Common Law Division
Supreme Court
New South Wales

Case Name:	Doe v Dowling
Medium Neutral Citation:	[2019] NSWSC 1222
Hearing Date(s):	26-27 August 2019
Date of Orders:	20 September 2019
Date of Decision:	20 September 2019
Jurisdiction:	Common Law
Before:	Fagan J
Decision:	1. Judgment for the plaintiffs for damages in the sum of $150,000 for each plaintiff. 2. Until further order the names of the plaintiffs are not to be published in connection with these proceedings. 3. The defendant is restrained from publishing any of the three articles that are the subject of the proceedings in any form which includes the name of any of the plaintiffs. 4. The defendant is restrained from publishing any matter of and concerning the plaintiffs to the same effect as the articles that are the subject of the proceedings or to the same effect as the imputations pleaded in the amended statement of claim or any imputations that do not differ in substance. 5. The defendant is to remove from the kangaroocourtofaustralia.com website the publications identified in the orders of the court as entered, including any republication by hyperlink to those publications from other electronic platforms controlled by the defendant. 6. The defendant is to pay the plaintiffs' costs of the proceedings on the indemnity basis.
Catchwords:	DEFAMATION – defamatory matter – where defendant admitted publication of defamatory material – where all imputations alleged were found to have been conveyed –justification not pleaded – no defence of absolute privilege – where defence of qualified privilege pleaded – whether conduct of defendant in

publishing material was reasonable in circumstances – Defamation Act s 30 subs (1)(c) – where no attempt to verify information before publication – behaviour unreasonable in circumstances – defence of qualified privilege fails – where defendant likely to repost defamatory material – non-publication order made – permanent injunction granted – defendant to pay costs on indemnity basis

Legislation Cited:

Australian Human Rights Commission Act 1986 (Cth)
Court Suppression and Non-publication Orders Act 2010 (NSW)
Defamation Act 2005 (NSW)
Disability Discrimination Act 1992 (Cth)
Evidence Act 1995 (NSW)
Uniform Civil Procedure Rules 2005
Sex Discrimination Act 1984 (Cth)

Cases Cited:

Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158; [1998] NSWSC 4
Attorney General v Leveller Magazine [1979] AC 440
Attorney-General v Times Newspapers [1992] 1 AC 191
Austin v Mirror Newspapers Ltd (1985) 3 NSWLR 354
Bristow v Adams [2012] NSWCA 166
Cairns and Morosi v John Fairfax & Sons Ltd (1983) 2 NSWLR 708
Carolan v Fairfax Media Publications Pty Ltd (No 7) [2017] NSWSC 351
Doe v Dowling [2017] NSWSC 202
Doe v Dowling [2017] NSWSC 1793
Doe 1 v Dowling [2018] NSWSC 1278
Dowling v Prothonotary of the Supreme Court of New South Wales [2018] NSWCA 340
Greek Herald Pty Ltd v Nikolopoulos & Others (2002) 54 NSWLR 165; [2002] NSWCA 41
Hockey v Fairfax Media Publications Pty Limited (No 2) [2015] FCA 750
Jane Doe 1 & Jane Doe 2 v Dowling (No 2) [2016] NSWSC 1910
Kirkpatrick v Kotis [2004] NSWSC 1265; (2004) 62 NSWLR 567
Mirror Newspapers Ltd v Fitzpatrick [1984] 1 NSWLR 643
Prothonotary of the Supreme Court of New South Wales v Shane Dowling [2017] NSWSC 664
Random House Australia Pty Ltd v Abbott [1999] FCA 1538
Urbanchich v Drummoyne Municipal Council [1991] Aust Torts Reports 81-127

	Visscher v Maritime Union of Australia (No 6) [2014] NSWSC 350
Category:	Principal judgment
Parties:	Jane Doe 1 - first plaintiff Jane Doe 2 - second plaintiff Jane Doe 3 - third plaintiff Jane Doe 4 - fourth plaintiff Shane Dowling - self-represented defendant

Representation:	Counsel: S Dawson with M Cowden - plaintiffs N/A Solicitors: Addisons Lawyers - plaintiffs N/A
File Number(s):	2016/383575
Publication Restriction:	No

JUDGMENT

1 The four plaintiffs in this proceeding claim damages for defamation arising from the publication by the defendant in December 2016 and February 2017 of three articles on the internet. The first and second plaintiffs commenced the action by filing on 21 December 2016 a statement of claim pleading causes of action in respect of the first article only ("the 21 December 2016 article"). The second and third plaintiffs were joined in February 2017 and the amended statement of claim on which proceedings have been conducted since that date pleads causes of action of all the plaintiffs with respect to the second and third published matters ("the 19 February 2017 article" and "the Secondary article").

2 The plaintiffs are four females, all employed by or contracted to the same corporation. The three published matters contained sensational and salacious allegations of sexual relations between the plaintiff's and the chief executive officer of corporation ("the CEO"). Orders were made on 21 December 2016 and 21 February 2017 that the names of the plaintiffs not be published and that they be referred to in the proceedings as Jane Doe 1, Jane Doe 2 etc. That was done in order to ensure that they would not suffer further damage through publicity that might be given to the proceedings.

3 The defendant describes himself as a journalist. I am satisfied that he published on his website the three internet articles with which this action is concerned. From the content of those articles, containing damaging allegations that he made no attempt to verify, it is apparent that his use of the term journalist is loose. The defendant has been unrepresented throughout the proceedings including at the final hearing, which took place on 26 and 27 August 2019 without a jury.

Pre-trial suppression orders and interlocutory injunctions

4 On the ex parte application of the plaintiffs on 21 December 2016, Campbell J made a non-publication order in respect of the names of the first two plaintiffs,

as already mentioned, and granted an interlocutory injunction with respect to the 21 December article. The orders were in these terms:

> 4. Pursuant to s 7 of the Court Suppression and Non-publication Orders Act 2010 (NSW) the names of the plaintiffs are not to be published without the leave of the Court by reason of s 8(1)(e) of that Act in connection with these proceedings.
>
> 5. By 8pm, Wednesday, 21 December 2016, the defendant remove the names of the women appearing in the fourth paragraph of [21 December 2016 article] ...
>
> 6. The defendant be restrained, until further order from publishing:
>
> a. The imputations particularised in paragraph 5 of the statement of claim filed herein;
>
> b. The 21 December 2016 article in any form which includes the names of the plaintiffs.

5 The defendant failed to comply with order 5 and the 21 December 2016 article remained accessible to the public on his Kangaroo Court of Australia website as at 23 December 2016: *Jane Doe 1 & Jane Doe 2 v Dowling (No 2)* [2016] NSWSC 1910. When the proceedings returned before his Honour on that date a substituted performance direction was made, appointing Mr Nigel Carson of KordaMentha to carry out the "take down" that was required under order 5 of 21 December. Campbell J further ordered:

> 4. ... the defendant is to provide to Mr Carson ... by no later than 4pm 29 December 2016, in written or electronic form, all information necessary to permit Mr Carson to access, modify and/or delete any data that is made available to the public via:
>
> a. The website http://kangaroocourtofaustralia.com;
>
> b. The Twitter handle @Kangaroo_Court;
>
> c. http://kangaroocourtofaustralia//fref=ts
>
> Including but not limited to, any username, user ID, password or other information needed to gain such access to such data, and any URL it must be access[ed] to do so.
>
> 5. ... the defendant is to provide to Mr Carson ... any other information requested by Mr Carson for the purpose of complying with the substituted performance direction, within 48 hours of any such request.

7. The proceedings be referred to the Registrar of the Supreme Court pursuant to Part 55 rule 11 of the Supreme Court Rules for consideration of whether to commence proceedings for punishment of the contempt.

6 On 2 February 2017 the first and second plaintiffs filed a notice of motion charging the defendant with contempt in that he failed by 8:00 pm on 21 December 2016 to remove the names of the women appearing in the 21 December 2016 article (in breach of order 5) and he continued to publish imputations against the first and second plaintiffs and their names (in breach of order 6).

7 On 19 February 2017 the defendant published on his website the second and third matters that are now the subject of this action. This contained allegedly defamatory imputations against the first two plaintiffs, who had commenced the proceedings in December 2016, and also against the third and fourth plaintiffs. All four plaintiffs applied by notice of motion on 21 February 2017 for interlocutory injunctions for removal of these additional articles and for non-publication orders with respect to the names of the third and fourth plaintiffs. The third and fourth plaintiffs were joined pursuant to leave granted on 21 February 2017 and an amended statement of claim, pleading causes of action by all four plaintiffs, was filed by leave that day.

8 On 22 February 2019 Walton J made the following orders:

3. Pursuant to s 7 of the Court Suppression and Non-publication Orders Act 2010 (NSW) the names of the third and fourth plaintiffs are not to be published without the leave of the Court ...

4. By 4pm, Wednesday, 22 February 2017, the defendant remove:

    a. [an identified part of the 19 February 2017 article];

    b. The names of the second to fifth women published [at an identified place in the 19 February 2017 article];

    c. The link to the [Secondary article].

5. The defendant be restrained, until 5pm on 3 March 2017, from publishing:

    a. The imputations particularised in respect of the third plaintiff and the fourth plaintiff in paragraph 9 of the statement of claim filed herein.

b. The 19 every 2017 article in any form which includes the names of the third plaintiff and/or the fourth plaintiff.

c. The Secondary article in any form which includes the names of the third plaintiff and/or the fourth plaintiff.

9 After 3 March 2017 order 5 was extended on a number of occasions and on 19 December 2017 McCallum J (as her Honour then was) extended its operation until further order: *Doe v Dowling* [2017] NSWSC 1793. In the same judgment her Honour dismissed the defendant's application for review of the orders for non-publication of the names of the plaintiffs in connection with the proceedings (Campbell J's order 4 of 21 December 2016 and Walton J's order 3 of 22 February 2017).

10 The first and second plaintiffs' notice of motion charging contempt (filed on 2 February 2017) was heard by Harrison J on 1 March 2017. On 15 March 2017 his Honour found the contempt proved (*Doe v Dowling* [2017] NSWSC 202) and on 10 August 2017 his Honour imposed a sentence of imprisonment for four months commencing that day and expiring 9 December 2017 (*Doe v Dowling* [2017] NSWSC 1037).

11 On 27 March 2017 the defendant was separately charged by the Prothonotary with contempts committed on 3 and 5 February 2017. On 3 February 2017, during a mention of these proceedings before a registrar, the defendant made scandalous allegations against that registrar and against a judge of the Court. He made a video recording of the proceedings. Later that day a charge of contempt was laid and a judge made an order prohibiting publication of what had occurred in the registrar's court. The defendant was notified of the charge and the non-publication order. In defiance of the order, on 5 February 2017 he published on his Kangaroo Court of Australia website the video recording of the proceedings and an article concerning the contempt charge against him. After hearing in May 2017 Wilson J found three charges of contempt proved on 3 August 2017: *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664. On 22 August 2018 her Honour imposed an aggregate sentence for the three contempts of imprisonment for 18 months commencing that day, with a non-parole period of 13 months to expire on 21

September 2019. This sentence was subsequently reduced on appeal to 4 months, which expired on 21 December 2018*: Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 340.

Pleadings

12 The defendant filed a defence on 23 February 2017. This addressed only the original statement of claim and therefore did not deal with the plaintiffs' allegations concerning the second and third published matters. On 4 April 2018 the defendant was directed to file his defence to the amended statement of claim by 27 April 2018. He filed a pleading on 20 April 2018. This was struck out on 17 August pursuant to r 14.28(1) of the *Uniform Civil Procedure Rules 2005* ("UCPR"): *Doe 1 v Dowling* [2018] NSWSC 1278. The defendant has not attempted to file another defence.

13 In the defence filed 23 February 2017 some admissions were made but the pleading was qualified by the statement within it that the defendant was "only guessing" the identity of the first two plaintiffs', a reference to the first two defendants' student is, Jane Doe 1 and Jane Doe 2. As a result, some apparent acknowledgements in the pleading cannot be relied upon as containing pleaded admissions. However, the defence was verified on affirmation. The Court may rely upon any clear admissions of fact within it as evidence of the truth of those matters.

14 In par 3 of the defence the defendant has admitted an allegation in the original statement of claim that he "is the registrant of the domain name 'kangaroocourtofaustralia.com' and the publisher of a website connected to that domain name called Kangaroo Court of Australia". In further response to that paragraph the defendant pleaded:

> I own and publish the judicial corruption website Kangaroo Court of Australia.

15 At par 4 of the defence the defendant admitted that on or about 21 December 2016 he published on his website the first of the matters complained of, the 21

December article. He pleaded affirmatively that the precise publication date was 20 December 2016.

Issues

16 On the state of the pleadings described above the issues to be decided are as follows:

(1) In respect of the 21 December 2018 article:

(a) (It being admitted by the defendant that the article was published on his website) was it downloaded by at least one person?

(b) Was the article published of and concerning the first and second plaintiffs?

(c) Did the article convey the defamatory imputations against the first and second plaintiffs as pleaded in the amended statement of claim?

(d) As a result of the publication were the first and second plaintiffs brought into hatred, ridicule and contempt and have they suffered loss and damage to reputation and injury to feelings?

(e) Is a permanent injunction warranted, against continued or renewed publication of the impugned matter?

(2) In respect of the 19 February 2017 article:

(a) Was the article published on the defendant's website and downloaded by at least one person?

(b) Was the article published of and concerning the plaintiffs?

(c) Did the article convey the defamatory imputations against the plaintiffs as pleaded in the amended statement of claim?

(d) As a result of the publication were the plaintiffs brought into hatred, ridicule and contempt and have they suffered loss and damage to reputation and injury to feelings?

(e) Is a permanent injunction warranted, against continued or renewed publication of the impugned matter?

(3) In respect of the secondary article:

(a) Was the article published on the defendant's website and downloaded by at least one person?

(b) Was the article published of and concerning the plaintiffs?

(c) Did the article convey the defamatory imputations against the plaintiffs as pleaded in the amended statement of claim?

(d) As a result of the publication were the plaintiffs brought into hatred, ridicule and contempt and have they suffered loss and damage to reputation and injury to feelings?

(e) Is a permanent injunction warranted, against continued or renewed publication of the impugned matter?

Defendant's purported election for jury trial

17 At the commencement of the final hearing the defendant claims to have made an election for jury trial pursuant to s 21 of the *Defamation Act 2005* (NSW). That section is in these terms:

> **21 Election for defamation proceedings to be tried by jury**
>
> (1) Unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.

(2) An election must be:

(a) made at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried, and

(b) accompanied by the fee (if any) prescribed by the regulations made under the Civil Procedure Act 2005 for the requisition of a jury in that court.

(3) Without limiting subsection (1), a court may order that defamation proceedings are not to be tried by jury if:

(a) the trial requires a prolonged examination of records, or

(b) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

18 The rules of this Court concerning the time and manner of electing trial of a defamation action by jury are contained in r 29.2A of the UCPR, as follows:

29.2A Elections for juries in defamation proceedings

(1) An election under section 21 of the Defamation Act 2005 for defamation proceedings to be tried by jury must be made by filing a notice of election for a jury trial and serving the notice on each other active party in the proceedings.

Note. Section 21 (2) (b) of the Defamation Act 2005 requires an election to be accompanied by the fee prescribed by the regulations under the *Civil Procedure Act 2005* for the requisition of a jury in the court concerned.

(2) A party may file and serve a notice of election for a jury trial only if:

(a) the party has served a notice of intention to file the notice of election on each other active party before a date has been fixed for the hearing of the defamation proceedings, and

(b) a notice of motion has not been filed under subrule (4) or, if such a notice of motion has been filed and served, the court has refused to make the order sought in the notice of motion.

(3) A party who serves a notice of intention to file a notice of election for a jury trial must, before a date has been fixed for the hearing of the defamation proceedings, inform the court that the notice of intention has been served.

(4) A party on whom a notice of intention to file a notice of election for a jury trial is served may, within 21 days of being served with the notice, file a notice of motion seeking an order under section 21 of the Defamation Act 2005 that the proceedings not be tried by jury.

(5) If a notice of motion is filed under subrule (4), a date may not be fixed for the hearing of the defamation proceedings until the court has disposed of the motion.

(6) Without limiting subrule (2), a notice of election for a jury trial may not be filed or served if:

(a) the court makes an order under section 21 of the Defamation Act 2005 (whether or not of its own motion) that the defamation proceedings not be tried by jury, or

(b) a date has been fixed for the hearing of the defamation proceedings.

19 The date for final hearing of the action was fixed by order of the Chief Judge made on 17 May 2019. The defendant had not served upon the plaintiffs by that date a notice of intention to elect for jury trial as required by r 29.2A(2)(a). In fact the defendant has never served a notice of intention. The first mention by him of trial by jury was on 26 July 2019 when he caused this proceeding to be included in that day's defamation list. At that time it was pointed out to the defendant that he had not made an election and that he would need an extension of time in which to do so. No application for extension of time was before the Court that day and accordingly no action was taken on the subject of trial by jury.

20 On 31 July 2019 the defendant emailed to the plaintiffs' solicitor a signed election for trial by jury dated that day. His covering message stated that he had applied to the registry for waiver of the fee payable on the election and that if the fee was waived, which he hoped would occur within two weeks, he would then file and serve the election. This email paid no heed to the requirement in r 29.2A of a prior notice of intention to elect, or to the need for an extension of time, of which he had been informed in open court five days earlier.

21 In those circumstances the plaintiff's application at the commencement of the trial was incompetent. Even at that time he did not apply for an extension of time within which to give notice of intention to elect. In any event no extension would have been granted, either on 26 July 2019 or on the first day of the hearing, if applied for. There has never been placed before the Court any evidence to explain the defendant's failure to comply with the time limits in r

29.2A. Further, the case was listed for 26 August 2019 on the basis of an estimate of two days hearing time. If the trial was to be by jury the estimate would have to have been increased. In that event it could not have proceeded on 26 August but would have to have been relisted either very late in 2019 or early in 2020. That would constitute a significant prejudice to the plaintiff.

22 The reason the case would take longer if tried by jury has to do with the personal characteristics of the defendant and the manner in which he conducts court proceedings on his own behalf. On numerous previous occasions the defendant's behaviour in Court has been disruptive and abusive. The events of 3 February 2017 that resulted in him being prosecuted for contempt was his worst day but he is usually intemperate and given to outbursts. The defendant is demonstrably ignorant of the law of defamation and of procedure. He is consistently irrational and unable to be relevant to the issues in court proceedings. The defendant has a strong tendency to fixate on certain subjects, none of which have anything to do with these proceedings. He dilates endlessly and repeatedly on these matters. A jury trial of any proceeding involving the defendant would be frequently interrupted by the jurors having to retire so that the defendant's irrelevancies could be sorted out. There would be a need for frequent directions to disregard his abusive and scandalising conduct, which he is unwilling or unable to control.

23 Further, it would have been futile to extend time for the service of a notice of intention to elect a jury trial because, having regard to the defendant being self-represented and unable to conduct his defence in an orderly and competent manner, the Court would invoke s 21(1) of the *Defamation Act* to order that he not be permitted to elect for jury trial. The characteristics of the defendant to which reference has been made would render it extremely difficult if not impossible to get through a trial by jury without the jurors being exposed to inadmissible and prejudicial statements and conduct. The additional cost to the plaintiff of a protracted hearing, with the risk of the trial being aborted due to the defendant's disruptive behaviour, and the additional burden on the public of the additional court time that would be required are further considerations.

24 The following extracts from the transcript on the morning of 26 August 2019 capture the defendant's submissions concerning trial by jury:

> DEFENDANT: [...] they've got no evidence to support their claim. [...] that's a clear factor that's a clear factor. That's why they don't want a jury. They've got nothing not a shred of evidence to support their claim. That's why they don't want a jury.
>
> HIS HONOUR: I don't think it's material why they don't want a jury or why you do but it's a procedural question. To have a jury you have to serve notice of your intention to elect for a jury before the case is set down and this case was set down in May.
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> DEFENDANT: [...] I'm the one who had to have it set down this year. They ignored me. They ignored my emails. [...] They were the ones refusing to have this matter set down, not me. I'm the one who drove and I've got the evidence here to back it up.
>
> HIS HONOUR: Let me assume that that's so. You drove it and you got it set down on whatever date it was listed [...] in May and you got it set down without having given notice of your intention to elect a jury.
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> DEFENDANT: Well, I'm not an expert in the law. I figure a jury would be forthcoming.
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> HIS HONOUR: Well, you're wrong.
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> DEFENDANT: You're not listening to me, you're jumping down my throat without even giving me an opportunity. You've heard the precedents and unless there's an extremely good reason you wouldn't be given that extension of time. Well, in this matter there is no greater reason, than the fact [...] there's no justification for a suppression order and non publication orders [...] and I've got [Leeming JA's] judgment here but I did gaol time in this matter for breaching suppression orders. Now, in a situation like that, in open justice, this Court should be taking every opportunity to make sure that nature justice is done, not the other way around. I did four months gaol last year for [the contempt prosecuted by the Prothonotary] ...
>
> I deny saying it but I was convicted of it anyhow [...]. Now, at the time, when I was gaoled last year, I appealed and I sought bail.
>
> HIS HONOUR: Has this got anything to do with the jury?
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> DEFENDANT: [After citing a judgment of Leeming JA concerning the importance of transparency with respect to prosecutions for contempt:] Now, the gaol time I did in relation to this matter isn't completely transparent and it should have been. It becomes, even more scandalous when they rock up to a final hearing with no evidence to support their claim because everyone knows I was stitched up. They never had any justification for the suppression orders and non publication orders in the first place, but even if they did have justification [...] it has to be open justice. Now, [Leeming JA is] talking about that issue. I'm talking the jury. It's a similar situation. Every opportunity has to

> be afforded to me to make out my defence, including the jury because I did gaol time, it's as simple as that ...
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> [...] In this situation, having a jury, is safe guarding, not open justice, but the reputation and credibility of this Court. [...]
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> That is key to a jury. I did gaol time. Once I did gaol time, it's game over, everything has to be done in the open and transparent manner because if it's not, it just damages the credibility of this Court. Now, I'll go outside and I'll write an article. Once again, I was denied a jury. Once again, they showed up with no evidence [...] they have no case. No case at all. The only reason the case is before the Court is because they used hearsay evidence of Richard Keegan, their lawyer, for the initial application but hearsay evidence isn't allowed at the final hearing. So, they've got no evidence, not a shred to support their claim and we're even actually wasting this Court's time actually hearing it and the reason we're doing that is because there's a big cover up with [the plaintiffs' employer], massive fraud going on there, sexual harassment, drug use.
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> [...] So, the bottom line is, to the jury, once I did gaol time, that's it, everything has to be done in an open and transparent manner and I need to be given every opportunity to defend myself. As far as the jury, in the technical viewpoint, I went and filed it, thinking I'd filed the right paperwork and I don't have the money to pay for a jury. I asked you to order it last time. You could order them to pay for it, your Honour. Nothing wrong with them paying for it. They've got a multi million dollar company. Even more so, they just rock up here with no evidence. That's a national scandal, they're not working on a book.

25 These submissions are entirely beside the point. They typify the defendant's inability to address the law applicable to any aspect of the proceedings and his preference for self-righteous fulmination upon topics that preoccupy his mind but are not otherwise under discussion. For the reasons given at [17]-[23] above it was ruled at the commencement of the hearing that in the absence of an election for a jury in compliance with r 29.2A, the proceeding would be heard and determined by judge alone.

Application for removal to the High Court

26 On 26 June 2019 the defendant filed in the High Court an application to have these proceedings and two others removed there. He asserted that the listing of the proceeding before this Court for final hearing was:

> "only rushed forward when [the plaintiffs] were, sort of, on notice that I was about to file the claim in the High Court. So to proceed with this today could be construed as an interference of an administration of justice of the High Court of Australia which would be very disturbing ...

27 I interpreted the defendant's submissions regarding his proceedings in the High Court as an application for adjournment of this matter pending a decision by that Court. As at 26 August 2019 no order had been made in the High Court staying the plaintiffs' action in this jurisdiction. There is no rule or statutory provision that effects an automatic stay upon an application for removal to the High Court being filed. Accordingly I refused to adjourn the hearing on this basis.

Application for recusal for perceived bias

28 Before the hearing proper had commenced on 26 August 2019 the defendant submitted that I should recuse myself because I had exhibited bias against him in another proceeding, namely, Capilano Honey Ltd v Dowling (No 2016/299522). That matter was before me in the defamation list on 26 July 2019 when an application was made by the plaintiff pursuant to r 14.28 of the UCPR to strike out a defence that had been filed by the defendant. I had reviewed the pleading with some care before hearing the application. It was manifestly and hopelessly non-compliant with the rules and insupportable. When the matter was reached in the list I heard submissions from the plaintiff's counsel and then indicated that I was disposed to make the order. The defendant protested that he had not been heard. I refrained from making a final decision or pronouncing an order until he had made his oral submissions. As could be expected from a review of the pleading, the defendant was unable to sustain it. I ordered that the pleading be struck out and gave brief reasons: *Capilano Honey Ltd v Dowling* (unreported, Supreme Court of New South Wales, Fagan J 26 July 2019).

29 A reasonable observer aware of all relevant facts could not conclude from the peremptory manner in which I dealt with the defendant's pleading in Capilano Honey Ltd v Dowling that I would not approach the present case with an open mind. The reasonable observer would have regard to the rules and principles of pleading, the patent deficiencies of the defence that was before me in Capilano Honey Ltd v Dowling on 26 July 2019 and my reasons for striking it out. My conclusion, based upon technical procedural considerations, that a

pleading drafted by the defendant in another case was non-compliant with the UCPR could not conceivably indicate a possibility of pre-judgment or bias with respect to the factual and legal merits of an entirely separate proceeding. The judgment upon the defendant's pleading in Capilano Honey Ltd v Dowling self-evidently had nothing to do with assessment of his credibility or reliability as a witness or with his character or conduct. I therefore declined to recuse myself from the final hearing of this action.

Application to strike out for want of prosecution

30 At the commencement of the final hearing the defendant said that he wished to make a "want of prosecution application". He had previously referred to this on 17 May 2019 when the matter was before the Chief Judge in the defamation list. His Honour directed that any application for relief in relation to want of prosecution should be listed to be heard on 26 August 2019 when the final hearing of the plaintiff's action was also listed. The defendant has never filed or served a notice of motion for this purpose or any supporting affidavit or other evidence or submission. Notwithstanding the absence of a formal application, I reviewed the chronology of the proceedings and received oral submissions from the defendant. The defendant's oral application for the proceedings to be struck out for want of prosecution was dismissed and the Court's reasons were reserved.

31 The proceedings have been constituted in their present form since 21 February 2017 when the third and fourth plaintiffs were joined in the amended statement of claim that was then filed. The defendant cannot attribute fault to the plaintiffs for delay in progressing the proceedings during 2017. In the first half of the year the parties' litigious efforts were directed to contesting continuance of Walton J's interlocutory injunction of 22 February 2017 and the orders prohibiting publication of the plaintiffs' names. The defendant was also engaged during May 2017 in defending the contempt charges brought against him by the Prothonotary. Both parties were engaged with the plaintiffs' prosecution of the defendant for breaching the interlocutory injunctions and

from 10 August 2017 to 9 December 2017 the defendant was serving his term of imprisonment for that contempt.

32 The defendant did not file a defence to the amended statement of claim for over a year. He eventually filed one when ordered to do so on 20 April 2018. Progress of the proceedings was then further held up until 17 August 2018 when the Court ruled on the plaintiffs' application to strike out that pleading. Then the defendant was imprisoned again from 22 August until December 2018, upon his conviction for the contempts charged by the Prothonotary. Without any further significant delay, on 17 May 2019 final hearing date was fixed.

33 This chronology does not disclose any material want of prosecution on the plaintiffs' part, let alone sufficient to warrant staying or dismissing their claim.

Publication of the articles

34 Publication of the 21 December 2016 and 19 February 2017 articles depends upon them having been accessed and viewed on the plaintiff's Kangaroo Court of Australia website. The plaintiff has not adduced evidence to prove comprehensively how many times the three impugned articles have been viewed online, however screenshots of the website have been tendered showing that comments were left by people who had read the articles. There is circumstantial evidence from these posted comments that the 21 December 2016 article was at least a read by a resident of Tasmania and a resident of Queensland and that the 19 February 2017 article was at least read by the same resident of Tasmania and a resident of New South Wales. In the absence of any evidence to the contrary I draw the inference, which the posted comments support, that these first two articles were read by at least the said residents of Tasmania, Queensland and New South Wales.

35 The secondary article was published on a website identified as "kerrystokes.net". Parts of it were incorporated in the 19 February 2017 article. The 19 February 2017 article also included, at the end of the extracted portions, a hyperlink to the secondary article, labelled "click here to read

more". I am satisfied by that by the inclusion of the hyperlink the defendant accepted responsibility for the content of the secondary article. The defendant's approval and adoption of the secondary article is signified by the placement of the hyperlink together with an extracted quotation: see *Urbanchich v Drummoyne Municipal Council* [1991] Aust Torts Reports 81-127; *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350 at [29]-[30].

Imputations conveyed by the 21 December 2016 article

36 The 21 December 2016 article is headed with the names of the CEO and of a former employee, together with the words "SEX SCANDAL". The article asserts that the former employee had issued a media release concerning her alleged affair with the CEO. The article incorporates what purports to be the full text of the media release, being a detailed account of an alleged affair in the workplace of the corporation. In one paragraph of the article the author writes:

> There are reports that [the CEO] has had sexual relationships with at least 4 other staff members at [the corporation] which include an [job title 1] and [job title 2]. I am reliably told the [job title 1] is [first plaintiff] and the [job title 2] is [second plaintiff].

37 Later passages in the article described the CEO as "a married father of four" and "a regular church goer [sic] who lives at [suburb] with his family". The article states that the former employee who had issued the media release had "sent several heated texts to [the CEO] allegedly [sic] multiple affairs with other women previously and currently employed at [the corporation]".

38 The imputations alleged to be carried by the article are pleaded, with respect to each of the first and second plaintiffs, in the following terms:

(1) The plaintiff has been in an adulterous relationship with the CEO.

(2) The plaintiff behaved disgracefully in that she had an affair with a man she knew to be married.

39 The entire article is the equivalent of approximately seven A4 pages of text. In order to determine whether the alleged imputations are conveyed, the whole article must be considered, reading the parts most material to the plaintiffs' case in their context: *Greek Herald Pty Ltd v Nikolopoulos* & Others (2002) 54 NSWLR 165; [2002] NSWCA 41 at [26]-[27]. The question is whether the alleged meaning would be taken from the article by the ordinary reasonable reader of fair average intelligence, who was neither perverse, nor morbid or suspicious of mind, nor avid for scandal; who does not live in an ivory tower but can and does read between the lines in the light of general knowledge and experience of worldly affairs: *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158; [1998] NSWSC 4 at p164-165.

40 Following the approach sanctioned by the above authorities I have no hesitation in finding that both pleaded imputations are conveyed by the article in respect of each of the first and second plaintiffs. Their names are given as two of the total of five women working in the one corporation who have had "sexual relationships" with the CEO. The article conveys that the CEO's marital status is a widely known fact that would certainly be within the knowledge of any woman working the organisation who engaged in sexual relations with him. The assertion that the CEO had "multiple affairs with other women previously and currently employed at [the corporation]" invites inclusion of the first and second plaintiffs, identified earlier in the article, as two of the "other women". The proposition that the CEO had "affairs" with them would naturally and reasonably convey to the ordinary reader that these were relationships that they knew to be with a married man.

41 I find it equally clear that the proved imputations are defamatory. The reputations of both plaintiffs would be lowered, in the eyes of those who are acquainted with them and in the opinion of the public, by the imputations that they carried on sexual relations with a married man and that they did so knowing him to be married. I have considered the discussion of circumstances in which such imputations might not be considered defamatory in *Cairns and Morosi v John Fairfax & Sons Ltd* (1983) 2 NSWLR 708 and *Random House Australia Pty Ltd v Abbott* [1999] FCA 1538. There is nothing in the

circumstances or status of the first and second plaintiffs or of the CEO that would convert the imputations conveyed by the 21 December 2016 article into an enhancement of reputation. Unlike the parties in *Cairns and Morosi v John Fairfax & Sons Ltd*, the first and second plaintiffs are not persons of whom it could be said, in Hutley JA's words, that "passions between the powerful and glamorous may have a quality which transcends middle-class morality".

Imputations conveyed by the 19 February 2017 article

42 The 19 February 2017 article again names the former employee of the corporation whose alleged media release, concerning her affair with the CEO, was the subject of the 21 December 2016 article. This second article equates to approximately four A4 pages of text. The first relevant passage commences with reference to Campbell J's orders of 21 December 2016, as follows (paragraphs numbered for ease of reference):

> 1 [The first and second plaintiffs] took out a suppression order against me when I named [them] as 2 of the women named in [the former employee's] legal documents before the Australian Human Rights Commission in her dispute with [the corporation]. [...]
>
> 2 Yet when I named [the third and fourth plaintiffs] as the other 2 women named by [the former employee] in the legal documents in the post a few weeks ago [the corporation] didn't even complain to me let alone take legal action.
>
> 3 [There are inserted captioned photographs of the third and fourth plaintiffs].
>
> 4 The key point about [the corporation] failing to take action when I named [the third and fourth plaintiffs] is that everything that the [former employee] has said is being proven to be true and correct because the only thing that [the corporation] are challenging in court is me naming [the first and second plaintiffs].
>
> 5 That means [the corporation is] run by [the CEO] who, based on the allegations, is a drugged out sex fiend that has committed massive fraud with shareholders funds. For whatever reason [the corporation] are refusing to challenge that.
>
> 6 Or as [an interviewee on television said] "Well, basically that she had a two-year affair with the CEO, often on company time, cocaine during the affair, misuse of credit cards right across the company, and a CEO who had relationships with four other women involved in [the industry or at the corporation]. So, basically that he was a drug taking, womanising CEO misusing company resources [...]".

7 One has to wonder how much have [the third and fourth plaintiffs] been paid to stay silent and how many others have been paid given News Corp said they know of least Seven women [the CEO] has had affairs with at [the corporation].

43 The portions of the secondary article extracted in the 19 February 2017 article are as follows:

8 It was [the fourth plaintiff] who had loud shouting arguments with [the CEO] in the [corporation] offices in front of many staff during the affair. After one argument too many she was promoted to [a senior position] which was a very odd promotion given her employment history and seen by many as a payoff to keep silent about the affair with [the CEO].

9 [The principal of the corporation] wants shareholders and the public to believe that the sex scandal only involves [the CEO and the former employee] and that it is old news that happened 2½ years ago. But there are very serious allegations of multi-million dollar fraud by [corporation] management that [the principal and directors] are trying to bury and refusing [to] address. The 4 women named would almost certainly have knowledge of or involvement in the financial fraud and should issue a public statement saying what they know. (Click here to read more)

44 The first and second plaintiffs plead that there are conveyed by the 19 February 2017 article the same imputations against them as are conveyed by the 21 December 2007 article. Applying the principles earlier identified, I accept that submission. Paragraphs 5, 6 and 7 convey that four women have had "relationships" or "affairs" with the "sex fiend", "womanising" CEO. Paragraph 1 names the first and second plaintiffs as two of the women who have been identified in the former employee's allegations in paragraph 4 purports to emphasise the truth of these allegations. Although this article does not in terms refer to the CEO's marital status the repeated use of the word "affair" is quite sufficient, in the context, to convey that all the alleged sexual relationships are said to have been extra-marital.

45 The third and fourth plaintiffs plead that the 19 February 2017 article conveys against each of them that "while an employee of [the corporation, she] had been in an inappropriate sexual relationship with [the CEO]". That is clearly conveyed by paragraph 2, identifying the third and fourth plaintiffs as the "other 2 women named by [the former employee]". Paragraphs 5 and 6 make it clear what being the "other two women" means, namely, that the "sex fiend",

"womanising" CEO had "relationships" with them. The speculation in paragraph 7 that the third and fourth plaintiffs may have been "paid to stay silent" reinforces that they are said to have had "affairs" of an illicit nature. Paragraph 8 conveys more to the same effect with respect to the third plaintiff.

46 All of the imputations as alleged by the plaintiffs arise out of the 19 February 2017 article and all of them are defamatory. Far from there being anything in the context to convey that the alleged sexual relationships might indicate attractiveness, power, glamour or other positive characteristics, the tone of the article is to paint the alleged sexual activity on the part of all of the supposed participants as debauched.

Imputations conveyed by the secondary article

47 The secondary article contains the following:

> a [The corporation] have confirmed the names of 2 more women who have allegedly had sexual relationships with [the CEO]. But this time they are not challenging it in court which they have done for [the first and second plaintiffs] even though they threatened to.
>
> b This seems to be an admission that [the CEO] did have sexual relationships with current [corporation employees] [the third and fourth plaintiffs].
>
> c [Paragraph 8 at [43] above].
>
> d All 4 women were named in legal documents in the Australian Human Rights Commission by [the former employee] who also made wide ranging allegations of sex, drug use and fraud using shareholders funds during the work hours by [the CEO]. To date the only thing [the corporation] have challenged in court are the names of [the first and second plaintiffs] which suggests that everything [the former employee] has claimed is true.
>
> e [Paragraph 9 at [43] above].

48 The plaintiffs allege that the secondary article conveys against each of them the same imputations as are said to arise from the 19 February 2017 article. I accept that this is so. Paragraphs a and b alone are sufficient to convey the imputation of participation in illicit sexual relationships against each plaintiff. The imputations are, for reasons given in relation to the other articles, defamatory.

Defence arguments

Justification

49 In his defence of 23 February 2017 the defendant alleged that "each of the Contextual Imputations was substantially true". This was apparently intended to be a reference to the imputations conveyed by the 21 December 2016 article as pleaded by the first and second plaintiffs in the statement of claim as originally filed. No evidence has been adduced to prove the truth of those imputations. No defence of justification has been pleaded or otherwise asserted in relation to the imputations against all four plaintiffs conveyed by the subsequent articles. The result is that a defence of justification is either not pleaded or, if pleaded, not proved, in respect of any of the imputations.

Absolute privilege

50 Also in the defence of 23 February 2017 the defendant alleged that the 21 December 2016 article "is covered by the defence of absolute privilege as it has already been published in the Australian Human Rights Commission". In written submissions filed by leave after the hearing defendant asserted this defence in relation to all three published matters. He submitted that the four plaintiffs were "named" in a complaint lodged with the Australian Human Rights Commission ("AHRC") by the former employee. The defendant says that in this complaint the former employee alleged the corporation had discriminated against her. By his use of the word "named" the defendant apparently means that the complaint filed by the former employee contained allegations that each of the plaintiffs was at some time in a sexual relationship with the CEO.

51 There has been no admissible evidence tendered to prove what the former employee may have communicated to the AHRC. The only evidence about proceedings in that Tribunal is a letter dated 17 March 2017 from a delegate to the President of the Commission, addressed to the corporation's solicitors. This was tendered by the plaintiff. It states that the former employee filed a complaint alleging unlawful discrimination by the corporation, contrary to the

Sex Discrimination Act 1984 (Cth) and the *Disability Discrimination Act 1992* (Cth), and that in March 2017 the complaint was terminated on grounds prescribed in s 46PH(1) of the *Australian Human Rights Commission Act 1986* (Cth). The grounds referred to in the letter are as follows:

> **46PH Termination of complaint**
>
> Discretionary termination of complaint
>
> (1) The President may terminate a complaint on any of the following grounds:
>
> (c) the President is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted;
>
> (d) in a case where some other remedy has been sought in relation to the subject matter of the complaint--the President is satisfied that the subject matter of the complaint has been adequately dealt with ...

According to the letter, three out of four aspects of the former employee's complaint were found to be "lacking in substance and/or misconceived".

52 The defendant relies upon the following parts of s 27 of the *Defamation Act*:

> **27 Defence of absolute privilege**
>
> (1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.
>
> (2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if:
>
> (b) the matter is published in the course of the proceedings of an Australian court or Australian tribunal, including (but not limited to):
>
> (i) the publication of matter in any document filed or lodged with, or otherwise submitted to, the court or tribunal (including any originating process) ...

53 In s 4 of the *Defamation Act* "Australian tribunal" is defined as follows:

> ***Australian tribunal*** means any tribunal (other than a court) established by or under a law of an Australian jurisdiction that has the power to take evidence from witnesses before it on oath or affirmation (including a Royal Commission or other special commission of inquiry).

The AHRC falls within this definition.

54 The defence under s 27 is only available "on an occasion of absolute privilege". The filing of the former employee's complaint with the AHRC would have been such an "occasion". But if, as the defendant asserts, he republished on his Kangaroo Court of Australia website the content or substance of the complaint, his doing so was certainly not "an occasion of absolute privilege". His reliance upon s 27 is misconceived.

Qualified privilege

55 In the defendant's closing submissions he purported to invoke the defence of qualified privilege under s 30 of the *Defamation Act*. In order to express reasons why this defence is not available to him it is sufficient to quote the following extracts of the section:

> **30 Defence of qualified privilege for provision of certain information**
>
> (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that:
>
> (a) the recipient has an interest or apparent interest in having information on some subject, and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

56 It is sufficient to dispose of this defence that the defendant also has satisfied subs (1)(c). As he does not contend that any of the defamatory imputations were true, he could not establish that his conduct in publishing them was reasonable without proof that he made some attempt to verify the content before publishing the articles: *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at pp 361B, 362G-365C. That was a decision of the Privy Council on s 22 of the *Defamation Act 1974* (NSW) (repealed), which was in materially the same terms as s 30 of the current Act. Subsection (3) of s 30 permits the Court to take into account, among other things, the following

matters when determining the reasonableness or otherwise of the defendant's conduct:

> (g) the sources of the information in the matter published and the integrity of those sources, and
>
> (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and
>
> (i) any other steps taken to verify the information in the matter published.

57 The allegations in the three articles concerning the plaintiffs had nothing to do with any person's discharge of public office or performance of public duties. The allegations were seriously damaging to the individuals concerned. There was no public interest in expeditious publication. In those circumstances the failure of the defendant to make any enquiry as to truthfulness before putting the articles on his website is a dominant factor, indicating unreasonableness on his part. During an interlocutory hearing in these proceedings, on 10 March 2017, the defendant admitted to McCallum J that he had never spoken to any of the plaintiffs or to the CEO with whom each of them was said to have had an affair or to the former employee who he claims first made the allegations.

58 In the Australian vernacular a "kangaroo court" is an unofficial tribunal that makes peremptory decisions unfairly and without sound evidence. The title has proved apt for the website on which the defendant published the offending articles. For the defamatory imputations against the plaintiffs the only source quoted (in the 19 February 2017 article) is a disaffected former employee of the corporation who is said to have formerly been a lover of the CEO. Lack of independent inquiry or substantiation appears on the face of the material. At the final hearing the defendant led no evidence to discharge his burden under of s 30(1)(c) of proving reasonable conduct in publishing these matters. His attempt to invoke the defence of qualified privilege fails.

The defendant's other submissions

59 The defendant's written submissions assert that imputations to the same effect as those conveyed by the three impugned articles have been widely

published by others. He appears to believe that this is a defence. But it is not. Also, throughout the hearing and repeatedly in his written submissions the defendant has characterised the plaintiffs' action against him as a "SLAPP lawsuit". He informed the Court that this acronym stands for Strategic Litigation Against Public Participation. This concept is evidently an obsession of the defendant, judging by the number of times he has referred to it in indignant terms and in an excitable manner. It has no technical legal meaning. The defendant did not identify any recognisable principle of law that he intended to bring to bear upon the case under this concept.

Damages

Absence of evidence from the plaintiffs on damages

60 No affidavit or oral evidence was given by any of the plaintiffs. I infer that publication of the three articles, conveying the defamatory imputations that I have found in them, would necessarily have caused damage to reputation and hurt to feelings. The occasioning of some damage is presumed: *Bristow v Adams* [2012] NSWCA 166 at [20]-[31]. The lack of evidence directly from the plaintiffs does not detract from the presumption.

61 If the plaintiffs had sworn affidavits or given oral evidence in chief they would have been exposed to cross-examination by the defendant. Their desire to avoid that experience is explicable on a basis that does not involve any doubt about the degree of damage caused by the defamation. I infer that they have justifiably sought to deny the defendant an opportunity to put scandalous questions to them, which would generate further damaging publicity. Equally justifiably, I have no doubt that the plaintiffs wished to avoid the unpleasantness of having to deal with the defendant's unremittingly obnoxious behaviour in court. During the defendant's several appearances before me he has consistently been aggressive, overbearing and rude toward everyone involved in the proceedings, including myself as presiding judge and opposing legal representatives. The plaintiffs' counsel has appeared against the defendant on numerous occasions in several proceedings. I have no doubt the plaintiffs would have wished to avoid being in a courtroom with him.

62 The plaintiffs relied upon affidavits of their solicitor. The defendant exercised his right to cross-examine the solicitor and put to him that he had been deliberately dishonest in various respects. These propositions were convincingly rejected. The defendant's allegations of dishonesty only revealed his own misunderstanding of events that had occurred in the course of these and other proceedings. The attack upon the solicitor's integrity was to no purpose as there was no aspect of his relevant evidence in chief that the defendant sought to have the Court disbelieve. This cross-examination was ineffectual and pointlessly offensive. It is little wonder that the plaintiffs sought to avoid a similar ordeal in circumstances where their case could be conducted without it.

Damage to reputation

63 While the plaintiffs' reticence to give evidence is understandable and does not support an inference against their case on damages, it does leave their case in a bare state. No evidence has been led to establish the total number of people who may have viewed the articles on the defendant's website. There is no evidence to suggest that the mainstream media have republished the articles. I infer that the interlocutory injunctions, granted at an early stage of the proceedings, have been effective to discourage republication. That will have minimised the damage to reputation.

Hurt to feelings

64 The plaintiffs did not adduce evidence from any friends, associates or colleagues of the plaintiffs who may have seen the articles and been affected in their view of the plaintiffs' character. Nor is there evidence of observation by friends or family to corroborate the degree to which the plaintiffs have suffered hurt to feelings. The plaintiffs sought to cover this aspect of their case by an affidavit of their solicitor reporting what each of them had told him about the hurt caused by the publications. With respect to each plaintiff the solicitor also deposed to his observation of continuing manifestations of anger and distress. This evidence was objected to by the defendant as hearsay.

65 The plaintiffs sought to have the solicitor's evidence in this respect admitted under s 66A of the *Evidence Act 1995* (NSW). That section excludes application of the hearsay rule to evidence of a previous representation (in this case, by each of the plaintiffs to the solicitor) if it is a "contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind". The relevant parts of the affidavit (Richard Keegan sworn 26 August 2019, pars 44-51) go well beyond the exception to the hearsay rule created by s 66A. Mr Keegan deposes that he was told by the plaintiffs things such as whether they had ever spoken to the defendant, their views of the defendant's possible wider agenda in publishing these allegations, their perception of the reactions of family friends and colleagues, difficulties felt in attending the workplace and so on.

66 To the extent that the solicitor's affidavit recounts the plaintiffs' descriptions of their anger and distress, they are admissible under s 66A. The additional representations deposed to, of the kind referred to above, are not admissible. The plaintiffs' anger and distress as described to the solicitor are no more than what I would infer in any event as a reaction to these articles being published on the internet, alleging sexual impropriety in the workplace with a senior executive. Any woman in the position of these plaintiffs would feel demeaned and lowered in the esteem of everyone who knows her by such assertions and would experience anger toward the perpetrator.

Assessment

67 Each of the plaintiffs has a single cause of action for each published article: s 8 of the *Defamation Act*. The first and second plaintiffs have three causes of action and the third and fourth plaintiffs each have two. Pursuant to s 39 the Court may award a single sum to each plaintiff for their multiple courses of action. The damages of each plaintiff are aggravated by conduct on the part of the defendant that has been improper and lacking in bona fides: *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643 at 660D (Samuels JA). His impropriety and lack of bona fides are manifest in the publication of these articles without the slightest attempt at verification and thereafter failing to

retract or apologise, while evidently well aware that he had no evidence of the truth of the imputations and when he ought to have known that he had no arguable defence.

68 Further, the defendant has maintained publication of all of the offending articles up to the present time in defiance of the interlocutory injunctions. He has published the names of the plaintiffs, in connection with the proceedings, in breach of orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW). The defendant has continued this defiance throughout the interlocutory stages of the case and has proceeded to the final hearing notwithstanding the judgment of McCallum J published on 19 December 2017 in which her Honour set out each of the defences that had been floated in argument for her and explain why none of them was sustainable: *Doe v Dowling* [2017] NSWSC 1793.

69 The defendant's submissions contain allegations of concerted legal action against him by the corporation in which the plaintiffs have been employed. Those submissions, taken together with the articles themselves, reveal an underlying and ongoing feud between the defendant and the corporation. He has inflicted serious collateral defamatory damage upon the plaintiffs in the course of this conflict with the corporation.

70 I do not distinguish between the plaintiffs with respect to the extent of damage they have suffered. Allowing for the aggravation of damages to which I have referred above, I assess damages in the sum of $150,000 for each plaintiff.

The justification for permanent injunctions

71 The plaintiffs seek permanent injunctions that would require removal of the offending articles from the defendant's website, where they are still displayed, and to prohibit future publication of the same or substantively similar imputations. In *Hockey v Fairfax Media Publications Pty Limited (No 2)* [2015] FCA 750 White J stated the principles upon which a permanent injunction may be granted, after final hearing of a defamation action and award of

damages, to restrain publication of further defamatory matter. His Honour said:

> [15] Whatever be the position in England, permanent injunctions restraining a repetition of publication of matters found to be defamatory are not usually issued as a matter of course in this country. The authorities show that injunctions are issued only when some additional factor is evident, usually, an apprehension that the respondent may, by reason of irrationality, defiance, disrespect of the Court's judgment or otherwise, publish allegations similar to those found to be defamatory unless restrained from doing so: *Higgins v Sinclair* [2011] NSWSC 163 at [245]; *Royal Society for the Protection of Cruelty to Animals v Davies* [2011] NSWSC 1445 at [63]-[66]; *Polias v Ryall* [2014] NSWSC 1692 at [99]; *Sierocki v Klerek (No 2)* [2015] QSC 92 at [52]-[53].

72 In *Carolan v Fairfax Media Publications Pty Ltd (No 7)* [2017] NSWSC 351 and McCallum J cited the above quoted passage and surveyed comprehensively the Australian authorities on the subject. Her Honour's conclusion, consistent with that of White J, was expressed as follows:

> [15] In my view, as a matter of principle, the critical factor in determining whether to grant a final prohibitory injunction in aid of a claim for defamation should 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. Such an order should only be made where the court is satisfied that the order is reasonably necessary to address that threat or risk.

73 Here the defendant has continued his publication of the offending material for more than 2½ years while these proceedings have been progressing toward final hearing, subject to delays including four months while the defendant served his term of imprisonment for contempt of the interlocutory injunctions and another four months when he was imprisoned for scandalous contempt in the face of the Court. The defendant has exhibited "irrationality, defiance, [and] disrespect of the Court's judgment" in full measure. It is highly likely that he will maintain these seriously defamatory articles on his website in defiance of final injunctions, necessitating further enforcement action by the plaintiffs.

74 It is appropriate that the final injunctions granted should not be limited to a prohibitory form but should include mandatory injunctions or "takedown orders". In view of the defendant' lack of cooperation with the Court it would

be unrealistic to expect that the existing articles could be redacted or adjusted to remove reference to the plaintiffs or otherwise to eliminate the defamatory imputations, while permitting some part of the articles to remain on display. The only way an effective order can be framed to be capable of enforcement is in terms requiring takedown of the offending articles in their entirety.

75 Notwithstanding the expectation of continuing defiance by the defendant, permanent prohibitory and mandatory injunctions may be an efficacious means of enforcing the Court's decision in that they may be brought to the attention of mainstream media and will in all likelihood dissuade responsible media proprietors from publication of any material that would frustrate the orders against the defendant: *Attorney General v Leveller Magazine* [1979] AC 440; *Attorney-General v Times Newspapers* [1992] 1 AC 191 at p 219 (Lord Oliver of Aylmerton); *Kirkpatrick v Kotis* [2004] NSWSC 1265; (2004) 62 NSWLR 567 at [106]-[108].

Non-publication orders

76 The Court's attempt to protect the plaintiffs against ongoing damage from the defamatory articles during the interlocutory stages has had two aspects. The first form of protective relief has been injunctive orders against continuing publication of the articles themselves on the website. The second aspect has been orders prohibiting publication of the names of the plaintiffs in connection with the proceedings. The intent of the non-publication orders has been to avert further damage to the plaintiffs in the process of them seeking justice. Although both of these measures have been frustrated to some degree by the plaintiff's defiant breaches they have had an effect in dissuading other media from inflicting further damage, as might have occurred if the proceedings had been extensively reported using the plaintiffs' names.

77 Continuance of the non-publication orders now that the plaintiffs' action has been heard to finality is necessary for the same reason that permanent injunctions are required. I have no doubt that if unconstrained by Court order the defendant would not hesitate to publish on his website the names of the

plaintiffs, together with any aspect of the evidence that he may think would appeal to those of his readers who share his prurient interest in the sexual activities, real or imagined, of other people.

78 The non-publication orders that we continued on a permanent basis are no wider than is necessary to protect the plaintiffs. They would permit reportage of the issues litigated but not the plaintiffs' names. As McCallum J observed in *Doe v Dowling* [2017] NSWSC 1793 at [67] the principal reason non-publication orders have been required in this case is that, without them, the proceedings would likely be the subject of reporting in the mass media with repetition of the allegations against the plaintiffs, by name. Such reports (if fair) would be defensible notwithstanding that the original publication by the defendant was not. Without the protection of non-publication orders, widespread publicity for the defendant's indefensible defamatory imputations against the plaintiffs could result, undermining the Court's jurisdiction to prevent such harm. The public interest in enabling the plaintiffs to seek effective relief significantly outweighs the public interest in knowing their names.

Costs

79 The plaintiffs have been entirely successful and the defendant should pay their costs. These must be assessed on the indemnity basis. The defendant must have known that he had no real prospect of successfully defending the plaintiffs' claims. He has never at any stage articulated an arguable defence. His manner of conducting proceedings has caused unreasonable delay and additional expense. This has been due, in part, to his ineptitude with respect to substantive law and procedure. Other contributors to delay have been the defendant's contempt of court orders and his prosecution and imprisonment for that contempt and for his extravagant and insupportable allegations against the Court. The defendant prolonged the final hearing with irrelevant cross-examination, misconceived argument and irrational repetition of his fixated ideas.

80 In his original publication of the defamatory articles that gave rise to the plaintiffs' actions and in his conduct throughout the proceedings the defendant has made himself a significant public nuisance. He has imposed substantial cost upon the public by carrying on a dispute in which he has never been able to articulate the semblance of a defence, by defying orders and by disrupting the Court with contemptuous behaviour. To the extent that he has caused the plaintiffs to incur costs he should compensate them without deduction.

Orders

81 Upon this judgment being handed down judgment will be entered for each of the plaintiffs for damages of $150,000. A permanent non-publication order, permanent prohibitory injunctions and takedown orders will be made, all in the terms that were sought by the plaintiffs at the conclusion of the hearing as set out on the schedule to the plaintiffs' written submissions. The defendant will be ordered to pay the plaintiffs' costs of the proceedings on the indemnity basis.

****

I CERTIFY THAT THIS AND THE 35 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE JUSTICE FAGAN

.....

Associate.....TA..... Date.....20.9.19.