SUPREME COURT OF QUEENSLAND

CITATION:	*Schoch v Palmer* [2016] QSC 147
PARTIES:	**WILLIAM MATTHEW SCHOCH** (plaintiff) **v** **CLIVE FREDERICK PALMER** (defendant)
FILE NO:	SC No 10172 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2016
JUDGE:	Applegarth J
ORDER:	**1. Application filed 24 May 2016 dismissed.** **2. Paragraphs 6 to 29 of the Amended Statement of Claim dated 19 April 2016 are struck out.** **3. The plaintiff has leave to amend paragraph (a)(i) of the Claim by deleting "$1,777,500" and replacing it with "$711,000" and deleting "5" and replacing it with "2".** **4. Paragraph 3 of the defendant's cross-application filed 31 May 2016 is adjourned to a date to be fixed.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – OTHER CAUSES OF ACTION AND MATTERS – where the plaintiff sued the defendant for making five alleged defamatory statements – where the limitation period under s 10AA of the *Limitation of Actions Act* 1974 (Qld) in respect of three of those statements had expired – whether it was not reasonable in the circumstances to have commenced an action within the one year limitation period – whether that limitation period should be extended pursuant to s 32A of the *Limitation of Actions Act* 1974 (Qld) *Defamation Act* 2005 (Qld), s 14 *Limitation of Actions Act* 1974 (Qld), s 10AA, s 32A, s 32A(2)

Argus Probity Auditors and Advisors Pty Ltd & Ors v Queensland Rail Ltd [2014] QSC 161 cited
Bidstrup v Cullen [2013] SASC 136 cited
Carey v Australian Broadcasting Corporation (2012) 84 NSWLR 90 followed
Cerutti v Crestside Pty Ltd [2016] 1 Qd R 89; [2014] QCA 33 cited
Findley v Morand [2014] QSC 297 cited
Houda v State of New South Wales [2012] NSWSC 1036
Hunter v Hanson [2014] NSWCA 263 cited
Jamieson v Chiropractic Board of Australia [2011] QCA 56 cited
Maccaba v Lichtenstein [2003] EWHC 1325 cited
Noonan v MacLennan [2010] 2 Qd R 537; [2010] QCA 50 followed
Pingel v Toowoomba Newspapers Pty Ltd [2010] QCA 175 followed
Ritson v Gay and Lesbian Community Publishing Ltd [2012] NSWSC 483 cited
State of Queensland v O'Keefe [2016] QCA 135 followed
York v Morgan [2015] NSWDC 109 cited

COUNSEL: The plaintiff appeared in person
C A Johnstone for the defendant

SOLICITORS: The plaintiff appeared in person
Kilmurray Legal for the defendant

[1] The plaintiff, Mr Schoch, is a chartered accountant. The defendant, Mr Palmer, is a prominent public figure, a company director and a businessman.

[2] Mr Palmer and Mr Schoch were once close. Mr Schoch did some audit work for one of Mr Palmer's companies in the late 1990s and early 2000s. In May 2011 Mr Schoch responded to an advertisement for the position as Chief Financial Officer of one of Mr Palmer's companies. He commenced employment in June 2011 and went on to hold positions of high responsibility. However, Mr Palmer and Mr Schoch had a falling out and Mr Schoch's employment was summarily terminated in December 2013. He sued for damages in April 2014. The issue in dispute was the terms of an oral contract that was struck between Mr Schoch and Mr Palmer in June 2011. The credibility and reliability of Mr Schoch and of Mr Palmer as witnesses were to be the critical issues in the case.

[3] During the course of that proceeding, Mr Palmer is alleged to have publicly defamed Mr Schoch on five occasions: on 8 April 2014, 30 April 2014, 6 September 2014, 14 September 2015 and 16 September 2015. The last date was the day after the trial ended.

[4] Mr Palmer's statements to journalists on those dates are alleged to have been republished in different media, with some of his reported comments continuing to be published on media websites.

[5] Mr Schoch held off suing for defamation until the civil trial concluded on 15 September 2015, when judgment was reserved. He says that Mr Palmer made the five defamatory statements in retaliation to his civil proceeding over the oral contract. Mr Schoch submits that it was reasonable to wait for the evidence in that case to be heard before suing for defamation. He submits:

> "My word and my credibility was in issue as against Palmer's. Palmer's defamations were aimed at undermining my word and my credibility in advance of the hearing and judgment. To file any earlier would be to self-undermine my own case, benefitting the defamer".

[6] He further submits:

> "There was a "complete overlap" in the real issue, credibility, in both cases. It was "unwise", in other words "not reasonable", to bring on defamation proceedings against Palmer before the oral contract trial was heard."

[7] This defamation proceeding was commenced on 9 October 2015. That was more than one year from the dates of the first three publications. Mr Palmer filed a "holding defence", and his solicitors complained that claims based on the first three alleged statements were out of time. As a result, Mr Schoch applies for extensions of time under s 32A of the *Limitation of Actions Act* 1974 (Qld). Mr Palmer cross-applies to strike out those parts of the pleading which rely upon the first three publications.

[8] The principal issue is whether Mr Schoch has satisfied me that "it was not reasonable in the circumstances" for him to have commenced an action in relation to those matters within one year from the date of their publication.[1] If he satisfies that requirement, then I must extend the limitation period.

[9] Mr Palmer argues that I should not be satisfied. He submits that the simple fact is that Mr Schoch made a conscious forensic decision to delay commencing the proceeding in circumstances where he had no reason to ignore the limitation period in which he was entitled to seek redress. Nothing in his evidence made it "positively unreasonable" for him "not to exercise his legal rights to sue within the statutorily designated period."[2] According to Mr Palmer, Mr Schoch has not discharged the onus of proving that "it was not reasonable in the circumstances" for Mr Schoch to have commenced an action within one year from the date of the relevant publication.

Relevant legislation and principles

[10] 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. This time limit, which is capable of extension, is imposed by s 10AA of the *Limitation of Actions Act* 1974 (Qld).

[11] Section 32A of that Act provides:

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1 *Limitation of Actions Act* 1974 (Qld), s 32A(2).

2 Mr Palmer's submissions in this regard rely upon statements made by Chesterman JA in *Noonan v MacLennan* [2010] 2 Qd R 537 at 548 [51]; [2010] QCA 50 ("*Noonan*").

> "(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.
>
> (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."

[12] The burden is on the applicant for an extension of time to point to circumstances which satisfy the Court that it was not reasonable for him or her to bring proceedings within the limitation period.[3] If that requirement is satisfied there is no discretion to refuse to grant an extension.

[13] Only in relatively unusual circumstances will the Court be satisfied that it was not reasonable to commence an action within the one year period.[4] However, a judicial gloss should not be put on the section. An applicant must establish that it was "not reasonable" in the circumstances to have commenced an action within one year from the date of publication, not that it would have been "positively unreasonable" to have done so or to "demonstrate affirmatively that he would have acted unreasonably."[5]

[14] The statutory requirement is objective. It is not enough for an applicant to prove a subjective belief that it was not reasonable to bring the proceeding.[6] Still, the phrase "not reasonable in the circumstances" invites inquiry into, and makes relevant, the applicant's reasons for not commencing proceedings within the limitation period.[7]

[15] The circumstances that might give rise to an extension are left at large.[8] Obvious candidates would be cases where an applicant is unaware of the defamatory publication within the limitation period. Other circumstances would be where the applicant 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. As Keane JA observed in *Noonan v MacLennan*:

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3 *Noonan* at 542 [15]; *Carey v Australian Broadcasting Corporation* (2012) 84 NSWLR 90 at 100 [55] ("*Carey*").

4 *Noonan* at 542 [15]; *State of Queensland v O'Keefe* [2016] QCA 135 at [16] ("*O'Keefe*").

5 *Jamieson v Chiropractic Board of Australia* [2011] QCA 56 at [20] which questioned expressions used by Chesterman JA in *Noonan* at 547 [48] and 548 [51]; see also *Houda v State of New South Wales* [2012] NSWSC 1036 at [14] ("*Houda*").

6 *Noonan* at 542 [20], 542 [65]; *Carey* at 101 [57].

7 *Carey* at 101 [57].

8 *Noonan* at 542 [17], 548 [51].

> "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."[9]

[16] Consideration of the issue of reasonableness commences with the fact that the Act, for good reason, sets a prima facie limit of one year to commence a defamation action.[10] However, the Court must be astute not to approach the matter on the basis that it is "not reasonable" to let a limitation period pass without commencing an action; the section expressly contemplates otherwise.[11]

[17] The focus must be on what circumstances existed prior to the expiry of the one year period in order to evaluate whether those circumstances made it "not reasonable" to have commenced an action within that one year period. It would be an error to be substantially influenced by circumstances which in fact occurred after the one year period.[12] Subsequent events may or may not vindicate the applicant's decision, but they are strictly irrelevant to the circumstances as they existed during the one year period and as at the expiry of the limitation period. For example, it may be not reasonable to commence a proceeding within the one year period because the applicant awaits disclosure of evidence or the determination of another process which will have a decisive effect for a potential defence of the proposed defamation action. However, the actual receipt of such evidence after the expiry of the limitation period or a favourable outcome of another proceeding after the expiry of the limitation period is not itself evidence which is capable of satisfying the statutory requirement.

[18] If the statutory requirement is satisfied, then the order for the extension of the limitation period may be for a period of up to three years from the date of the publication. The length of the extension is a matter for judgment,[13] and has sometimes been described as a matter of discretion.[14]

[19] The provision for an extension of the limitation period in the Act, and in comparable legislation which was enacted in other jurisdictions as a result of the passage of uniform defamation laws in 2005, differs from other legislation which confers a discretion to extend a limitation period. It does not create a general power to grant an extension of time when it is reasonable to do so, having regard to the applicant's explanation and any prejudice to the parties.[15]

[20] 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 applicant to have commenced an action within the one year period.[16]

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9 At 542 [17].
10 *Noonan* at 543 [22].
11 *Houda* at [13].
12 *O'Keefe* at [26] – [28].
13 *Ritson v Gay and Lesbian Community Publishing Ltd* [2012] NSWSC 483 at [24] – [25].
14 *Noonan* at [47].
15 c.f. for example, the relevant provision in the United Kingdom legislation considered in *Maccaba v Lichtenstein* [2003] EWHC 1325 (QB) at [11].
16 *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 at [87]; *O'Keefe* at [21].

The Act in the context of multiple publications

[21] The application of the statutory test in the context of a single publication has generated much litigation. Its application in the context of multiple publications, some of which occurred within one year before the proceeding was commenced, and some of which occurred earlier, is more complex. A particular complexity in the absence of a "single publication rule" in Australian law[17] is the continuing publication of defamatory matter over a period which straddles the expiry of the limitation period in respect of the original publication: for example, an article in an online newspaper which continues to be published to readers after the expiry of a year from its first publication.

[22] The starting point is that an action over a publication or a republication which occurred more than 12 months before proceedings commenced is statute-barred. Arguably, a plaintiff who relies upon publications and republications as causes of action which are not statute-barred may rely for other purposes upon earlier, statute-barred causes of action, for example, as proof of malice or in aggravation of damages.

[23] This is not a case in which the plaintiff sues the publisher of a newspaper for past publications by it and continuing publications by that defendant each time an article is downloaded and understood by readers who access the defendant's web page. Instead, Mr Schoch seeks to hold Mr Palmer liable both for the publications he made to journalists on the dates I have mentioned, and for republications by media organisations, including on websites he alleges continue to publish Mr Palmer's defamations of him. Some of those alleged republications for which Mr Palmer is sought to be held liable may have occurred in the 12 months prior to commencement of this proceeding, but others, like Mr Palmer's alleged original publications, are *prima facie* statute-barred.

The publications and their chronology

[24] The defence filed on 10 November 2015, the day after Mr Schoch requested default judgment, does not admit most of the pleaded publications and republications on the grounds that the allegation has not been sufficiently particularised. The fifth alleged publication is denied. Insofar as the cross-application is one to strike out, I proceed for the purpose of that argument on the assumption that the allegations of publication and republication are true. I also rely upon copies of certain alleged republications which are exhibited to Mr Schoch's affidavit. It is convenient to summarise the alleged publications and other relevant events.

10 June 2011	Mr Schoch's employment commences
8 December 2013	Mr Schoch's employment terminated
3 April 2014	Oral contract proceeding commences
8 April 2014	First publication (media conference with journalists)
30 April 2014	Second publication (response to questions from *Courier-Mail* journalist)

[17] *Dow Jones & Co Inc v Gutnik* (2002) 210 CLR 575, 601 [29] – 605 [37]; *Dods v McDonald (No 1)* [2016] VSC 200 at [14].

5 September 2014	Third publication (presumed date of email to *The Australian*)
6 September 2014	Email republished – *The Weekend Australian*
10 September 2014	Mr Schoch resolves to sue Mr Palmer for defamation over 6 September 2014 publication in *The Weekend Australian*
7 September 2015	Civil trial commences
14 September 2015	Fourth publication (Mr Palmer speaks to reporters outside the court building)
15 September 2015	Final day of hearing of civil trial
16 September 2015	Fifth publication (Mr Palmer appears on the Nine Network's *Today* program)
9 October 2015	Defamation action commences
10 November 2015	Defence filed

Publications – overview

[25] By way of overview, the first few publications are relatively innocuous. The fourth and fifth alleged publications are more serious, with the fifth publication alleging that Mr Schoch was dishonest. The fourth and fifth publications are not statute-barred. Mr Schoch requires an extension of 33 days in respect of the third publication and any republication in *The Weekend Australian* on or about 6 September 2014. He requires much longer extensions in respect of the first and second publications.

[26] Separate consideration is required in respect of the first two publications. This is because Mr Schoch submits that he was "unaware" of the defamatory matter conveyed by each of those publications until 24 September 2015, shortly before this proceeding was commenced.

The first and second publications

[27] Mr Schoch alleges that on 8 April 2014, during a media conference with various journalists, Mr Palmer was asked a question about the contract case which Mr Schoch had commenced and responded:

> "That's what happens when you have a billion dollars. People like to have a shot at you. I get that all the time."

and that in response to a question about Mr Schoch's motives in commencing the action Mr Palmer responded:

> "Political motivation, I guess. You become a lot more interesting to people once you have the balance of power."

The words spoken on 8 April 2014 are alleged to have been published by Australian Associated Press, to have been published in an online newspaper, *The Brisbane Times* and to continue to be published to members of the general public.

[28] Mr Schoch alleges that after being dismissed he received an invoice for $633,150.14 purportedly on account of accommodation and other charges incurred during the period that he lived at the Palmer Coolum Resort. The existence of the invoice is said to have become public knowledge. He alleges that on 30 April 2014, in response to an inquiry by a reporter from *The Courier-Mail* newspaper about the invoice, Mr Palmer said:

> "He's being invoiced for the services he had at the resort. He should really understand what the agreement says, I would have thought."

Those words were alleged to have been published on the newspaper's website and are alleged to continue to be published to the general public on that website.

[29] Mr Schoch's evidence is that he obtained copies of the *Brisbane Times* article, first published on 8 April 2014, and *The Courier-Mail* article, first published on 30 April 2014, when he conducted internet searches of articles about his contract case. He listed both articles in his disclosure in that proceeding and says that he was unaware at the time the articles contained "imputations" defamatory of him. Therefore, he did nothing about the articles apart from disclosing them in the proceeding.

[30] He says the next time the two articles came to his attention was when he prepared a draft statement to counsel on 21 September 2015 in which he listed the two defamations of which he was then aware, being the publications which I have referred to above as the third publication and the fifth publication. This statement included the first two articles as part of the chronology of what Mr Schoch refers to as the "lead up to the first statement I identified at the time as self-evidently defamatory": the publication on 6 September 2014. On 24 September 2015 counsel drafted a statement of claim and emailed it to Mr Schoch. It included the first and second publications, and Mr Schoch says that he "thus became aware for the first time on 24 September 2015 of the defamatory publications of 8 April 2014 and 30 April 2014."

[31] This is unlike a case in which an applicant for an extension of time was unaware of the publication at all until after the limitation period expired.[18] Mr Schoch does not say that he was unaware of the publications of 8 April and 30 April 2014 or that he did not read them. In essence, he says that it took a barrister to point out that they were defamatory.

[32] Mr Schoch did not seek advice about the first and second publications after reading them. His failure to do so is a relevant circumstance. He says nothing about his reaction, in terms of distress, upon reading what Mr Palmer allegedly said about him in the first two publications. Those two publications may not have been "self-evidently" defamatory. However, if each was arguably defamatory (and Mr Schoch's case is that they are at least arguably defamatory) and might be worth suing over because of the harm which they caused or were likely to cause Mr Schoch, then he should have sought advice about his position, and done so in a timely way.

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[18] *Argus Probity Auditors and Advisors Pty Ltd & Ors v Queensland Rail Ltd* [2014] QSC 161; *Findley v Morand* [2014] QSC 297.

[33] Having not done so, I consider that he has not discharged the burden of showing that it was "not reasonable in the circumstances" to have commenced an action for defamation within one year from the date of the publication. This is so, even if, having taken advice, he would have been told that it was unwise to sue at that time because an action over the publication might be speculative and that the costs of litigating the claim would be disproportionate to its prospects of success or the quantum of damages which might be recoverable, or that there was some other good reason to delay commencing proceedings at that time.

[34] This is not a case in which an applicant for an extension of time sought advice in a timely way about whether the publication was defamatory and defensible, and was advised to await some further development. It is possible to imagine circumstances where it is inadvisable, and therefore not reasonable, to commence a proceeding over a certain publication, but later, new publications change matters. If in such a case a potential plaintiff decides to "hold fire" over the initial publication by not suing, it is reasonable to place the potential defendant on notice of a potential claim and to reserve the right to sue. In this case, there was nothing of that kind. Mr Schoch did not take the first step of seeking advice about whether each of the first two publications was arguably defamatory, and he did not place Mr Palmer on notice of a potential claim. That conduct leads me to conclude that he has not discharged the burden imposed by s 32A of the Act. Expressed differently, it may have been not reasonable in the circumstances to have commenced an action within the one year limitation period over the first two publications, but only if Mr Schoch considered his position and placed Mr Palmer on notice of the possible claim.

The third publication

[35] Mr Schoch alleges that some time before 6 September 2014 *The Australian* newspaper was planning an article about his Supreme Court action and an affidavit sworn by him in those proceedings which referred to the financial situation of Mr Palmer and some of his companies. He alleges that Mr Palmer was requested by a reporter to comment on the proposed article and in response sent an email to the newspaper which read "… As for mr schock (sic) he just not a truthful person."

[36] These words appeared at the conclusion of a feature article which was published in *The Weekend Australian* on Saturday, 6 September 2014 headed "Palmer 'was close to insolvency'", near an article headed "Costly journey from Clive's friend to foe".

[37] Mr Schoch alleges that the words of Mr Palmer's email, which were republished in the newspaper meant that he:

(a) was an untruthful person;

(b) was a liar;

(c) was dishonest;

(d) was not a person to be associated with.

[38] The essence of Mr Schoch's argument as to why it was not reasonable to commence a proceeding over the third publication, and to delay doing so until the oral contract case

had been heard, has been summarised in [5] and [6] above. His explanation appears more fully in his affidavit (some parts of which were objected to) and in his written submissions.

[39] Mr Schoch says that he became aware of the defamatory statement contained in *The Weekend Australian* on 6 September 2014. He was upset by what he read and sought legal advice immediately. He saw counsel on Wednesday, 10 September 2014 and at that meeting pointed to what he describes as Mr Palmer's "reputation for both ongoing media attacks and litigation". Mr Schoch says that after meeting with counsel, he resolved to sue Mr Palmer for defamation to protect and defend his reputation, but not to do so then as it would undermine his credibility leading up to the trial, "playing into Palmer's agenda". Mr Schoch's affidavit explains why his reputation is important to him. He says that he believed at the time that the point of Mr Palmer's statement on 6 September 2014 was to "go on the attack, to undermine my credibility before the oral contract case; to 'white ant' me personally". I disregard parts of the second sentence in paragraph 37 of Mr Schoch's affidavit as containing inadmissible opinion about Mr Palmer's personality and state of mind. The remaining parts of paragraph 37 are relevant to Mr Schoch's subjective reasons for not suing at the time and are admissible.

[40] Mr Schoch explains his view that had he sued for defamation at the time, Mr Palmer's response would have been "disproportionate to maintain his reputation built up over decades" as a person "not to sue". Mr Schoch says that he was aware that Mr Palmer would launch a campaign in the media which would "attack my character relentlessly in the lead up to the oral contract case." He justifies that belief by reference to Mr Palmer's alleged retaliation for filing the oral contract case by sending him an invoice for $633,150.14 for the time he was General Manager of the Palmer Coolum Resort. I treat Mr Schoch's characterisation of the invoice as a false one as an assertion of Mr Schoch's belief about retaliatory conduct, not as evidence of fraud on Mr Palmer's part.

[41] Paragraphs 44 to 55 of the affidavit outline facts in relation to Mr Palmer's public reputation for litigation. These paragraphs seem relevant to Mr Schoch's reasons for acting as he did. Mr Schoch says that he was conscious that Mr Palmer was happy with his established reputation for being an intimidating and feared litigator, and Mr Schoch had been personally involved over many years as a witness for Mr Palmer in a number of law suits. Mr Schoch also relies upon Mr Palmer's negotiating tactics in relation to the 2012 PGA Australian Championship and Mr Palmer's conduct in response to litigation threatened by the PGA. These paragraphs are relevant to Mr Schoch's belief about what Mr Palmer would do if he was sued for defamation. I consider the word "narcissistic" in paragraph 54 to be unnecessary, gratuitous and inadmissible opinion, which I disregard.

[42] I treat other parts of the Mr Schoch's affidavit as conveying his subjective reasons not to sue shortly after the third publication on 6 September 2014 and before the hearing of the oral contract case. Mr Schoch explains in his affidavit that suing before the hearing of the oral contract case would have involved the republication of the false statement made on 6 September 2014 and this would have benefitted and done "the work of the agenda of the defamer, by widening the extent of publication on the issue of my credibility as a witness before the case was heard." Mr Schoch argues that it would have been positively "unwise" to undermine his own credibility before the hearing by filing proceedings, and that he was aware that a claim for defamation against Mr Palmer would have been the subject of extensive media interest, with the media seeking further

comments from Mr Palmer. In addition, and based upon his understanding of Mr Palmer's thinking and *modus operandi*, having acted in various roles for Mr Palmer and his companies at times since May 1978, Mr Schoch considered that, had he filed a defamation claim before the trial of the oral contract case, there would have been no apology or retraction from Mr Palmer. In summary, Mr Schoch's evidence is that he had good reason not to sue at the time and that filing a defamation action "would have been counterproductive" to his oral contract case which was then in progress.

[43] In addition, Mr Schoch relies upon unexpected delay in the oral contract case coming on for hearing. He asserts that Mr Palmer's interests delayed the hearing of that case by about three months, which is more than the period of the extension which he seeks in respect of the third publication. He says that Mr Palmer changed lawyers three times, did not comply with discovery orders and filed interlocutory applications and then withdrew them. Eventually, a Supervised Case List judge set the matter down for trial.

Mr Schoch's submissions

[44] I have earlier quoted Mr Schoch's principal submission that it was "unwise" and "not reasonable" to start a defamation proceeding against Mr Palmer before the oral contract case was heard.

[45] The problem which Mr Schoch alludes to in his affidavit, namely that a plaintiff in a defamation action necessarily has to plead the alleged defamer's words, even when the plaintiff alleges that they are false, and the pleading becomes public knowledge, is an unfortunate but long-established fact of defamation litigation.[19] In this proceeding, Mr Schoch has had to plead statements, including the third statement, which he alleges are false and defamatory of him. Many defamation proceedings, and the reporting of them, widen the extent of the original publication and make the truth or falsity of the defendant's allegations a matter of interest to the media and parts of the general public.

[46] Mr Schoch's argument seems to be not so much about the inevitable perils of defamation litigation in that regard, but about a question of timing and whether it would have been "counterproductive" to his prospects in the oral contract case to file a defamation proceeding before it was heard. I shall assume for this purpose that it was reasonable to expect that any defamation action would have resulted in the media seeking and obtaining Mr Palmer's comments about it.

[47] Any derogatory remarks by Mr Palmer in that event may have damaged Mr Schoch's reputation in the general community, pending the hearing and determination of the defamation action, just as comments by Mr Palmer about the current defamation proceeding may. Any anticipated public comments by Mr Palmer about the issues in a defamation action, based on the third statement, would not necessarily have affected Mr Schoch's prospects in the oral contract case. That case was to be heard by a judge alone. The judge could be expected to not be influenced in Mr Palmer's favour by such comments, and may have taken a dim view of them. I am not persuaded that filing a defamation proceeding would have been counterproductive to Mr Schoch's oral contract case.

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[19] *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 at [134] – [136]; *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89 at 110 [35]; [2014] QCA 33 at [35].

[48] To the extent Mr Schoch reasonably feared some form of retaliation by Mr Palmer for having been sued for defamation, that retaliation was likely to occur whenever Mr Schoch sued. Further, Mr Palmer might have been expected to accuse Mr Schoch of being untruthful when Mr Palmer came to give evidence in the oral contract case.

[49] Mr Schoch did not send a concerns notice[20] or some other form of communication, recording his concerns that the September 2014 email and its republication in *The Weekend Australian* were defamatory, untrue and upsetting. He did not communicate a reservation of rights and explain that he intended to issue proceedings for defamation once the oral contract case was concluded and, if necessary, apply for an extension of time in order to do so. Doing so may not have greatly influenced Mr Palmer's conduct, but at least he would have been on notice of the proposed defamation action and had an opportunity to respond to any reservation of rights by Mr Schoch. Arguably, by not placing Mr Palmer on notice of his intention to sue, Mr Palmer would have felt less constrained in making public comments about Mr Schoch in the course of the pending oral contract case than he would have been had he been placed on notice.

[50] Mr Schoch's case is that the third publication was obviously defamatory, hurtful and harmful to his reputation. It was unreasonable to not at least reserve his rights to sue over it. His unreasonable conduct in that regard is a relevant circumstance.

[51] I have regard to Mr Schoch's subjective reasons for not commencing a proceeding over the third publication. However, in my view, it would only have been reasonable to not commence a defamation action within the limitation period in the circumstances if Mr Schoch had first placed Mr Palmer on notice that he intended to sue after the oral contract case was heard. If, in response, Mr Palmer had opposed that course of action and foreshadowed opposition to any later application for an extension of time, Mr Schoch might have considered further his position, including the course of filing a proceeding for defamation, but not serving it on Mr Palmer for some time.[21]

[52] In summary, in the circumstances in which Mr Schoch was placed, he had to make a decision about how best to vindicate his reputation in respect of an alleged defamation by someone who he expected would respond to media inquiries about any action. However, that difficulty arose irrespective of when he chose to sue. If Mr Schoch was concerned about the wisdom of suing for defamation before his oral contract case was heard because of anticipated media coverage given to any comment by Mr Palmer about a defamation action, then the reasonable course was to delay filing proceedings, and to place Mr Palmer on notice that he intended to sue for defamation after the civil proceeding was heard. Having regard to Mr Schoch's subjective reasons and other relevant circumstances, I conclude that it was not reasonable to not commence a defamation proceeding without at least placing Mr Palmer on notice of his intention to sue for defamation and the time at which he intended to file those proceedings.

The overlap argument

[53] Mr Schoch does not state in his evidence that he hoped to win the battle of credibility in the oral contract case, and having done so, to be in a much stronger position in a defamation action over the third publication, for example, because Mr Palmer would be

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[20] *Defamation Act* 2005 (Qld), s 14.

[21] See *Hunter v Hanson* [2014] NSWCA 263 at [72]; *York v Morgan* [2015] NSWDC 109 at [14].

unlikely or unable to plead defences of truth to imputations arising from his assertion that Mr Schoch is "just not a truthful person". He submits that there was a "complete overlap" between the issue of credibility that arose in his contract claim and an issue of credibility in his proposed defamation action. This "complete overlap" is said to have made it "unwise" or "not reasonable" to commence the defamation proceeding before the oral contract case was heard.

[54] An "overlap" argument has been considered in other cases. One was considered recently by the Court of Appeal in *State of Queensland v O'Keefe*,[22] a decision which was delivered the day before the present applications were heard. The parties were alerted to this case on the morning of the hearing of the applications. In that case there was a "sufficient overlap" between the criminal charge against Mr O'Keefe and the allegedly defamatory statements in a briefing note to make it "objectively justifiable" for Mr O'Keefe to focus his attention on the criminal charge in conjunction with responding to his suspension from the police force, rather than any civil claim for defamation.[23] The Court of Appeal concluded that it would not have been reasonable for Mr O'Keefe to pre-empt the outcome of the criminal proceeding by prematurely commencing the civil proceedings for defamation involving much the same allegations. The Court referred to the earlier decision of McCallum J in *Houda v State of New South Wales*,[24] which was based on a "complete overlap" between the issues raised in certain criminal proceedings and a defamation claim.[25] McCallum J concluded that it was not reasonable for the plaintiff to pre-empt the outcome of the criminal proceedings when so much was at stake, including his professional reputation, by commencing the claim for defamation before the limitation period expired. Her Honour concluded that it does not necessarily follow that every person facing criminal charges should automatically have an extension of the limitation period.[26] Reference may also be made to *Bidstrup v Cullen*,[27] in which an extension of time was allowed in circumstances where findings of a coroner were to the effect that certain allegations made against the plaintiff were false. The coroner made findings which were contrary to the alleged defamatory statements and those findings gave the plaintiff "the green light" to issue defamation proceedings.[28]

[55] These cases are fact specific and they do not establish some general principle that an overlap (complete or otherwise) between an existing proceeding and a proposed defamation action makes it "not reasonable" in the circumstances to commence a defamation action within the one year limitation period.

[56] I have to consider whether, viewed objectively, any overlap between the issues in the oral contract case and the issues which might be expected to arise in a defamation action based on the third publication made it "not reasonable" to bring the defamation action before the oral contract was heard (and determined). One relevant inquiry is what effect a favourable finding of credibility in respect of Mr Schoch's evidence in the oral contract case would have on a claim for defamation over the 6 September 2014

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22 [2016] QCA 135.
23 At [33].
24 [2012] NSWSC 1036.
25 At [37].
26 At [37].
27 [2013] SASC 136.
28 At [48].

publication and republication of the statement that he is "just not a truthful person". Assuming for the purposes of argument, that the trial judge in the oral contract case favoured Mr Schoch's evidence over that of Mr Palmer in their "word against word" contest about what was said when the employment contract was negotiated in June 2011, it would remain open to Mr Palmer in a defamation action to challenge Mr Schoch's credibility and to assert that he is or was "not truthful". There may have been scope in the oral contract case to challenge the credibility of Mr Schoch during cross-examination on matters which simply went to his credibility and which were not directly related to his conversations with Mr Palmer about his employment contract. However, the real issue in the oral contract case was expected to be Mr Schoch's credibility (and Mr Palmer's credibility) with respect to evidence given in that case about the content of their discussions about the oral contract. The trial judge might make findings of a more general kind about the credibility of Mr Schoch or Mr Palmer. However, the focus of the case was on the credibility of their evidence with respect to the subject matter of that contract case.

[57] The precise context in which Mr Palmer allegedly sent his "just not a truthful person" email to *The Australian* newspaper is not clear. Mr Schoch alleges that it was in response to a planned article about the financial situation of Mr Palmer and his companies. In any event, if Mr Palmer sought to justify the truth of one or more of the kind of imputations which Mr Schoch has now pleaded based on the "just not a truthful person" statement, then Mr Palmer might rely upon matters unrelated to the oral contract case and which were not canvassed in it. A favourable finding by the trial judge in the oral contract case about Mr Schoch's credibility would not preclude Mr Palmer from challenging Mr Schoch's credibility in the proposed defamation action or from seeking to prove the truth of one or more of the imputations pleaded by the plaintiff.

[58] Contrary to Mr Schoch's submissions, there was not a "complete overlap" in the issues in both cases. There was not a sufficient overlap between the issue of credibility raised in the oral contract case and the alleged defamatory statement in the 6 September 2014 email, and its republication, to make it not reasonable in the circumstances for Mr Schoch to commence a claim for defamation before the limitation period expired. The outcome of the oral contract case, assuming a finding of credibility in Mr Schoch's favour, would not have a significant effect on a defamation action's prospects of success. A preference by the trial judge for the credibility of Mr Schoch over that of Mr Palmer in a word-on-word contest over what was said about the terms of the oral employment contract might be expected to have some influence on any assessment by Mr Schoch of his prospects in the defamation case, and possibly some influence on an assessment by Mr Palmer of his prospects of defending a defamation action based on the third publication. But that effect should not be overstated.

[59] Incidentally, Mr Schoch does not say that he thought that a success by him on the credibility issue in the oral contract case would prompt Mr Palmer to sue for peace or take some conciliatory course in respect of Mr Schoch's defamation claim.

[60] Viewed objectively, such a success is unlikely to have had a significant practical effect upon his prospects of success in the defamation action, including the chances of

defeating any substantive defence which Mr Palmer might choose to raise. This case is factually quite distinct from the three "overlap" cases that I have mentioned.

[61] In summary, a finding of credibility in Mr Schoch's favour in the context of the issues raised in the oral contract case would not have been so influential on the prospects or resolution of the defamation claim as to make it "not reasonable" in the circumstances to commence a defamation action within the limitation period.

Conclusion – third publication

[62] I am not satisfied that it was not reasonable to commence a defamation action over the third publication within the limitation period in circumstances in which Mr Schoch did not put Mr Palmer on notice of his intention to sue for defamation and to reserve all of his rights. These would include the right to apply for an extension of time if, as matters transpired, the oral contract case was not heard and decided before the expiry of the limitation period on or about 6 September 2015. In short, it was not reasonable in the circumstances for Mr Schoch to not commence the proceeding and to keep his proposed claim up his sleeve.

[63] My conclusion makes it unnecessary to canvass whether, in addition, the statutory requirement is not satisfied because it was open to Mr Schoch to file a defamation proceeding within time, but to delay serving it.

The artificiality argument

[64] Mr Schoch points to the fact that it will be "artificial" for him to litigate over republications of the first three publications which were republished online in the year between 9 October 2014 and the filing of proceedings on 9 October 2015, and which are alleged to be continuing, but to be not able to litigate over earlier publications and republications of the same statements.

[65] Mr Schoch cites the following passage from Dr Collins QC's work on defamation:

> "The limitation period might also be extended where the claimant has a number of related causes of action, only some of which are statute-barred, or statute-barred only with respect to defamation, and it would be artificial if the claimant were not permitted to litigate all causes of action in a single proceeding."[29]

[66] This passage is based upon the decision of Gray J in *Maccaba v Lichtenstein*.[30] However, that decision concerned different limitation provisions and a jury trial involving an action for harassment and actions for slander. A factor which militated in favour of "disapplying" the limitation period was "the artificiality of the case proceeding with the two claims in slander removed from it". In assessing damages for harassment, the jury would be directed to ignore the two slanders. I am concerned with different issues, a different statutory regime and a proceeding in which neither party has elected for trial by jury.

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[29] M Collins QC, *Collins on Defamation*, Oxford University Press (2014) at 374 [19.05].
[30] [2003] EWHC 1325 (QB) at [19] – [25].

[67] There may be some perceived artificiality in permitting Mr Schoch, in suing over publications or republications which are not statute-barred, to refer to earlier, statute-barred publications and republications which are not relied upon as separate causes of action. They are relied upon, for example, in support of aggravated damages and a finding of malice. Mr Schoch pleads that Mr Palmer "has persisted in a malicious course of conduct intended to defame and hurt the reputation of [Mr Schoch] over an extended period of time", and has not taken any steps to have the statements on the websites removed or amended. He is alleged to have engaged in a course of conduct maliciously for the additional improper purpose of deterring other employees from commencing proceedings against him or any company under his control. It would seem open, in litigating his claim in respect of the fourth and fifth publications, for Mr Schoch to point to the first, second and third. To some minds it may seem "artificial" that a party can rely upon the past conduct of a defendant in publishing defamatory matter in aggravation of damages, when those earlier publications would be statute-barred if made the subject of a separate cause of action. To other minds, there is nothing artificial about such a course. It is the course that is dictated in any case in which some causes of action over publications by a defendant are statute-barred but other, more recent causes of action are not.

[68] It is unnecessary to reach a conclusion about whether there is anything artificial about it. Mr Schoch's submissions about artificiality do not permit an extension of time of a limitation period so as to avoid the alleged artificiality of being able to refer to and rely upon the first three publications, but not to sue over them. A different statutory regime for the extension of limitation periods in defamation claims may have permitted a different result. The statutory regime which I must apply does not.

Disposition of the applications

[69] Mr Schoch has not discharged the burden of satisfying me that it was not reasonable in the circumstances for him to bring proceedings in respect of the first, second and third publications within the limitation period.

[70] As for Mr Schoch's application, I decline to make the orders sought in his application filed 24 May 2016. These seek an extension of time to 9 October 2015 of the limitation period for the causes of action for defamation arising from publications:

(a) posted on websites on 8 April 2014;

(b) in newspapers and on websites on 30 April 2014; and

(c) in newspapers and on websites on 6 September 2014.

[71] Because any publications or republications for which Mr Palmer is allegedly liable and which occurred before 9 October 2014 are statute-barred, it seems appropriate in the circumstances to grant his cross-application to strike out paragraphs 6 – 29 of the amended statement of claim filed 19 April 2016. These are the paragraphs which plead matters in connection with the first, second and third publications.

[72] Mr Schoch did not ask for leave to re-plead any republications of the first, second and third statements which occurred after 9 October 2014 and for which he might hold Mr Palmer liable. I would be reluctant to grant such leave, absent evidence of a viable

claim in this regard based upon proven, as distinct from inferred, publications, which did Mr Schoch actual harm. If he was not sufficiently upset to seek advice and remedy in respect of the first and second publications when they occurred, he is unlikely to have been much affected by an occasional possible download of those publications from media websites.

Other applications

[73] Mr Schoch also sought an order for the determination of the question of whether the pleaded imputations were conveyed and whether they were defamatory of the plaintiff. This was based upon delays which he attributed to the defendant over the eight months since the proceeding was commenced, what are alleged to be deemed admissions in the so-called holding defence and a preference to have a separate trial on liability in a case in which no substantive defences have been pleaded. I decline to make that order. Mr Schoch indicated at the hearing that he intended to further amend his pleading. The defence was filed to avoid a default judgment. There have been delays by both sides, including a delay by Mr Schoch in bringing the application for an extension of time. In any event, even if the pleadings were now closed and the only issues on liability were whether the pleaded imputations were in fact conveyed and were defamatory, I would be reluctant to order, in effect, separate trials of liability and quantum. However, the present state of the pleadings makes it inappropriate to order a separate trial.

[74] Mr Palmer seeks an order for Mr Schoch to provide further and better particulars in response to requests dated 27 April 2016 and 14 May 2016. At the hearing the parties agreed that any new pleading by Mr Schoch should incorporate, where appropriate, the further and better particulars which he has given or proposes to give in response to those requests. Additional particulars which do not constitute material facts and which do not have to be included in his pleading can be provided in a separate document. I trust that it will be unnecessary for me to revisit the past dispute over particulars. However, I will formally adjourn to a date to be fixed the hearing of paragraph 3 of Mr Palmer's application filed 31 May 2016.

[75] The efficient conduct of this action requires the delivery of a further amended statement of claim which is properly pleaded and particularised and which is intended to stand as the pleading upon which Mr Schoch proceeds to trial, if the action is not otherwise resolved. I propose to make directions for a draft further amended statement of claim to be delivered to Mr Palmer's solicitors by a date to be fixed. That will permit them to make any *constructive* comments about the draft and a final version to be settled by Mr Schoch's counsel before it is filed. I will also make directions for the filing and service of a defence by a date to be fixed. I will allow the parties to make submissions about further directions which will facilitate the just and expeditious resolution of the real issues in the proceeding at a minimum of expense.

[76] The solicitors for Mr Palmer will be directed to bring in draft minutes of orders incorporating the orders stated in these reasons and the directions which I have indicated I intend to make. The substantive orders which I intend to make are orders dismissing Mr Schoch's application and orders in terms of paragraphs 1 and 2 of Mr Palmer's application filed 31 May 2016. The application made in paragraph 3 of Mr Palmer's application will be adjourned to a date to be fixed.

[77] Subject to hearing from the parties, there seems no reason to displace the ordinary rule that costs should follow the event. Although Mr Palmer's pursuit of further and better particulars has not been determined, he has been substantially successful in opposing Mr Schoch's application for extensions of time in respect of the first, second and third publications and in having parts of Mr Schoch's pleading which relied upon those publications struck out. In the circumstances, I consider that the appropriate order for costs is that the plaintiff pay the defendant's costs of and incidental to the application filed on 24 May 2016 and of and incidental to the application filed on 31 May 2016 to be assessed on the standard basis.