Supreme Court
New South Wales

Medium Neutral Citation:

Munsie v Dowling (No 10) [2018] NSWSC 709

Hearing dates:

24 April 2017

Date of orders:

21 May 2018

Decision date:

21 May 2018

Jurisdiction:

Common Law

Before:

Rothman J

Decision:

(1) The defendant is hereby permanently restrained from publishing:

(a) the February 2014 article (the Corby Article);
(b) the February 2014 tweet (the Corby Tweet);
(c) the 31 May 2014 article (the Private Communications Article);
(d) the 3 June 2014 sign (the Bribery Sign);
(e) the 3 June 2014 clip (the Bribery Film Clip);
(f) the 3 June 2014 clip (the Addisons Film Clip);
(g) the 5 June 2014 clip (the Dawson Film Clip);
(h) the 8 June 2014 article (the Corruption Article);
(i) the 16 April 2014 article (the Suppression Order Article);
(j) the 13 February 2015 email (the Relationship Email);
(k) the 13 February 2015 article (the Relationship Article);
(l) the 13 February 2015 video (the Relationship Video);
(m) the 13-16 February 2015 tweets (the Relationship tweets);
(n) the 29 March 2015 article (the FOI Article);

(o) the 10 May 2015 article (the Corruption Article);
(p) the 4 May 2015 tweets (the Stokes tweets);
(q) the 31 May 2015 tweet (the Judicial Favours tweet);
(r) the 31 May 2015 tweet (the Judicial Favours article);
(s) the 14 June 2015 article (the ICAC Article); and
(t) the website blogs (the Addisons/Capilano Blogs).

(2) The defendant is hereby permanently restrained from publishing any matter of and concerning the plaintiffs to the same effect as those publications listed in Order 1;

(3) The defendant is hereby permanently restrained from publishing any matter of and concerning the plaintiffs to the same effect as the imputations contained in the Third Further Amended Statement of claim;

(4) The defendant shall pay the plaintiffs costs of and incidental to the proceedings and interest on those costs;

(5) Liberty to apply on three (3) days' notice on the form of the restraining order and costs.

Catchwords:

DEFAMATION – imputations arising from various publications on the internet and other social media – persistent defamation of plaintiffs – permanent injunctions sought and granted

Cases Cited:

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46
Bellino v Australian Broadcasting Corporation (1996) 185 CLR 183; [1996] HCA 47
Carolan v Fairfax Media Publications Pty Ltd (No 7) [2017] NSWSC 351
Church of Scientology of California Inc v Reader's Digest Services Pty Ltd [1980] 1 NSWLR 344
Hockey v Fairfax Media Publications Pty Ltd (No. 2) (2015) 237 FCR 127; [2015] FCA 750
Munsie v Dowling (No 4) [2015] NSWSC 37
Munsie v Dowling (No 7) [2015] NSWSC 1832
Phillips v Robab Pty Ltd [2014] NSWSC 1520
Polias v Ryall [2014] NSWSC 1692
Rastogi v Nolan [2010] NSWSC 735
Stephens v Western Australia Newspapers Ltd (1994) 182 CLR 211; [1994] HCA 45
Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104; [1994] HCA 46

Category:

Principal judgment

Parties:

Justine Munsie (First Plaintiff)
Kerry Stokes (Second Plaintiff)

Ryan Stokes (Third Plaintiff)
Shane Dowling (Defendant)

Representation:

Counsel:
A T S Dawson SC (First, Second & Third Plaintiffs)

Solicitors:
Addisons (First, Second & Third Plaintiffs)
Self-represented (Defendant)

File Number(s):

2014/114469

Publication restriction:

Non-Publication Order regarding Ex A & Ex C; Non-Publication order re submissions made by parties in the parties insofar as they raise issues that are otherwise the subject of an order restricting publication.

JUDGMENT

1. **HIS HONOUR:** The plaintiffs seek permanent injunctive relief against the defendant to restrain the defendant from publishing specific publications and from publishing of any material of and concerning the plaintiffs to like effect and/or containing the same imputations.

2. As may be obvious from the foregoing paragraph, the Statement of Claim is based upon the cause of action in defamation and interlocutory restraining orders have already been made and continue to be in force. The defendant is the registrant of the domain name kangaroocourtofaustralia.com and the publisher of the website connected to that domain name called Kangaroo Court of Australia, upon which the majority of the impugned publications were published.

3. The first plaintiff is a solicitor and partner in the law firm Addisons; the second plaintiff is Chairman of Seven West Media; and the third plaintiff is the son of the second plaintiff and Chief Operating Officer of Seven Group Holdings Limited, a Director of Seven West Media and Chairman of the National Library of Australia. The plaintiffs do not seek damages.

The Issues

4. The current claim is described in the Third Further Amended Statement of Claim, for which no Defence is extant. Defences were sought to be filed to one or other of the statements of claim, but have been struck out.

5. The First Defence was struck out by Hoeben CJ at CL on 18 August 2014: *Munsie v Dowling (No 4)* [2015] NSWSC 37. The Second and Third Defences of 31 March 2015 and 24 July 2015 were struck out by Davies J on 4 December 2015: *Munsie v Dowling (No 7)* [2015] NSWSC 1832. The

Defence of 24 July 2015 was a Defence to the current Third Further Amended Statement of Claim.

6. Notwithstanding the lack of defence, examining the defences that were sought to be filed, none of them took issue with the publication as a matter of fact, or the identification of the plaintiffs or the imputations that were alleged to arise from the publications. As a consequence, there is some comfort in the Court considering that the issues of publication, identification and the imputations alleged to arise are issues that need not be examined at length.

7. However, the defendant is self-represented. There is authority for the proposition that, in the case of self-represented defendants, the Court should consider, independently, whether the imputations are conveyed and, if they are, whether they are defamatory of the plaintiffs: *Rastogi v Nolan* [2010] NSWSC 735, per Simpson J at [7] and [35].

8. The plaintiffs submit that the Court should be less concerned with such an approach because of the findings already made for the purpose of interlocutory orders. As already noted, interlocutory orders are extant and continue to be enforceable. However, the test at an interlocutory hearing, even in defamation proceedings for which interlocutory orders are rare, is materially different from that which applies to a final hearing and to permanent injunctive relief.

9. At interlocutory hearing, and for the purpose of the making of interlocutory orders, while the Court must bear in mind the rarity of interlocutory orders and the nature of a restraining order in relation to publications (*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; [2006] HCA 46), the test is one that relates to the existence of a serious question to be tried and a weighing of the balance of convenience in the making of the orders sought. At final hearing, the plaintiffs are required to make out their case and the need for permanent interlocutory relief.

The publications

10. In the crafting of a judgment of this kind it is often necessary to repeat some parts of the publication. If possible, and to the extent that it does not detract from the disclosure of the reasoning process of the Court, such a process should not involve the repetition of what is said to be the defamatory material. Unfortunately, sometimes that repetition is necessary.

11. In this case, partly due to the lack of a substantive defence on the issue of publication and whether the imputations arise (even on those defences that were sought to be filed), it is unnecessary and inappropriate to repeat the defamatory material. It is sufficient for the Court to refer to the publication and the nature of the imputations.

12. As earlier stated, the imputations arise from publications on the Internet. Given the published reactions to the Internet publications by "bloggers", it is apparent that at least one person read each publication and understood the imputations contained in them.

13. In or about February 2014, the defendant published an article titled "Kerry Stokes, Channel Seven and Lawyer Justine Munsie Caught Lying in the Schapelle Corby matter" ("the Corby Article"). The imputations in the publication are plain and obvious. The article imputes that the first plaintiff lied to the Australian Federal Police ("AFP") about Channel Seven's ability to

comply with an AFP search warrant; the first plaintiff, a solicitor, attempted to assist her client, Channel Seven, to avoid revealing documents caught by an AFP search warrant, which she knew would prove that Channel Seven had concluded an illegal deal to pay Schapelle Corby for an interview and did so dishonestly; and the first plaintiff, a solicitor, has repeatedly committed perjury.

14. The same article also conveyed imputations concerning the second plaintiff that he: used threats and intimidation against the AFP to avoid having to reveal documents caught by an AFP search warrant, which he knew would prove that Channel Seven had concluded an illegal deal to pay Schapelle Corby for an interview; lied to the AFP about Channel Seven's ability to comply with an AFP search warrant; made dishonest threats against the AFP concerning their raid on Channel Seven; had repeatedly committed perjury; and is, or was, delusional.

15. There is no doubt that the imputations aforesaid arise from the article, the terms of which I do not repeat. There is also no doubt that those imputations are defamatory.

16. At or around the same time, the defendant published a link to the foregoing article on his Twitter page ("the Corby tweet") which imputes, separately from the article itself, that the first and second plaintiffs have each been caught lying and are liars in relation to issues concerning Schapelle Corby. By its link, the Twitter publication also, by reference, publishes the imputations contained in the article and already mentioned.

17. The Twitter publication clearly carries those imputations and is clearly defamatory of each of the first and second defendants.

18. On about 31 May 2014, the defendant published another article ("the Private Communications Article") relating to the second defendant's allegedly illegal private communications with a judge of the Court (obviously, not the Court as presently constituted). It should be added that the judge may or may not be aware of the publication and is not a party to the litigation.

19. The ordinary and natural meaning of the article imputes to the second defendant that he had private and corrupt communications with a judge of the Court in order to obtain judicial favour not otherwise permitted and has committed contempt of court and/or perverted the course of justice.

20. The next matter upon which the plaintiffs rely is a sign, published on or about 3 June 2014 ("the Bribery Sign"), the natural and ordinary meaning of which imputes that the second plaintiff has been discovered or caught out bribing two judges of the Supreme Court of New South Wales; perverting the course of justice; and having private communications with two judges of the Supreme Court. Plainly, the sign is defamatory and the imputations arise from the sign.

21. On 3 June 2014, a film clip ('the Bribery Film Clip") was published the effect of which, and the imputations arising from which, are similar or identical to at least one of the imputations arising from the sign. Again, the film clip is defamatory in its natural and ordinary meaning, carrying the imputation already described.

22. A further film clip, was published on the website on or about 3 June 2014 ("the Addisons Film Clip"). That film clip carried imputations in its natural and ordinary meaning. Those imputations

include that the first plaintiff is a "dodgy lawyer"; the first plaintiff works for a firm of "dodgy lawyers"; the first plaintiff has engaged in serious misconduct with Kerry Stokes and a judge; the first plaintiff works for a firm whose employees committed a criminal offence of false imprisonment. Further, the Addisons Film Clip, in its ordinary meaning, conveys certain imputations in relation to the second plaintiff: that he has engaged in serious misconduct with his lawyer and a judge.

23. On or about 5 June 2014, the defendant published on the website a video that he had obviously filmed during the course of that day ("the Dawson Film Clip"). The video was of Counsel for the plaintiffs returning to Chambers following a hearing in the Supreme Court. The video has commentary. The Dawson Film Clip, giving it its natural and ordinary meaning, carried imputations of the first plaintiff as being in an improper personal relationship with a judge of the Supreme Court.

24. The next matter about which complaint is made is an article published on the website on or about 8 June 2014 ("the Corruption Article"). The article referred to a former judge of the Supreme Court who was a judge at the time of the article and who was suing interests associated with the Fairfax Group for defamation and who is accused, by the defendant, of "doing a favour for Seven's Kerry Stokes".

25. The ordinary meaning of the article of 8 June 2014 imputed of the second plaintiff that he: corruptly obtained a favour from a Supreme Court judge; bribed judges to get them to commit the criminal offence of having private communications with him; and engaged in corrupt dealings with judges.

26. A further article was published on or about 16 April 2014 on the defendant's website ("the Suppression Order Article"). That article referred to suppression orders made by the Court in relation to these defamation proceedings.

27. The Suppression Order Article, in its natural and ordinary meaning, carried imputations that the first plaintiff: dishonestly abused the legal system by obtaining a suppression order to stop the defendant exercising his right of free speech; fabricated evidence to assist the second plaintiff in obtaining a suppression order against the defendant; conspired with the second plaintiff and a judge of the Supreme Court, the conspiracy being one to commit a criminal offence; and misconducted herself as a lawyer such as to warrant her being struck off the Solicitors' Roll.

28. Further, the Suppression Order Article, in its natural and ordinary meaning, carried imputations in relation to the second plaintiff (over and above those already mentioned in relation to the first plaintiff) that he: dishonestly abused the legal system by obtaining a suppression order stopping the defendant exercising his right to free speech; conspired with the first plaintiff and a judge of the Supreme Court to commit a criminal offence; has repeatedly committed perjury; and is corrupt in that he has bribed a judge of the Supreme Court to obtain a suppression order concerning the defendant.

29. On or about 13 February 2015, the defendant published a copy of an email with the subject heading "Kerry Stokes' 'Power Couple'" ("the Relationship Email") on the website about which

complaint is made. It makes a number of salacious allegations concerning both the first and second plaintiff.

30. In its ordinary and natural meaning, the Relationship Email imputes: that the first plaintiff has been involved in, or is involved in, an adulterous sexual relationship with the second plaintiff; that the first plaintiff has engaged in unprofessional criminal conduct by having a sexual relationship with her client; that the second plaintiff has had, or is in, an adulterous sexual relationship with the first plaintiff; that the second plaintiff has engaged in criminal conduct by having a sexual relationship with his lawyer.

31. On the same date, 13 February 2015, the defendant published an article ("the Relationship Article") under the heading "Known Adulterer and Womaniser, 7's Kerry Stokes Denies Sexual Relationship with Lawyer…". The article, as a whole and in its natural and ordinary meaning carries a number of imputations which are defamatory of the first and second defendant. It imputes to the first defendant that: she was involved, or is involved, in an adulterous sexual relationship with the second plaintiff; by engaging in that adulterous sexual relationship, she has engaged in conduct which is similar to the alleged fraud and corruption engaged in by Julia Gillard when she was in a sexual relationship with a Bruce Wilson; she has engaged in misconduct as a lawyer by having an adulterous sexual relationship with a client, the second plaintiff; the misconduct warrants investigation by the Office of the Legal Services Commissioner; she has dishonestly misused the Court's process to cover up the truth about her conduct and Kerry Stokes' conduct which led the AFP to raid Channel Seven; and she has dishonestly sought to conceal her adulterous sexual relationship with the second plaintiff.

32. The converse is also conveyed in relation to the second plaintiff, namely: that he is in an adulterous sexual relationship with the first plaintiff; that he is corrupt in that he failed to disclose to shareholders that he had a conflict of interest arising from that relationship; that he has engaged in fraud and corruption; that he has dishonestly misused the Court's process to cover up the truth about his and the first defendant's conduct which led the AFP to raid Channel Seven; and he has dishonestly tried to conceal his relationship with the first plaintiff by threatening legal action.

33. On or about 13 February 2015, the defendant published a video ("the Relationship Video") on the website entitled "Kerry Stokes' 'Power Couple' Relationship with Lawyer Justine Munsie". Again, the YouTube clip in its natural and ordinary meaning carries imputations in relation to the first and second plaintiffs.

34. The imputations again concern the alleged adulterous sexual relationship between the first and second plaintiff and are imputations against each of the first and second plaintiffs; that the first plaintiff has engaged in misconduct as a lawyer by such sexual relationship; and that she has dishonestly sought to conceal that sexual relationship. In relation to the second plaintiff, the YouTube clip referred to in the immediately preceding paragraph, further imputes that he has dishonestly tried to conceal his alleged sexual relationship with his lawyer.

35. Between 13 and 16 February 2015, the defendant published hyperlinks to the aforesaid 13 February article and to the YouTube clip. The defendant also published links to the YouTube clip

in six tweets accessible through his Twitter page together with certain descriptions ("the Relationship Tweets").

36. Without repeating them, the tweets again reflect the imputations that are contained in the other publications relating to an adulterous sexual relationship between the first and second plaintiff; misconduct of the first plaintiff as a lawyer; attempts to conceal the sexual relationship by each of the first and second plaintiffs; and, in relation to the second plaintiff, a dishonest attempt to conceal his sexual relationship with the first plaintiff.

37. On 29 March 2015, a further publication occurred in which the defendant published an article entitled "Kerry Stokes and the NLA Lose Freedom of Information Legal Battle Against KCA Blogger" ("the FOI Article"). Again in its ordinary natural meaning the FOI Article carried imputations of the second plaintiff.

38. In this article, imputations also were conveyed of the third plaintiff which are damaging to his reputation. The imputations against the second plaintiff in this article were that he had engaged in corrupt conduct by using his son's position as Chairman of the National Library of Australia to archive the defendant's website and, in relation to the third plaintiff, that he engaged in corrupt conduct as the aforesaid Chairman, by archiving the website to provide his father a favour, to which he was otherwise not entitled.

39. On 10 May 2015, the defendant published a further article concerning the second and third plaintiff's entitled "Channel Seven's Ryan Stokes Thrown under a Bus for Corruption as Chair of the National Library" ("the Corruption Article". The content of the article carries imputations against the second and third plaintiffs.

40. In relation to the second plaintiff, the article repeats the imputation of corrupt and criminal conduct by taking advantage of the third plaintiff's position in the National Library of Australia to remove the defendant's website; the second plaintiff is one of Australia's biggest tax cheats; and the second plaintiff paid a bribe to his son in his son's capacity as Chairman of the National Library of Australia in order to obtain a decision in the second plaintiff's favour concerning the removal of the aforesaid website.

41. Further, the Corruption Article carried, in the totality of the article and in its ordinary and natural meaning, imputations in relation to the third plaintiff, namely, that the third plaintiff acted corruptly as Chairman of the National Library of Australia for the benefit of his father by deciding to remove, and/or by removing, a website, namely the defendant's website.

42. Further, the third plaintiff lied when he denied making the decision to remove the website; the third plaintiff misused his position as Chairman of the National Library of Australia to make a decision favouring his father notwithstanding his "clear conflict of interest" and against internal recommendations; and the third plaintiff, as Chairman of the National Library of Australia, accepted a bribe from his father to make the aforesaid decision.

43. The defendant also published a number of tweets. The defendant published two tweets on 4 May 2015 ("the Stokes Tweets"), one concerning the abuse of the position by the third plaintiff as Chair of the National Library of Australia and another concerning the second plaintiff being a massive tax cheat.

44. On 31 May 2015, the defendant published a tweet ("the Judicial Favours Tweet") concerning the first and second plaintiffs and a judge of the Supreme Court, in essence, accusing the judge of taking bribes and, more relevantly for these proceedings, the first and second plaintiff from offering and paying bribes to the aforesaid judge.

45. The imputations arising from that tweet are, once more, that the first plaintiff is a dodgy lawyer; has engaged in an improper personal relationship with a judge; and that the first plaintiff is guilty of bribery and of the crime of having private communications with a judge and obtaining judicial favours as a consequence. In relation to the second plaintiff, the natural and ordinary imputations arising from the article involved, again, an imputation that the second plaintiff bribed a judge of the Supreme Court; had an improper personal relationship with a judge of the Supreme Court and was guilty of having private communications with the judge and getting a judicial favour as a consequence.

46. On 14 June 2015, the defendant published an article ("the ICAC Article") entitled "ICAC Request Evidence re: Kerry Stokes & Ryan Stokes Getting Judicial Favours from NSW Judges". The article, once more, in its ordinary and natural meaning, conveyed the imputations that the first plaintiff bribed judges to obtain ex parte hearings and impermissible orders in her favour; has consistently engaged in corrupt conduct in her dealings with judges of the Court; and has an improper personal relationship with a particular judge of the Court.

47. Further, the aforesaid article conveyed, as a whole and in its ordinary natural meaning, imputations of the second plaintiff: that he bribed judges to obtain ex parte hearings and impermissible orders in his favour; and that he has consistently engaged in corrupt conduct in his dealing with judges of the Supreme Court. Further, again, the aforesaid article carried imputations in relation to the third plaintiff, namely: that the third plaintiff bribed judges to obtain ex parte hearings and impermissible orders in his favour; that the third plaintiff engaged in corrupt conduct in dealing with the judges of the Court; that the third plaintiff engaged in corrupt conduct at the National Library of Australia by stopping at the request of his father, the archival of a website; and that the third plaintiff tried to cover up his corrupt conduct at the National Library of Australia by seeking orders for the removal of two articles which expose the corruption.

48. Over and above the foregoing articles and imputations, the plaintiffs rely on a number of blogs ("the Addisons/Capilano Blogs") that were published on the website in relation to the articles.

49. First, the blogs, being published on a website over which the defendant has control are publications or republications of the said blog. Secondly, the blogs show that at least those persons who have posted the blogs have read the articles to which they refer, being the articles upon which the plaintiffs otherwise rely and which are earlier summarised as are the imputations contained in them.

50. Thirdly, the blogs convey imputations which are scandalous, embarrassing and broader in impact than the imputations to which the Court has referred above. Further again, the blogs convey imputations in relation to persons who are not party to the proceedings of a scandalous and embarrassing nature.

51. It is unnecessary to repeat the terms of the blogs or to recite the imputations that arise from them. It is sufficient to make two comments. A number of the blogs relate to issues associated with Capilano Honey and its involvement with Addisons. Also, and notwithstanding the attempt to file Defences, the terms of each Defence does not allege the truth of any of the articles or any of the imputations or of any of the blogs and the imputations that arise from them.

Principles

52. It has long been established that the Court's power or jurisdiction to grant interlocutory injunctions in defamation cases is required to be exercised with great caution and only in very clear cases. A summary of the principles was recited by Hunt J in *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 at 349-350. The principle has long been followed.

53. The High Court in *ABC v O'Neill*, supra, examined the principles associated with the grant of an interlocutory injunction in defamation proceedings. The judge at first instance had granted an interlocutory injunction, which was upheld by the Full Court of the Tasmanian Supreme Court. The majority of the High Court (Gleeson CJ, Gummow, Hayne and Crennan JJ) took the view that the trial judge and the Full Court, erred by failing to take appropriate account of the significance of the value of free speech in considering whether to restrain a publication; the role of the jury in determining whether the publication was justified; and the possibility that, even if there were actionable defamation, there may be only nominal damages.

54. However, as has been pointed out in various judgments, the statement of principle in *ABC v O'Neill* deals with the issue of whether or not an interlocutory judgment would issue that prevented the initial publishing or broadcasting of a publication. It does not deal with the remedy of a permanent injunction, once publication has occurred and the cause of action established.

55. Such issues were discussed by McCallum J in *Carolan v Fairfax Media Publications Pty Ltd (No 7)* [2017] NSWSC 351 in which her Honour identified the crucial issue to be "an assessment of the existence and degree of any threat or risk of a repeat of the publication of the defamatory matter successfully sued on in the proceedings."

56. In the Federal Court of Australia, White J in *Hockey v Fairfax Media Publications Pty Ltd (No. 2)* (2015) 237 FCR 127; [2015] FCA 750 referred to the necessity to show "some additional factor" being, for example, an apprehension that the publisher may disrespect the Court's judgment or repeat allegations similar to those found to be defamatory.

57. In *Phillips v Robab Pty Ltd* [2014] NSWSC 1520, I compared the position of permanent injunctions with those of an interlocutory nature. At [182] of *Phillips v Robab*, I said:

"[182] Permanent injunctions of the kind sought are in a very different category to interlocutory injunctions sought pending the determination of defamation proceedings. Such permanent injunctions, as part of the final relief, are a more common feature of defamation proceedings than was previously the case. Such permanent injunctions have a particular use in circumstances where the defamatory material has been published on the internet and, therefore, can easily be republished...."

58. Ordinarily, when the Court is dealing with mass media, there can be an expectation that a defamatory publication will not be republished by that defendant. With the advent of the Internet, on which anyone can be a "publisher", such expectations may be unfounded. Where, as is suggested in these proceedings, there is a probability that, in the absence of restraining orders, republication or the publication of similar imputations will occur, the power to issue permanent injunctions is obvious.

59. The evidence before the Court, disregarding previous judgments of the Court, discloses a tendency to publish, regardless of the consequences and otherwise than on a basis of rational consideration of the truth or appropriateness of the imputations.

60. The plaintiff submits that "the defendant has an irrational obsession with the plaintiffs" and is "committed to publishing scurrilous and scandalous material about … them". The defendant lists the publications (to which reference has already been made). The defendant's submission has merit.

61. There is plainly an obsession by the defendant with the plaintiffs and the defendant has continued to publish material that cannot, on the evidence before the Court, and is not, on the pleadings before the Court, sought to be justified. Some of the material has been published, notwithstanding orders of the Court requiring him to cease publication and to remove the earlier publications from the Internet.

62. Interlocutory orders have issued from the Court. Some of those orders have had some effect. Nevertheless, the evidence establishes that, while the matters about which complaint is made have been removed from the defendant's website, other publications have issued which are links to websites in which the defendant's articles are able to be seen and the links and publications include imputations that the defendant has been enjoined from publishing.

63. The analysis of the evidence before the Court that the factors to which each of McCallum J and White J referred, see above, are present in the circumstances of this defamation. There is a real threat and a high risk that the defendant will continue to publish the matters about which the plaintiffs complain and/or convey the imputations in another form.

64. In *Polias v Ryall* [2014] NSWSC 1692, I said, at [99]:

"[99] Given the continuing nature of the publication and the refusal of the defendants to remove the publications or to cease and desist from the continuing repetition of the imputations, it is appropriate, particularly given the scurrilous nature of the defamatory imputations and their lack of bona fides, to grant injunctions, the effect of which is to enjoin the defendants and each of them from continuing to publish imputations of that kind relating to these incidents: see *Rastogi v Nolan* [2010] NSWSC 735, per Simpson J."

65. In the circumstances of these publications, the threat and risk of republication is even greater.

Freedom of Speech

66. In *ABC v O'Neill*, supra, as earlier stated, the High Court dealt with the importance of freedom of speech in the context of the grant of interlocutory injunctions. As earlier stated, permanent injunctions are in a different category, particularly in circumstances where the publication has

already occurred, but, mainly, because the cause of action in defamation has already been established.

67. Nevertheless, and notwithstanding that the defendant has no defence filed, it seems, from the material before the Court, that the defendant seeks to rely upon some notion of freedom of speech.

68. It is appropriate, notwithstanding the absence of a defence, for the Court to deal with the issue. Apart from the constitutionally guaranteed freedom of political communication, there is no "Bill of Rights" or "freedom of speech" in Australia. The legislature is, apart from the constitutional guarantee, entitled to regulate the relations between its citizens on the basis that it considers appropriate.

69. It was stated by the majority judgment in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; [1994] HCA 46 and *Stephens v Western Australia Newspapers Ltd* (1994) 182 CLR 211; [1994] HCA 45 that the implied guarantee in the Constitution of freedom of communication in relation to matters of public affairs and political discussion did allow for a defence to be pleaded, relying upon that guarantee.. As was pointed out by Mason CJ, Toohey and Gaudron JJ in *Theophanous*, such a protection was only permitted when the publisher was not aware of the falsity of the material; did not act recklessly in publishing, being recklessness as to whether it was true or false; and otherwise acted reasonably in taking some steps to check the accuracy of the material. That onus is placed upon the publisher. No attempt has been made to satisfy any such test.

70. Moreover, the judgment of Dawson, Brennan and McHugh JJ in *Theophanous* took the view that the implied guarantee had no role to play in the defamation and libel laws in the various States.

71. If it were necessary to decide finally the issues associated with the implied guarantee, it may be necessary to refer to the comment of Dawson, McHugh and Gummow JJ in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183; [1996] HCA 47 in which their Honours in note 115 at page 222 referred to the need to be precise as to the "political comment" or "public interest" upon which the comment is said to depend.

72. Their Honours referred to such a comment referring:

"expressly or impliedly, to the conduct of individuals whose office or public activities invited public criticism and discussion. Thus, a comment on the conduct of a private individual who had secretly engaged in organised crime could not be justified at common law as a fair comment on a subject of public interest, no matter for how long or how heavily he or she had been engaged in organised crime. It is the failure to grasp this point that has led to the view that 'some subject of public interest' … includes general abstractions unrelated to the conduct of particular individuals".

73. In other words, the implied guarantee may well apply to the issues of corruption and its avoidance. But once the publication descends into the making of particular allegations and the conveying of particular imputations about an individual, which imputations are untrue, then it does not defeat an action in defamation, where the cause of action has been finally determined.

74. Once the action in defamation is successful, and there is a threat of republication of the defamatory imputations, in a real and substantial way, then the remedy of injunctive relief is available, notwithstanding the implied guarantee.

75. Nevertheless, as earlier stated, there is no attempt in these proceedings to rely upon the defence of implied guarantee of freedom of speech and there is no attempt by the defendant to establish the preconditions to which the joint judgment in *Theophanous* referred. It is, therefore, unnecessary to deal with the matter on any final basis, other than to clarify that it does not apply in the absence of some fact justifying it.

76. For the foregoing reasons, the Court makes the following orders:

1. The defendant is hereby permanently restrained from publishing:

1. the February 2014 article (the Corby Article);
2. the February 2014 tweet (the Corby Tweet);
3. the 31 May 2014 article (the Private Communications Article);
4. the 3 June 2014 sign (the Bribery Sign);
5. the 3 June 2014 clip (the Bribery Film Clip);
6. the 3 June 2014 clip (the Addisons Film Clip);
7. the 5 June 2014 clip (the Dawson Film Clip);
8. the 8 June 2014 article (the Corruption Article);
9. the 16 April 2014 article (the Suppression Order Article);
10. the 13 February 2015 email (the Relationship Email);
11. the 13 February 2015 article (the Relationship Article);
12. the 13 February 2015 video (the Relationship Video);
13. the 13-16 February 2015 tweets (the Relationship tweets);
14. the 29 March 2015 article (the FOI Article);
15. the 10 May 2015 article (the Corruption Article);
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17. the 31 May 2015 tweet (the Judicial Favours tweet);
18. the 31 May 2015 tweet (the Judicial Favours article);
19. the 14 June 2015 article (the ICAC Article); and
20. the website blogs (the Addisons/Capilano Blogs).

2. The defendant is hereby permanently restrained from publishing any matter of and concerning the plaintiffs to the same effect as those publications listed in Order 1;

3. The defendant is hereby permanently restrained from publishing any matter of and concerning the plaintiffs to the same effect as the imputations contained in the Third Further Amended Statement of claim;

4. The defendant shall pay the plaintiffs costs of and incidental to the proceedings and interest on those costs;

5. Liberty to apply on three (3) days' notice on the form of the restraining order and costs.

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Decision last updated: 21 May 2018