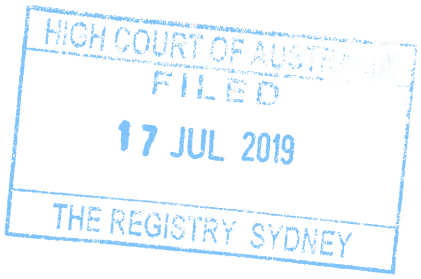
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S197 of 2019

BETWEEN:

SHANE DOWLING
Applicant



and

JANE DOE 1
First Respondent

JANE DOE 2
Second Respondent

JANE DOE 3
Third Respondent

JANE DOE 4
Fourth 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 s 40(2) of the Act.
2. The resolution of the Questions has no special urgency.

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3. In any event, the application for removal is premature, in that:
   (a) the filing of evidence has yet to be concluded; and
   (b) there have not yet been any findings of fact.

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

4. The procedural history of the matter appears in the judgment of McCallum J (as her Honour then was), *Doe v Dowling* [2017] NSWSC 1793 at paragraphs [1] to [26] (see further the affidavit of Richard Michael Keegan sworn 17 July 2019 at paragraph [8]; and the judgment of Walton J, *Doe 1 v Dowling* [2018] NSWSC 1278 at [1] to [6] and [43]). The main factual dispute in the proceedings below is whether publications made by Mr Dowling conveyed certain defamatory imputations of and concerning the first to fourth respondents. Mr Dowling has no defence before the Court as his defences have been struck out with no leave to re-plead.
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 2.1, 2.2, 2.5, 2.7 and 2.8 in the application for removal do not raise questions which are appropriate for removal. Despite the reference to "constitutional power" in Questions 2.1, 2.2 and 2.5, 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 2.8, and the bare reference to the *Constitution* in Question 2.7, do not make these Questions 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 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) Questions 2.2 and 2.5 have a similar difficulty concerning their evidential foundation. The bases for the matters stated in Questions 2.2 and 2.5 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 of NSW hearing matters in the asserted circumstances, no such question thereby arises. The Supreme Court of NSW evidently has jurisdiction to hear the proceedings. The only issue which remotely might arise is one relating to actual or apprehended bias, which appears to be raised separately in Question 2.7, but in any event does 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 26 June 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.28, which falls very far short of supporting the factual matters underpinning Question 2.2.

(d) Questions 2.3, 2.4 and 2.6 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 (Question 2.3); or, apparently, a matter of procedure (Questions 2.4 and 2.6).

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 evidence has not been completed and no findings have been made.

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 of NSW, 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.

Part V: List of authorities

10 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 17 July 2019

Richard Keegan

20 Martin O'Connor
Solicitor for the Respondents by his
employed solicitor, Richard Keegan