

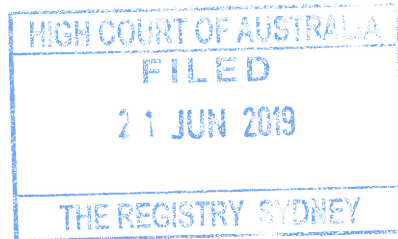
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S162 of 2019

BETWEEN:

SHANE DOWLING
Applicant

and



CAPILANO HONEY PTY LIMITED
First Respondent

BEN MCKEE
Second Respondent

RESPONSE

20 **Part I: Reasons why an order for removal should not be made**

1. The questions raised in Part II of the application for removal (“**the Questions**”) do not warrant removal. They do not fall within s 40(1) of the *Judiciary Act 1903* (Cth) (“**the Act**”) as they do not arise under the Constitution or involve its interpretation. Nor do they otherwise involve questions which would warrant removal under s 40(2) of the Act.
2. The resolution of the Questions has no special urgency.
3. In any event, the application for removal is premature, in that:
 - (a) the pleadings have yet to close (an application by the respondents to strike out Mr Dowling’s amended defence has yet to be heard);
 - 30 (b) the filing of evidence has yet to be concluded; and
 - (c) there have not yet been any findings of fact.

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Part II: A brief statement of the factual issues in contention

4. The procedural history of the matter appears in the judgment of Hoeben CJ at CL, *Capilano Honey Ltd v Dowling (No 3)* [2019] NSWSC 539 at paragraphs [4] to [16] (see further the affidavit of Alexander Maile Latu sworn 21 June 2019 at paragraph [8]). The main factual dispute in the proceedings below is whether publications made by Mr Dowling: conveyed certain defamatory imputations of and concerning the second respondent (and their defensibility); and/or conveyed representations concerning the respondents (and their truthfulness).
5. So far as s 40(2) of the Act is concerned, the Court would not be satisfied that it was appropriate to make the order for removal having regard to all the circumstances including the public interest: Act, s 40(4).

Part III: A brief statement of the respondent's argument

6. Questions 2.2, 2.3 and 2.4 in the application for removal do not raise questions which are appropriate for removal. Despite the reference to "constitutional power" in questions 2.2 and 2.3, they do not fall within the terms of s 40(1) of the Act. In a similar vein, the reference to the implied freedom of political communication in question 2.4 does not make it appropriate for removal in accordance with s 40(1) of the Act.
7. So far as s 40(2) of the Act is concerned, the Court would not be satisfied that it was appropriate to make the order for removal having regard to all the circumstances including the public interest: Act, s 40(4).
8. Further:
- (a) The bases for the matters stated in questions 2.2-2.3 appear to be assertions of those matters by Mr Dowling. Regardless, despite the references to there being a question of "constitutional power and/or legal authority" over the Supreme Court hearing matters in the asserted circumstances, no such question thereby arises. The Supreme Court evidently has jurisdiction to hear the proceedings. The only issue which remotely might arise is one relating to actual or apprehended bias but that is not raised in the Questions and, in any event, would not give rise to a question requiring removal.
- (b) The respondents are not aware of any evidential material in the proceedings below to support the allegations contained in questions 2.1

and 2.3. In Mr Dowling's affidavit filed on 31 May 2019 in support of the removal application, the only material not amounting to Mr Dowling's own assertions on the topic in question 2.3 appears to be paragraph [10] on p.56, which falls very far short of supporting the factual matters underpinning question 2.3. There is no material outside of Mr Dowling's own assertions that is relevant to the factual matters underlying question 2.1.

10 (c) Questions 2.1 and 2.5–2.7 are not articulated as questions suitable for removal, in that they do not identify any particular Constitutional provision or other basis for those Questions other than: a bare reference to lack of legality (Questions 2.1, 2.6 and 2.7); or, apparently, a matter of procedure (Question 2.5).

9. There is no reason why, even if the Questions were otherwise suitable for removal, that removal would be necessary at present. In terms of the substantive proceedings, the pleadings are not closed, evidence has not been completed and no findings have been made.

20 10. There would be no utility in removing the matter into this Court in those circumstances. Further, to do so would interfere with the ordinary processes of the Supreme Court, and would do so in circumstances where this Court would not have the benefit of judicial reasoning below: see *Bienstein v Bienstein* [2003] HCA 7; 195 ALR 225 at [45].

11. More generally, even supposing that there is some point or points of general importance lying within the proceedings below, there is no demonstrated basis to conclude that the ordinary appeal process (including the possibility of seeking special leave to appeal to this Court) would not be adequate to deal with such matters in due course.

Part IV: No special order for costs is sought by the respondents

12. In the event that the application for removal is refused, the respondents seek an ordinary order for costs.

30 **Part V: List of authorities**

13. *Bienstein v Bienstein* [2003] HCA 7; 195 ALR 225 at [45].

Part VI: Particular constitutional or statutory provisions

14. The respondents contend that there are no applicable constitutional or statutory provisions.

Dated 21 June 2019

A handwritten signature in cursive script that reads "Richard Keegan". The signature is written in black ink and is positioned above a horizontal dotted line.

Martin O'Connor

Solicitor for the Respondents by his
employed solicitor, Richard Keegan