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IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 HARRISON J

MONDAY 14 APRIL 2014

IN THE MATTER OF JUSTINE MUNSIE v SHANE DOWLING

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CLOSED COURT

Mr A S Dawson for the plaintiffs ex parte

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DAWSON: Your Honour, this is an application which is ex parte and which is a new matter.

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I have a notice of motion, an affidavit and a statement of claim which, if your Honour pleases, I will hand up. The nature of the relief and I should say at the outset is for an injunction to refrain an ongoing defamation and I am also seeking a suppression order (documents handed up).

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The reason for the matter proceeding ex parte and the reason for the suppression order, your Honour, are the same. I will demonstrate that to your Honour by reference to the evidence.

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HIS HONOUR: Where is the article? In the exhibit note?

DAWSON: It is in confidential exhibit JMM 1 and it is the first--

HIS HONOUR: I have got an exhibit note.

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DAWSON: Your Honour, the relevant article, if your Honour has the exhibit note it is behind, your Honour will see there is a 9 page document which is the web site.

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HIS HONOUR: Yes.

DAWSON: Then there is an 8 page document immediately after that which is the relevant article and it runs for the first two and a half pages of that 8 page printout.

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HIS HONOUR: With a picture of the second plaintiff at the start?

DAWSON: Exactly. Your Honour it might be easier if I gave your Honour the folder with the exhibit tab so that your Honour isn't flicking through many pages (folder handed up).

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HIS HONOUR: I have read that.

5 DAWSON: Thank you your Honour. As a preliminary matter, your Honour, it occurs to me that there may be some utility in seeking an order for a closed Court. The reality is there is no-one here but a failure to do so can produce certain consequences later.

10 If, however, your Honour were to make the suppression order proposed in paragraph 6 and following the notice of motion that would cover today. I wonder whether by way of abundant caution there ought to be either a general non-publication order. At this stage its practical utility is of some question given nobody is here or whether the Court should be closed.

15 HIS HONOUR: It is easier to close the Court I think.

DAWSON: If your Honour pleases.

20 HIS HONOUR: I will direct any persons not having any interest in these proceedings to leave the Court or the hearing of the Court and I will now close the Court.

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25 DAWSON: Your Honour could I start, to the extent that your Honour hasn't already gleaned from the material, demonstrate to your Honour first of all why the matter is brought before your Honour ex parte and this feeds into why the suppression order relief that we seek hangs off the injunction that we seek.

30 Can I put it plainly your Honour. The plaintiffs' position is, and I will elaborate on this very briefly in a moment, but the relief that the plaintiffs seek from their point of view really does and must go together. In other words if your Honour were persuaded that an injunction should lie that a suppression order of some description ought not, I believe my instructions would be withdraw the application. I will demonstrate where that is.

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Can I take your Honour to the affidavit. Your Honour has I think read the article which is JMM1. In Ms Munsie's affidavit at paragraph 32 she refers to a previous communication with the defendant which is set out at JMM7.

40 In brief, your Honour, that concerned a prior publication by the defendant on his web site that was unquestionably defamatory of the second plaintiff and in respect of which Ms Munsie was instructed to write to the defendant. If your Honour goes to JMM7, your Honour will see the e-mail covering that letter from Ms Munsie to the defendant dated 26 May 2011 and the letter, the detail of
45 which I don't need to trouble your Honour with, deals with suggestions of a contempt of Court and being charged for it and being found guilty of perjury, allegations levelled against the second plaintiff.

50 The letter deals with those allegation, asserts their falsity and requests certain remedial action on the part of the defendant. Your Honour will see that the

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letter contains the not unfamiliar title "not for publication".

5 In response the defendant behind tab JMM8 rather than go along with that obvious condition on which the letter was communicated decided nonetheless to put it on his web site with a further defamatory post and took things even further by defaming the first plaintiff and including a picture of her just to ensure that there was no question of identification.

10 HIS HONOUR: Where is that?

15 DAWSON: That is on page 3 of the printout behind JMM8. Behind JMM9 your Honour, the first of those documents is an interview between the defendant and Alt Media. In that interview which starts on page 3 of what was a 109 page printout which we haven't burdened your Honour with the entirety of, the defendant gives an interview about who he is and what he does. Your Honour will see halfway down the page on page 3, he is introduced as the Judge of the kangaroo Court of Australia.

20 There's then a blurb - perhaps I'll leave your Honour to read that and perhaps over to the next page and it is the next page I want to draw your Honour's attention to.

25 So your Honour that is why we say that this application necessarily has to be by way of ex parte application and it is also the reason at the same time as to why we seek the suppression order and tie the two aspects of the application together.

30 It is obvious, in my respectful submission, from that material that the likely, indeed only likely consequence of letters being written to the defendant to request that he take remedial action or that he be available for a Court hearing which can be contested in the usual way before orders are made, the only likely result of those communications will be a publication of this kind no doubt in more extreme terms which will serve to damage further the very rights and reputations that the proceedings are designed to protect in the first place. Not
35 that I need to take your Honour through them but for completeness can I note that behind tab JMM9, the next two documents your Honour are the relevant printouts of the two articles referred to in that letter of correspondence that I have taken your Honour to. In fact I think that is the first of the final two. The second is just a further article.

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HIS HONOUR: Pardon me for inquiring, but where is the authority to restrain?

DAWSON: I am coming to that, because your Honour will need to be satisfied, with respect - -

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HIS HONOUR: These publications, they are at large now?

DAWSON: Yes, they are.

10 HIS HONOUR: The allegedly defamatory and arguably clearly defamatory arguments are at large at the moment?

15 DAWSON: Yes. The leading thought is ABC v O'Neill. Can I take your Honour through it. I can cut to the chase, that the principle is this; that there is, on the balance of convenience, very great weight placed on the two matters which were discussed in ABC v O'Neill. The first is freedom of speech, a shorthand way of describing that particular consideration, and the second is that traditionally a jury would determine the question of the truth of the defamation.

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25 So, the reluctance in the courts of equity, over time, to interfere with a defendant's desire to publish, or to continue to publish, defamatory matter was exercised with great restraint because of those two factors. But what the High Court plainly left room for, and in my submission this is clear from the reasons that I will take your Honour through, in an exceptional case, if one needs to call it that, or more specifically in a case where there can be no contest about the truth or falsity of the publication, there is a discretion which remains and, on balance of convenience, that fact tips the favour back towards the plaintiff for the purpose of the grant of an injunction, be it quia timet injunction or otherwise.

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35 The basis for the injunction we seek today, namely that there could be no doubt that the allegations that have been made by the defendant about the plaintiffs, are false. If he comes to court when the matter is returnable if your Honour is minded to grant the orders, and the matter comes back and the injunction is before the court for consideration as an on-going interlocutory injunction, as opposed to the interim injunction we seek today, then it will be open to the defendant to come to the court, as the defendant did in ABC v O'Neill and say; here is the outline of the truth of the defence - it doesn't have to be every aspect of the evidence - but here is a proper basis on which we say we can defend the matter and it is at that point then that it becomes very difficult for a plaintiff.

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45 Can I take your Honour through ABC v O'Neill. Your Honour, the facts in the case are probably not terribly important, but they can be summarised very briefly. The plaintiff, Mr O'Neill, was a prisoner in the Tasmania gaols and he was in gaol for the murder of a young boy. The publication which the ABC proposed to make raised suspicions about whether the plaintiff had been involved in the disappearance of the Beaumont children in South Australia and raised other allegations of criminality.

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At the hearing at first instance before Justice Crawford, the defendants, which included at the time other people involved in the production and broadcast of the relevant documentary, tendered evidence which demonstrated that they had things such as confessions by the plaintiff, records from the South Australian police that he, in fact, Mr O'Neill was a suspect in the disappearance of the Beaumont children and other matters of that kind; again, by no means the whole of the defence on which the defendants would have relied, but cogent material supporting a very arguable truth defence.

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In paragraph 16 in the judgment of the Chief Justice and Justice Crennan their Honours reviewed the authorities and explain, your Honour, the caution which courts have always exercised in the prior restraint of the publication of defamatory material. Can I invite your Honour to go to paragraph 19, at the bottom of page 68 of the report - it is reported in 2006 volume 227 CLR at 57 - and at 68 at the end of paragraph 19 their Honours say, "These are the organising principles to be applied.....(Read)..... will be awarded." That was of particular relevance in relation to Mr O'Neill's incarceration in respect of the offence for which he was there.

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As to free speech, I draw your Honour's attention to paragraphs 31 and 32 of ABC v O'Neill where the Chief Justice and Justice Crennan explain the importance of the public interest in free speech and at the end of paragraph 31, at the bottom of page 72, "Subsequently courts of equity were not....(Read).....is approached." Your Honour, there is no doubt that the jurisdiction is a narrow one and I accept that and confront that from the outset.

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Can I take your Honour to the judgment of Justices Gummow and Hayne and the relevant passages are at 65 to 72 where their Honours consider what the Chief Justice and Justice Crennan had described as the organising principles. Those paragraphs are often cited in injunction cases for the proposition that the test in Beecham is the correct test. Your Honour will see that test set out in paragraph 65, (Read). On that second inquiry, your Honour, that the freedom of speech consideration tips the balance usually in favour of a defendant, because a plaintiff cannot overcome that on a balance of convenience.

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Then at paragraph 73 and following their Honours consider the application of those principles in defamation cases and, without going to the detail, their Honours refer to two bodies of case law that had developed up to that time in Australia, one called, unhelpfully, the rigid approach and the other called the flexible approach. The rigid approach was said to be those cases which appeared to established that the plaintiff could never get an injunction. The flexible approach was an approach which was infected by error, namely that it tended to down play the importance, on the balance of convenience question, of the importance of free speech. Perhaps that is captured most accurately in paragraph 75 where their Honours refer to a sequel of Perriman, being the production of the body of case law which held that interlocutory injunction applications in defamation actions occupied a field of their own.

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Then there is a reference, in 87, to the second or flexible view of the exercise

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of the power. Some examples are given at 79, (Read). Then at 83, (Read). Then at 85, and this is the passage which is the key to understanding where the power lies and the extent of the power to grant an injunction notwithstanding the usual starting position where the balance of convenience is against a plaintiff and their Honours say, (Read).

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So what emerges from all of that is this proposition; if there is any doubt about whether the publication is defamatory, one does not get past first base. There can be no doubt here, and I will not spend time on that aspect unless your Honour requires me to take your Honour through it. One gets to the second inquiry, and as Justices Gummow and Hayne say, plainly on that inquiry obviously enough one must give due weight to the interest in free speech, but that is tempered by other rights and inquiries that need to be made on the balance of convenience question applying the principles in Beecham to a defamation context. One of the key matters that their Honours focussed, which was in issue in ABC v O'Neill, is the apparent weakness or strength of the proposed defence under section 15, which is the truth defence in the 1957 Tasmanian defamation Act. That legislation also required a defendant to show public benefit, but that is not relevant for present purposes. The defence as, with respect, your Honour well knows now, across the country, is truth alone.

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So what this case comes down to today, and in my respectful submission what it will come down to if Mr Dowling decides to contest these orders on an interlocutory basis, is whether he can put forward a respectable argument that he has a defence of truth for these publications. The evidence that I adduce on the application, in the affidavit of Ms Munsie, is designed to demonstrate the clear case that the allegations that are made in the publications about, generally speaking, the AFP, the Schapelle Corby investigation and the question of perjury more generally, that those allegations are, each of them, false and false beyond any rational argument.

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It is in a case such as that, where the strength of the case on falsity, putting it another way, the weakness of the case on truth from a defendant, it is those sorts of cases where an injunction will lie and considerations of free speech do not come into play because there is no free speech consideration that would tell against the protection of a plaintiff's reputation if a defendant cannot assert to the court respectably that he or she or it can defend the matter in some way, usually on the balance of a jurisdiction defence.

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HIS HONOUR: Before you go on, about paragraph 16 in O'Neill there is a reference in the Chief Justice's joint judgment to exceptional circumstances. As I read that judgment, he or they, do not go on to elaborate on that. I am not, as I sit here, able to remind myself whether that notion is picked up by anybody else in the judgment. Can you tell me about that, or does it just fall on the floor there and hide for another day, as it were?

DAWSON: Their Honours, in paragraph 16, in fact refer to exceptional cases.

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HIS HONOUR: Yes, I do beg your pardon, you are right; in all but exception cases, is that notion picked up elsewhere?

5 DAWSON: I would say yes, your Honour, by Justices Gummow and Hayne when they talk about cases where there is an inquiry to be made about the strength of weakness about the defence, in particular the truth defence. What their Honours do do is to go through the fact that evidence was tendered at the hearing of the truth of the allegations and their Honours come down against the grant of the injunction on the basis not only of that matter, but also of two other considerations. One is the trial Judge conflated the notion of public interest under the Act as part of the defence and the broader notion of public interest in free speech and failed to take into account that nominal damages was likely to be the result. To come directly to your Honour's question, there is not an elaboration of what an exceptional case is, that I remember.

15 HIS HONOUR: I would say, with great respect, that it would have been very helpful had they adverted to that rather than leave it for another day, which, for relevant purposes, is 14 April, 2014.

20 DAWSON: But the exceptional case to which their Honours refer, in my respectful submission, must be, by the clear reasoning in the judgment throughout all four of the judges who were in the majority, that the exceptional case is a case where there is good reason not to let the matter simply go to a trial before the jury on the question of defences and a case where, on the balance of convenience, the balance tips in favour of the plaintiff because of specific circumstances such as the unavailability of a defence.

25 HIS HONOUR: Just out of interest, paragraph 5 in the summons seeks an order that, (Read). The matter has already been published. Are you seeking a mandatory injunction that it be taken down?

30 DAWSON: I accept that is the effect of it, but the reason for expressing it in that way, your Honour, is because it would you futile to have a take down order and nothing else because it wouldn't stop him doing the same thing.

35 HIS HONOUR: I understand that, but put aside for the moment the question of publication of anything that happens here, why are you not protected, if you have until then, a restraint on publication, leave to serve short notice to have the matter returnable on an urgent basis, given that the publication is alive and the prospect of it being taken down by way of order in the manner just discussed, is small, until such time as the defendants are either before the court or flout the orders?

45 DAWSON: I see the sense of what your Honour puts to me, our experience of this defendant, as your Honour has seen, because of the speed at which I did it, suggests to us, and indeed the plaintiffs themselves, that unless there is a substantial order made now which has the effect of getting rid of what is on-line at the moment and silencing him until the matter comes back, that steps will be taken between now and when the matter returns, which will turn the matter into an uncontrollable mess.

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HIS HONOUR: That is always, as we know, the risk of a defamation proceeding, a constant repetition of the defamatory is at the heart of the proof of the case.

5 DAWSON: Except in a defamation action, as a plaintiff one always, as your Honour correctly puts to me, considers the injection of new material into the allegations. That is one thing to grapple with. It is entirely another thing to grapple with the entire process being undertaken against a defendant, being ridiculed, being treated with contempt and being the thing that provokes further
10 unrivalled, unprincipled attacks.

Your Honour has seen the example where a perfectly reasonable letter was written explaining the factual basis for the concern and inviting a response which involves a very minor amendment to the article that is on-line. The
15 defendant's reaction to that was to ramp it up, if I may put it that way, in a way which made the position much, much worse. Now, yes, it is true, that one can rely on those matters in aggravation in a defamation case and, yes, one has to make a decision in cases not to take the tiger by the tail. But in these proceedings, your Honour, what will happen, in my respectful submission, is
20 that the price that one must pay is, in effect, quadrupled by the defendant today. It will not just be that these allegations will be given more oxygen than they currently are receiving. The price that the plaintiffs will pay, if the defendant is not restrained and indeed if there is no suppression order, is that the rights that they are seeking - -

25 HIS HONOUR: Do you anticipate that this defendant, if ordered by the court, will - are you asking that this matter come back before the court at some convenient time?

30 DAWSON: Yes, I accept that that must necessarily happen to give Mr Dowling an opportunity to contest the orders on an interlocutory basis.

HIS HONOUR: And is the anticipation that between now and then he will be ordered to take down from his website, which I suspect is not at a major
35 location for publication, and that you anticipate he would take that down between now and when the matter comes back before the court?

40 DAWSON: Yes, and the effect of order 5 is that it stops him doing it on the current website and anywhere else. That then creates a situation, your Honour, where the plaintiff's rights are preserved immediately. He cannot, between the time he is notified of the application, and the hearing of the application, go viral and make the price of a plaintiff, who is entitled to enforce his or her rights, far too high, such that the administration of justice is entirely prejudiced. It is almost like a blackmail situation, where a plaintiff, who wishes
45 to do something about something, in this case a very serious allegation having been made and which your Honour will see in the evidence comes up rather alarmingly high on the Google results for each of these plaintiffs - -

HIS HONOUR: That is because the public probably likes reading rubbish usually, and I don't say it judgmentally of this defendant.

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5 DAWSON: One can also make the observation that people have too much time on their hands to produce this material and to read. But, for example, a man of Mr Stokes' interests, who has international relationships and Google is a global search tool, and while those of us in Australia might be able to disregard these sort of publication, one never knows what the impact might be for people who are visiting and happen to download the material here and react in a particular way. He should not have to deal with a bunch of allegations of lying to the Federal Police.

10 HIS HONOUR: Has Mr Stokes commenced proceedings against the AFP for damages in the circumstances that arose out of the incident?

15 DAWSON: I don't think that has happened, although I suspect, although I don't know, that the reason would be that in the course of that litigation - -

HIS HONOUR: Which litigation?

20 DAWSON: The litigation between Channel 7 and indeed the first plaintiff here, and the AFP - I should say, more accurately, if I take your Honour to the judgment, it is behind annexure B to the affidavit. There were proceedings between Channel 7 and the Federal Police Commissioner which had, in the end, the setting aside of the search warrants which were the subject of the controversy. But the allegations of non-compliance, which have been made, I think this is correct, the main publisher of those allegations is the defendant here, namely, that the allegation that was some dishonest non-compliance going on the part of Channel 7, its lawyer and its officers.

30 I was going to take your Honour to that judgment in due course, but perhaps it is convenient to do so now. What was in issue was whether or not the search warrants should have been issued in circumstances where the magistrates, who were approached to issue them and did issue them, were misled by various information that they were provided with by the Australian Federal Police. At paragraph 60 of that judgment her Honour Justice Jago summarises the three possible ways in which the search warrants were issued.

35 I should say, your Honour, that at this point her Honour has identified the fact that contrary to what appeared to be the AFP position, there was no offence for reaching an agreement with a criminal - -

40 HIS HONOUR: Sorry to interrupt you, but the burden of what I am proposing, or inquiring about, is; to what extent has Mr Stokes, among others, given, to use your expression, oxygen to these allegations elsewhere?

DAWSON: There are no other proceedings, your Honour.

45 HIS HONOUR: I mean, apart from these?

DAWSON: There are no other proceedings between Mr Stokes and this defendant, or other defendants, concerning these allegations.

50 HIS HONOUR: But there were proceedings between Mr Stokes and other

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plaintiffs and the AFP?

5 DAWSON: It was Channel 7 and the other recipients of the search warrant, which included the first plaintiff in these proceedings. Indeed, one was even issued to search her home.

HIS HONOUR: Although Ms Munsie was an applicant?

10 DAWSON: Yes, so Mr Stokes wasn't but Mis Munsie was, along with the company.

HIS HONOUR: Again, I am trying to get my head around it - -

15 DAWSON: I'm sorry if I was not answering your Honour's question.

HIS HONOUR: Did those proceedings in the Federal Court themselves give oxygen to the concerns that Mr Dowling has, for good or ill, re-produced in his own publication?

20 DAWSON: If anything, your Honour, the ventilation of the contest about the search warrant was to inject a healthy dose of carbon monoxide into the suggestion of any non-compliance and I was going to show to your Honour how that occurred. So, if anything, it had the effect of quashing any suggestion that Channel 7 had done anything wrong and, at the same time, it
25 resulted in the setting aside of the search warrants for a very specific reason.

HIS HONOUR: The burden of what I am asking you, on an ex parte application, is whether you are aware of any circumstances in which any or either of the plaintiff has approbated the concerns of which they now seek to
30 enjoin publication?

DAWSON: I will just take some specific instructions, your Honour. Your Honour, there was, I am told, a Senate Inquiry into the issue of the search warrants and representatives from Channel 7 gave evidence in that inquiry.
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HIS HONOUR: That is hardly something of which they were the author.

40 DAWSON: Yes, in that inquiry there was no suggestion of dishonest non-compliance, which is where we are in these proceedings. Apart from that, your Honour, I am not aware of any other matter, other than the response by Channel 7 to media coverage at the time, about the AFPs claims that Channel 7 had not complied, and was seeking more time to comply and the controversy deal with by Justice Jago in her judgment of dishonest non-compliance and Channel 7, and its officers, bringing about the raid on Channel 7's premises,
45 and other premises, which were the subject of the search warrants. That allegation has not been aired by any activity on the part of the plaintiffs.

Your Honour, the other thing I should mention is that as your Honour will see from the statement of claim, there is no relief sought in the nature of damages.
50 It is significance for two reasons. One, on any view it is an inadequate remedy

for the purposes of these proceedings and these plaintiffs do not wish to have vindication by way of a damages award which they can enforce against the defendant. What they want is a permanent injunction to protect themselves against the publication of these falsities.

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The fact that the matter has already been published, does not prevent your Honour exercising the power, which plainly exists in exceptional cases, to grant the injunctive relief which we seek. But on the balance of convenience inquiry, I have addressed certain matters on that.

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On the question of whether damages are an adequate remedy, it is a significant matter from the plaintiffs' point of view and, objectively, damages will not be an adequate remedy. This defendant will not have any assets and if he does it will pale into insignificance compared to what the defamation case would be worth in respect of publications of this kind and the extent of the publication.

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But the effective way to shut this defendant down is by way of a permanent injunction. What we are asking for, in essence, is a regime which can apply between now and trial and judgment in these proceedings, subject of course to any interlocutory justification we have to make for the continuation of the orders to preserve the plaintiffs' position.

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It would be an extraordinary case, in my respectful submission, your Honour, if, on the basis of if the evidence which demonstrates the clear falsity of these allegations, an injunction did not lie, at least on an interim basis, and I make the same argument perhaps with more detail to respond to anything what Mr Dowling may raise on an interlocutory basis.

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Could I demonstrate where we get the clear case on falsity from, so that your Honour is satisfied about that matter, because that is the, in one sense, gateway to the exercise of the jurisdiction. The affidavit, your Honour, deals with various matters. I don't know if your Honour has had a chance to read or skim read it, but your Honour will see the first section of the website, paragraph 4 and following, deals with the publications on the website. Paragraphs 11 to 14 refer to Google searches which your Honour will see between tabs 3 and 4. Tab 5 is a communication to Google in an attempt to have Google take some remedial action, but as of today's date nothing has occurred and your Honour will no doubt be aware of the difficulty in having Google comply with requests of that kind.

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HIS HONOUR: It is unlikely. Is JMM-6 attached to this material?

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DAWSON: That is a publication all of its own. It is remarkable the ability of those who capture serious defamatory stings, but there you have it. The evidence about falsity begins at paragraph 16 of the AFP proceedings. I think, with respect, your Honour has a certain flavour of that. Perhaps if I can just let your Honour read that portion of the affidavit down to paragraph 39. So, it is from 16 to 39. That is the evidence which I will explain which goes to the

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question of falsity.

HIS HONOUR: Yes, I have read that.

5 DAWSON: Your Honour, I should say this; that the judgments that your
Honour has behind tab B, or Annexure B, and Annexure E, I don't suggest that
those judgments are conclusive of the issue of dishonest non-compliance with
the AFP search warrants and that issue generally in the case of Justice Jago's
10 decision or the question of perjury in relation to the Ray Hadley matter which
Judge Sorby dealt with in the District Court. Of course, those judgments would
not be admissible to prove those facts, but it is adduced to demonstrate to your
Honour the basis on which those allegations are said to be false and the way
in which it will be put in these proceedings.

15 I have included, your Honour, on the question of truth or falsity in the materials,
the material in tab D, or Annexure D, which is the extract from the judgment of
Justice Sackville where his Honour made various remarks about the second
plaintiff, which were picked up by the defendant in his publication; one of the
judgments behind JMM-9.

20 The long and the short of it is that Mr Stokes was not accepted as a reliable
witness by Justice Sackville. That seems to be the basis of the allegation
levelled against Mr Stokes, that he is, for example, Australia's number one
perjurer, is like to perjure himself in any proceedings that he might commence
25 against the AFP, etcetera. I cannot rely on the judgments for establishing a
fact referred to in those judgments, nor indeed could Mr Dowling. But I wanted
to draw that judgment to your Honour's attention which contains some
unfortunate observations about Mr Stokes, but on balance it appears to be that
a finding against Mr Stokes, where he was not accepted, in effect which misled
30 him into believing one thing and where the documents might have suggested
another.

HIS HONOUR: When did this publication first go off?

35 DAWSON: I think it was the week before last, your Honour. There should be
a date on it. Late February is the date is given in the affidavit, I'm reminded,
your Honour.

HIS HONOUR: Where did I see that? It must be before 19 March?

40 DAWSON: Yes, and the reason why these proceedings are somewhat later
than one might expect, given a February publication date, is that Mr Stokes
only recently became aware of the existence of it. That is paragraph 4. I am
not sure there is a date for that, but some time around 19 March.

45 HIS HONOUR: When did it first go up, can you tell me?

DAWSON: The date of the tweet, which is probably the best indicator, is 23
and 24 February.

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HIS HONOUR: Would JMM-6 likely post-date or pre-date the publication on the net?

5 DAWSON: It probably post-dates it by a matter of minutes. If there is a link in the tweet, it must mean that the article is already up. If your Honour goes to the comments section on page 4 of 9 of the article in question, the first comment is 23 February. So it does seem to be on or around 23 February, as best we can tell.

10 I am conscious of the time I am taking, but I don't want to leave your Honour dissatisfied about any aspects of the injunction.

HIS HONOUR: You haven't. It is a February publication?

15 DAWSON: Yes, sometime in February, by reference to the - -

20 HIS HONOUR: I suppose my rhetorical question is, one that I posed earlier but with the benefit of now knowing the date of the publication, having regard to the antiquity of this defamatory material, why aren't you protected if this matter is brought back to me at 10 o'clock on Wednesday or even tomorrow afternoon if you thought you could serve it on time so Mr Dowling could tell me if it was true, or why or not? You say he might do something in the meantime - -

25 DAWSON: Your Honour, can I make this submission; the very fact that your Honour describes, and I don't say this critically at all, a publication in late February of this year as a matter of some antiquity, is a good demonstration of how time is a relevant concept in the social media's face, and if that is enough to make it antique, namely a matter of six weeks, then 24 hours is a very nice window for someone to do something if they wish to, to flout what it is we are attempting to do in these proceedings.

HIS HONOUR: And that would be, theoretically, in anticipation of what?

35 DAWSON: It would be widespread publication of the fact of this publication, the nature of these proceedings, the publication of the affidavit, the statement of claim - -

40 HIS HONOUR: But if I ordered that the publication of these proceedings be enjoined pending a return under the Act, and granted short service, so that Mr Dowling, if he has any good advice or an appreciation of the law, would know that he would be required to answer the summons or the statement of claim if he chose to, and in the meantime would be enjoined from publicising in any way the fact of the proceedings, on facing an allegation of contempt, why isn't that a good protection?

45 DAWSON: I would not be so bold as to say it is not good protection, if your Honour was proposing to make orders in paragraphs 6 and 7 in the notice of motion, but stand over the question raised in paragraph 5, that is certainly some protection against the fall-out that we fear from taking this action.

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5 The answer, though, that I would give your Honour as to why your Honour would nonetheless grant the relief, with respect, is that on the material before the court there is every justification for the exercise of the jurisdiction and when your Honour, with great respect - -

HIS HONOUR: Meaning that the material published could not possibly be true?

10 DAWSON: Yes.

HIS HONOUR: I understand that.

15 DAWSON: And on the question of; should ex parte relief be given on an interim short term basis so as to set this proceeding up properly from the word go, in my submission the balance is well and truly in the plaintiff's favour on the material before the court. If it turns out that there is some matter of which we are not aware that radically alters that position, then the damage done to the defendant, in having to remove this material from his website, is very slight
20 when one puts it against the reputation of damage that is being done to an officer of this court being accused of on-going perjury and one of the country's business leaders being accused of serious dishonesty - -

25 HIS HONOUR: But the horse has slightly bolted, hasn't it?

DAWSON: But there is a stable full of them out there and unless one takes action now, the rights of these plaintiffs will be trespassed upon. It is no impediment to the exercise of jurisdiction that there has been publication already. One is not confined to a quia timet injunction.

30 HIS HONOUR: Hence, the discussion over many, many pages about whether the circumstances of that case permitted the Crown's injunction at all.

35 DAWSON: Precisely. For those reasons I was going to propose, and this may not meet with your Honour's approval in light of the discussion between us, but I was going to propose that these orders be made, if it pleases your Honour, until some time after the Easter break for the matter to come back. So it gives Mr Dowling time to put together some material, if he wishes to, and it will be on that occasion that we would obviously have to justify the continuation of the
40 orders after a proper hearing in relation to the merits of the application. But, in the meantime, particular with the time that Easter has - -

45 HIS HONOUR: I am not absolutely certain that those who retain you don't have a faint affection to the proposal I am raising.

DAWSON: Your Honour has the benefit of looking in one direction and I don't have eyes in the back of my head, but if I could just get some instructions.

50 HIS HONOUR: Yes.

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DAWSON: Your Honour, one of our difficulties is the first plaintiff, Ms Munsie, is overseas from Wednesday. I have real difficulty this week, but that is hardly the point. There are other barristers, I accept, but if your Honour is - -

5 HIS HONOUR: Even by the same token, if the orders I was proposing enjoin publication of any reference to these proceedings, it might be the case of giving Mr Dowling enough rope.

10 DAWSON: Indeed, and that is not lost on us, with respect, but what we wouldn't want to do is provoke an entirely new set of allegations which don't fall foul of the borders that your Honour is debating with me as a possibility.

HIS HONOUR: But if I take that a bit further, if this is it man who you anticipate is likely to flout orders of the court, although we are speaking totally
15 hypothetically, by analogy with the same line of reasoning, one cannot have confidence that he would conform with an order directing him to take down the publication and, in fact, I suspect you would find if he is passionately wedded to his website and his blog, he would more than likely resist more strongly by his own application to set aside the idea. I have no idea, but I have been
20 thinking theoretically, but I have been around long enough to think that those are possibilities that could flow.

25 DAWSON: But the idea of these orders was to build four very strong walls around Mr Dowling in relation to these allegations and these proceedings.

HIS HONOUR: I appreciate that, but I have to confess what troubles me is, without in any way derogating from your proposition that the material complained of, if unlikely or even highly unlikely to be true, I am just concerned about restraining the injunction in the circumstances of this case, perhaps
30 having regard to the time that has passed since it was published. I am not suggesting that the plaintiffs have sat on their hands, but doing the best I can I would be happy to make an order suppressing publication of these orders and bring the matter back as soon as you wish.

35 DAWSON: Can I take some instructions about that?

HIS HONOUR: Yes.

40 DAWSON: Your Honour, the concern we have is this; if I can just engage with your Honour as to whether order 5 stands over or not to another day. As your Honour has seen, the defendant can publish with ease, and appears to have no shortage of ability to produce material, on our case blatantly untrue material. If the defendant is served with orders which inform him of the nature of these proceedings, but tell him in no uncertain terms that he may not publish
45 anything about these proceedings until they are brought back and resolved on the primary question, nothing will stop him, your Honour, from ensuring that against the possibility that order 5 is made, the very same subject matter is published somewhere else. It is no controversial proposition that people of this kind have followers, as your Honour has seen from the evidence there are
50 people who support him strongly for good or worse - -

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HIS HONOUR: When you say; people of this kind - -

DAWSON: People who are prepared to follow - -

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HIS HONOUR: I am just troubled, Mr Dawson - -

10 DAWSON: I understand why, your Honour, but can I say this; it may be that I have, in attempting to discharge my duty on an ex parte application, put the authorities to your Honour too far against myself - -

15 HIS HONOUR: Not at all. I am well aware of the authorities and I know what they say and I think you have put them, if I may say so, quite properly. The hurdle is a high one.

20 DAWSON: But one must look at that in context where there is, on the evidence, no rational possibility of a truth defence being made out, then one really is in an entirely different territory unaffected by the usual matters which compel restraint in the exercise of the power. We are in that category here and the problem, your Honour, with what, with respect your Honour carefully puts to me about a halfway house solution perhaps, the problem is that it leaves this defendant free to publish the very same allegations with impunity, as long as he does not mention the fact that the plaintiffs are trying to stop him from doing so. That would seem to be, with respect, an unhealthy price to have to pay for a plaintiff coming to court for a very good reason, ex parte, in order to set up the process of enforcing their valid rights in the usual way.

30 Your Honour, what will happen undoubtedly, if orders 6 and 7 are made and not order 5 on a short term basis, is that Mr Dowling will see what is coming; he will, if he is given any kind of advice, realise that there is a real risk that order 5 might be made and he will take every step available, if he is as passionately committed to publishing these things as the evidence suggests, he will take every step to ensure that they come up somewhere else and then the exercise will be an entirely futile one and the processes of this court will have been entirely frustrated. If the court is to do justice in these proceedings, it has to be in a position to preserve the status quo now, pending a proper contested argument on an interlocutory basis where both sides can maintain their position.

40 HIS HONOUR: The status quo now is that the matter has been published and is at large.

45 DAWSON: Yes, that is quite right, but if the plaintiffs have a valid claim to the final injunction that they seek, if they have a prima facie case entitling them to that relief, then they are entitled, in support of that final relief, to have an injunction granted immediately. Whether they can justify that at an interlocutory hearing, obviously is an open question and they accept the force of that.

50 The problem of telling this defendant that he is about to come before the court,

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is that he is clever enough to work out how he can do maximum damage to these plaintiffs without breaching the orders that are made, if they are made in a somewhat compromised way. It almost makes the effort more dangerous than simply leaving the material on-line.

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HIS HONOUR: Well, that is the risk, isn't it.

10 DAWSON: Yes, and it is a risk that the court should not ask the plaintiffs to take, in circumstances where the evidence is overwhelming on the key questions which displaces the caution that ABC v O'Neill records as appropriate in defamation injunction cases, namely, that if there is no defence, there is no free speech issue. We were not talking about trampling on the right of a free speech, because if it is not defensible free speech then it is not free speech as the law would recognise it. It is not very hard for a defendant, on an application for an injunction, if a free speech question is engaged to resist the application for an injunction, but that turns, your Honour on - -

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HIS HONOUR: Do the authorities go as far as to say that the court will enjoin the publication of lies?

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DAWSON: I don't think I have ever seen that phrase as crisply stated.

HIS HONOUR: That is the question we are talking about, isn't it?

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DAWSON: Yes, that is the effect of it, because as their Honours Justice Gummow and Hayne say, the question on the balance of convenience question, about the strength or weakness of the defence, is material to whether or not the jurisdiction is enlivened. In this case, your Honour, we are at that very point. Imagine, your Honour, the reaction both of the plaintiffs and the court, were your Honour's, with great respect, perfectly sensible suggestion, to be effected, but the result of it was Mr Dowling then ensures that seeking an injunction against him becomes completely irrelevant because these allegations surface on websites, the publisher of which is unknown or the publisher of which is residing overseas and Mr Stokes and Ms Munsie, by their actions in bringing this case carefully and in a considered way before the court, end up forcing Mr Dowling into a position where he publishes so much more

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lively, that the position changes between now and when we come back.

HIS HONOUR: Let me ask you this: The principle authority on enjoining is O'Neill. Are there any authorities in the literature which has been published that give examples of where an injunction has been granted?

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DAWSON: Yes, your Honour, there are many cases where injunctions have been granted

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HIS HONOUR: In New South Wales recently?

DAWSON: Recently I can think of one case that is very much on point, but suppression orders were made, so I am probably in a position of some difficulty, but I can describe it in general terms.

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5 HIS HONOUR: No, I want to read it. I don't mean you should reveal it to me in breach of an order that prevents that, but I would like to know if I can turn up, with as much ease as I can turn up O'Neill, an authority dealing with the factual circumstances that give content to the notion that the highly likely, or to use your expression, no rational likelihood of the truth of the publications, has convinced a court to overcome the disinclination to enjoin a publication because of the free speech argument. Do you have any of those that I can compare the facts of this case with?

10 DAWSON: I don't know, your Honour. But, can I say this; the reason that there are not any that I can think of I suspect is because they never get to court, because when it is obvious to a plaintiff that there is an arguable defence, the application is never brought and there are plenty of examples
15 where those get to court and are not awarded, and I can think of one example which is Creek v Channel 7 where that precise eventuality transpired. I was counsel for the defendant. But on the other side, if the allegation is entirely false and cannot be defended, even on an outline basis for the purpose of resisting the injunction, in matters I have been involved in are likely to resolve
20 in the defendant agreeing not to publish the material.

HIS HONOUR: It is beguilingly persuasive, but it leaves me slightly uncomfortable.

25 DAWSON: But, your Honour, it is a proposition that does not have authority to back it up because no one has had ability to test it. This is a situation; there are very few applications for injunctions because of ABC v O'Neill I, but what the authorities tends to do is to throw into sharp focus where one is likely to get one, and then in those cases one falls outside ABC v O'Neill and the obvious
30 thing to be done is that the material is taken down.

HIS HONOUR: But there must be cases where there has been, on this analogy, an interim injunction to enjoin made a publication, a disgruntled responds to that by turning up to show that the material he has published is "true" and the plaintiff, on an application to continue the injunction, takes him
35 on on that issue and the courts have dealt with it and set out the facts that they are all arguing about it. It strikes me as extraordinary that there is not such a case, which be of significant assistance to me.

40 DAWSON: I'm not aware of any, but I see the force of what your Honour is saying.

HIS HONOUR: The force of what I am saying is; there are so few as to amount to no cases where, in the reported authorities, the defamation has been enjoined, notwithstanding the matters that O'Neill says, in theory, are
45 around to be grappled with.

DAWSON: That, in my submission, is no reason not to be satisfied on the application of the principles.

50 HIS HONOUR: You have told me on numerous occasions to be courageous,

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but I would like to do so with the benefit of some authority.

5 DAWSON: The reason I took your Honour to ABC v O'Neill is because it is the strongest authority against me, but it carves out the jurisdiction that we seek to --

10 HIS HONOUR: It is a signpost to a destination, but I would like to know what the destination is, that's all. I am still of the view that I would only be minded to do what I proposed. That may carry with it unpalatable consequences for you if the anticipated the defendant would do the things that he might do. Do you want to take some instructions on that?

DAWSON: May I do that?

15 HIS HONOUR: Yes.

SHORT ADJOURNMENT

20 DAWSON: Your Honour, can I, before I accept what your Honour has puts to me, just attempt one more way of persuading your Honour in relation to order 5.

HIS HONOUR: Yes, you go on.

25 DAWSON: I just want to give your Honour a reference to a file number. The question of; has this happened before, the answer is; yes, but the file I am thinking of, where I appeared for the plaintiff, is the subject of orders which probably prevent me, in closed court, to referring to it, but if I give your Honour the file number your Honour could, as the court, access the file. It may be that
30 in those circumstances we cannot take it further and I don't want to go over the ground again. I have said all I can and if your Honour is of the view that the matter should stand over on the basis that orders 6 and 7 are made, but standing the question of order 5 over, on an interlocutory basis, then we will, with great respect, agree with that.

35 Can I suggest this, your Honour; if orders 1, 2, 3 and 4 could be made, together with orders 6 and 7, and in order 8, the date 17 April, should be 15 April, and I was going to suggest an amendment to the final part of that order, rather than referring to "post" which might not be all together reliable in the
40 time and perhaps it could read, "...and by leaving the documents at," et cetera and no reference to the PO Box.

HIS HONOUR: To start with, what date do you say you can serve it by?

45 DAWSON: Tomorrow at 5 pm and to be returnable on Thursday, if your Honour is available, the 17th, and if your Honour could make it 2 pm. Is there any chance of that?

50 HIS HONOUR: It is before a long weekend and two hours for a contested application, bearing in mind we have spent almost two hours on an ex parte

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application, does not fill me with confidence.

DAWSON: I would like to be able to stay in it, but if I cannot - -

5 HIS HONOUR: That would be appropriate, I must say.

DAWSON: I have a commitment in the District Court on that morning which should not for very long. So perhaps some time after morning tea?

10 HIS HONOUR: Why don't we try for noon?

DAWSON: Yes. Can I give your Honour the file number for the other matter; 2011/380054. Between now and then obviously I will have a very thorough search for any other authorities. There may be some examples from interstate, for example.

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HIS HONOUR: I will make the following orders:

20 1. I grant leave to the plaintiffs forthwith to file in court a statement of claim together with a notice of motion notice of motion, each dated today.

2. I abridge time for service of the statement of claim and the notice of motion upon the defendant to 5 pm, Tuesday, 15 April, 2014.

25 3. I order that the notice of motion and the statement of claim, together with the supporting affidavit of the first plaintiff sworn today and a copy of these orders may, together, be served upon the defendant either by email to the address, "shane.dowling@hotmail.com", or by delivery to 5/68-70 Curlewis Street, Bondi Beach.

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4. Appoint noon on Thursday 17 April, 2014 for the return of the notice of motion.

35 5. Up to and including 4 pm on Thursday, 17 April, 2014, make orders 6 and 7 in the notice of motion.

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