SUPREME COURT OF QUEENSLAND

CITATION:	*Noonan v MacLennan & Anor* [2010] QCA 50
PARTIES:	**MICHAEL NOONAN** (plaintiff/respondent) **v** **GARY MACLENNAN** (first defendant/first applicant/appellant) **JOHN HOOKHAM** (second defendant/second applicant/appellant)
FILE NO/S:	Appeal No 9941 of 2009 DC No 1672 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2010
JUDGES:	Keane and Holmes and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted** **2. Appeal allowed** **3. Decision below is set aside and judgment given for the defendants against the plaintiff** **4. Plaintiff to pay the defendants' costs of the action and of the appeal to be assessed on the standard basis**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – OTHER CAUSES OF ACTION AND MATTERS – where defendants were university lecturers – where defendants published an article critical of the plaintiff's PhD thesis on 11 April 2007 – where plaintiff alleged the criticisms were defamatory – where plaintiff initially pursued a non-legal dispute resolution process run by the university – where plaintiff commenced legal proceedings on 17 June 2009 – where s 10AA of the *Limitation of Actions Act* 1974 (Qld) provides that an action for defamation must not be brought after the end of one year from the date of publication of the material complained of – whether it was not reasonable in the circumstances for the plaintiff to have commenced an action within one year from the date of publication

Defamation Act 2005 (Qld), Div 1 Pt 3
District Court of Queensland Act 1967 (Qld), s 118(3)
Limitation of Actions Act 1974 (Qld), s 10AA, s 32A, s 32A(2)

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Murphy v Lewis [2009] QDC 37, applied
Pickering v McArthur [2005] QCA 294, cited
Pingle v Toowoomba Newspapers Pty Ltd unreported, P Lyons J, SC No 9056, Supreme Court of Queensland, 22 September 2009, cited
Robertson v Hollings unreported, Dutney J, SC No 2263, Supreme Court of Queensland, 6 April 2009, applied

COUNSEL: J B Rolls for the applicants/appellants
P J Favell for the respondent

SOLICITORS: Eardley Motteram for the applicants/appellants
H Drakos & Company for the respondent

[1] **KEANE JA:** Mr Noonan is the plaintiff in an action for damages for defamation arising out of the publication of an article in "The Australian" newspaper on 11 April 2007. Mr MacLennan and Mr Hookham are the defendants in the action. They were at all material times staff members of the Queensland University of Technology ("the University"). The article in "The Australian" repeated the defendants' criticisms of the plaintiff's PhD thesis. These criticisms are alleged to have been defamatory of the plaintiff.

[2] Mr Noonan's action was commenced on 17 June 2009. By the defence in the action, the defendants pleaded, inter alia, that Mr Noonan's action is barred by s 10AA of the *Limitation of Actions Act* 1974 (Qld) ("the Act") in that the action was brought more than one year after the date of the publication of which Mr Noonan complains.

[3] The pleading of this ground of defence to Mr Noonan's claim prompted Mr Noonan to seek relief under s 32A of the Act. Under s 32A(2) a court is obliged to extend the limitation period 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 …".

[4] On 21 August 2009 the learned primary judge granted Mr Noonan's application to extend the date for bringing an action until 18 June 2009. His Honour also dismissed the defendants' cross-application for judgment in the action based on the limitation defence pleaded by them.

[5] The defendants seek leave to appeal against the learned primary judge's decision pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld). At the hearing of the application for leave, the Court reserved the question whether leave should be granted and heard argument on the points of substance agitated by the parties. It is convenient to proceed immediately to consider whether the learned primary judge's decision has occasioned an injustice.[1]

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[1] Cf *Pickering v McArthur* [2005] QCA 294.

The Act

[6] Section 10AA of the Act provides: "An action on a cause of action for defamation must not be brought after the end of 1 year from the date of the publication of the matter complained of."

[7] Section 32A of the Act provides:

> "**Defamation actions**
>
> (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."

[8] In *Robertson v Hollings*,[2] Dutney J observed that the issue which arises under s 32A(2) of the Act is not whether a court is satisfied that it was reasonable for the plaintiff to commence the proceeding only after the period of one year has expired, but whether it was not reasonable to commence an action during that period.

The decision at first instance

[9] Mr Noonan pursued grievance procedures against the defendants under the University's Memorandum of Policy and Procedure ("the MOPP"). These procedures were initiated by the defendants' conduct towards Mr Noonan at a seminar at which his thesis was criticised by them. Aspects of those criticisms appeared in the article in "The Australian" published on 11 April 2007. As a result of Mr Noonan's complaint, the defendants were suspended from their employment at the University; they then commenced proceedings against the University in relation to their suspension.

[10] In support of his application at first instance, Mr Noonan swore an affidavit in which he said that he believed, as a result of his reading of the MOPP, that he had to choose between pursuing the defendants through the University's grievance procedures or by way of a defamation action. In this regard, Mr Noonan said:

> "11 I understood from my reading of the relevant sections of the QUT grievance procedures that Policy E/9.2 of the QUT Memorandum of Policy and Procedure ('**MOPP**') relates to grievance resolution procedures for student related grievances. Section 9.2.2 of this policy outlines options for

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[2] Unreported, Dutney J, SC No 2263, Supreme Court of Queensland, 6 April 2009 at 1-7.

> resolution, including informal, formal and external agencies resolution. Paragraph c. provides that 'a complainant may use an external agency to resolve a grievance (ie. a legal practitioner); however QUT is committed to facilitating the resolution of grievances without the need to make recourse to external agencies'. Section 9.2.1.b states that the procedures outlined do not apply 'if the subject of the grievance relates to matters where the complainant has engaged an external agency such as a legal practitioner'. I took this to mean that I had to choose between pursuing Hookham and MacLennan through QUT grievance procedures or through a defamation action in a court. I decided on advice that pursuing the matter through QUT channels was most appropriate at that time."

[11] The University's grievance procedures were in train between 12 April 2007 and 30 October 2007 when the University reached a settlement with the defendants. Mr Noonan said in his affidavit that it was on 5 February 2008 that he decided "… to pursue defamation proceedings and make [the defendants] accountable for the damage they had done". He thereafter set about preparing his case. It appears that he did not seek legal advice until a later date.

[12] The kernel of the learned primary judge's reasoning is to be found in the following passage:

> "I agree with Mr Favell that the plaintiff does not have to show that it was impossible for him to commence the proceedings. This is important to remember, in my opinion. The inference I draw from the plaintiff's material, whilst not overlooking the detail of the direct evidence to which I have already referred, is that from October 2007 until April 2007 [sic], he was bringing his various thoughts together following turbulent times preceding that. He came to a certain realisation in February 2008 (see paragraph 27 of the affidavit) and then started his preparations for a defamation case (see paragraph 28 of the affidavit).
>
> I do not think that the plaintiff has to account for every day or week of the relevant period. He must show that in the circumstances, viewed objectively, it was not reasonable for him to commence his action within one year from the date of publication. In spite of Mr Roll's criticisms, I am satisfied on the balance of probabilities that the plaintiff has done that."

[13] It is clear that his Honour's reference to "April 2007" is intended to be a reference to "April 2008". In my respectful opinion, the matters of fact to which his Honour referred do not support the conclusion that it was not reasonable to commence an action before 11 April 2008. None of the matters of fact to which his Honour referred suggest that it would have been in any way unreasonable of him to have commenced an action before that date.

[14] The passages in Mr Noonan's affidavit to which his Honour referred in this part of his reasons are:

"22 On or about 30 October 2007 I was advised by email that a settlement had been reached between QUT and Hookham/MacLennan after many months of legal hearings. Exhibited hereto and marked '**MJN-4**' is a true copy of such email.

23 On or about 31 October 2007 I attended a meeting with QUT Vice Chancellor Peter Coaldrake, the Dean of Creative Industries Sue Street and Corrs legal counsel David Abernethy. Mr Abernethy explained the indemnities in place and I was made aware that the charges I had made had been set aside. I recall Sue Street asking Mr Abernethy if the indemnities meant that I could not sue for defamation. He said I could. Dr Coaldrake said defamation was very messy, expensive and time-consuming. I was assured by Mr Abernethy that the confidentiality agreements signed by Hookham and MacLennan meant they could never attack me or my project again, although he added that Hookham was planning to write a book and that the gag order only applied until June 2010.

24 On or about 16 November 2007 Stephen Kerin, Hookham and MacLennan's lawyer, filed a racial discrimination complaint against me, QUT, John Hart, Spectrum Organization and Disability Services Queensland in the Human Rights and Equal Opportunity Commission on behalf of May Dunne.

25 On or about 18 December 2007 I had a conversation with QUT ethics officer David Wiseman in which I became aware that the National Health and Medical Research Committee ('**NHMRC**') had investigated and cleared my project of any ethical breaches. I immediately emailed Carol Dickenson and others to request that it be made as public as possible to redress the damage done to my name and professional reputation. I did not receive a reply and to my knowledge there were no articles that covered the clearance of my work by Australia's peak research ethics body. Exhibited hereto and marked '**MJN-5**' is a true copy of such email.

26 On or about 14 January 2008 John Hookham emailed his thoughts about my project's clearance by the NHMRC and continued to attack my project and my character. His email was received by my QUT colleague Wayne Taylor and many others. Exhibited hereto and marked '**MJN-6**' is a true copy of such email.

27 On or about 5 February 2008, knowing my original complaint was set aside and Hookham and MacLennan (and their supporters) appeared free to continue attacking me and my project without recourse, I decided to pursue defamation proceedings and make them accountable for the damage they had done.

> 28 I prepared a 1124 page document containing all relevant articles, events, emails, and student blogs relating to the defamation case against Hookham, MacLennan and others. This document took many months to prepare and impacted on my PhD work. I further distilled this down to several hundred pages, linking each to the various proposed defamation actions I was planning to take. I wanted to make sure that I had a sound and reasonable case before I took the next step of engaging a legal representative."

Discussion

[15] 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.

[16] 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.

[17] 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. 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.

[18] On the reading of s 32A(2) which was favoured by Dutney J in *Robertson v Hollings*, and which I am also inclined to regard as correct, there was no evidence by which Mr Noonan could have satisfied the court that the commencement of proceedings before the end of the year after 11 April 2007 was not reasonable. There is no evidence to support the view that Mr Noonan held off from commencing his action before 11 April 2008 by reason of the prospect that a negotiated settlement of his claim would render an action unnecessary. There was no other objective basis on which he might reasonably have chosen not to commence proceedings before 11 April 2008. It is not suggested, for example, that he was not able to arm himself with the evidence or advice necessary to pursue the action he has now brought.

[19] On Mr Noonan's behalf it was said 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. In my respectful opinion, this argument does not reflect a correct interpretation of s 32A(2) of the Act. In *Robertson v Hollings*,[3] Dutney J referred with evident approval to the observations of Kingham DCJ in *Murphy v Lewis* where her Honour said:[4]

> "There is no evidence the plaintiff was aware of the limitation period until it expired and I accept he was not. That is not to the point. There is no evidence he made any attempt to obtain advice about or explore his rights of redress. He was not hampered from doing so. His assumption an investigation was under way, even if accepted, is not determinative. It would not preclude other action and he took no steps to keep abreast of its progress. The view I have formed from the plaintiff's evidence as a whole is that his choice not to explore legal redress earlier is explained by what his priorities were at the time. It is perfectly understandable that he would rate the complaint low on his list of priorities. That does not establish it was not reasonable to commence proceedings within time. Given the clear legislative intention behind the very restrictive limitation period applied to such actions by s 10AA, the plaintiff has not discharged the onus he bears in this application and it is refused."

[20] I respectfully agree with these views. The test posed by s 32A(2) is an objective one. 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".

[21] On an interpretation of s 32A(2) more favourable to Mr Noonan which might be argued, one might read s 32A(2), contrary to the view of Dutney J, as if it allowed an extension of time where a court is "satisfied that it was reasonable in the circumstances for the plaintiff not to have commenced an action …". Even on this interpretation of s 32A(2), which is more favourable to Mr Noonan, it cannot be said that it was reasonable not to commence proceedings before 11 April 2008.

[22] Consideration of the issue of reasonableness must commence from the position that the Act lays down strict time limits for the commencement of proceedings for damages for defamation. No doubt the legislature was moved to fix these strict limits for good reason. These limits are part of the law of the land to be observed by all persons save where s 32A(2) is engaged. And on any view of s 32A(2) of the Act, it operates by reference to what is reasonable. Mere ignorance of the strict time limits fixed by the Act cannot afford a reasonable basis for not complying with them. Generally speaking, ignorance of the law has never been thought to be a reasonable basis to relieve a person of the consequence of non-compliance with the law.

[23] Mr Noonan was under no disadvantage which might have impeded his ability to ascertain, and comply with, the applicable time limit in this case. The circumstance that Mr Noonan was pursuing a grievance procedure with the University did not prevent Mr Noonan addressing the question of the liability of the defendants to him

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3 Unreported, Dutney J, SC No 2263, Supreme Court of Queensland, 6 April 2009 at 1-6, 1-7.

4 [2009] QDC 37 at [32].

in damages. It is not suggested, for example, that Mr Noonan expected that a claim for damages against either of the defendants would be vindicated as part of any arrangements concluded between the University and the defendants in the grievance procedures under MOPP. In any event, that grievance procedure concluded at the end of October 2007; Mr Noonan was informed at that time that he was entitled to pursue an action for defamation against the defendants. He actually decided to commence an action in February 2008. Objectively speaking, he had ample opportunity to do so before 11 April 2008.

[24] There is no suggestion that after October 2007 Mr Noonan took steps to inform himself of the law relating to the action which, in February 2008, he actually decided to bring. He did not seek legal advice about the action he proposed to bring: his evident assumption that he did not need to do so was not a reasonable one, at least in the absence of any attempt on his part to inform himself of the law relating to his proposed action.

[25] In my respectful opinion, there was no evidentiary basis for a conclusion that it was reasonable for Mr Noonan not to bring the action which he has now brought prior to 11 April 2008. Even on an interpretation of s 32A(2) more favourable to him, it was not reasonable to commence proceedings only after the time limit set by law had expired.

Conclusions and orders

[26] In my respectful opinion, the decision in respect of which leave to appeal is sought was erroneous. The decision of the learned primary judge was not open on the evidence, even on the view of s 32A(2) of the Act most favourable to Mr Noonan.

[27] The decision below occasioned a substantial injustice to the defendants in that they were wrongly denied the benefit of a complete defence to Mr Noonan's claim. The defendants were entitled to succeed on their application for summary judgment. Leave to appeal should be granted in order to enable this injustice to be remedied.

[28] Accordingly, I would grant leave to appeal, allow the appeal, set aside the decision below and give judgment in the action for the defendants against the plaintiff.

[29] There is no apparent reason why costs should not follow the event. I would order that the plaintiff pay the defendants' costs of the action and of the appeal to be assessed on the standard basis.

[30] **HOLMES JA:** As Keane and Chesterman JJA have explained, s 32A of the *Limitation of Actions Act* 1974 (Qld) is an unusual provision. It requires more of an applicant for an order extending the limitation period for a defamation action than that he show that it would have been reasonable for him not to commence an action within the one year period; he must go further and establish something rather more difficult: that it would not have been reasonable for him to do so. I agree with their Honours that as the respondent in this case failed to adduce evidence meeting that requirement, the order at first instance should not have been made. Accordingly, I agree also with the orders their Honours propose.

[31] **CHESTERMAN JA**: On 17 June 2009 the respondent commenced proceedings in the District Court in Brisbane claiming damages for defamation against the applicants. His statement of claim alleged that they were the authors of an article which was published on 11 April 2007 in the Higher Education Supplement of the

Australian Newspaper. The article was alleged to contain 12 imputations defamatory of the respondent and damaging to his reputation.

[32] Section 10AA of the *Limitation of Actions Act* 1974 (Qld) ("*Limitation Act*") took effect from 1 January 2006, and provides that:

> "An action on a cause of action for defamation must not be brought after the end of 1 year from the date of the publication of the matter complained of."

The applicant's proceedings were commenced one year and two months out of time. The point was taken by the applicants in their defence filed 21 July 2009.

[33] Section 32A of the *Limitation Act* 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.
>
> (3) A court may not order the extension of the limitation period … 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."

[34] On 21 July 2009 the applicants applied to the District Court pursuant to *UCPR 293* for final judgment in the action on the ground that the respondent's action was barred by s 10AA of the *Limitation Act*.

[35] On 17 August 2009 the respondent applied to a judge of the District Court for an order that, pursuant to s 32A of the *Limitation Act*, the limitation period for his action be extended to 18 June 2009.

[36] The application was supported by an affidavit in which the respondent explained that he was a post graduate student at the Queensland University of Technology in which he presented, on 20 March 2007, the details of the work he intended to undertake for his doctoral thesis. The applicants were members of the academic staff of the university. They attended the presentation and were outspokenly critical of the content of his thesis and the manner in which he proposed to treat it. Subsequently they wrote the article which was published in The Australian.

[37] Following publication the respondent instigated disciplinary proceedings against the applicants pursuant to the university's "Grievance Procedures and Code of Conduct". The respondent thought that the published article:

> "misrepresented (his) work … and (he) believed it to be defamatory of (him) and (his) work."

[38] Having studied the university's Grievance Procedures and Policies he understood them to mean:

> "… that I had to choose between pursuing (the applicants) through QUT grievance procedures or through a defamation action in a court. I decided on advice that pursuing the matter through QUT channels was most appropriate at that time."

[39] After a series of meetings, consultations, correspondence and complaints which terminated on or about 30 October 2007 the respondent was advised that the applicants and the university had come to terms. On 31 October 2007 the respondent met with the university's Vice Chancellor, the Dean of the relevant department and the university's solicitor. It was explained to the respondent that the settlement did not prevent him suing for defamation if he wished though the Vice Chancellor did express the view that such proceedings were "very messy, expensive and time-consuming".

[40] According to the respondent's affidavit:

> "27. On or about 5 February 2008, knowing … (the applicants) … appeared free to continue attacking me and my project … I decided to pursue defamation proceedings … .
>
> 28. I prepared a 1124 page document containing all relevant articles, events, emails, and student blogs relating to the defamation case … . This document took many months to prepare and impacted on my PhD work. I further distilled this down to several hundred pages, linking each to the various proposed defamation actions I was planning to take. I wanted to make sure that I had a sound and reasonable case before I took the next step of engaging a legal representative."

[41] The respondent swore that he "was not aware that there was a limitation period of 1 year for defamation actions" until after 11 April 2008. He does not explain when or in what circumstances he learnt of the limitation period.

[42] Both applications were heard on 21 August 2009 when a District Court judge made an order on the respondent's application extending the limitation period to 18 June 2009. The applicants' application for summary judgment was dismissed.

[43] The judge gave brief reasons. His Honour said:

> "… to extend an operational (sic) period is a very important step to take. Having said that, I will confine myself to the words used in section 32A(2). I would only add that the circumstances referred to in that subsection should … be viewed objectively.
>
> … The plaintiff was a university student at the time of the publication. He invoked a grievance procedure in relation to the publication and that occupied him up to October 2007. No criticism, in fact, is made about him during the April 2007 - October 2007 period. However, in October 2007 he learned that he could bring defamation proceedings … .
>
> (The applicants' counsel) argued that … (the respondent) did nothing after that. Counsel argued, for example, that we do not know when

> the (respondent) went to solicitors and … could have asked about his rights, but, according to (counsel), the (respondent) did nothing to vindicate his rights.
>
> … paragraph 28 of the (respondent's) affidavit … is relevant.
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> I also think that the other matters referred to in the … affidavit in relation to the post-October 2007 period have relevance … . I do not, however, think that the plaintiff's ignorance of section 10AA of the Act has relevance.
>
> Having said all that, I am still of the view that (the applicants' counsel's) submissions have merit but … those submissions focus too much on a specific event (that referred to in paragraph 28 of the … affidavit) without attaching significance to the whole of the circumstances for the one period (April 2007 - April 2008).
>
> I agree with (counsel for the respondent) that the (respondent) does not have to show that it was impossible for him to commence the proceedings. This is important to remember, in my opinion. The inference I draw from the … material … is that from October 2007 until April 2007 (*semble* 2008), he was bringing his various thoughts together following turbulent times preceding that. He came to a certain realisation in February 2008 … and then started his preparations for a defamation case … .
>
> I do not think that the (respondent) has to account for every day or week of the relevant period. He must show that in the circumstances, viewed objectively, it was not reasonable for him to commence his action within one year from the date of publication. … I am satisfied … that (he) has done that."

[44] The applicants seek leave to appeal from the dismissal of their application for summary judgment and against the order extending time for the respondent to bring his action. The court reserved the question of leave and heard argument on the appeal. It is apparent that if the appeal should succeed then leave should be granted to appeal.

[45] The essence of the judge's reasoning appears to be that:

(a) one should look at the whole of the circumstances which occurred in the 12 month limitation period;

(b) an applicant for extension of time does not have to show that it was "impossible" to commence proceedings within time;

(c) between October 2007 and April 2008 the respondent was recovering from the turmoil of his involvement in university grievance procedures and was "bringing his various thoughts together";

(d) the respondent "came to a certain realisation in February 2008" (in fact he decided to commence defamation proceedings);

(e) he commenced preparations for the action thereafter;

(f) an applicant does not have to account "for every day or week of the relevant period"; and

(g) the respondent had shown that it was not reasonable for him to commence his action within one year of publication.

[46] There is a leap of logic between the premises (a) to (f) and the conclusion expressed in (g). Moreover it is apparent that the primary judge posed the wrong test by which his Honour then apparently assessed the evidence. It is not relevant that it may not have been "impossible" for a plaintiff to commence proceedings within time. To describe the test in those terms and then, rightly, ignore it leaves one at a loss to understand just what test the judge applied.

[47] The application required the primary judge to address s 32A(2) of the *Limitation Act*. The subsection is unusual. It requires a court to extend time if it be satisfied that the described precondition has been fulfilled. The court has no discretion in the matter. If so satisfied it must extend time. However, there is a discretion 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.

[48] The subsection is unusual in a second respect. It does not, as does other legislation allowing for an extension of a limitation period, permit the extension where it was reasonable, because of defined circumstances, to extend time. To obtain an extension an applicant must demonstrate that it would have been unreasonable for him in the particular circumstance to have commenced an action within the first year after publication. That is to say an applicant must demonstrate affirmatively that he would have acted unreasonably in suing within time.

[49] It is no doubt right that an applicant does not have to account for every day or week in the limitation year. What he has to do is satisfy the court that it was not reasonable in the circumstances to have commenced an action within the limitation period. That, obviously, involves the identification of the circumstances which made it unreasonable to commence the action in time.

[50] The law ordinarily requires litigants to commence their proceedings within the appropriate limitation period for the reasons explained by McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. It is only in special and specified circumstances that a limitation period may be extended. An applicant who wishes to sue for defamation beyond the limitation period must show that it was not reasonable to commence his action in time against the law's normative requirement that he sue in time. The test is therefore a difficult one for a plaintiff to satisfy.

[51] The legislation gives no hint as to the sorts of cases that might be thought appropriate for an extension of time. The circumstances which might justify an extension are left at large. Nevertheless they must be so compelling as to make it positively unreasonable for a person defamed not to exercise his legal rights to sue within the statutorily designated period.

[52] We were referred to three cases in which applications were made for an extension of time. Peter Lyons J in *Pingel v Toowoomba Newspapers Pty Ltd* (9056/2009 22 September 2009) extended time. The plaintiff claimed to have been defamed in the local newspaper. Rather than commencing proceedings she took action under the provisions of Div 1 Pt 3 of the *Defamation Act* 2005 (Qld) seeking redress by means other than an action for damages. The parties corresponded about the possibility of the newspaper making alternative amends, and an offer to do so was made. About two weeks after the expiration of the 12 months' limitation period the newspaper withdrew its offer to make amends. The learned judge thought that it

would have been unreasonable for Ms Pingel to commence her action when she was actively pursuing alternative methods of resolving her dispute provided by the *Defamation Act*, with apparent prospects of success.

[53] In *Robertson v Hollings* (2263/2009 6 April 2009) Dutney J refused to extend time. The applicant wished to sue officers of the RSPCA and the publishers of a television program "Animal Rescue" which depicted Ms Robertson as having mistreated a large number of dogs in her possession. The application was brought about 15 months after publication. The reasons given for the lateness in commencing proceedings was that Ms Robertson was, within the 12 month period:

> "… subject to a number of Court hearings in relation to which she was unrepresented and which resulted from the seizure of the dogs in January 2009.
>
> She also appeared to have had difficulties understanding the nature of the proceedings, in the absence of legal advice … .
>
> Against the submission is the fact that, within time, she commenced two proceedings for defamation against other parties who had placed allegedly defamatory material on their websites … ."

[54] Dutney J found that the applicant had not chosen to ignore legal redress but found she was aware that she could have commenced proceedings within time had "she been focusing upon the issues". The application was refused.

[55] In the third case, *Murphy v Lewis* [2009] QDC 37, the parties to a defamation action were both nurses employed at a hospital for the mentally ill. One complained about the other in a letter to their superior. The hospital authorities investigated the complaints during the course of which Murphy learned of the allegations Lewis made against him.

[56] The allegedly defamatory letter was written on 11 January 2007. Proceedings were commenced in July 2008. Murphy's argument was that it was not reasonable for him to have commenced proceedings until the hospital's internal investigation had been concluded, which did not occur until December 2007.

[57] Kingham DCJ found that there had been no formal investigation and Murphy had no reason for believing there was one. The factual basis of his argument therefore failed. Her Honour, however, expressed the opinion that even if the hospital had conducted a full investigation it would have been unreasonable for the plaintiff not to have commenced his action within time. Her Honour said, pertinently:

> "There is no evidence he made any attempt to obtain advice about or explore his rights of redress. He was not hampered from doing so. His assumption an investigation was under way … is not determinative. It would not preclude other action … . The view I have formed from the plaintiff's evidence … is that his choice not to explore legal redress … is explained by what his priorities were at the time. … That does not establish it was not reasonable to commence proceedings within time."

[58] To succeed in his application the respondent had to show that he should not have commenced proceedings in time. I do not mean to gloss the statute but I think that is the import of the statutory test: that it was not reasonable to commence an action within the year.

[59] One must therefore examine the circumstances to identify why it would have been unreasonable to sue in time. The facts show only that the respondent chose to pursue redress through the university's internal procedures. Accepting that the respondent believed he could not at the same time pursue a remedy in court the conclusion is that the respondent chose one procedure over the other. His preference for the private remedy did not make it unreasonable for him to commence legal proceedings. He understood he had a choice, and he made it. It is not apparent why it would be unreasonable for him to accept the consequences of the choice.

[60] In any event he took no steps to ascertain the correctness of his own view that he could not litigate if he put the university's grievance procedures in motion. It is not, on its face, reasonable to form an opinion about the availability of legal remedies without taking legal advice.

[61] I agree with Judge Kingham's opinion that a plaintiff who wishes to claim damages for defamation does not act reasonably (if no more is shown) in delaying the start of proceedings while some investigative or disciplinary proceeding, affecting the parties to, and the subject matter of, the defamation, is undertaken.

[62] Even if it be assumed that the respondent was justified in withholding proceedings until the university had completed its inquiries, and took whatever measures it thought fit, the respondent would not have demonstrated it was unreasonable to begin his action within the limitation period. That period expired in April 2008. The respondent knew in October 2007, six months earlier, that the university would not provide him with any adequate remedy against the applicants' attacks on his reputation. He knew then, if not before, that he could sue. He did nothing to protect his position in the six months remaining for that end.

[63] In February 2008 he resolved to sue. He was even then within time. He did not seek legal advice but set about the self imposed task of compiling what he believed to be the relevant materials.

[64] The case is thus one of the pursuit, for six months, of a private remedy followed by a period of inaction which is not identified but which exceeded six months in which the respondent refrained from commencing legal proceedings while he satisfied himself that he "had a sound and reasonable case".

[65] The test which appears in s 32A(2) is an objective one. It must have been unreasonable for the respondent to have commenced proceedings in time. The test is not satisfied by showing that an applicant believed he had good reason not to sue. This is all that is shown in this case.

[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.

[67] It is apparent from the amendment to the *Limitation Act* that Parliament has identified some public interest in the speedy commencement and determination of actions for defamation. The limitation period is short. The public interest so identified should not be undermined by too ready an acceptance of circumstances that are said to have made it unreasonable to sue within the year.

[68] No basis was shown for the order made in the District Court on the respondent's application. It should have been dismissed and there should have been judgment on the applicants' application for summary judgment.

[69] I would grant leave to appeal, allow the appeal, set aside both orders made in the District Court and instead order that the respondent's application be dismissed and that on the applicants' application there be judgment for the applicant defendants against the respondent plaintiff. The respondent should pay the applicants' costs of the applications and action in the District Court, and of the application and appeal in this Court.