Common Law Division
Supreme Court
New South Wales

Case Name:	Capilano Honey Ltd v Dowling (No 4)
Medium Neutral Citation:	[2021] NSWSC 264
Hearing Date(s):	25, 26, 27 & 28 May and 3 June 2020
Date of Decision:	26 March 2021
Jurisdiction:	Common Law
Before:	Button J
Decision:	(1) Verdict and judgment for the first plaintiff in the sum of $25,000. (2) Verdict and judgment for the second plaintiff in the sum of $150,000. (3) Costs reserved.
Catchwords:	DEFAMATION — website and ancillary social media operated by defendant — assertions that company with which second plaintiff closely associated selling "toxic honey" — other assertions about second plaintiff directly — all imputations made out — no defences able to be relied upon — tort established — effect of implausible nature of statements on award of damages — damages awarded INJURIOUS FALSEHOOD — written online statements that corporate first plaintiff selling "toxic honey" — whether statements false — whether statements malicious — relevance of possibly sincere belief in truth of statements in determination of malice — difficulty in assessing quantum of damages to civil onus and standard of proof — damages awarded PERMANENT INJUNCTION — whether defendant should be permanently restrained from repeating statements and making similar statements — relevance of previous conduct of defendant in litigation
Legislation Cited:	*Defamation Act 2005* (NSW), ss 7(2), 35

Cases Cited:	*Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 *Australand Holdings Ltd v Transparency and Accountability Council Incorporated* [2008] NSWSC 669 *Born Brands Pty Limited & Ors v Nine Network Australia Pty Ltd & Ors* [2011] NSWSC 642 *Capilano Honey v Dowling (No 3)* [2019] NSWSC 539 *Capilano Honey Ltd v Dowling (No 3)* [2020] NSWSC 662 *Capilano Honey Ltd v Dowling* [2020] NSWSC 660 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; [1993] HCA 31 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519; [1998] HCA 37 *Dingle v Associated Newspapers Ltd* [1964] AC 371 *Doe v Dowling* [2019] NSWSC 1222 *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 *Moit v Bristow* [2005] NSWCA 322 *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388; [2001] HCA 69 *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664 *Trkulja v Google LLC* [2018] HCA 25; (2018) 92 ALJR 619 *Urbanchich v Drummoyne Municipal Council* (1991) Aust Tort Reports 81 *Zaia v Eshow* [2017] NSWSC 1540
Texts Cited:	Patrick George, *Defamation Law in Australia* (2nd edition, 2012, Lexis Nexis)
Category:	Principal judgment
Parties:	Hive and Wellness Australia Pty Ltd (First Plaintiff) Dr Ben McKee (Second Plaintiff) Shane Dowling (Defendant) (self-represented)
Representation:	Counsel: M A Cowden (Plaintiffs) Solicitors: Addisons Lawyers (Plaintiffs)
File Number(s):	2016/299522

Publication Restriction: Nil

JUDGMENT

Introduction

1 Hive and Wellness Australia Pty Ltd (formerly known as Capilano Honey Ltd, and hereinafter "Capilano") is the first plaintiff in these proceedings. It has brought a claim against Mr Shane Dowling (the defendant) for the tort of injurious falsehood. Damages are sought on the basis that all of the elements of the tort are established by Capilano on the balance of probabilities. Permanent restraining orders with regard to the publications said to establish the tort, along with any similar publications, are sought as well.

2 The chief executive officer (CEO) of Capilano is (and has been for some time) Dr Ben McKee. He is the second plaintiff in these proceedings, and has brought proceedings against the defendant for the tort of defamation. In the alternative, he proceeds against the defendant for injurious falsehood. Counsel (who appeared for both plaintiffs) made it clear at the hearing that, if I found the tort of defamation established in his favour, injurious falsehood was not to be additionally pressed by Dr McKee.

3 Again, with regard to both torts alleged by Dr McKee, the remedies sought were damages and permanent restraining orders.

4 In a nutshell, the proposition of the plaintiffs is that the defendant has posted material on a website, Facebook, and Twitter that is harshly critical of Capilano and Dr McKee. The website is entitled the Kangaroo Court of Australia ("the KCA"), and the Facebook and Twitter accounts are closely linked to it. The fundamental assertion of the defendant about which the plaintiffs complain is that Capilano is in the business of selling honey to Australian consumers that is dangerous to their health, and in particular not properly tested for contaminants. Dr McKee, in light of his central role in Capilano, claims that he is implicated indirectly in that state of affairs by the defendant, and also that he is the subject of direct assertions by the defendant about his bad character.

5 The publications that are the foundation of the alleged torts are eleven articles that the defendant is said to have digitally published between 17 September 2016 and 11 March 2017 on the KCA website, and that were repeatedly "linked to" and republished on the other social media.

6 The foundation of the claim of both plaintiffs for restraining orders is the conduct of the defendant in the past, said to demonstrate that, unless subject to serious sanction, he will do as he sees fit in the future, even if one or more torts are established and significant damages are awarded against him.

7 The defendant, who was self-represented before me, resisted the propositions that Capilano had established injurious falsehood; that Dr McKee had established defamation or injurious falsehood; that damages should be ordered against him; and that restraining orders of any kind should be made.

Important aspects of the proceedings

8 Two significant procedural and evidential aspects of the matter should be noted at this early stage.

9 The first aspect is that a series of preceding interlocutory decisions that were not the subject of appeal and that I regarded as binding upon me at the hearing had the effect that the disputed matters and defences upon which the defendant could rely were extremely limited: see *Capilano Honey v Dowling (No 3)* [2019] NSWSC 539 (Hoeben CJ at CL), *Doe v Dowling* [2019] NSWSC 1222 (Fagan J), and *Capilano Honey Ltd v Dowling (No 3)* [2020] NSWSC 662 (Button J). As a result of those judgments, the pleaded defence upon which the defendant was required to rely at the hearing had become very restricted indeed.

10 I shall expand on the consequences of that when I turn to summarise the nature of the interaction of the statement of claim, as it was pressed at the conclusion of the hearing, and the defence as it was placed before me at its commencement ("the extant defence").

11 The second aspect is that, although he relied upon portions of the voluminous evidence tendered by the plaintiffs, the defendant did not place any oral or documentary evidence before me in his own case. In particular, he did not place before me any evidence in his own case — whether emanating from himself, any kind of expert evidence, a medical doctor, an unwell person, or anyone else — to say that the honey in question actually is, or even may be, "toxic".

12 The result of those two aspects of the matter is that the matters calling for my determination are in truth reasonably circumscribed, legally and evidentially.

The publications upon which the claims are based

13 I proceed to refer to the eleven publications that are the nub of the claims of the plaintiffs by their headings, and to provide a very brief flavour of their contents. Although they all appeared on the KCA website, as I have said, they were also repeatedly reposted by way of the associated Facebook and Twitter accounts.

14 The first publication is an article entitled "Australia's Capilano Honey Admit Selling Toxic And Poisonous Honey To Consumers" (hereinafter, "toxic and poisonous honey"). An example of its contents is the opening paragraph: "Capilano Honey are putting the lives of Australians at risk by knowingly selling honey that is full of antibiotics, toxins, irradiated pollen from China and alkaloids". The article also states that "Ben McKee has used the company's Facebook page to spread lies and deliberately defame" Mr Simon Mulvany, another person who was said to have raised questions about the safety of the products of Capilano. A heading within the article is entitled "The lies and crimes of Capilano CEO Ben McKee".

15 The second publication is entitled "Channel Seven, Capilano Honey And Addisons Lawyers Involved In Judicial Favours Scam" (hereinafter, "judicial favours scam"). An extract from the article speaks of "the Kerry Stokes owned and controlled Channel 7 and Capilano Honey" being "up to their necks in a judicial favours scam". It goes on to assert judicial corruption in the Supreme

Court of New South Wales. Later, the article includes "when I read about Capilano Honey suing Simon Mulvany and seen the court documents is was obvious [sic] that Stokes and Addisons Lawyers were trying the same scam again but this time it included Capilano Honey and their CEO Ben McKee".

16 The third publication appeared on the same website. It is entitled "Sex Tape Featuring Capilano Honey CEO Ben Mckee Covered Up By Directors" (hereinafter, "sex tape covered up"). Its opening paragraph commences "There is a sex tape featuring Capilano Honey CEO Ben McKee talking about having anal sex with a female staff member at Capilano Honey". To the right of that text is a photograph of Dr McKee wearing a shirt bearing the Capilano Honey logo, and holding a jar of honey with a Capilano label.

17 The fourth publication also appeared on the KCA website. It is entitled "Capilano Take Out Super-Injunction To Silence A 2nd Journalist Re: Poisonous And Toxic Honey" (hereinafter, "super-injunction to silence"). It includes the heading within the text "All Australians should be alarmed that a food company like Capilano Honey can get a secret super-injunction so they can conceal their corrupt conduct". Later, the article reads "Yes, I am in breach of the super-injunction telling you I am being sued by Capilano and Ben McKee but as far as I am concerned the super-injunction was illegally issued by a nameless judge who has failed to publish reasons for his corrupt secret hearing which breaches common law. So as far as I am concerned the injunction is null and void".

18 The fifth publication is entitled "Capilano Honey Want Journalist Jailed For Exposing Their Toxic And Poisonous Honey" (hereinafter "Capilano want journalist jailed"). It includes the following text: "Capilano Honey and their CEO Ben McKee think they're smart instituting proceedings against me and asking for a Super-Injunction and then asking the court to charge me with contempt when things didn't go their way. All they have done is expose themselves for being the crooks and fraudsters they really are".

19 The sixth publication appeared later on the same website, and is entitled "Capilano Honey Flag Possible Recall Of Honey Because Of Health And Safety Fears" (hereinafter, "possible recall"). It includes the following "Ben McKee is kidding himself if he blames my article. McKee and Capilano have known about the health and safety dangers for a long time and instead of doing something to fix the problem they have concealed it from the public". That paragraph is followed immediately by the heading "Federal Government agency confirms toxic and poisonous honey".

20 The seventh publication, again to the KCA website, is entitled "Choice Magazine Caught In Cash For Comment Scandal" (hereinafter, "cash for comment"). The opening sentence is "[C]onsumer advocates Choice have published a scandalously corrupt and biased article in support of Capilano Honey right at a time when Capilano have been under fire for selling poisonous and toxic honey". A little later it is said that "[t]he only conclusion you can draw is that Choice have been involved in a cash for comment scandal that is quite common in Australia".

21 The eighth publication is entitled "Capilano Honey And Choice Cover-Up Of Poisonous Honey Exposed By Federal Government" (hereinafter "cover-up exposed"). The article speaks of a statement from the Australian Department of Agriculture and Water Resources that assertedly "totally discredits the false and misleading media releases that Capilano Honey has issued saying they extensively test their honey and denying allegations that Capilano sells poisonous and toxic honey".

22 The ninth publication is entitled "Capilano Honey Calls For Ban On Pesticides To Stop Poisoning Bees And Honey" (hereinafter "ban on pesticides"). The opening paragraph contains the sentence "It's not everyday a food manufacturer in effect admits that the food they are selling is being poisoned".

23 The tenth publication is entitled "Capilano Honey: Poisonous And Toxic Honey Investigation" (hereinafter, "honey investigation"). The opening sentence of the article is "I have written a number of articles in September

2016 regarding Capilano Honey knowingly selling toxic and poisonous honey".

24 The eleventh and final publication is entitled "Woolworths, Coles And Aldi Running A Scam Selling Imported Food As Organic" (hereinafter "organic food scam"). The article includes the following text "How much is Capilano Honey paying ACO [Australian Certified Organic] to use the certification label?"

25 The next paragraph commences "The scam is quite simple. Import food, in this case honey, say it is organic and pay an Australian certifier to give you a label to prove it is organic and then have the major grocery stores stock the product". It is later said that the scam "does involve the likes of the major grocery stores, Australian Certified Organic and Capilano Honey and their Allowrie Honey brand".

26 Those are the eleven articles that form the nub of the claims of the two plaintiffs. They were placed before me by them in documentary form repeatedly, as part of proving multiple republication. Separately, there were a number of similar documents, subsequently published by the defendant, also placed before me, in order (amongst other reasons) to support the claim for permanent restraining orders.

The statement of claim

27 I turn now to summarise briefly the statement of claim as it stood at the conclusion of the hearing. Thereafter, I shall discuss the degree to which the extant defence was able to engage with that pleading of the plaintiffs.

28 The statement of claim commences by seeking an order that the defendant be restrained from publishing a number of representations and imputations, or representations and imputations to the same effect. They may be summarised as being that Dr McKee knowingly permits Capilano Honey to sell toxic Honey; that he has made false and misleading and deceptive statements; that he is motivated by greed in putting the health of Australian consumers at risk;

that he has been involved in a “judicial favours scam”; that he is part of a dishonest scheme with Mr Kerry Stokes to close down “whistleblowers” who have brought to light corrupt conduct on the part of Mr Stokes and others; that he engaged in a conversation in which he spoke of wishing to have sexual intercourse with a female employee; that he has behaved corruptly and vexatiously in the conduct of litigation; that he engaged in the provision of corrupt payments to Choice magazine, in order to have the latter conceal the dangers of the products of Capilano Honey; that he has corruptly paid a certification organisation to certify falsely that the products are organic; and that products of Capilano Honey are falsely marketed.

29 In similar vein, the statement of claim seeks an order permanently restraining the defendant from publishing any of the eleven articles that I have touched upon above that form the nub of the claim. Further permanent restraining orders are also sought.

30 Separately, damages are sought if either tort said to have been committed against Dr McKee is established, along with costs.

31 The statement of claim goes on to assert that Capilano is an Australian public company, that Dr McKee has been its CEO at relevant times, and that he has been employed by Capilano for over twelve years as at the date of the statement of claim.

32 It proceeds to assert that the defendant is the publisher of the KCA website, and also operates a Facebook profile in his own name, the KCA Facebook Page, and the KCA Twitter Account.

33 The statement of claim goes on to allege each of the eleven publications, and to assert that each of the articles carries a number of defamatory imputations about Dr McKee; I shall not pause to recount them all, because I believe that my summary of the subject matter of the restraining orders sought adequately captures them.

34 The statement of claim goes on to assert that many but not all of the articles originally published on the KCA website were republished on the KCA Facebook Page, the personal Facebook profile of the defendant, and on the KCA Twitter account.

35 The statement of claim separately proceeds to assert that each of the eleven articles also establishes the tort of injurious falsehood committed against both Dr McKee and Capilano Honey. A number of representations arising therefrom are alleged. In the context of this tort, they focus upon the asserted dangerousness of Honey sold by Capilano; its contamination by antibiotics or pollution; the dishonest promotion by the plaintiffs of the products as 100% Australian; and that the plaintiffs are putting the lives of Australians at risk by selling honey that is "full of" various contaminants.

36 The statement of claim goes on to assert that the above representations are false, and provides particulars made up of statements that are the opposite of the representations of which complaint is made.

37 This statement of claim asserts that the defendant was motivated by malice in publishing the assertedly injurious statements, and that malice is demonstrated either by knowledge that the statements were false, or reckless indifference to the point of wilful blindness, or by an improper motivation on the part of the defendant to harm the interests of Mr Stokes through an attack on Capilano Honey, bearing in mind that, through another company, Mr Stokes allegedly had a financial interest in Capilano Honey.

38 Finally, actual loss and damage as a result of the allegedly injurious statements is asserted.

The extant defence

39 I turn now to discuss the pleaded defence of the defendant, to which I believed it was incumbent upon me to restrict him at the hearing, bearing in mind previous binding interlocutory judgments that had not been the subject

of appeal. As I have said, those judgments rendered the extant defence extremely concise and circumscribed.

40 By reference to the statement of claim, the defence admits that the defendant published the “toxic and poisonous honey” article on 17 September 2016.

41 The extant defence of 13 July 2018 also admits with regard to the defamation claim brought by Dr McKee that that article *was* capable of conveying a number of imputations pleaded in the statement of claim. Those imputations are:

(a) The second plaintiff, as CEO of the first plaintiff, knowingly permits the first plaintiff to sell toxic and poisonous honey to consumers.

(b) The second plaintiff deserves to be sacked as CEO of the first plaintiff because he has put the health of Australian consumers at risk.

(c) The second plaintiff, as CEO of the first plaintiff, has made false and misleading statements on Facebook about Simon Mulvany to deceive the public about the fact that Capilano is putting the lives of Australians at risk by knowingly selling honey that is full of antibiotics, toxins, irradiated pollen from China and alkaloids, and to cover up its lies that it uses 100% Australian honey.

(d) The second plaintiff has lied in media interviews to deceive the public about the fact that Capilano is putting the lives of Australians at risk by knowingly selling honey that is full of antibiotics, toxins, irradiated pollen from China and alkaloids, and to cover up its lies that it uses 100% Australian honey.

(e) The second plaintiff, as CEO of the first plaintiff, is motivated by greed to sell toxic honey dumped in Australia to Australian consumers.

(f) The second plaintiff, as CEO of the first plaintiff, put the health of Australian customers at risk in order to become rich.

(g) The second plaintiff, as CEO of the first plaintiff, is dishonest in that he has permitted the first plaintiff to use inferior untested imported honey, thereby putting the reputation of Australia as a producer of honey at risk, and then lying about it.

42 The defence also admits that, from on or about 25 September 2016, the defendant published the "judicial favours scam" article, which contained a hyperlink to the "toxic and poisonous honey" article.

43 The defence admits that a number of pleaded imputations *were* thereby capable of being conveyed. They are as follows:

(a) The 17 September 2016 Toxic Honey Imputations;

(b) The second plaintiff, as CEO of the first plaintiff, is involved in a judicial favours scam;

(c) The second plaintiff, as CEO of the first plaintiff, is part of a dishonest arrangement with channel 7 and Kerry Stokes to close down whistleblowers who have exposed corrupt and criminal conduct by Kerry and Ryan Stokes and their companies;

(d) The second plaintiff, as CEO of the first plaintiff, has bribed corrupt judges;

(e) The second plaintiff, as CEO of the first plaintiff, has brought a frivolous and vexatious court case against Simon Mulvany to silence his legitimate criticism of the first plaintiff.

44 The defence goes on to admit that, on or about 6 October 2016, the defendant published of and concerning Dr McKee the “sex tape covered up” article on the KCA website, containing a link to the 17 September 2016 “Toxic Honey” KCA article.

45 However, the defence *denies* that the article was capable of conveying the following imputations:

(a) The 17 September 2016 Toxic Honey Imputations;

(b) The second plaintiff is a predatory and perverted employer with deviant sexual desires in that he suggested to Simon Mulvany that he wanted to have anal sex with a female employee of the first plaintiff.

(c) The second plaintiff disgracefully mistreated a female employee of the first plaintiff by telling Simon Mulvany that he wanted to have anal sex with that employee.

(d) The second plaintiff while CEO of the first plaintiff openly discussed his desires to have anal sex with a female employee of the first plaintiff with Simon Mulvany.

(e) The second plaintiff, as CEO of the first Plaintiff, has been involved in a sex scandal by suggesting to Simon Mulvany that he wanted to have anal sex with a female employee of the first plaintiff.

(f) The second plaintiff deserves to be sacked as CEO of the first plaintiff because, as CEO of the first plaintiff, he has been involved in a sex scandal by suggesting to Simon Mulvany that he wanted to have anal sex with a female employee of the first plaintiff.

(g) The second plaintiff as CEO of the first plaintiff has dishonestly tried to cover up his involvement in a sex scandal.

46 The defence goes on to admit that from on or about 11 March 2017, the defendant published of and concerning Dr McKee the "organic food scam" article, which included links to the 17 September 2016 "Toxic Honey" KCA Article.

47 The defence *denies* the imputations in paragraph 34 of the statement of claim, which were, at the conclusion of the hearing, (a), (c), (d), (e) and (f):

(a) The 17 September 2016 Toxic Honey Imputations;

(c) the second plaintiff, as CEO of the first plaintiff, has paid Australian Certified Organic to use and organic certification label for the first plaintiff's products dishonestly;

(d) the second plaintiff, as CEO of the first plaintiff, has involved the first plaintiff in a major food scam;

(e) the second plaintiff, as CEO of the first plaintiff, lies about the quality of the first plaintiff's product;

(f) the second plaintiff, as CEO of the first plaintiff, deliberately deceives Australian consumers about the first plaintiff's products.

48 The defence goes on to state that paragraphs 35 to 40 of the statement of claim are "possibly true".

49 To expand on that, paragraph 35 of the statement of claim asserts that the defendant republished several of the eleven articles on his Facebook page.

50 Many of the paragraphs thereafter in the statement of claim are permutations of the above paragraph, in that they speak of republication on the personal Facebook page of the defendant rather than the KCA Facebook page.

51 Paragraph 40 of the statement of claim is similar insofar as republication of articles is concerned, but it pertains to republication on the KCA Twitter account.

52 Returning to the defence, at paragraph 59 the defendant *denies* that the articles said to have been republished were capable of conveying various imputations; because they are by their nature repetitive, arising as they do from republications, I shall not state them again.

53 Those are the bounds of the extant defence. It can be seen immediately that it did not contain any of the defences that are commonly raised in answer to a claim of defamation, including truth. And although the defendant denied that certain imputations could be drawn, he expressly conceded that many of them *were* available.

54 In short, it can be seen that the points at which battle was joined between the plaintiffs and the defendant were, on the pleadings, very limited indeed with regard to defamation of Dr McKee.

55 As for injurious falsehood, the defence does not explicitly engage with the assertions of malice and falsity to be found in the statement of claim. Even so, whatever the formal rules may be about failure of a pleaded defence to dispute matters asserted in a statement of claim leading to implicit acceptance, in light of the self-represented position of the defendant, and in accordance with my understanding of the contentment of counsel for the plaintiffs, I have taken the approach that all elements of that tort must be proven on the balance of probabilities by the relevant plaintiff.

Undisputed facts

56 Based upon the assertions contained in the statement of claim, the response of the extant defence, the evidence placed before me, the conduct of the hearing (including final submissions), and making due allowance for the fact that the defendant represented himself, I regard the following facts as undisputed.

57 At the relevant times, Capilano was a company incorporated in Australia.

58 Dr McKee is also a person ordinarily resident in this country.

59 At the relevant times, the defendant operated the KCA website. It is at that digital location that the material complained of was initially posted. The defendant also maintained Facebook and Twitter accounts that readily linked, and led a digital reader to and from, the KCA website. He also republished many of the eleven articles to the Twitter Page, and the two Facebook pages.

60 Many of the materials posted by the defendant contain hyperlinks to other materials posted by him. The text of the hyperlinks themselves often constitutes negative statements about Capilano or Dr McKee.

61 The four digital locations maintained by the defendant constituted a structure of interlocking media whereby he published articles about Capilano and Dr McKee to the Internet, where they could be freely accessed by members of the public.

62 Persons located within Australia have left short, written, digital comments in response to materials posted by the defendant at various digital locations.

63 A significant proportion of those comments express agreement with, or acceptance of, the adverse statements made by the defendant about the two plaintiffs.

64 There is evidence that at the least some of those commentators are based in Australia.

65 One can infer without difficulty that each of the articles has been read at least once by a person in Australia. One can also infer that all of the hyperlinks relied upon by the plaintiffs have been “clicked on” and opened and read at least once by a person in Australia.

Submissions of Dr McKee

66 I turn now to summarise the submissions of Dr McKee in support of proof of the tort of defamation.

67 Dr McKee submitted that the control of the KCA by the defendant, and the fact that he was the author of the articles about Dr McKee, was undisputed and indisputable.

68 He also submitted that publication, in the sense of promulgation to readership in Australia, could be readily established, bearing in mind: the number of subscribers to the KCA website and its associated digital platforms; the evidence of the physical locations of a number of commentators; the names of certain commentators (for example, “Emu”); and the subject matter of the comments themselves.

69 He also drew attention to the fact that the extant defence did not dispute publication, and in some cases admitted it.

70 Dr McKee submitted that the defamatory implications about himself “jumped off the page” with regard to each article, bearing in mind that they (correctly) asserted that he was very closely associated with Capilano. In other words, the point was made that an adverse statement about Capilano would be readily “sheeted home” to Dr McKee, bearing in mind his undisputed position in the company, and the fact that the publications often spoke of Capilano and himself in closely related ways.

71 He also submitted that a number of direct statements about himself personally – for example, that he had been "caught out lying all over town" – possess the same attribute. He submitted that the "ordinary reasonable reader" would unquestionably be led to think less of Dr McKee based upon the assertions in the eleven articles.

72 He submitted that the extant defence explicitly admitted a significant proportion of the imputations sought to be drawn by Dr McKee.

73 He invited attention to the fact that the extant defence does not, and the defendant therefore cannot, rely upon truth, qualified privilege, or indeed any other defence to the tort of defamation.

74 Finally, it was said that damage to reputation is presumed in the tort of defamation once publication, identification, and defamatory imputation are established.

75 In short, Dr McKee submitted that the tort of defamation can be established without difficulty.

76 As for the quantum of damages, he invited attention to the "statutory cap" to be found in s 35 of the *Defamation Act 2005* (NSW), which at the time of the hearing was in the amount of $407,500.

77 He submitted that damages for this tort should reflect a combination of vindication to his reputation, recompense for damage thereto, and consolation for hurt feelings. He submitted that the process of arrival at the appropriate quantum is necessarily impressionistic. As a guide only, he relied upon other sums of damages ordered in broadly similar cases for the proposition that damages should be ordered in a sum between $200,000 and $300, 000 (trial transcript (TT) 246.20).

78 Because of the view to which I have come about the establishment of defamation by Dr McKee, I shall not pause here to recount his submissions in support of the alternative tort of injurious falsehood.

Submissions of Capilano about injurious falsehood

79 Turning now to summarise briefly the submissions of Capilano in support of injurious falsehood, it was accepted that the elements of injurious falsehood need to be proven on the balance of probabilities by a plaintiff, without the benefit of any presumptions, in contrast to the tort of defamation.

80 It was said that the elements of that tort are: a false statement of or concerning the goods or business of a plaintiff; publication of that statement by the defendant to a third person; malice on the part of the defendant; and proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement.

81 Again, it was submitted that authorship by the defendant, identification of Capilano, and publication in Australia are either admitted, indisputable, or to be inferred without any difficulty whatsoever.

82 As for falsehood, it was submitted that a great deal of evidence had been placed before me to demonstrate that, in truth, the products of Capilano are not toxic, poisonous, dangerous, or contaminated. It was submitted that I would be comfortably satisfied on balance that the statements made by the defendant about those products are simply not true. And without seeking to reverse the onus of proof that it conceded that it bore, Capilano invited attention to the absence of evidence in the defence case, and the reliance by the defendant upon indirect statements of himself and others asserting problems with the quality of the honey, as opposed to real and probative *proof*.

83 As for malice, the position of Capilano was that the attack on its products is, in truth, motivated by an ulterior purpose; that is, one intentionally concealed or kept in the background.

84 It was said that the criticisms of the product of Capilano are in fact motivated by hostility on the part of the defendant against Mr Stokes, a well-known Western Australian businessman. It was said that the evidence shows that, many years ago, there had been some form of "pre-litigious" contact between Mr Stokes and the defendant, in that the lawyer of the former sent a letter to the latter about some potential dispute or other. That was said to be the beginning of the animus on the part of the defendant against Mr Stokes.

85 The ulterior purpose of the defendant was said to be established by the repeated negative references to Mr Stokes in most if not all of the eleven articles, as well as in the many subsequent publications by the defendant that were also in evidence.

86 Finally, as to damages for injurious falsehood, counsel for Capilano accepted the difficulty in quantifying any damage actually suffered by Capilano as a result of the publications of the defendant, especially bearing in mind other negative publications that had been made by another person at around the same time. Her ultimate position was that "it may be that your Honour could only be satisfied on the evidence that a less than significant figure would be awarded on the basis of damages" (TT 268.29).

Submissions of both plaintiffs in support of restraining orders

87 Finally, it was said that the approach of the defendant to litigation generally, and indeed this litigation itself, well establishes that, unless made subject to serious sanction for breaching court orders, he is a person who will determinedly continue to publish tortious material about each plaintiff.

Submissions of the defendant

88 The following summaries are concise reflections of written and oral submissions that featured a degree of discursion and repetition; in saying that, of course I am not being critical of a self-represented litigant.

Written submissions of the defendant (defamation and injurious falsehood)

89 The written submissions of the defendant about both alleged torts may be summarised as follows.

90 First, the defendant spoke of a defence of qualified privilege by reason of the public interest aspects asserted to be within the publications: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25.

91 Secondly, with regard to a particular article, the defendant relied upon the defence of absolute privilege, by reason of court documents having been referred to, or linked to, in the "toxic and poisonous honey" article.

92 In the alternative to absolute privilege, the defendant relied upon the "[d]efence for publication of public documents" and "[d]efences of fair report of proceedings of public concern".

93 Thirdly, he submitted that, even if those defences could not be made out, the failure by the plaintiffs to provide test results that he submitted were called for invites an adverse inference about the quality and safety of Capilano honey. It was also said that there was indeed documentary evidence before me in which concerns were expressed about testing methods adopted by Capilano with regard to its products.

94 Fourthly, it was said that the plaintiffs had failed to prove malice on his part, and financial loss on theirs.

95 Fifthly, the submission was that there was national criticism of Capilano Honey even *before* the defendant had published articles about Capilano suing Mr Mulvany, the erstwhile critic of its products. In other words, it can hardly be said that loss to reputation had occurred by way of the defendant's publications, because that loss had already been caused by other publishers on previous occasions.

96 Sixthly, in light of the asserted twelve month limitation period for commencing defamation claims, the protracted nature of the litigation means that the case should be dismissed on the basis that it is an abuse of process. (I interpolate that, because this submission self-evidently conflates the commencement of a claim with its prosecution, it need not be discussed further, nor formally determined.)

97 Seventhly, the defendant, as the publisher, had reasonable grounds to believe the allegedly defamatory material to be true.

98 Eighthly, the defendant had, on many occasions, unsuccessfully sought a response from Capilano to questions submitted by himself, and had appropriately referred to that fact in more than one article.

99 Ninthly and finally, the defendant could not be said to have been motivated by malice, because other media (at the least, a television program from many years ago) was also said to have accused Capilano Honey of selling poisonous and polluted honey.

Oral submissions of defendant about torts alleged by Dr McKee

100 The oral submissions of the defendant made at the conclusion of the hearing about the torts said to have been committed against Dr McKee may be summarised as follows.

101 First, there may be a question as to whether Dr McKee is legally entitled to sue the defendant for injurious falsehood.

102 Secondly, the defendant submitted that, for the purposes of injurious falsehood, it is incumbent upon the plaintiff or plaintiffs to prove each element on the balance of probabilities – including falsehood. It was submitted that there was a serious issue at the end of the hearing as to whether or not the plaintiffs had indeed proven for the purposes of the tort that what the defendant had said about the honey was false.

103 The defendant also submitted that the Court needs to look carefully at evidence of actual damage, both with regard to Capilano, and if it is maintained or able to be maintained, with regard to Dr McKee.

Oral submissions about injurious falsehood alleged by Capilano

104 As for the single claim of the first plaintiff, the defendant submitted that there would need to be careful consideration about whether there was indeed evidence to prove, on the balance of probabilities, that what the defendant had published is indeed false.

105 Separately it was submitted that evidence of asserted damage in Malaysia, and the concomitant paucity of evidence of such damage in Australia, demonstrates that the plaintiffs have failed to detail a loss of sales in Australia. Moreover, it was submitted that the damage said to be suffered overseas, but not in Australia, was “suspicious”.

106 To the extent that Capilano needed to prove that what the defendant said was false, for the purposes of injurious falsehood, it was said to be important to reflect that the position of the defendant was that the evidence shows that Capilano have never released the details of their testing for potentially problematic substances such as herbicides. The defendant went further to submit that the plaintiff does not conduct testing at all.

107 Finally, the defendant submitted orally that any concern expressed by him about the state of Capilano honey falls under the *Lange* defence of freedom of political communication, as a subset of the defence of qualified privilege.

Defamation against Dr McKee?

108 I turn first to determine whether the tort of defamation has been established to have been committed by the defendant against Dr McKee. It is convenient first to set out the elements of that tort, bearing in mind the circumscribed position of the defendant based upon the extant defence.

Elements of defamation

109 There are three elements to the tort of defamation, which a plaintiff must make out on balance to succeed: publication of the subject matter, identification of the plaintiff, and the presence of material with a defamatory meaning within the published matter.

First element: publication

110 Proof of publication can be demonstrated by the presence of the articles on the KCA website maintained by the defendant, and access to it by digital readers of that website. And it can readily be inferred that the articles had been read, at the least, by the persons who had left comments. Some of those persons, one can readily infer, were at the relevant time within Australia. As I have shown above, this element was never in dispute before me.

111 Nor, with regard to the criss-crossing hyperlinks between various iterations of the eleven articles on various digital platforms, was it ever disputed that the defendant "consented to, or approved of, or adopted, or promoted, or in some way ratified" the content thereof: *Urbanchich v Drummoyne Municipal Council* (1991) Aust Tort Reports 81. There is no doubt that the defendant was providing hyperlinks between his articles in a way that invited attention to, and approved of, the linked articles.

112 For completeness, the defendant has arguably admitted in a practical sense to engaging in publication via hyperlinks to the "Toxic Honey" article, by stating that it is "possibly true" that the matters complained of were republished on social media.

113 In my opinion, republication by way of the structure of hyperlinks has been readily established.

114 My finding, in short, is that the element of publication (including by way of republication) has been made out with regard to all of the iterations of the eleven publications upon which Dr McKee relied.

Second element: identification

115 The element of identification be dealt with summarily. The defendant, in his extant defence, expressly admitted that the matters complained of were of and concerning the second plaintiff. And the contents of the eleven articles expressly identify Dr McKee by way of name, photographs, and the text that explains repeatedly his managerial relationship with Capilano.

116 This element is readily established, and has never been in serious dispute.

Third element: defamatory meaning

117 The central test for determining whether a publication is defamatory is objective. It begins with considering "what ordinary reasonable people would understand by the matter complained of": *Trkulja v Google LLC* [2018] HCA 25; (2018) 92 ALJR 619 at [31].

118 Having regard to the attributes of such a reader discussed in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164-167, and without going through the comprehensive list, suffice to say the ordinary reasonable reader is, relevantly, capable of reading "between the lines"; of average intelligence; and prone to engage in in loose thinking. In short, the determination of what an ordinary reasonable reader would derive from a publication is a matter of impression.

119 Finally, in reflecting upon the reaction of that reader for the purposes of the test, one needs to think about whether the published matter is likely to lead an ordinary reasonable person to think less of the plaintiff: *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519.

120 What then would be the response of an ordinary reasonable person to the things that the defendant has written about Dr McKee? I believe that the submission made on his behalf is correct: the defamatory imputations "jump off the page". They are very often able to be discerned at once from the title of an article, or from its subheadings, or from its very first paragraph.

121 I do not believe it is necessary for me to parse each of the many alleged imputations said to arise from each of eleven articles, many of which have been republished more than once. I believe that it is undeniable that the defendant has clearly stated that Dr McKee is: running a business that endangers the health of Australians; a dishonest person; a corrupt person; a manipulative person; a person who seeks to take advantage of a workplace power imbalance for sexual gratification; and a dangerous and incompetent member of the beekeeping and honey producing industry. Quite apart from the fact that many of the defamatory imputations are expressly conceded in the extant defence, I believe that all of the imputations against Dr McKee pressed at the conclusion of the hearing in the amended statement of claim are established, based, without elaboration or extrapolation, upon the words of the defendant himself.

122 In short, the three necessary elements of defamation are established. I turn to discuss whether there are any bases for resistance available to the defendant. It can be seen from my summary of it above that the extant defence pleads none.

123 To be more specific about that, the extant defence does not rely on qualified privilege. That means that the implied freedom of political communication has no possible application, because the latter is an aspect of the former.

124 Nor does it permit of any other ground of denial of liability, despite the written and oral submissions that the defendant was permitted to make as an indulgence.

125 In similar vein, because of the circumscription of the extant defence, the defence of truth is unable to be relied upon.

126 Separately, even if that were not the case, and reflecting on questions of truth, untruth, and falsity for a moment, Dr McKee placed a great deal of evidence before me about the safety of the honey sold by Capilano. That included with regard to “front-end loading”, in the sense of quality control at the stage of production and harvesting, and “back-end loading”, in the sense of quality control at the stage of refinement and readiness for sale. That evidence was neither contradicted by any form of direct nor expert opinion evidence proffered by the defendant. Nor was it successfully impugned to any degree in the cross-examination of Dr McKee conducted by the defendant.

127 Instead, the defendant relied upon a great deal of evidence of *controversy about* the safety of the honey of Capilano, whether generated by himself or others. He also submitted that the asserted failure of Capilano to test for certain substances raised a significant concern about contamination. But, as I have said, he did not place before me evidence of the *actual* lack of safety of the product.

128 In that regard, I think the following points were soundly made by counsel for the plaintiffs.

129 First, no evidence was placed before me of any person ever having been harmed by consuming a product of Capilano.

130 Secondly, it may be correct to say that contained in the products of Capilano are trace quantities of substances that, if present in very large quantities, could be dangerous to humans. But, to explain my opinion about that possibility by way of metaphors, merely because coffee contains caffeine, and drinking 100 cups of coffee in a day could be injurious to one’s health, does not mean that a single cup of coffee can be described as “toxic”, or “poisonous”. In the same way, a pair of woollen socks may conceivably contain infinitesimally small quantities of a pesticide, which was present on

the grass that was eaten by the sheep whose wool was shorn, and from which the socks were knitted. But the conceivable presence of that substance does not mean that persons who manufacture or sell woollen socks are required, without more, to test the socks for the presence of such substances. And nor does it mean that the socks can be described in any sensible or fair way as "contaminated" or "toxic".

131 Thirdly, to continue the metaphorical explanation of my assessment of the evidence, merely because a vintner does not test his or her product for strychnine does not establish, without more, that that deadly poison is present in a bottle of wine.

132 In other words, speaking generally, a failure to test for a substance does not of itself establish the presence of that substance.

133 Fourthly and finally, much of the material relied upon by the defendant can be thought of as an exercise in "bootstrapping": because there has been a controversy about the safety of Capilano honey, that means that Capilano Honey is indeed unsafe. But that is to test the correctness of a disputed thesis by assuming that it is indeed correct. To the contrary: I believe it has been shown that it *was* safe.

134 In short, even leaving aside, for the sake of argument only, the presumptions applicable to the tort of defamation, and the circumscription of the extant defence, on the evidence before me, I do not believe that it has been shown that the honey sold by Capilano was ever unsafe.

135 In summary, I believe that the elements of defamation committed by the defendant against Mr McKee have been established, and there is no resistance to the establishment of the tort available to the defendant.

136 Separately, on the evidence before me, there is no truth to the proposition that Dr McKee ever made a lascivious statement about a junior female employee.

Damages in defamation?

137 Because I accept the submission of counsel that damage is presumed once the three essential elements of defamation are established, that leaves the question of damages, and trying to quantify them in an intuitive way. I also accept the submission on behalf of Dr McKee that my task is to award damages in such a way as to vindicate Dr McKee's reputation, and that I must arrive at a sum "sufficient to convince a bystander of the baselessness of the charge": *Moit v Bristow* [2005] NSWCA 322 at [120]-[121] per McColl JA (Beazley JA and Campbell AJA agreeing); *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [70]-[78] per Tobias and McColl JJA.

138 On the one hand, I respectfully think that the assertions of the defendant about Dr McKee are ones that reasonable right-thinking people would not accept readily; in other words, they would take them with "a very large grain of salt". I also think that the title of the KCA itself (a colloquialism well known to Australians), its logo (a cartoonish jumping kangaroo), and the other extreme or radical claims made upon that website by the defendant, would lead many of those who read the material complained of to do so with further circumspection. There is also no evidence that Dr McKee has suffered emotional harm to an extreme or debilitating degree as a result of the defamatory things that the defendant has written about him. All of those factors argue, in my opinion, in favour of tempering the quantum of damages.

139 On the other hand, I accept that as a business person of mature years and a person of longstanding experience in the honey industry, it is professionally harmful and personally hurtful for Dr McKee to be spoken of as a dishonest person who conducts a business that endangers the health of Australians. I also accept that it is professionally harmful and personally hurtful for Dr McKee to be accused of dishonesty, corruption, and verbal sexual impropriety. There also obviously needs to be a degree of vindication of the reputation of the person defamed here. Finally, the repeated and interlocking nature of the defamations, their blunt extremity, and the intransigent and recalcitrant approach of the defendant on the evidence – that he is entitled to

speak and write as he sees fit, as shown by the extracts from the eleven articles that I have provided – requires reflection on my part in the measure of damages.

140 As a starting point in assessing damages, I must have regard to the principles laid out in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; [1993] HCA 31 (*Carson*): that the purposes of the award of damages for defamation are vindication of the plaintiff's reputation; recompense for damage to reputation; and consolation for hurt feelings. In *Carson* it was also said (at 70, citing *Dingle v Associated Newspapers Ltd* [1964] AC 371):

> Although damages are awarded to vindicate the plaintiff's reputation, damages are not awarded as compensation for the loss in value of a plaintiff's reputation as though that reputation were itself a tangible asset or a physical attribute.

141 In *Zaia v Eshow* [2017] NSWSC 1540, which I think in some ways (at least, for the purpose of assessing damages in the context of defamatory claims that may be difficult to accept) is analogous, McCallum J (as her Honour then was) stated at [117] that in her Honour's assessment:

> The defamation in the present case was serious and persistent. A substantial award is required to vindicate the plaintiff's reputation. However, that assessment must be tempered by the likelihood that many readers would have dismissed what was said as an irrational account and would continue to hold the plaintiff in the high esteem in which he is clearly held by many. I also have regard to the fact that I propose in this case to grant a permanent injunction restraining the defendant from repeating the defamation. The availability of that remedy serves to reduce the quantum of damages, albeit to a limited extent.

142 In all the circumstances, I believe that damages in the sum of $150,000 are appropriate.

143 Turning separately to the ancillary claim of Dr McKee, because I am well satisfied that the defendant has defamed Dr McKee, and because defamation is a tort that is easier to establish than injurious falsehood, and because counsel did not submit that greater damages would be available for the latter

tort, I do not believe it is necessary for me to determine the alternative claim of Dr McKee.

Determination of claim of Capilano for injurious falsehood

144 I turn next to resolve the claim of Capilano for injurious falsehood. As before, I shall begin by discussing the elements of that tort, each of which must be proven by the plaintiff on balance.

Elements of injurious falsehood

145 In short, I must be satisfied that there has been a false statement of or concerning the plaintiff's goods or business; publication of that statement by the defendant to a third person; malice on the part of the defendant; and proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement: see *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388; [2001] HCA 69 at [1].

146 It is important to bear steadily in mind that, as distinct from the tort of defamation, it is the *plaintiff* who bears the onus of proving *falsity* to the civil standard.

Element one: a false statement of or concerning the plaintiff's goods or business

147 As has been foreshadowed in the summary of the submissions of the defendant, he submitted that the falsity of his statements as to the toxicity of Capilano honey could not be established on balance.

148 To resolve that controversy immediately; in my contingent discussion of the topic of truth or otherwise in the context of defamation at [123] to [130] above, I have already discussed the state of the evidence about the alleged toxicity of the honey sold by Capilano, and the alleged wrongs committed by Capilano ancillary to that. I have also explained, including by way of metaphor, my general approach to the way the defendant argued his case. That analysis, I believe, is apposite here. I will not repeat myself, except to say that the

defendant did not, by way of evidence possessing probative value, engage successfully with the task of proving that the honey of Capilano is harmful (or, to express the task more correctly in terms of onus and standard of proof, the task of leading me, at the end of the hearing, to fail to be satisfied on balance by Capilano that its honey is safe).

149 To repeat just a little: the evidence placed before me featured a detailed explanation by Dr McKee, on behalf of Capilano, as to how Capilano takes steps to ensure that its products are safe. In response, the defendant pointed to controversies about the question, and to alleged deficiencies in those steps of Capilano. But controversies and alleged deficiencies do not of themselves establish harmfulness, let alone toxicity. What one would need in response from the defendant is *evidence* about harmfulness; as I have said, none was forthcoming.

150 On balance, Capilano has persuaded me that the honey that it purveys is *not* harmful to health. That also means, as a matter of logic, that Capilano has established on balance the falsity of the assertions of the defendant that it is in the business of selling honey that *is* harmful to health. That means in turn that the element of falsity has been established to the civil standard.

Element two: publication of that statement by the defendant to a third person

151 The definition of publication in this context is the same as in the context of defamation. I shall revisit neither the relevant principles nor the relevant evidence. On the evidence, and bearing in mind that the authorship and promulgation of the articles by the defendant were never disputed, I am well satisfied on balance that this element has been made out.

Element three: malice on the part of the defendant

152 As I have said, for the tort of injurious falsehood to succeed, it is incumbent upon a plaintiff to prove malice on the part of the defendant.

153 What is meant by the protean word “malice” in the particular context of injurious falsehood is complex. It has been said, for example, that the defendant “must have intended to cause the harm or the harm must be the natural and probable result of the publication” and it is sufficient to show that the defendant “intended to cause the harm that was suffered”: Patrick George, *Defamation Law in Australia* (2nd edition, 2012, Lexis Nexis) at 278. It has also been said that malice may be evident from personal spite (*Australand Holdings Ltd v Transparency and Accountability Council Incorporated* [2008] NSWSC 669*,* hereinafter *“Australand*”) or evident from an “evil or harmful state of mind” (*Born Brands Pty Limited & Ors v Nine Network Australia Pty Ltd & Ors* [2011] NSWSC 642, hereinafter “*Born Brands*”).

154 In *Australand*, McCallum J said at [156]:

> I accept that impropriety of purpose is the essence of malice. However, care must be taken when drawing comparisons with the principles applicable in the law of defamation. Where malice is alleged to defeat a defence of qualified privilege in a defamation case, the propriety of the defendant’s purpose in publishing the matter complained of is measured by reference to its relevance to the privileged occasion. The existence of a sole or dominant purpose irrelevant to the occasion amounts to malice. The parameters of impropriety of purpose in the context of the tort of injurious falsehood are more elusive.

155 And at [159] her Honour went on to say:

> The apparent difficulties of definition are helpfully analysed by Mr JD Heydon, as his Honour then was, in the following passage in *Economic Torts* (2nd ed 1978) at 83, the first part of which is adopted in *Clerk & Lindsell on Torts* (19th ed 2006) at 24-13:
>
> > “Malice means one of three things: either personal spite, or an intention to injure the plaintiff without just cause, or knowledge of the falsity of what is said. There has been a great deal of discussion as to which formulation is correct; this has largely been arid, because the precise formulation has hardly ever mattered. The best view now seems to be that any one of the three states of mind will suffice for liability.”

156 In the subsequent judgment of *Born Brands* at [21], her Honour clarified that malice is to be understood as “as an evil or harmful state of mind”.

157 It is to be recalled that the case for Capilano is that, in truth, the defendant is not motivated by a sincere concern for the health of Australian consumers, nor by a desire to be a crusading journalist who brings to light alleged wrongful conduct on the part of business people and their enterprises. Rather, it is said, the real motivation for the impugning of the products of Capilano was hostility by the defendant towards Mr Stokes, and a desire to damage the business and other interests of the latter, in light of the understanding of the defendant that a company associated with Mr Stokes was a significant shareholder in Capilano.

158 With regard to malice, I have reflected at length on the question of whether the defendant may be a "righteous believer" who was not acting maliciously, because he honestly believed that he was serving members of the public by exposing a dangerous product that could harm or even kill them: see generally *Australand*. In his written and oral submissions, the defendant himself has spoken repeatedly about journalists who revealed the dangers of smoking in the latter half of the 20th century, and whose work, he submitted, was sought to be suppressed by large corporations.

159 In my opinion, it is possible on the evidence that that kind of self-belief forms part of the motivation of the defendant. Even so, I think that the submission of Capilano has force: the eleven basal articles themselves are replete with references to Mr Stokes in very harsh terms. The repeated assertion is that he is a shadowy figure who manipulates Capilano and its litigation against the defendant. To same effect are many of the subsequent publications of the defendant, placed before me by both plaintiffs with the primary but not exclusive purpose of demonstrating that restraining orders are necessary. Those references to Mr Stokes are repeated, trenchant, consistent, and often made in the same breath as attacks on Capilano.

160 On balance, I have come to be satisfied that a substantial part of the motivation for the attack upon Capilano is indeed an animus towards Mr Stokes. And I say that leaving aside the very telling way in which the written and oral submissions of the defendant at the conclusion of the hearing dealt

with the topic of Mr Stokes, and focusing exclusively on the evidence formally placed before me.

161 In my opinion, a significant part of the motivation for the impugning of the products of Capilano is an animus on the part of the defendant against Mr Stokes. In that sense, the false statements made about the honey are indeed motivated by an ulterior purpose on the part of the defendant. For that reason, I am satisfied that the necessary element of malice has been established on the balance of probabilities.

Element four: proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement

162 As for the element of actual damage, the final element of the tort, there was a significant amount of evidence placed before me of the time (and therefore expense) needed to be devoted to management of social media by an employee of Capilano as a result of the digital statements of the defendant. There was also evidence of bad publicity about the products of Capilano that arose in South-East Asia, as a result of the publications of the defendant. Finally, there was some material to suggest that sales of Capilano products declined quite noticeably year-on-year for a time in the same geographical area.

163 Quite apart from all of that evidence, one can readily infer that the posts of the defendant must have caused some actual damage to the business of Capilano, bearing in mind that not a few of the comments posted to digital platforms and placed in evidence are to the effect that individual consumers would never purchase any products from Capilano again. One can also readily infer that at least one of the persons who posted such a comment was true to his or her word.

164 In my opinion, the final element of actual damage to the business of Capilano is well established on balance.

Quantum of damages?

165 Turning now to the question of the amount of damages that I would be satisfied on balance should be awarded to Capilano, I think the concession of counsel for Capilano recounted by me above is a significant one. I have borne in mind that my task, as best I can, is to place the successful plaintiff in the position that it would have been in if the tort had not been committed.

166 That in turn requires me to be satisfied on the balance of probabilities of any actual loss that I seek to recompense by damages. Precise quantification is not easy, because there has been at least one other person who, at around the times of the pleaded dates, was saying and writing adverse things about Capilano and its products. No doubt that had its own negative effects, and those effects are not to be sheeted home to the defendant.

167 I also think I should err on the side of caution in terms of quantum, bearing in mind the onus of proof.

168 To be weighed against that is the evidence to which I have immediately referred above with regard to the time, effort, and expense devoted to trying to counter the claims of the defendant by Capilano, and the evidence of loss of sales, at the least in overseas markets.

169 In my opinion, in accordance with the concession of counsel, and adopting a cautious approach in light of the burden of proof, the appropriate damages with regard to the tort of injurious falsehood committed against Capilano is $25,000.

Determination of claim for restraining orders

170 Having determined that the defendant committed the tort of defamation against Dr McKee, and the tort of injurious falsehood against Capilano, I am amply satisfied that continuing restraining orders need to be made. That is because, on the basis of the previous conduct of the defendant with regard to this and other litigation, I am well satisfied that, unless subject to serious

sanction, he will do as he sees fit, including by way of continuing to commit, or committing again, those torts against the two plaintiffs. I hold that view on the basis of the following prior conduct of the defendant.

171 First, in related or similar litigation, he has been imprisoned for contempt of court twice: see *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664 (Wilson J); *Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 340 (Basten JA, Macfarlan JA, Meagher JA); *Doe v Dowling* [2017] NSWSC 202 (Harrison J).

172 Secondly, as I have shown, in this case there is evidence of the defendant openly stating in one of the articles that he was well aware that he was "in breach of a super-injunction", but being content to be so because of a pervading sense of righteousness.

173 Thirdly, in this litigation itself, the defendant promptly breached the implied undertaking in *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 as soon as he received some witness statements from the plaintiffs by posting them to his website. Thereafter, he was in breach of orders that I had made urgently as Duty Judge for some days before he took them down: see *Capilano Honey Ltd v Dowling* [2020] NSWSC 660; *Doe v Dowling* [2019] NSWSC 1222 (Fagan J).

174 Fourthly and finally, at the commencement of the remote hearing itself of this substantive matter before me, the defendant insisted that he would run the risk of committing a criminal offence by recording the necessary transmission of proceedings without my permission. He maintained that position in the face of my request, and thereafter order, that he refrain from doing so. It was only when I made it clear that, if he insisted on continuing to do so, he would be excluded from the hearing and the case of the plaintiffs would proceed against him *ex parte*, that he gave me a written undertaking that he would not further do so, and that he had destroyed any previously recorded material: see *Capilano Honey Ltd v Dowling* [2020] NSWSC 660 at [18]-[20].

175 That phase of the hearing before me was, in my opinion, very powerful evidence of the intractable attitude that the defendant takes to admonitions or prohibitions of the legal system, unless he is the subject of serious consequences for lack of compliance.

176 In short, I am well satisfied that the entirety of these proceedings before me will be rendered futile unless the defendant is prohibited by court order from conducting himself as he sees fit, including by way of committing further torts against the two successful plaintiffs, along with the real sanction of being dealt with for contempt of those orders.

Approach to costs

177 At the hearing, the contingent question of costs was reserved until after the delivery of this judgment. My associate will be in touch with the parties in order to set out a proposed timetable for the provision of written submissions so that the question can be determined in Chambers, subject to either party filing a successful notice of motion, with affidavit in support and written submissions of no more than five pages, submitting that the question of costs must be resolved in open court.

Orders

178 In the following orders, I have retained the abbreviations adapted in the orders sought by the plaintiffs.

179 I order that:

(1) There be judgment for the plaintiffs.

(2) There be an award of damages for the first plaintiff in the amount of $25,000.

(3) There be an award of damages for the second plaintiff in the amount of $150,000.

(4) The defendant is permanently restrained from publishing:

(a) the 17 September 2016 “Toxic Honey” KCA Article;

(b) the 25 September 2016 “Judicial Favours Scam” KCA Article;

(c) the 6 October 2016 “Car Conversation” KCA Article;

(d) the 9 October 2016 “Super Injunction” KCA Article;

(e) the 13 October 2016 “Capilano Honey Want Journalist Jailed” KCA;

(f) the 30 October 2016 “Capilano Honey Flag Possible Recall” KCA Article;

(g) the 6 November 2016 “Cash for Comment Scandal” KCA Article;

(h) the 13 November 2016 “Cover-Up of Poisonous Honey” KCA Article;

(i) the 17 November 2016 “Ban on Pesticides” KCA Article;

(j) the KCA “Capilano Investigation” Page;

(k) the 11 March 2017 “Scam Selling Imported Food As Organic” KCA Article,

as defined in the Statement of Claim.

(5) The defendant is permanently restrained from publishing any matter of and concerning the plaintiffs to the same effect as the publications listed in Order 4.

(6) The defendant is permanently restrained from publishing any matter of and concerning the second plaintiff to the same effect as the imputations contained in the Statement of Claim, or to the effect of any imputations that do not differ in substance.

(7) The defendant is permanently restrained from publishing any matter of and concerning the first plaintiff, to the same effect as the representations contained in the Statement of Claim, or to the effect of any representations that do not differ in substance.

(8) By 5pm on Monday, 29 March 2021 the defendant must permanently remove from the kangaroocourtofaustralia.com website the following publications, or any publication in substantially the same form:

(a) the article dated 17 September 2016 titled 'Australia's Capilano Honey Admit Selling Toxic and Poisonous Honey to Consumers';

(b) the article dated 25 September 2016 titled 'Channel Seven; Capilano Honey and Addisons Lawyers Involved in Judicial Favours Scam';

(c) the article dated 6 October 2016 published on the KCA Website titled 'Sex Tape Featuring Capilano Honey CEO Ben McKee Covered up by Directors';

(d) the article dated 9 October 2016 published on the KCA Website titled 'Capilano Take Out Super-Injunction to Silence a 2nd Journalist re: Poisonous and Toxic Honey';

(e) the article dated 13 October 2016 published on the KCA Website titled 'Capilano Honey Want Journalist Jailed For Exposing Their Toxic And Poisonous Honey';

(f) the article dated 30 October 2016 published on the KCA Website titled ‘Capilano Honey Flag Possible Recall of Honey Because of Health and Safety Fears’;

(g) the article dated 6 November 2016 published on the KCA Website titled ‘Choice Magazine Caught in Cash for Comment Scandal’;

(h) the article dated 13 November 2016 published on the KCA Website titled ‘Capilano Honey and Choice Cover-Up of Poisonous Honey Exposed by Federal Government’;

(i) the article dated 17 November 2016 published on the KCA Website titled ‘Capilano Honey Calls for Ban on Pesticides to Stop Poisoning Bees and Honey’;

(j) the webpage published from on or around 17 December 2016 on the KCA Website titled ‘Capilano Honey: Poisonous and Toxic Honey Investigation”;

(k) the article dated 11 March 2017 published on the KCA Website titled ‘Woolworths, Coles, and Aldi Running a Scam Selling Imported Food As Organic’; and

(l) all the articles referred to in Schedule B to these orders.

(9) By 5pm on Monday, 29 March 2021 the defendant must permanently remove any republication of the publications referred to in Order 8 (including any hyperlinks to those articles) from:

(a) the Kangaroo Court of Australia Facebook page;

(b) the Kangaroo Court of Australia Twitter account;

(c) the defendant’s Facebook page;

(d) the defendant's Twitter account; and

(e) any other electronic platform which is controlled or administered by the defendant,

including, but not limited to, the publications set out in Schedules A and C to these orders.

(10) Costs are reserved.

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Schedules A-C – publications subject to orders