

# SUPREME COURT OF QUEENSLAND

CITATION: *Sierocki & Anor v Klerck & Ors (No 2)* [2015] QSC 92

PARTIES: **JARROD SIEROCKI**  
(first plaintiff)  
**INSOLVENCY GUARDIAN PTY LTD**  
ACN 149 298 313  
(second plaintiff)

**v**

**PAUL GRANT KLERCK**  
(first defendant)  
**INTERACTIVE ENTERTAINMENT AUSTRALIA PTY LTD**  
ACN 068 003 805  
(second defendant)  
**SK & ASSOCIATES PTY LTD**  
ACN 155 041 491  
(third defendant)  
**BRENT THOMPSON**  
(fourth defendant)  
**INFOLINK IT PTY LTD**  
ACN 128 081 489  
(fifth defendant)  
**CHRISTINE WAKE**  
(sixth defendant)

FILE NO: SC No 638 of 2013

DIVISION: Trial

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 April 2015

DELIVERED AT: Brisbane

HEARING DATES: 30 March 2015; 8 April 2015

JUDGE: Flanagan J

ORDER:

1. **That the first defendant pay to the first plaintiff damages for defamation in the sum of \$80,000.00 plus interest in the amount of \$11,627.20;**
2. **That the second defendant pay to the first plaintiff damages for defamation in the sum of \$20,000.00 plus interest in the amount of \$2,906.80;**
3. **That the third defendant pay to the first plaintiff damages for defamation in the sum of \$20,000.00 plus interest in the amount of \$2,906.80;**

4. That the fourth defendant pay to the first plaintiff damages for defamation in the sum of \$60,000.00 plus interest in the amount of \$8,720.40;
5. That the fifth defendant pay to the first plaintiff damages for defamation in the sum of \$10,000.00 plus interest in the amount of \$1,453.40;
6. That the first defendant pay to the second plaintiff damages for defamation in the sum of \$30,000.00 plus interest in the amount of \$4,360.20;
7. That the second defendant pay to the second plaintiff damages for defamation in the sum of \$5,000.00 plus interest in the amount of \$726.70;
8. That the third defendant pay to the second plaintiff damages for defamation in the sum of \$10,000.00 plus interest in the amount of \$1,453.40;
9. That the fourth defendant pay to the second plaintiff damages for defamation in the sum of \$20,000.00 plus interest in the amount of \$2,906.80; and
10. That the fifth defendant pay to the second plaintiff damages for defamation in the sum of \$5,000.00 plus interest in the amount of \$726.70.
11. The first defendant is permanently restrained, by himself and/or his servants or agents from publishing or causing to be published:
  - (a) any of the ten matters complained of in paragraphs 6, 12, 18, 22, 26, 32, 38, 45, 49 and 58 of the amended statement of claim filed 26 April 2013 in these proceedings or matters substantially to the same effect as those matters complained of, on the internet or otherwise; and
  - (b) any of the imputations pleaded in the amended statement of claim filed 26 April 2013 of and concerning the first plaintiff, or any imputation that does not differ in substance to any of those imputations.
12. The fourth defendant is permanently restrained, by himself and/or his servants or agents from publishing or causing to be published:
  - (a) any of the two matters complained of in paragraphs 38 and 58 of the amended statement of claim filed 26 April 2013 in these proceedings or matters substantially to the same effect as those matters complained of, on the internet or otherwise; and
  - (b) any of the imputations pleaded in paragraphs 39 and 59 of the amended statement of claim filed 26 April 2013 in these proceedings of and concerning the first plaintiff, or any imputation that does not differ in substance to

**any of those imputations.**

**CATCHWORDS:** DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – IN GENERAL – where judgment had been awarded against the first to fifth defendants pursuant to r 374 of the *Uniform Civil Procedure Rules 1999 (Qld)* – where there were ten publications, two by email and the rest on the internet – where the first plaintiff was the director of the second plaintiff – where the second, third and fifth defendants were companies associated with the first defendant – where the fourth defendant was a former client of the second plaintiff – where two publications were extremely difficult, if not impossible, to remove from the internet – where the publications carried the imputations that, *inter alia*, the first plaintiff was fraudulent; is a conman; committed adultery; participated in illegal drugs; was evil; was a thief; was a liar; preyed on the innocent – where the publications carried the imputations that, *inter alia*, the second plaintiff's services were disreputable; were unprofessional; were run by the first plaintiff, a man with the imputations above; that the second plaintiff encouraged threatening behaviour – where the first plaintiff suffered, *inter alia*, humiliation and embarrassment; loss of business and reputation; loss of chairmanship of Brisbane Spartan's Basketball Club; loss of membership of the Order of the Knights Templar, Knights of Malta and the Freemasons – where there was no plea of aggravated or special damages – what the proper assessment of damages for defamation against each individual defendant is for each plaintiff as a global sum

DEFAMATION – INJUNCTIONS – JURISDICTION AND GENERALLY – where judgment had been awarded against the first to fifth defendants pursuant to r 374 of the *Uniform Civil Procedure Rules 1999 (Qld)* – where there were ten publications, two by email and the rest on the internet – where the first plaintiff was the director of the second plaintiff – where the second, third and fifth defendants were companies associated with the first defendant – where the fourth defendant was a former client of the second plaintiff – where, following service of the claim and statement of claim, the first and fourth defendants persisted in further publications – whether the first and fourth defendants have evidenced an intention to continue to publish defamatory matter concerning the first plaintiff – whether a permanent injunction against the first and fourth defendants ought to be granted

*Defamation Act 2005 (Qld)*, s 34, s 35(2), s 36, s 39

*Atholwood v Barrett* [2004] QDC 505, cited  
*Bristow v Adams* [2012] NSWCA 166, cited

*Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44  
 [1993] HCA 31, cited  
*Cerutti & Anor v Crestside Pty Ltd & Anor* [\[2014\] QCA 33](#),  
 considered  
*Feo v Pioneer Concrete (Vic) Pty Ltd* [1999] 3 VR 417;  
 [1999] VSCA 180, considered  
*Graham v Powell (No 4)* [2014] NSWSC 1319, considered  
*Klerck & Ors v Sierocki & Anor* [\[2014\] QCA 355](#), cited  
*Marsden v Amalgamated Television Services Pty Ltd* [2001]  
 NSWSC 510, cited  
*North Coast Children's Home Incorporated trading as Child  
 & Adolescent Specialist Programs and Accommodation  
 (CASPA) v Martin* [2014] NSWDC 125, cited  
*Phillips v Robab Pty Ltd* [2014] NSWSC 1520, cited  
*Roberts v Prendergast* [2014] 1 Qd R 357; [\[2013\] QCA 47](#),  
 cited  
*Royal Society for the Prevention of Cruelty to Animals (NSW)  
 v Davies* [2011] NSWSC 1445, cited  
*Ryan v Premachandran* [2009] NSWSC 1186, cited  
*Sierocki & Anor v Klerck & Ors* [\[2014\] QSC 9](#), cited

COUNSEL: A M Nelson for the plaintiffs  
 C J Main (*clerk*) for the second, third and fifth defendants  
 No appearance by the first and fourth defendants

SOLICITORS: Whitehead & Associates for the plaintiffs  
 Irish Bentley for the second, third and fifth defendants  
 No appearance for the first and fourth defendants

## Introduction

- [1] The plaintiffs claim damages for defamation arising from 10 publications. Two publications occurred by email and the balance were posted on a range of websites.
- [2] On 11 February 2014 Douglas J ordered,<sup>1</sup> pursuant to r 374 of the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”), that the plaintiffs have judgment against the first, second, third, fourth and fifth defendants conditional upon the assessment of damages by the Court under chapter 13, part 8 of the UCPR. The present proceedings are for that assessment of damages. The entry of judgment stands as a determination of the elements of the plaintiffs’ claim for damages, that is that the defendants published the matters complained of and that they conveyed the defamatory imputations pleaded.<sup>2</sup>

## Preliminary

- [3] There was no appearance by the first and fourth defendants at the assessment of damages. The second, third and fifth defendants are companies of which the first

<sup>1</sup> *Sierocki & Anor v Klerck & Ors* [2014] QSC 9. This was not disturbed on appeal: *Klerck & Ors v Sierocki & Anor* [2014] QCA 355.

<sup>2</sup> *Graham v Powell (No 4)* [2014] NSWSC 1319, [10] (McCallum J).

defendant is either a director and/or shareholder. The second, third and fifth defendants were represented by solicitors but played no active part in the proceedings. The solicitors had previously sought and obtained leave to withdraw as solicitors on the record for the first defendant but had been unable, as at the date of hearing, to obtain similar instructions in respect of the second, third and fifth defendants. The proceedings against the sixth defendant have been discontinued.

- [4] For the purpose of the assessment of damages, the plaintiffs' evidence-in-chief was by way of affidavits. No affidavit material in relation to the assessment of damages was filed or served by the first to fifth defendants.

### **Background**

- [5] The first plaintiff is a married man of 33 years of age with two children. He first met the first defendant in or about September 2010. Over time the first plaintiff and the first defendant became friends and ultimately in February 2011 incorporated the second plaintiff, Insolvency Guardian Pty Ltd. The first plaintiff and the first defendant were appointed as directors in equal shareholdings in Insolvency Guardian. For the purpose of conducting the business premises were leased at Varsity Lakes.<sup>3</sup>
- [6] For reasons that are not revealed in the material, there was an apparent falling out between the first plaintiff and the first defendant. On or about 18 November 2011 they met at Robina and drafted terms and conditions for separation as business partners. This was only three months after they had commenced business together. The first defendant resigned as a director of Insolvency Guardian and soon after created the third defendant, SK & Associates Pty Ltd effectively to compete with Insolvency Guardian for bankruptcy and insolvency referrals.
- [7] After the separation, the first defendant remained disgruntled with the first plaintiff and made repeated threats. In October 2012 he began publishing the material complained of on various websites. In January 2013 the first defendant sent an email to the first plaintiff and to a solicitor who was acquainted with both of them. He also sent an email to the first plaintiff's wife. I will return to the content and nature of the defamatory material shortly.
- [8] The fourth defendant is a former client of Insolvency Guardian. It appears from the material that the fourth defendant was also disgruntled with the plaintiffs because they had failed to secure for him an early discharge from bankruptcy. The fourth defendant therefore aligned himself with the first defendant. In January 2013 he joined the first defendant in publishing defamatory material on two websites including [www.ripoffreporter.com](http://www.ripoffreporter.com). This website required the defendants to acknowledge that the material would not be removed even on their own request.
- [9] The second, third and fifth defendants are companies associated with the first defendant. Each company is the relevant registrant of websites used in publishing a number of the defamatory matters.

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<sup>3</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [1]-[7].

- [10] Even after the statement of claim was served on 24 January 2013, over the next month the defendants continued to publish 24 more articles of and concerning the plaintiffs.

### **The defamatory matters**

#### *The first defamatory publication*

- [11] On or about 9 October 2012 the first and third defendants published certain words concerning the plaintiffs on the website [www.insolvencyprofessionals.com.au](http://www.insolvencyprofessionals.com.au). The third defendant is the registrant of the relevant website for Insolvency Professionals. The publication referred to Insolvency Professionals taking over three former clients of Insolvency Guardian. One of those clients included the fourth defendant, Brent Thompson. The publication is critical of the business ability of the plaintiffs. Paragraph 7 of the amended statement of claim (“ASOC”) pleads the relevant meanings conveyed by the publication. These include that the plaintiffs had failed to achieve outcomes that had been promised to the three clients. The publication also carried a more serious meaning, namely that the second plaintiff permitted or encouraged its employees to threaten its competitors with physical violence. Paragraph 10 of the ASOC pleads that as a consequence of the publication the first plaintiff suffered loss and damage including:

- (a) emotional hurt, humiliation and embarrassment; and
- (b) reduction of his professional reputation or standing.

The damages claim on behalf of the second plaintiff is limited to the reduction of the company’s professional reputation or standing.<sup>4</sup>

- [12] Given this difference in the damages claimed for the first plaintiff and the second plaintiff it is necessary to differentiate between the two in assessing damages. It is also important to note that whilst all ten publications were of and concerning the first plaintiff, only the first, second, fifth, sixth, seventh, ninth and tenth publications were of and concerning the second plaintiff. There are also differences in the meanings said to arise. These observations simply reinforce the need to differentiate between the first and second plaintiffs in awarding damages.

#### *The second defamatory publication*

- [13] This publication involved the first and second defendants and was made on 11 October 2012. The publication was made on a website [www.infolinkit.com.au](http://www.infolinkit.com.au). The second defendant is the registrant of this website. The meaning said to arise from the publication in respect of the first plaintiff is that he gave incorrect advice to clients of the second plaintiff and that his advice could not be trusted or relied upon.<sup>5</sup> Further, that the first plaintiff is not a person that one should do business with. Similar meanings are pleaded in respect of the second plaintiff.<sup>6</sup>

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<sup>4</sup> Amended statement of claim filed 26 April 2013, [11].

<sup>5</sup> Amended statement of claim filed 26 April 2013, [13].

<sup>6</sup> Amended statement of claim filed 26 April 2013, [14].

*The third defamatory publication*

[14] This is a publication made on or about 17 January 2013 and only involved the first defendant. The first defendant sent an email to the first plaintiff and to a solicitor, John Ramsden, who was known to both the first plaintiff and the first defendant. The publication was therefore limited. The email seems to be in response to an allegation that the first plaintiff had posted an article critical of the first defendant. The email contained a number of serious defamatory meanings, including that the first plaintiff:<sup>7</sup>

- had posted material on a website defamatory of the first defendant;
- was evil;
- was stupid;
- was a liar;
- was a fake; and
- falsely represented himself as:
  - (a) having a doctorate of law;
  - (b) being a barrister at law; and
  - (c) being a law lecturer at Bond University.

The third defamatory publication is not pleaded to be defamatory of the second plaintiff.

*The fourth defamatory publication*

[15] This was a publication involving the first and second defendants made on or about 17 January 2013 on a website [www.websitepromotion.net.au](http://www.websitepromotion.net.au). Even though paragraph 22 of the ASOC pleads that the publication was by the first and third defendants, I note that the second defendant is pleaded in paragraph 4 as being the registrant of the website [www.websitepromotions.net.au](http://www.websitepromotions.net.au). The fourth publication was made in the context of an adverse review that the first defendant had received. The publication refers to the fact that the first defendant was seeking damages against Reviews Talk for the allegedly defamatory review. The only mention of the first plaintiff in the fourth publication is as follows:<sup>8</sup>

“PS, Jarrod Sierocki you will be the first person that the CIB investigate for this defamatory posting.”

[16] The fourth defamatory publication is said to be defamatory only of the first plaintiff. The defamatory meanings carried by the publication were that the first plaintiff posted

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<sup>7</sup> Amended statement of claim filed 26 April 2013, [19].

<sup>8</sup> Amended statement of claim filed 26 April 2013, sch 4.

untrue and defamatory comments about the first defendant and was being investigated by police.<sup>9</sup>

*The fifth defamatory publication*

- [17] This publication was also made on 17 January 2013 by the first defendant. The publication first deals with the first defendant's proposal to sue Reviews Talk for defamation. The article specifically states that the first defendant believed that the first plaintiff was responsible for the posting of the article on Reviews Talk.
- [18] One of the imputations arising from the publication is that the first plaintiff was waging a smear campaign against the first defendant and participating in the publication of lies about the first defendant. Other imputations said to arise are that the first plaintiff acted fraudulently, that he had mistreated and defrauded previous clients and that he had acted unlawfully in a way that would cause the Insolvency and Trustee Service Australia to investigate him.<sup>10</sup>
- [19] The imputations in respect of the second plaintiff are more limited and include that:<sup>11</sup>
- it authorises or permits or encourages its employees to engage in threatening conduct in respect of competitors;
  - it authorises or permits or encourages its employees to threaten competitors with physical violence;
  - its services are disreputable; and
  - its services are unprofessional.

*The sixth defamatory publication*

- [20] The sixth publication involves the first and fifth defendants and was also made on 17 January 2013. It was a posting to a website [www.scammonster.com](http://www.scammonster.com). From the pleading in paragraph 3 of the ASOC it is not entirely clear to me what involvement the fifth defendant had in the sixth publication. Paragraph 3 pleads that the first defendant is a shareholder of the fifth defendant and is the registrant of the scammonster.com website. I note however, that the further amended defence of the first, second, third and fifth defendants denies that the first defendant is the registrant of the scammonster.com website and further pleads in paragraph 3(b)(i) that the registrant of the website is the fifth defendant and not the first defendant. I therefore proceed on the basis that the fifth defendant is the registrant of the relevant website. The sixth defamatory publication does not name either the first or second plaintiffs. Paragraph 33 of the ASOC, however, pleads that by way of true innuendo the sixth publication was defamatory of the first

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<sup>9</sup> Amended statement of claim filed 26 April 2013, [23].

<sup>10</sup> Amended statement of claim filed 26 April 2013, [27].

<sup>11</sup> Amended statement of claim filed 26 April 2013, [28].

plaintiff because by their natural and ordinary meaning the words were meant and were intended to mean that the first plaintiff:

- is dodgy;
- is operating a scam;
- knows nothing about the field of assisting people in financial hardship;
- preys on innocent people;
- defrauds innocent people of their money; and
- gives clients of the second plaintiff false hope.

Only three of these imputations are pleaded as arising in respect of the second plaintiff.<sup>12</sup>

*The seventh defamatory publication*

- [21] This is a publication also made on 17 January 2013 and involves both the first and the fourth defendants. This was a publication made on the website [www.ripoffreport.com](http://www.ripoffreport.com). According to paragraphs 17 to 19 of the affidavit of Dr Bradley Schatz,<sup>13</sup> a forensic computer scientist, because of the terms of service of this particular website he is of the opinion that, assuming no co-operation from the operators of the website in regard to a request to remove content, such content would generally remain on the website for as long as it continues to operate. The ninth defamatory publication was also made using the same website. The website is located in the United States of America.<sup>14</sup>
- [22] The seventh publication purports to be one written by the fourth defendant, Brent Thompson, a former client of the plaintiffs. He sets out the story of his dealings with the first plaintiff. The defamatory meanings said to be conveyed are extensive and serious.<sup>15</sup> The most serious of these is that the first plaintiff is a conman who defrauded the fourth defendant and ruined his life. Further meanings said to arise are that the first plaintiff assisted others to work for cash and avoid paying income tax and that the first plaintiff defrauded a countless number of people other than the fourth defendant. The thrust of the imputations is that the first defendant is a fraudster and a liar. The meanings said to arise from the seventh publication in respect of the second plaintiff are pleaded in paragraph 40 and include imputations that the second defendant defrauded the fourth defendant and others and was involved in underhanded deals. Further, that the second plaintiff was operated by the first plaintiff who was a man who fraudulently portrayed himself as a barrister, an accountant, holding a doctorate in law and as a law lecturer at Bond University.

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<sup>12</sup> Amended statement of claim filed 26 April 2013, [34].

<sup>13</sup> Affidavit of Bradley L Schatz affirmed 16 March 2015.

<sup>14</sup> Amended statement of claim filed 26 April 2013, [44], [57].

<sup>15</sup> Amended statement of claim filed 26 April 2013, [39].

*The eighth defamatory publication*

- [23] This publication was by the first defendant only. The publication was by way of email to the first plaintiff's wife on or about 17 January 2013. The publication whilst limited was clearly targeted. This email is said to be defamatory only of the first plaintiff. The meanings conveyed are that the first plaintiff had an extra-marital affair, took illegal drugs, was an evil person and is a liar.<sup>16</sup>

*The ninth defamatory publication*

- [24] This publication was made on or about 21 January 2013 and only involves the first defendant because the action against the sixth defendant has been discontinued. As I have already noted, this was a publication on the ripoffreport.com website. The most significant defamatory meanings conveyed by this publication are that the first plaintiff is an extortionist; is evil; is a thief and falsely portrays himself to be lawyer.<sup>17</sup> By way of true innuendo pleaded in paragraph 51 of the ASOC, the publication is also intended to mean that the first plaintiff bullied and defrauded the sixth defendant.<sup>18</sup> The ninth publication is pleaded to be defamatory of the second plaintiff because it meant that the second plaintiff was operated by a person that was an extortionist, a liar, a thief and a person who falsely portrays himself as a lawyer.<sup>19</sup>

*The tenth defamatory publication*

- [25] This publication involves the first and fourth defendants and was made on or about 20 January 2013. It is a serious defamation and commences with the words:<sup>20</sup>

“Be Warned Jarrod Sierocki is a filthy low life conman that will rip you off. He runs a business called Insolvency Guardian, Insolvency Solutions, NIIPA, and Australian Online News and Media.”

- [26] The publication carried the following meanings namely that the first plaintiff was a filthy low life conman; he defrauded people who did business with him; he takes advantage of desperate people; he commits fraud on a daily basis, rips cash off innocent people and is a person who should be in gaol.<sup>21</sup> The words are pleaded as being defamatory of the second plaintiff because they were intended to mean that the second plaintiff was operated by a person that was a low life conman who defrauded people, took advantage of people, committed fraud, ripped cash off innocent people and should be in gaol.<sup>22</sup>

**The effect on the first and second plaintiff of the publications.**


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<sup>16</sup> Amended statement of claim filed 26 April 2013, [46].

<sup>17</sup> Amended statement of claim filed 26 April 2013, [50].

<sup>18</sup> Amended statement of claim filed 26 April 2013, [51].

<sup>19</sup> Amended statement of claim filed 26 April 2013, [52] – [53].

<sup>20</sup> Amended statement of claim filed 26 April 2013, sch 10.

<sup>21</sup> Amended statement of claim filed 26 April 2013, [59].

<sup>22</sup> Amended statement of claim filed 26 April 2013, [61].

- [27] There is no claim for special damages made by the plaintiffs. There is no claim for an award of aggravated damages. What is sought is an award of general damages. In relation to each of the relevant publications the plaintiffs plead that the publication was actuated by ill will and by greed and the desire to profit at the plaintiffs' expense. The plaintiffs further plead that the defamatory matter was published with the intention that the words would cause people who read them to shun and avoid the plaintiffs and lower their estimation of the plaintiffs.<sup>23</sup> The state of mind of the defendants are not relevant to awarding damages except to the extent that the state of mind affects the harm sustained by the plaintiffs.<sup>24</sup>
- [28] As to the effect of these publications on the plaintiffs, a number of affidavits were relied on. The first plaintiff, in his affidavit sworn 3 April 2013, identifies that the second plaintiff is a company with less than 10 employees which operates a business providing bankruptcy and company liquidation services. Those services are predominantly marketed and delivered online.<sup>25</sup> He states that he has been approached by representatives of businesses with which the plaintiffs deal on a regular basis. These representatives have cancelled their business arrangements with the second plaintiff because of the bad publicity arising from the defamatory publications.<sup>26</sup>
- [29] In his affidavit filed 16 March 2015, the first plaintiff states that he has been greatly affected by the defamatory publications.<sup>27</sup> He states that he and his wife have been consumed by humiliation and embarrassment caused by the publications.<sup>28</sup> He has been contacted by friends and business acquaintances to tell him about the things they have read on the Google search engine. Whilst attending business meetings he has found that almost without fail a person at the meeting would raise the subject of the material published by the defendants on the internet. The most frequent comment that he hears is "your reputation precedes you".<sup>29</sup> Family members in Germany, Serbia and Poland have read the publications online.<sup>30</sup> This has caused the first plaintiff severe embarrassment.
- [30] The publications have caused him much distress which has led to him experiencing depression and crying himself to sleep.<sup>31</sup> The publications have also had a wider effect on his standing in the community. He has been shunned by parents of children in his son's rugby team.<sup>32</sup> He had previously been elected chairman of the Brisbane Spartan's (Clem Jones Foundation) Basketball Club. He states that as a result of the publications the Board has asked him to stand aside because "the image is bad for the Club".<sup>33</sup> The first plaintiff is also a Freemason. His father and grandfather were also Freemasons. On 7 February 2013 he received a letter from the Freemasons summoning him to attend a meeting at the United Grand Lodge of Queensland to show cause why he should not

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<sup>23</sup> Amended statement of claim filed 26 April 2013, [9], [15], [20], [29], [41], [54], [63].

<sup>24</sup> *Defamation Act 2005* (Qld) s 36.

<sup>25</sup> Affidavit of Jarrod Sierocki sworn 3 April 2013, [2].

<sup>26</sup> Affidavit of Jarrod Sierocki sworn 3 April 2013, [42].

<sup>27</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [37].

<sup>28</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [38].

<sup>29</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [40].

<sup>30</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [63].

<sup>31</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [37], [41].

<sup>32</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [54].

<sup>33</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [56].

be expelled from the Order as a result of the things published by the defendants. He resigned from his lodge as a consequence of that meeting.<sup>34</sup> He has also been asked to resign from the Knights Templar and Knights of Malta.<sup>35</sup>

- [31] He states that his life as he knew it ended two years ago when the defendants began publishing this material about him on the internet. He believes he can never apply for a job because someone will google him and see what everyone else sees, namely the defamatory publications.<sup>36</sup> Even today, Google has the first plaintiff listed on the first page of the image search results with a picture of a person with a black hood over their head with two holes for the eyes and one hole for the mouth which looks something like a Klu Klux Klan hood. This picture is hyperlinked to the ripoffreport.com website which I have already observed is permanent until it ceases to operate. As at the date of swearing this affidavit, namely 14 March 2015, the first plaintiff is aware that there are still at least three entries on Google alleging that he is a conman, a thief and a liar.<sup>37</sup>
- [32] The first plaintiff's wife has also sworn an affidavit sworn 14 March 2015. She states that since the defamatory publications were posted on the internet a number of parents have informed her of the articles which have been published. She has noticed that people have avoided her and her husband.<sup>38</sup> A former client and friend of the first plaintiff, Shane Heal, in an affidavit sworn 12 March 2015, states that he was contacted by a person advising him to "stay away from Jarrod Sierocki, he 'rips people off and he can't be trusted'".<sup>39</sup> Mr Heal searched the internet using Google and saw and read the allegations about the plaintiffs. Even though he was a friend of the first plaintiff he did become very wary of him for a long time.<sup>40</sup> Another person who dealt with the first plaintiff, Paul Khoury, in an affidavit sworn 16 March 2015, also states that his general impression is that the first plaintiff's general reputation with the insolvency industry is now a terrible one because of the publications.<sup>41</sup> It may be accepted that the publications have had a devastating effect on the first plaintiff particularly in respect of his reputation in the business and wider community.

### **Damages principles**

- [33] As observed by Mason CJ, Deane, Dawson and Gaudron JJ in *Carson v John Fairfax & Sons Ltd*,<sup>42</sup> an award of damages in a defamation case serves three purposes, namely consolation for the personal distress and hurt caused to the plaintiffs by the publication, reparation for the harm done to the plaintiffs' personal and business reputation and vindication of the plaintiffs' reputation. The first two of these purposes are frequently considered together and constitute consolation for the wrong done to the plaintiff. Vindication, as stated by the High Court, looks to the attitude of others to the plaintiff. The sum awarded must be at least the minimum necessary to signal to the public the vindication of the plaintiff's reputation.

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<sup>34</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [59] – [60].

<sup>35</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [61].

<sup>36</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [66] – [67].

<sup>37</sup> Affidavit of Jarrod Sierocki sworn 14 March 2015, [69].

<sup>38</sup> Affidavit of Vedrana Sierocki sworn 14 March 2015, [11].

<sup>39</sup> Affidavit of Shane Douglas Heal sworn 12 March 2015, [5].

<sup>40</sup> Affidavit of Shane Douglas Heal sworn 12 March 2015, [7].

<sup>41</sup> Affidavit of Paul Khoury sworn 16 March 2015, [6] – [7].

<sup>42</sup> (1993) 178 CLR 44, 60.

- [34] Damage to reputation is of course presumed to flow from the defamatory publication.<sup>43</sup> Pursuant to s 34 of the *Defamation Act* 2005 (Qld) (“**the Act**”) in determining the amount of damages to be awarded in any defamation proceedings, the Court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded. Section 35 of the Act caps the damages for non-economic loss. The last gazetted increase caps such losses at \$366,000.00 on and from 1 July 2014. This cap applies regardless of how many publications or how many imputations are sued upon however, pursuant to s 35(2), it can be exceeded if an award of aggravated damages is made. As I have already observed the plaintiffs did not plead a claim for aggravated damages. A claim for aggravated damages and the material facts to warrant such an award need to be specifically pleaded.<sup>44</sup> Mr Nelson of Counsel, who appeared for the plaintiff accepted that I should assess damages on the basis that the plaintiff does not claim aggravated damages. He submitted, however, that for s 35(2) to operate, it does not require aggravated damages to be pleaded but simply that the Court is satisfied that the circumstances of the publication of the defamatory matter are such as to warrant an award of aggravated damages. Mr Nelson identified those circumstances as including the allegation that the first and fourth defendants were actuated by malice and that the first defendant was actuated by greed. Further, that the defendants have failed to apologise and have pleaded in their defences that the imputations were true. The difficulty I have with this submission is that s 35(2) may operate so as to have serious consequences for a defendant by permitting an award of damages to exceed the maximum. Whilst two of the matters identified by Mr Nelson as warranting an award of aggravated damages have been specifically pleaded the other circumstances have not.
- [35] In circumstances where I am assessing damages where judgment has been entered on the basis of the plaintiffs’ pleaded case, I would be reluctant to take into account circumstances warranting an award of aggravated damages that have not been specifically pleaded. It is, however, unnecessary for me to further consider this submission because in the circumstances of this case I have no intention of awarding damages in excess of the cap.
- [36] Section 39 permits the Court to assess damages in a single sum even when there are, as in the present case, ten separate defamatory publications. A single sum must however be assessed in respect of each plaintiff for each defendant. This flows from s 39 when read with s 8 of the Act. It is important therefore, to distinguish between the various roles of the defendants. The first defendant was involved in each of the ten publications. He may be viewed as the prime mover in relation to the publications. The roles of the second, third and fifth defendants as entities related to the first defendant, either by way of him being a director or shareholder, are limited to those companies being the relevant registrant of the website upon which the publications were made. The second defendant was involved in the second and fourth publications. The third defendant was involved in the first publication. The fifth defendant was involved in the sixth publication. The fourth defendant, Brent Thompson, was involved in the seventh and tenth publications. Any global award of damages in respect of each defendant

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<sup>43</sup> *Bristow v Adams* [2012] NSWCA 166, [20]-[31] (Basten JA). This has been subsequently approved by Applegarth J (with whom McMurdo P and Gotterson JA agreed) in *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33, [31].

<sup>44</sup> *Uniform Civil Procedure Rules* 1999 (Qld) rr 150(1)(b), 158(2).

should recognise their differing roles and participation in the publication of the defamatory material and the differing imputations which arise from each publication.

- [37] Section 34 of the Act was recently considered by the Queensland Court of Appeal in *Roberts v Prendergast*.<sup>45</sup> There the defamatory statements were made about the respondent to three persons at separate times. Those statements conveyed meanings that the respondent who was a builder, was “an incompetent builder”, was a “dishonest builder” and that his “reputation [was] so bad that any person doing business with him was ruining their own reputation”.<sup>46</sup> These publications were made orally to three persons. They were certainly not the subject of extensive internet publications as is the case here. Nor were the defamatory meanings as serious as the present case. Gotterson JA, in considering s 34, concluded that the case called for a substantial award of general damages and that the sum awarded at first instance of \$50,000.00 bore an appropriate and rational relationship to the harm sustained by the respondent.<sup>47</sup>
- [38] In *Cerutti & Anor v Crestside Pty Ltd & Anor*,<sup>48</sup> Applegarth J (with whom McMurdo P and Gotterson JA agreed), stated that caution had to be exercised in utilising other awards of damages in defamation cases. His Honour observed:

“[48] A problem confronting both trial judges and this court in considering comparable cases is the relative infrequency of damages awards for defamation in this State and the wide factual variations between the few cases that go to trial. How does one compare a bad defamation, such as an imputation of criminality or dishonesty, communicated to a limited number of people, with a less serious defamation communicated to a far greater number? Cases can be found of very substantial awards. There are other cases in which judges are far more moderate in their awards. It is unnecessary to survey the facts of those cases since none closely compare to the present.

[49] This court might look to awards in other Australian jurisdictions, given the infrequency of defamation awards in this State. But historically, awards of damages for defamation in New South Wales by judges and juries have been generally higher than in other Australian jurisdictions. This may have something to do with the value of an average house in Sydney compared to other cities or the higher cost of living there, but it may reflect some less obvious difference. Where defamation litigation in this State is relatively rare, and there are so few awards, it is permissible to look to other Australian jurisdictions in determining whether an award of damages is manifestly inadequate or manifestly excessive. However, neither trial courts nor this court should be expected to construct lists of

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<sup>45</sup> [2014] 1 Qd R 357.

<sup>46</sup> *Roberts v Prendergast* [2014] 1 Qd R 357, 359 [13] (Gotterson JA).

<sup>47</sup> *Roberts v Prendergast* [2014] 1 Qd R 357, 367 [50].

<sup>48</sup> [2014] QCA 33, [47].

awards in defamation cases or to have long lists of cases presented to them. They can, however, benefit from the careful selection and citation by counsel of broadly comparable cases. Such a course was adopted at trial.”  
(Footnotes omitted)

- [39] Mr Nelson referred to a number of cases where awards varied from a high of \$525,000.00<sup>49</sup> to awards in the order of \$80,000.00.<sup>50</sup> Mr Nelson also referred to one of the higher awards given in Queensland by Samios DCJ in *Atholwood v Barrett*.<sup>51</sup> His Honour awarded \$100,000.00 in that case for what was viewed as a most serious defamatory statement, namely that the plaintiff was a paedophile. The total award in that case was \$140,000.00 plus interest.
- [40] As observed by Gibson DCJ in *North Coast Children’s Home Incorporated trading as Child & Adolescent Specialist Programs and Accommodation (CASPA) v Martin*,<sup>52</sup> “[w]hile imputations of dishonesty, incompetence and neglect are serious issues, imputations of involvement in child abuse of any kind must be viewed as the most serious imputations capable of being made.” In that case her Honour was dealing with imputations of child abuse made in relation to employees of an organisation working in the area of caring for disadvantaged children. Her Honour awarded \$50,000.00 to the corporate plaintiff and \$100,000.00 each to the individuals who had been the subject of the child abuse imputations. Cases such as *Marsden*, *Atholwood* and *North Coast Children’s Home* all concern serious allegations of paedophilia and child abuse. I agree with the observations of Gibson DCJ that such imputations are, according to general community standards, of a more serious nature than the imputations in the present case.
- [41] There are, however, other factors that inform an appropriate award of damages. They include the extent of the publications. The publication by email in the third defamatory publication and eighth defamatory publication were limited to the first plaintiff’s wife and a solicitor known both to the first plaintiff and the first defendant. The posting of the other publications, however, on the relevant websites, constitutes a publication to the world at large. The affidavit evidence establishes that this information was widely read by persons who knew the first plaintiff and it had a grapevine effect. The publications on the websites damaged the first plaintiff’s reputation, not only from a business perspective but from a wider community perspective. There is a recent case decided by McCallum J in the New South Wales Supreme Court, *Graham v Powell (No 4)*,<sup>53</sup> which I consider “broadly comparable” to the present case.
- [42] In *Graham v Powell (No 4)*, McCallum J had to assess damages in circumstances where Beech-Jones J had entered judgment. In that case there were nine publications. The first to eighth were items made available for downloading on the internet on two websites operated by the defendant. The ninth matter complained of was an email sent by the defendant to a number of email addresses including the Mayor of Goulburn,

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<sup>49</sup> *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510 (\$275,000 and \$250,000 respectively).

<sup>50</sup> *Ryan v Premachandran* [2009] NSWSC 1186.

<sup>51</sup> [2004] QDC 505.

<sup>52</sup> [2014] NSWDC 125, [66].

<sup>53</sup> [2014] NSWSC 1319.

various councillors and mass media outlets. The imputations that were said to arise from the publications were very serious. These included that the plaintiff, in his role as a councillor, participated in a transparent fraud; had fraudulently lied; had used his public position as a Councillor for private gain; had stolen public money; had acted as a shyster; and was guilty of fraud, corruption and incompetence. Further imputations which arose were that the plaintiff had sought to bribe the Mayor of the Palarang Council. An allegation was also made that the plaintiff was a disgusting parasite who dishonestly presented himself as ethically motivated to Palarang Council when all he cared about was enriching himself. Further, that the plaintiff, as a Councillor, ripped off residents. There were also allegations of misappropriation and corruptly receiving fees.

- [43] Her Honour accepted that the plaintiff was absolutely devastated by the persistence, viciousness and irrationality of the defendant's defamatory publications against him.<sup>54</sup> Her Honour also accepted that the imputations were very serious involving allegations of bribery, theft, corruption, and dishonesty against a serving councillor. Her Honour was satisfied that the publications were likely to have done serious and lasting damage to the plaintiff's reputations in the eyes of at least some readers.<sup>55</sup> Her Honour awarded damages, including aggravated damages, in the sum of \$80,000.00 and granted injunctive relief. The imputations in the present case are at least as serious but go further and include that the first plaintiff is an adulterer, a fraud, a criminal, a liar, a conman and a sociopath.<sup>56</sup> There is however no pleaded claim for aggravated damages.
- [44] An award of damages must be sufficient to vindicate the plaintiffs' reputation both up to the time of judgment and into the future.<sup>57</sup> I accept the submission of the plaintiffs that in the present case, where the defamatory material has been published on the internet and in circumstances where two of those publications are extremely difficult, if not impossible, to remove, the defamatory statements concerning the plaintiffs can never be truly driven underground.
- [45] As I have already observed, there has been no apology in relation to these publications. Indeed, the defences filed by the first and fourth defendants persisted in the truth of the allegations. Accordingly, there is no material before me evidencing factors that I may take into account in mitigation of damages pursuant to s 38 of the Act.
- [46] Mr Nelson submitted that, given the grave and widespread allegations together with the permanent stain that they will leave upon the plaintiffs' reputations, vindication is the most important feature and calls for a very large award. The first plaintiff is only 33 years of age. The award in relation to the publications by the first defendant at least should be sufficiently large "so as to convince people, both personally and in respect of business transactions, that they should ignore the [defamatory matters] posted..."<sup>58</sup>
- [47] Taking the above matters into account I award the following damages. In respect of the first plaintiff:

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<sup>54</sup> *Graham v Powell (No 4)* [2014] NSWSC 1319, [39].

<sup>55</sup> *Graham v Powell (No 4)* [2014] NSWSC 1319, [41].

<sup>56</sup> Plaintiffs' submissions dated 30 March 2015, [32].

<sup>57</sup> *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071 (Lord Hailsham LC); *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33, [35] (Applegarth J).

<sup>58</sup> Plaintiffs' submissions dated 30 March 2015, [43].

- (a) as against the first defendant for all ten defamatory publications: \$80,000.00;
- (b) as against the second defendant for the second and fourth defamatory publications: \$20,000.00;
- (c) as against the third defendant for the first defamatory publication: \$20,000.00;
- (d) as against the fourth defendant for the seventh and tenth defamatory publications: \$60,000.00; and
- (e) as against the fifth defendant for the sixth defamatory publication: \$10,000.00.

[48] In respect of the second plaintiff:

- (a) as against the first defendant for the first, second, fifth, sixth, seventh, ninth and tenth defamatory publications: \$40,000.00;
- (b) as against the second defendant for the second defamatory publication: \$5,000.00;
- (c) as against the third defendant for the first defamatory publication: \$10,000.00;
- (d) as against the fourth defendant for the seventh and tenth defamatory publications: \$20,000.00; and
- (e) as against the fifth defendant for the sixth defamatory publication: \$5,000.00.

[49] Interest at the rate of 6.5% is payable on those amounts from the date of the claim to the date of judgment.

[50] The awards of damages for the second plaintiff are lower than those for the first plaintiff because of the matters I have identified in paragraph 12 above. The second plaintiff has not claimed special damages and the material does not establish any actual quantum of business loss suffered by it as a result of the relevant defamatory publications. As Winneke P observed in *Feo v Pioneer Concrete (Vic) Pty Ltd*,<sup>59</sup> where a corporation has been slandered in the way of its business, the slander is actionable per se, and it is unnecessary to either allege or prove special damage. His Honour continued:

“That does not mean that the presumed damage to its reputation can only be compensated if calculable in precise money terms. As Ormiston JA said in *Kay’s* case ... damages are not to be assessed for injury to the company’s ‘reputation as such’, but are to be assessed ‘having regard to financial and commercial considerations by which a corporation’s reputation is ordinarily assessed’. In some cases the damages assessed may only be nominal; particularly

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<sup>59</sup> [1999] 3 VR 417, [57], cited with apparent approval by Applegarth J in *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33, [83].

where the court cannot be satisfied that the nature of the defamatory imputation, or the breadth of its publication, has caused significant harm to the trading reputation of the corporation defamed. However, that is not to say that the defamatory publication is not actionable at the suit of the corporation. If no proof is tendered of specific loss, the assessment of damages is to be made on the material available to the court and the view which it forms of the loss likely to have been suffered by the company as a consequence of the defamatory material which it finds to have been published of and concerning the entity in the way of its business...”

- [51] In the present case the relevant defamatory publications in respect of the second plaintiff gave rise to 52 imputations, most of which concerned the actual conduct of the second plaintiff’s business. The publications, having been posted on the relevant websites, were bound to have a wide readership. The publications were made in circumstances where the first defendant was in direct competition with the second plaintiff for business. It may therefore be readily presumed that the relevant defamatory publications injured the second plaintiff’s professional reputation or standing.

### **Injunctive relief**

- [52] The plaintiffs seek a permanent injunction restraining the first and fourth defendants from publishing material defamatory of the first plaintiff. From the material before the Court it is clear that after the first and fourth defendants were served with the statement of claim they persisted in further publications.<sup>60</sup> The plaintiffs submit that the first and fourth defendants have evidenced an intention to continue to publish defamatory matter concerning the first plaintiff. The defendants in this respect do not seem to be deterred by the likely financial consequences of their action and only the threat of contempt proceedings is likely to act as a real deterrent.<sup>61</sup> Similar injunctive relief has been granted in *Royal Society for the Prevention of Cruelty to Animals (NSW) v Davies*,<sup>62</sup> *Phillips v Robab Pty Ltd*<sup>63</sup> and *Graham v Powell (No 4)*.<sup>64</sup>

- [53] I am satisfied that the first and fourth defendants may be likely to publish similar allegations against the first plaintiff unless restrained. Accordingly, I will order that:

1. The first defendant is permanently restrained, by himself and/or his servants or agents from publishing or causing to be published:
  - (a) any of the ten matters complained of in paragraphs 6, 12, 18, 22, 26, 32, 38, 45, 49 and 58 of the amended statement of claim filed 26 April 2013 in these proceedings or matters substantially to the same effect as those matters complained of, on the internet or otherwise; and

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<sup>60</sup> Affidavit of Jarrod Sierocki sworn 3 April 2013, exhibit T.

<sup>61</sup> Plaintiff’s submissions dated 30 March 2015, [46].

<sup>62</sup> [2011] NSWSC 1445.

<sup>63</sup> [2014] NSWSC 1520.

<sup>64</sup> [2014] NSWSC 1319.

- (b) any of the imputations pleaded in the amended statement of claim filed 26 April 2013 of and concerning the first plaintiff, or any imputation that does not differ in substance to any of those imputations.
2. The fourth defendant is permanently restrained, by himself and/or his servants or agents from publishing or causing to be published:
    - (a) any of the two matters complained of in paragraphs 38 and 58 of the amended statement of claim filed 26 April 2013 in these proceedings or matters substantially to the same effect as those matters complained of, on the internet or otherwise; and
    - (b) any of the imputations pleaded in paragraphs 39 and 59 of the amended statement of claim filed 26 April 2013 in these proceedings of and concerning the first plaintiff, or any imputation that does not differ in substance to any of those imputations.

### **Conclusion**

[54] As well as the orders in relation to injunctive relief I will make the following orders:

1. That the first defendant pay to the first plaintiff damages for defamation in the sum of \$80,000.00 plus interest in the amount of \$11,627.20;
2. That the second defendant pay to the first plaintiff damages for defamation in the sum of \$20,000.00 plus interest in the amount of \$2,906.80;
3. That the third defendant pay to the first plaintiff damages for defamation in the sum of \$20,000.00 plus interest in the amount of \$2,906.80;
4. That the fourth defendant pay to the first plaintiff damages for defamation in the sum of \$60,000.00 plus interest in the amount of \$8,720.40;
5. That the fifth defendant pay to the first plaintiff damages for defamation in the sum of \$10,000.00 plus interest in the amount of \$1,453.40;
6. That the first defendant pay to the second plaintiff damages for defamation in the sum of \$30,000.00 plus interest in the amount of \$4,360.20;
7. That the second defendant pay to the second plaintiff damages for defamation in the sum of \$5,000.00 plus interest in the amount of \$726.70;
8. That the third defendant pay to the second plaintiff damages for defamation in the sum of \$10,000.00 plus interest in the amount of \$1,453.40;

9. That the fourth defendant pay to the second plaintiff damages for defamation in the sum of \$20,000.00 plus interest in the amount of \$2,906.80; and
10. That the fifth defendant pay to the second plaintiff damages for defamation in the sum of \$5,000.00 plus interest in the amount of \$726.70.