identified by Chesterman JA in *Noonan* is not the outer limit but the particular point to which the period of extension ‘must’ be granted. In that event a question might arise as to whether any particular prejudice to the prospective defendant arising from the extension is one of the ‘circumstances’ that must be considered in determining when it ceased to be ‘not reasonable’ to commence. It is not necessary for me to attempt to resolve these matters on this application.”

- [27] The statement that the exercise of discretion under the New South Wales equivalent to s 32A(2) involves a normative judgment was cited with approval by Dalton J in *Mowen* at [6].
- [28] Whilst the applicant/plaintiff’s explanation for the delay is unsatisfactory the respondent/defendant has not sought to identify any particular prejudice arising from an extension of time to 25 July 2014.
- [29] There is however a further reason why I would consider an extension to 25 July 2014 as appropriate. Ms Spence at [29] of the applicant/plaintiffs’ written outline submitted that pursuant to r 376(4) of the *UCPR* the further causes of action sought to be added fall within the ambit of that rule in that they arise out of the same facts

or substantially the same facts as the cause of action for relief which has already been claimed in the proceeding.

[30] Rule 376(4) of the *UCPR* provides:

“(4) The court may give leave to make an amendment to include a new cause of action only if—  
(a) the court considers it appropriate; and  
(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.”

[31] As I have already discussed above the file note of 31 January 2012 and the email of 27 January 2012 deal substantially with the same subject matter. There is no doubt that the additional causes of action for defamation arise out of the same facts or substantially the same facts as the cause of action for defamation pleaded in the original statement of claim. I should make it clear that I only have regard to r 376(4) as a relevant consideration for the purposes of exercising a normative judgment as to the length of period for the extension. This is because s 32A(3) states that 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 the subsection (2).

### **Conclusion**

[32] I would therefore make orders pursuant to s 32A of the *Limitation of Actions Act* 1974 that the first, second and third plaintiffs be granted an extension of time in which to commence proceedings for defamation in relation to the matters complained of in exhibits “LCA-10” and “LCA-11” to the affidavit of Lindsey Claude Alford sworn 20 June 2014 and pleaded in the proposed amended statement of claim.

[33] I will hear the parties as to the appropriate order for costs.