IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S145 of 2019

BETWEEN:

SHANE DOWLING
Applicant

and

SEVEN NETWORK (OPERATIONS) LIMITED
First Respondent

SEVEN WEST MEDIA LIMITED
Second Respondent

RESPONSE

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 s40(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; in particular, Mr Dowling has not yet filed a defence;
   (b) the filing of evidence has yet to be concluded;
   (c) there have not yet been any findings of fact;
   (d) the substantive proceedings are awaiting the determination of a motion for contempt brought by the respondents against Mr Dowling, and evidence in relation to that motion has yet to be completed.

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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 Rees J, *Seven Network (Operations) Limited v Shane Dowling* [2018] NSWSC 1890 at paragraphs 3-22 (see further the affidavit of Alexander Maile Latu of 4 June 2019 at paragraph 8). The main factual issue in dispute in the proceedings below is whether Mr Dowling was the owner or operator, at relevant times, of certain websites (**"the Websites"**). The respondents contend that Mr Dowling used the Websites to disclose their confidential information.

10 5. So far as the factual matters raised in Part III of the removal application are concerned, the only substantial factual disputes seem to be as to the characterisation of the conduct of officers of the court as bullying Mr Dowling, and as to the factual foundation for question 2.2.

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

6. The first two of the Questions (that is, questions 2.1 and 2.2 in the application for removal) do not raise questions which are appropriate for removal. Despite the reference to "constitutional power" in those questions, they do not fall within the terms of s.40(1) of the Act. So far as s.40(2) of the Act is concerned, the
20 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).

7. Further:

   (a) The only sense in which there is "evidence before the court" of the matters stated in question 2.1 is the assertion of those matters by Mr Dowling himself, and his references to emails by him making those allegations.

   (b) Even if that matter were before the Supreme Court in some substantive way, no question of "constitutional power and/or legal authority" would
30 thereby arise. 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.

(c) Question 2.2 has a similar difficulty concerning its evidential foundation. The respondents are not aware of any evidential material in the proceedings below to support the allegation. In Mr Dowling's affidavit filed on 14 May 2019 in support of the removal application, the only material not amounting to Mr Dowling's own assertions on this topic appears to be paragraph 10 on p.39, which falls very far short of supporting the factual matters underpinning question 2.2.

(d) Even if that matter were before the Supreme Court in some substantive way, the considerations set out in (b) above would arise.

10 (e) Question 2.3 is not articulated as a question suitable for removal, in that it does not identify any particular Constitutional provision or other basis for the question other than a bare reference to lack of legality.

8. 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. In terms of the motion that Mr Dowling be held in contempt, evidence has not been completed and the motion has not yet been set down for hearing.

9. There would be no utility in removing the matter into this Court in those
20 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].

10. 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.

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

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

Part V: List of authorities

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

Part VI: Particular constitutional or statutory provisions

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

Dated 4 June 2019

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Kieran Smark SC

Counsel for the Respondents