SUPREME COURT OF QUEENSLAND

CITATION:	*Leigh v Bruder Expedition Pty Ltd* [2022] QCA 267
PARTIES:	**TRACY LEIGH** (applicant/appellant) **v** **BRUDER EXPEDITION PTY LTD** ACN 603 551 579 (respondent)
FILE NO/S:	Appeal No 371 of 2020 DC No 2380 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2019] QDC 271 (Clare SC DCJ)
DELIVERED ON:	20 December 2022; footnote 10 added, 10 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2022; further written submissions received on 12 and 20 September 2022
JUDGES:	Bowskill CJ and Morrison and Dalton JJA
ORDERS:	**1. Leave to appeal is granted.** **2. The appeal is dismissed.** **3. The appellant pay the respondent's costs, including costs reserved in this Court.**
CATCHWORDS:	COURTS AND JUDGES – CONTEMPT – PARTICULAR CONTEMPTS – DISOBEDIENCE OF ORDERS OF COURT – INJUNCTIONS – where the appellant was found by a jury to have published injurious falsehoods about the respondent on a Facebook page – where the judge presiding over the injurious falsehood trial (the Trial Judge) made an order restraining the appellant from publishing similar statements about the respondent (the Order) – where the appellant published further statements about the respondent (the Further Statements) – where the respondent brought contempt proceedings against the appellant – where the judge presiding over the contempt proceedings (the Primary Judge) found that the appellant published the Further Statements in contempt – whether the Primary Judge erred in finding that the Order was sufficiently clear and unambiguous that breaches of it could be found to be contemptuous

COURTS AND JUDGES – CONTEMPT – PROCEDURE AND EVIDENCE – OTHER MATTERS – where the appellant contended that the contempt application was deficient because it did not particularise the alleged breaches – where the Primary Judge had counsel for the respondent give particulars orally at the contempt application – where the appellant did not press for further particulars – whether the appellant was denied procedural fairness

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – GENERALLY – where the Order was made on 1 November 2019 but was filed on 12 November 2019 – where the appellant published the Further Statements on 3 November 2019 – where the respondent filed the contempt application on 4 November 2019 – whether the Order was enforceable at the time the application for contempt was filed

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – COURSE OF CONDUCT AT TRIAL – CONDUCT ESTABLISHING AGREEMENT, CONSENT OR DISCLAIMER – where, at the contempt hearing, the appellant's counsel conceded that the Trial Judge made the Order – whether there are exceptional circumstances to justify the Court allowing the appellant to depart from the concession made below

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – WHAT CONSTITUTES JUDGMENT OR ORDER – where the Trial Judge, counsel for the appellant and counsel for the respondent agreed as to the terms of the Order in court – where the Trial Judge signed the Order in chambers – whether the Trial Judge pronounced the Order in court – whether the Order was made

COURTS AND JUDGES – CONTEMPT – GENERAL PRINCIPLES – where the appellant left the courtroom prior to the discussion of the terms of the Order – whether there was sufficient material before the Primary Judge to prove beyond reasonable doubt that the appellant knew of the Order prior to publishing the Further Statements – whether there was sufficient material before the Primary Judge to prove beyond reasonable doubt that the appellant published the Further Statements

Uniform Civil Procedure Rules 1999 (Qld), r 660, r 661

Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd & Ors [2003] VSC 201, considered
Australian Consolidated Press Ltd v Morgan (1965) 112 CLR 483; [1965] HCA 21, applied

Cavanagh-Lang v O'Callaghan & Ors [2000] SASC 187, cited
Emmanuel College v Rowe [2014] QSC 238, cited
Harrison v Harrison [1955] Ch 260, applied
Holtby v Hodgson (1889) 24 QBD 103; [1889] UKLawRpKQB 162, considered
M'Niel v Garratt [1841] ER 317, cited
O'Grady v Magistrates Court of Victoria & Ors [2016] VSC 156, considered
Pang v Bydand Holdings Pty Ltd [2011] NSWCA 69, considered
Registrar Court of Appeal v Pelechowski [1997] NSWSC 519, applied
Pelechoswki v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435; [1999] HCA 19, cited
Trippe Investments Pty Ltd v Henderson Investments Pty Ltd (1990) 72 NTR 18; [1992] NTCA 1, considered
University of Wollongong & Ors v Metwally (No 2) (1985) 59 ALJR 481; [1984] HCA 74, applied
White IT Pty Ltd v Heywood & Anor [2019] QSC 215, applied

COUNSEL:	D A Skennar KC for the applicant/appellant M D Martin KC, with S Spottiswood, for the respondent
SOLICITORS:	Australian Law Partners for the applicant/appellant Mills Oakley Lawyers for the respondent

[1] **BOWSKILL CJ:** I agree with the orders proposed by Dalton JA for the reasons given by her Honour.

[2] **MORRISON JA:** I agree with her Honour Dalton JA.

[3] **DALTON JA:** This is an application pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld) for leave to appeal against a decision of Judge Clare on 12 December 2019 convicting the appellant of contempt of court. Full submissions were made before us as to both the application and the appeal. I would give leave to appeal because the points raised are of general importance. For reasons explained below, I would order that:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The appellant should pay the respondent's costs, including costs reserved in this Court.

Background to the conviction for contempt

[4] The appellant is a pensioner without significant assets. In 2015 she established a Facebook page called "Lemon Caravans & RVs in Aus". The Facebook page became popular. The respondent manufactures caravans. On 12 July 2019 it obtained an interlocutory injunction against the appellant prohibiting her publishing her views about its caravans. The respondent sued the appellant for injurious falsehood and on 1 November 2019, after a trial before a jury in the District Court, Judge Sheridan

awarded damages in the amount of $357,000 to the respondent.[1] At the time of judgment, orders were made prohibiting the appellant publishing various statements about the respondent's caravans and business in the future.

[5] Almost immediately, on 3 November 2019, the appellant published statements about the respondent's caravans and business. On 4 November 2019, the respondent filed an application for the appellant to be punished for contempt of court.

Judge Sheridan's order

[6] At 3.48 pm on Friday, 1 November 2019, day 10 of the injurious falsehood trial, the jury returned its verdict in favour of the respondent. The Judge was due to commence work in a circuit town on Monday, 4 November. Counsel for the respondent sought a permanent injunction in respect of the four statements which were the subject matter of the proceeding. Argument ensued as to the terms of the injunction, having regard to the fact that the jury's verdict was in favour of the respondent in respect of only two of the four statements sued upon. Judge Sheridan suggested that the parties prepare submissions as to the point of difference between them and that the interlocutory injunction which she had made on 12 July 2019 continue until she had considered those submissions. The parties were diverted from that course when counsel for the appellant said, "I would not, and could not, object to your Honour making an order in [the terms sought by the respondent] subject to your Honour considering whether the reference to the second and third statements should continue after your Honour's received written submissions".

[7] Her Honour said that seemed an appropriate course and said, "So to be clear, then, it would be in or – an order in terms of that proposed, with that, Mr Martin and you've offered to send … terms through to my Associate so that I can sign off on that this afternoon …". Counsel for the appellant briefly re-enlivened the idea that the interlocutory injunction should remain in place, and then said, "But if your Honour makes the best order that Mr Martin could want, subject to … potential revision". He meant potential revision after Judge Sheridan considered submissions to be filed. And the judge said, "Yes, I think that is the preferable course."

[8] At that stage the parties had the respondent's written draft order prohibiting the appellant publishing the same or similar matters as were comprehended by all four statements which had been the subject of the injurious falsehood proceeding. A further paragraph was agreed to be added dealing with the proposed further submissions. Counsel for the respondent said, "So I'll prepare an order, and if I could just get the wording – so should there be another paragraph subject to your Honour – should I – like a paragraph 4, is that what your Honour had contemplated?" Counsel for the appellant then articulated the extra paragraph, "The terms of paragraph 2 of this order [the permanent injunction] are subject to any amendment which the trial judge considers necessary or appropriate after consideration of written submissions". There was discussion during which it was agreed that a reference to paragraph 3 of the order should also be included in the new paragraph, and a timetable for the exchange of written submissions was agreed. At this stage the judge checked with both counsel that they were in agreement as to the terms of the order and said, "So, Mr Martin, can I still trouble you to ---" and Mr Martin said, "Yes, I'll prepare this

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1 On 10 November 2020 the Court of Appeal set aside the verdict and dismissed Bruder's claim, so that there could be no retrial.

this afternoon and will send it over". Judge Sheridan said that, "… then I can sign it and place it with the file".

[9] Counsel for the appellant then clarified another small part of the wording of the new paragraph to be added to the order. Counsel for the respondent repeated the words which counsel for the appellant suggested and enquired "Is that right?" Counsel for the appellant replied "Yes". Judge Sheridan commented on this new wording concluding that, "That's quite clear" and "I'm satisfied that works". Both counsel indicated their agreement with that by saying thank you to Judge Sheridan and she said "So if you could have that sent through, Mr Martin". The court adjourned at 4.46 pm.

[10] At 5.28 pm counsel for the respondent emailed the associate to Judge Sheridan and counsel for the appellant saying, "Agreed order is attached". The order attached was in terms of that discussed in court. At 6.06 pm the associate to Judge Sheridan emailed the parties saying, "Her Honour has signed the attached order in those terms".[2] The draft order shows that Judge Sheridan signed and dated it 1 November 2019.

[11] Judge Sheridan's order made in the circumstances described above was as follows:

> "
>
> **ORDER**
>
> Before: Sheridan DCJ
>
> Date: l November 2019
>
> Document initiating application: application filed 4 July 2019
>
> IT IS ORDERED BY THE COURT THAT:
>
> 1. There be judgment for the applicant against the respondent in the sum of $357,000.00.
>
> 2. The respondent be restrained by herself or her servants or agents from publishing, causing to be published, encouraging, requesting or enabling to be published by any means whatsoever any statements, comments or images with respect to the applicant and the products sold by it by any means whatsoever including but not limited to on a Facebook page entitled '*Lemon Caravans & RVs in Aus*' to the same effect as the first, second, third and fourth statements referred to in the second further amended statement of claim filed on 28 October 2019 in these proceedings or matters substantially to the same effect as those matters.
>
> 3. The respondent pay the applicant's costs of and incidental to these proceedings including any reserved costs.
>
> 4. The terms of paragraphs 2 and 3 of this order are to take effect immediately but subject to any amendment which the trial judge considers necessary or appropriate after consideration of written submissions to be provided to opposing counsel and delivered to the trial judge's Associate as follows:

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[2] By mistake there was no order attached to this email. This came to the associate's attention on 6 November 2019. He then provided a scanned copy of the order to the parties. Nothing turns on this.

a. the respondent's submissions by 5pm on 4 November 2019;

b. the applicant's submissions by 5pm on 5 November 2019.

If you, Tracey Leigh do not obey paragraph 2 of this order you will be liable to court proceedings to compel you to obey it and punishment for contempt."

Publication on 3 November 2019

[12] The evidence before Judge Clare was that on Sunday 3 November 2019 the appellant published two posts on her website, one at 9.20 pm, and one at 10.31 pm. People commented on the 10.31 pm post, and the appellant published two responses (the Responses) to those comments.

Application for contempt

[13] The respondent filed an application for contempt on 4 November 2019. It relied upon the content of the Responses.

[14] It is necessary to describe some more of the factual circumstances relating to the appellant's making what was called "the first statement" in the statement of claim in the proceeding before Judge Sheridan.

[15] The respondent's case in the proceeding before Judge Sheridan relied upon four statements published by the appellant on her website. The case as to the first statement was that on 5 May 2019, the appellant published a link to a website maintained by a Mr Charles Coles. Mr Coles maintained his website to complain about an offroad caravan he had purchased from the respondent. Mr Coles' website contained statements that the respondent:

- produced off-road caravans which were defective, of poor quality, unsafe, overpriced and not good value for money, and
- refused to assist its customers.

[16] The statement of claim in the proceeding before Judge Sheridan pleaded that the appellant's "first statement" was in terms of the two dot points above, and in terms of the appellant's comment on the link to Mr Coles' website, that the respondent needed to "pick up its act" with respect to defects and customer service.

[17] Judge Sheridan's order of 1 November prohibited the appellant publishing anything to the same effect as (*inter alia*) the first statement.

[18] The Responses relied upon by the respondent as the basis of its contempt application, were:

- "It is a massive lie because, in conjunction with the very sexy marketing videos, it gave them so much credibility that they did not deserve because one element in the patent application, the weld point in the air bag attachment component, was weak and failed.

  And this happened not once but TWICE.

AND THEY REDESIGNED THAT COMPONENT NOT ONCE, BUT TWICE, AND WELL BEFORE THE WELD FAILURE IN CHARLIE COLES CARAVAN.

And to make matters even worse, in spite of knowing of the first and original weld failure in May 2018, they didn't tell anyone. They just very quietly redesigned that component and put it into production. Then, when owners that had the weak and poorly designed weld attachment brought their caravans in for servicing, it was very quietly rectified without telling them or anyone else.

And as a result, the same weld failure occurred in Charlie Coles' caravan some nine months later, BECAUSE BRUDER PROTECTED THEIR BUSINESS REPUTATION OVER AND ABOVE THEIR CUSTOMER'S SAFETY."

- "… as part of the discovery process I received over 500 documents from Bruder that showed Charlie Coles had told 100% truth. And so, so much more."

[19] In the contempt application, the Responses were said to be to the same effect as the first statement, and I think that is plainly correct. The first of the Responses was also said to be to the same effect as the third and fourth statements, but I need not examine that.

Hearing before Judge Clare

[20] The application filed 4 November 2019 was heard before Judge Clare on 13 November 2019. Counsel appeared on both sides. Argument was confined to whether or not a contempt had been proved; the parties agreed that if a contempt was proved, there would be another hearing as to penalty.

[21] On 12 December 2019 the matter was listed again. Judge Clare announced that she found the contempt proved[3] and proceeded with a hearing as to penalty. She ordered that the appellant perform community service.

[22] I will now deal with the points raised on appeal.

Grounds 1, 2 and 3: orders must be clear and unambiguous

[23] Grounds 1, 2 and 3 of the appeal were that the order made by Judge Sheridan was too ambiguous to found a contempt application, and that the primary judge erred in not so finding.

[24] The appellant gave the primary judge a passage from the case of *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd & Ors*[4] as authority identifying the elements of a contempt charge. Gillard J made a list of five elements, the first two of which were: "(i) that an order was made by the court; (ii) that the terms of the order are clear, unambiguous and capable of compliance; …".

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3 It seems that Clare SC DCJ contemplated delivering reasons for judgment that day, but something went astray. The reasons for judgment were sent to the parties on 30 January 2020. Unless there was a good reason in the interests of justice, the reasons ought to have been delivered on notice to the parties in open court, see below.

4 [2003] VSC 201 at [31].

[25] The primary judge relied upon this authority, but paraphrased it. She said, "The elements are that: (i) Judge Sheridan made an order; (ii) the terms of the order were capable of being understood; …". The appellant submitted that the primary judge erred in applying a legal test more favourable to the respondent than the authorities permitted. I reject this submission.

[26] The passage of *Advan Investments* to which the primary judge was referred was of a general kind, and no authority was cited for the propositions in it. There was no further discussion of the principle relevant to this appeal point in the case. There are decisions of the High Court and of intermediate appellate courts which discuss in detail the requirements for clarity in orders and undertakings in contempt proceedings. Those cases make it clear that there is no particular semantic formula to be applied. In *White IT Pty Ltd v Heywood & Anor*[5] I referred to some of those decisions:

> "[11] I think the law as to ambiguity in this context is conveniently summarised by Beazley JA in *Pang v Bydand Holdings Pty Ltd*:
>
> '52. A person cannot be committed for contempt of court for breach of an order or undertaking, the terms of which are ambiguous: *Australian Consolidated Press Ltd v Morgan* [1965] HCA 21; 112 CLR 483. If on its plain reading, objectively construed, the undertaking is of uncertain or ambiguous meaning, there will be no contempt for a failure to obey it: *Spokes v Banbury Board of Health* at 48-49. Nor can a person be committed for contempt on the ground that upon one of two possible constructions of an undertaking, the person had breached the undertaking: see *Australian Consolidated Press Ltd v Morgan* per Owen J at 515-516, referring to the statement of Jenkins J in *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387.
>
> 53. There is a distinction, however, between an undertaking the terms of which are ambiguous and the situation where there are difficulties of construction: see *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 per Lindgren J at 121. In that case, Lindgren J pointed out that neither a contemnor's lack of understanding of the terms of the undertaking according to their true meaning nor lack of awareness that his or her conduct constituted a contempt means the alleged contemnor cannot be found guilty of contempt: cf *Watkins v AJ Wright (Electrical) Ltd* [1996] 3 All ER 31.
>
> 54. In *Kirkpatrick v Kotis* [2004] NSWSC 1265; 62 NSWLR 567 Campbell J (as his Honour then was), was concerned with whether the terms of a court order were ambiguous. His Honour referred to the statement of Sir W Page Wood VC, in *Spokes v Banbury Board of Health*, that a court order must be obeyed unless it is ambiguous.

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5 [2019] QSC 215, [11]-[13].

55. Campbell J, at [55], then made the following observation:

> "In my view, the court approaches the question of whether the order is ambiguous with the caution appropriate to a type of litigation which could result in the defendant being punished – if an order is really not clear, it is unjust for someone to be punished for not obeying it. As well, though, the court approaches the question of whether the order is ambiguous on the basis that the recipient is expected to try to understand it and obey it. If a person taking that approach to the order could be in real doubt about what it meant, in a respect which is relevant to the particular charge of contempt which is brought, the charge will fail. This means that there will sometimes be orders which a grammatical analysis would show to contain a syntactic ambiguity, but which are none the less enforceable if it is the type of ambiguity that has no real risk of misleading. There will sometimes be orders which contain a term which has multiple meanings, but where that semantic ambiguity has no real risk of misleading. If there were to be an order addressed to a promoter of musical groups not in any way to be involved in the advertising or promotion of a band under some particular name, the order would be enforceable notwithstanding that a *'band'* can sometimes be a rubber band, or a headband." (emphasis added)

56. As these authorities indicate, various phrases have been used when seeking to determine whether the terms of an undertaking are ambiguous. These include: whether its terms were really not clear; whether the terms were such that a person reasonably trying to obey them would know what they meant; whether the person required to comply with the undertaking could be in real doubt as to what the undertaking meant: see *Kirkpatrick v Kotis* at [55]; whether the terms of the undertaking could mislead the person bound upon a plain reading of its words: see *Spokes* at 48-49.

57. It is clear on the authorities that if the terms of an undertaking are truly ambiguous, there can be no contempt, because it cannot be said what it was that required compliance. It also appears to be common ground on the authorities that regardless of how the question is formulated, the terms of an undertaking are to be given a sensible meaning, consistent with its actual terms. It must be possible on that meaning for the undertaking to be capable of being obeyed.'

…

[13] I do not think the terms of paragraph 1(a) of the order are so ambiguous as to be meaningless, although it may be that in any particular case the drafting is sufficiently ambiguous that it cannot be said with any certainty that the respondents have

> breached the terms of the order. For this reason I do not think that the approach urged by the respondents – to find that paragraph 1(a) of the order is so ambiguous there could not possibly be a contempt finding in relation to it in any case – should be taken. Rather, I think that each alleged breach ought to be examined to see whether or not the conduct alleged is in breach of the order, bearing in mind as part of that exercise that ambiguity in the order may prevent a finding of contempt in any particular case. This is in accordance with the words of Windeyer J in *Australian Consolidated Press Ltd v Morgan*, another case on ambiguity in the area of contempt:
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> 'Logically the first question is, Was there a breach by the appellant of its undertaking to the Court? That involves a consideration of the true meaning and scope of the undertaking.'" (my underlining).

[27] There were various matters relied upon by the appellant to say that the terms of paragraph 2 of Judge Sheridan's order was too uncertain or ambiguous to found an application for contempt. It was said that the fact that the order referred to the first, second, third and fourth statements in the second further amended statement of claim made it ambiguous.

[28] The statement of claim is a relatively short document of 11 pages. It is clearly worded in plain English. The second, third and fourth statements are defined simply as three identified posts which the appellant put on her Facebook page. The pleading of the first statement is slightly more complicated because it relates to the link to Mr Coles' website. Nonetheless it is still very clear:

> "5. On 5 May 2019 the respondent approved and in so doing published a post made on the Lemon Facebook Group by Lisa Desmond (Lisa Desmond's post) which contained a hyperlink to the website as well as the words 'BRUDER EXP-6 OFF ROAD CAMPERVANS' (the website).
>
> 6. The website was maintained and the content therein written by Charles Coles (Mr Coles).
>
> 7. By the website Mr Coles complained that an off road caravan he had purchased from the applicant had a number of significant defects which the applicant was refusing to rectify.
>
> 8. At the trial of this matter the applicant will refer to the contents of the website for its full content, true meaning and effect.
>
> 9. The website contained statements that the applicant:-
>
> (a) produces off road caravans which are defective;
>
> (b) produces off road caravans which are poor quality;
>
> (c) produces off road caravans which are unsafe;
>
> (d) produces off road caravans which are over-priced and not good value for money; and
>
> (e) refuses to assist its customers.

10. Lisa Desmond's post received:-

    (a) approximately 145 'likes' or 'reactions'; and

    (b) approximately 137 comments.

11. On 5 May 2019 the respondent published a comment on Lisa Desmond's post which read as follows:-

    > 'Lisa thank you for your kindness to your friends. I am hoping by showing this to 45 000 members that Bruder might pick up their act. Losing a sale would cost them a fortune.'

12. By reason of the matters pleaded in paragraphs 5 and 11 herein the respondent stated:-

    (a) that the statements about the applicant's off road caravans pleaded in paragraph 9 herein were correct;

    (b) the applicant needed to 'pick up its act' with respect to defects in its off road caravans and customer service,

    (the first statement)."

[29] Closely allied with this submission was an argument that paragraph 2 of Judge Sheridan's order was uncertain because it was not capable of being understood "without reference to an external document(s), that is the second further amended statement of claim and a non-existent website".

[30] As to the non-existent website, there was some evidence that after the jury verdict, the appellant took down her website, and that she re-enlivened it in order to make the publications of 3 November 2019. Whatever the factual status of the website as at 1 November 2019, the order was perfectly plain that the appellant was not to publish at all, including on her website. Whatever the status of the website on 1 November 2019, the appellant managed to publish on the website on 3 November 2019. There is nothing in this point.

[31] I turn to the rest of these two submissions. The appellant says that because Judge Sheridan's order referred (1) to the first, second, third and fourth statements, and (2) to the second further amended statement of claim without either setting parts of it out or annexing it, the order was not clear on its face. The appellant's counsel relied on a paragraph in *Emmanuel College v Rowe*[6] as authority for this proposition. However the particular paragraph, and indeed the judgment, is not authority for the proposition stated.

[32] In my opinion it was not necessary that the second further amended statement of claim, or part of it, either be extracted in, or the whole of it annexed to, the order of Judge Sheridan. The relevant parts of the statement of claim were the first, second, third and fourth statements, all of which the appellant had written. At the time the order was made, the parties had just concluded a two week trial. The appellant had attended the trial up to and including the delivery of the jury's verdict. She had given evidence and been cross-examined. The four statements which the appellant had

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6 [2014] QSC 238, [23].

written were the central subject of the trial. She had solicitors and experienced senior counsel acting for her. If she did not have a copy of the second further amended statement of claim in her possession at the time the orders were made, she had clear means of immediately obtaining it.

[33] The post which the appellant published at 10.31 pm on 3 November included:

> "I am restricted right now from publishing anything in relation to the First to Fourth publications in the Statement of Claim in the case of Bruder Expedition Pty Ltd v Tracy Leigh.
>
> This doesn't include Bruder's claim that they had a registered patent for the suspension and for the lift mechanism for the roof.
>
> They don't. They lied.
>
> …
>
> What else was admitted in public in court? More to come when the final injunction orders are settled next week and I know what I can and can't expose about the trial, what was put into evidence, and what I really know about the Bruder group of companies. …" (my underlining).

[34] The appellant submitted that the appellant's use of the word "publications" rather than "statements" in that post showed that the appellant was not able to understand the order of Judge Sheridan. I reject this submission. In my view the post by the appellant showed that she very well understood the structure of the statement of claim; what the first to fourth statements were, and the effect of Judge Sheridan's order. That she used a slightly different word in explaining her understanding of the orders to her readers is neither here nor there.

[35] I reject the submissions as to ambiguity. I refer to paragraphs [55] and [56] of *Pang*, extracted above. Approaching the question on the basis that the appellant was expected to try to understand and obey the order, it seems to me that the appellant could not have been in any real doubt about what it meant. In fact, she demonstrated that she understood it in her 10.31 pm post.

[36] Next the appellant argued that Judge Sheridan's order described the second further amended statement of claim as having been filed on 28 October 2019, when in fact it was filed on 29 October 2019. I do not think the appellant could have been in real doubt as to what document was being referred to; I think that if she were trying to obey the order she would have understood what it meant.

[37] The appellant's next point concerned the final words of paragraph 2 of the order made by Judge Sheridan, "substantially to the same effect as those matters". The submission was that these words did not precisely define how substantial a similarity was required to be to infringe the order. I think that the words of the order are clear enough. Judge Clare was not concerned with hypothetical questions of semantics. She was concerned with whether or not particular publications breached the terms of the order. Windeyer J's approach in *Australian Consolidated Press Ltd v Morgan* outlined at paragraph [13] of *White IT* (above) has much to commend it. Here, the publications were very similar to the first statement referred to in the statement of

claim. There was no argument reasonably available to the appellant that they were not substantially to the same effect as the matters referred to in the first statement.[7]

[38] Lastly as to ambiguity, the appellant relied on the fact that on 20 December 2019 Judge Sheridan revisited the order of 1 November 2019 as had always been contemplated. Judge Sheridan made a permanent injunction, in terms which are clearer than the second paragraph of the order of 1 November 2019. The permanent injunction was in the following terms:

> "… it is ordered that the respondent be restrained by herself or her servants or agents from publishing, causing to be published, encouraging, requesting or enabling to be published by any means whatsoever any statements, comments or images with respect to the applicant and the products sold by any means whatsoever including but not limited to on a Facebook page entitled 'Lemon Caravans and RV's in Aus' to the same effect or matters substantially to the same effect as statements, comments or images that:
>
> a. Bruder produces off road caravans which are defective;
>
> b. Bruder produces off road caravans which are of poor quality;
>
> c. Bruder produces off road caravans which are unsafe;
>
> d. Bruder's off road caravans are overpriced and not good value for money;
>
> e. Bruder refuses to assist its customers;
>
> f. The application filed by Bruder was vexatious litigation;
>
> g. Bruder sold a caravan which was severely defective;
>
> h. Bruder was required to provide a refund to the owner of the severely defective caravan;
>
> i. The severely defective caravan sold by Bruder could have killed the owner due to the suspension giving away whilst driving."

[39] It may be accepted that this order is superior in some respects to the earlier interlocutory order, which is no doubt due to the fact that counsel had a longer time to prepare it and, perhaps because the contempt application had intervened, counsel were more focused on the expression of the order. However, to acknowledge this, does not mean that the order of 1 November 2019 was too unclear to found a contempt proceeding. As explained above, in my opinion it was not.

[40] I conclude that Judge Clare did not err in finding that the order of Judge Sheridan was sufficiently clear and unambiguous that the breaches of it complained about by the respondent could be found to be contemptuous.

Ground 4: procedural fairness

[41] The fourth ground of appeal is that Judge Clare, "erred in denying the [appellant] procedural fairness in allowing the respondent to amend their (sic) application during

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7 There was a similar argument made in the appellant's written submissions that the phrase "the subject matter of these proceedings" was also ambiguous. It is not a phrase which is contained in Judge Sheridan's order.

the hearing to particularise the allegations of contempt". In fact this was not the ground agitated either in the written submissions or at the hearing.

[42] The written submissions as to this point contend that the contempt application filed on 4 November 2019 was "deficient as it contained no particulars that clearly articulated the parts of the statements that had been breached". This was a point taken by counsel appearing for the appellant before Judge Clare. She presumably agreed, for she had counsel for the respondent give particulars orally at the hearing. The appellant said that the particularisation was *ad hoc* and confused. The process might have been conducted more succinctly, and it does not aid understanding that Auscript frequently misnamed counsel in the transcript of the relevant part of the hearing. Nonetheless, at the end of the process her Honour said, "Alright. So we have particulars." Counsel appearing for the appellant did not press for any further particulars, or ask for an adjournment to consider those which had been provided; he said, "Thank you, your Honour" and moved onto other things. There is nothing in this point.

Ground 5: when was the order of Judge Sheridan made?

[43] The respondent formally filed Judge Sheridan's order on 12 November 2019; the sealed copy bears the date 1 November 2019.

[44] Because the order of Judge Sheridan made on 1 November 2019 was not filed until 12 November 2019, the appellant contended that as at 4 November 2019, when the application for contempt was filed, Judge Sheridan's order was not enforceable – r 661(4) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR). There is nothing in this point. By the time of the hearing before Judge Clare the order of 1 November 2019 had been filed and was enforceable. If authority be needed for this it is found in r 661(5)(a), below, which encapsulates the common law, see *Registrar Court of Appeal v Pelechowski*,[8] "It is the established rule of the Court, that a party who has notice of an order is bound by it from the time it is pronounced: and if he presumes to disobey it he is liable to the censure of the Court for so doing."

[45] Separately, and more substantially, the appellant contended that there was no order made by Judge Sheridan on 1 November 2019 because on 1 November 2019 Judge Sheridan did not pronounce her order in court – see r 660(1)(a) below. Judge Clare found that the order was made by Judge Sheridan on "Friday afternoon", ie., 1 November 2019. In my view the appellant's argument must fail because:

(a) counsel appearing for the appellant before Judge Clare conceded that an order was made on 1 November 2019;

(b) in fact an order was pronounced by Judge Sheridan on 1 November 2019.

I will deal with each of these points in turn.

(a) Concession by counsel

[46] During the hearing before Judge Clare, counsel for the appellant referred to the five elements listed in the passage from *Advan* referred to above. He then said:

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[8] [1997] NSWSC 519 in the judgment of Handley JA in the Court of Appeal citing *M'Niel v Garratt* [1841] ER 317. This case was overturned, by majority, in the High Court on grounds not affecting this reasoning – (1999) 198 CLR 435; [1999] HCA 19.

> "… And elements of proving contempt are quite clear, in my submission, and settled. They've got to prove an order was made by the court. That's not in issue. That the terms of the order are clear, unambiguous and capable of compliance. That is in issue.
>
> The order was served on the alleged contemptor or excused in the circumstances or service dispensed with pursuant to the rules of court. That's in issue. That the alleged contemptor had knowledge of the terms of the order. That is in issue in relation to the 3rd of November. And the alleged contemptor had breached the terms of order. That's in issue. Those issues all have to be proved beyond reasonable doubt and if your Honour requires the authority I have it here." (my underlining).

[47] Counsel appearing for the appellant before us submitted that this Court should entertain an argument that there was no order made on 1 November 2019 because the question of whether or not an order had been made involved only a question of law. There are two fundamental difficulties with that submission. First, there are plainly factual matters relevant to the question, see below. Secondly, there was not merely a failure to argue an available point of law before Judge Clare; a concession was made which defined the scope of the dispute before her:

> "It is elementary that a party is bound by the conduct of [its] case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against [it], to raise a new argument which, whether deliberately or by inadvertence, [it] failed to put during the hearing when [it] had an opportunity to do so."[9]

[48] It was argued on behalf of the appellant that the passage at [46] did not amount to a concession; counsel was informing Judge Clare that he expected the respondent to prove that an order had been made by the court. The language used by counsel for the appellant before Judge Clare is clearly to the contrary of that submission.

[49] In an attempt to demonstrate exceptional circumstances, the appellant's counsel made the following submissions which assumed, wrongly in my view, that the appellant's lawyers did not know what happened before Judge Sheridan after the jury returned its verdict on 1 November, so that concession was made in ignorance of the true facts.

[50] The transcript of the hearing on 1 November 2019 was not received by the solicitors for the appellant until 27 November 2019, ie., after the hearing before Judge Clare. This is noted in the submissions of counsel for the appellant before Judge Clare. However, he did not ask that the hearing before her be adjourned until he had the transcript.

[51] Counsel appearing for the appellant before Judge Clare was not the same counsel who appeared before Judge Sheridan. However, he was instructed by the same firm of solicitors who represented the appellant before Judge Sheridan. Those solicitors were copied into the email sent by counsel for the respondent to the associate to Judge Sheridan at 5.28 pm on 1 November 2019 saying, "Agreed order is attached". They were also copied into the reply from the associate to counsel at 6.06 pm that night

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9 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481, 483.

saying, "Her Honour has signed the attached order in those terms". If those solicitors were not in court after the jury returned its verdict (see below) it was their duty to find out what had transpired in court after they left; ie., to make an enquiry of the experienced senior counsel they left in the courtroom to conduct the proceeding.

[52] Counsel for the appellant made the submission that if there was a concession made before Judge Clare, that concession was made "in reliance on false evidence" said to be sworn by the respondent's solicitor and advanced by counsel for the respondent.

[53] On the application before Judge Clare the respondent was faced with proving that the appellant knew of the order of 1 November 2019 before publishing on 3 November 2019. The respondent's solicitor therefore swore an affidavit (4 November 2019) on the application before Judge Clare designed to prove that the appellant knew of Judge Sheridan's order before she published in breach of its terms. The respondent's solicitor swore that the appellant, her solicitors and counsel were in court at the time the order was made by Judge Sheridan. Then it was brought to her attention that the appellant had left the courtroom, apparently upset by the verdict. The respondent's solicitor then swore a second affidavit (12 November 2019) correcting her earlier statement and saying, "The [appellant's] solicitors and senior counsel were present in the courtroom when her Honour Judge Sheridan made her order on 1 November 2019."

[54] Before Judge Clare counsel for the respondent said, "[the appellant] wasn't present when the order was made. She was present during the trial and when the jury delivered its verdict, but she wasn't present when the order that Mr Morris and I finally agreed upon and her Honour made was pronounced by the court."

[55] On the hearing of the appeal the appellant's counsel argued that the second affidavit and counsel's submission were false because Judge Sheridan did not make an order in court on 1 November 2019. I think it was wrong for the appellant's counsel to characterise this as false evidence. The appellant's counsel may have come to a view that it was arguable that an order had not been made in court by Judge Sheridan (in fact I think that view is wrong, see below), but that view was not a proper basis to make serious accusations against other legal practitioners.

[56] The matter took on a further dimension when this court invited additional written submissions on the topic of the concession made by the appellant's counsel before Judge Clare. Again the submissions made assertions of false evidence and submissions by the respondent's counsel.[10] It was said (without evidence) that when the appellant left court after the jury verdict, the appellant's solicitor followed her out, so that only the appellant's counsel remained in the courtroom before Judge Sheridan. If that were so, the solicitors for the appellant knew this at all times. The appellant was not deprived of any opportunity to put on material about this before Judge Clare, or before this Court.

[57] Even assuming the solicitor left the courtroom with the appellant after the jury delivered its verdict, senior counsel for the appellant was in court for the entirety of the proceedings on 1 November 2019. If at any stage after the contempt application

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[10] As originally published my judgment attributed these submissions to the appellant's counsel. The appellant contacted the Court after the judgment was delivered, to say that it was she who had written the further submissions. The Registry made enquiries and this was confirmed by the former solicitors for the appellant. I accept that the submissions do not bear counsel's name and are not to be attributed to her. 10 February 2023.

was filed the solicitors for the appellant had thought it relevant to investigate what happened in court after the jury returned its verdict, they could have made an enquiry of their counsel.

[58] In any event, the transcript of the hearing on 1 November 2019 was received by the appellant's solicitors on 27 November 2019. That is, a fortnight prior to judgment having been given by Judge Clare, so that, if it mattered, further submissions could have been made to Judge Clare at that stage. In fact the solicitors for the appellant swear the (asserted) significance of what is recorded in the transcript was not appreciated until 2021. It is evident that the concession was made through inadvertence, but that is not enough, see *Metwally* above.

[59] There is no basis shown to conduct this appeal differently to the way the hearing before Judge Clare was conducted, namely on the basis of the appellant's counsel's concession that Judge Sheridan made an order on 1 November 2022.

(b) Power of inferior courts to make orders

[60] The District Court is a court of statutory jurisdiction. Rule 660 of the UCPR provides:

> "(1) An order is made by—
>
> (a) the order being pronounced in court by the person making the order; or
>
> (b) for a proceeding under chapter 13, part 6 [applications on the papers] —the order being set out in a document, with or without reasons, and signed by the person making the order.
>
> (2) An order takes effect as of the date on which it is made.
>
> (3) However, the court may order that an order takes effect as of an earlier or later date."

[61] There is a long history in our law making a distinction between pronouncing a judgment or order orally in court and recording it.[11] Recording a judgment or order has been referred to variously over the years as "passing and entering", "entering", "perfecting" and "perfecting by entry". Rule 661 of the UCPR now refers to the process of recording as filing. The distinction between pronouncing an order in court and the filing of an order is preserved in the rules – see r 660(1)(a) above, and r 661:

> "**661 Filing an order**
>
> (1) If a judge or judge's associate, magistrate, judicial registrar or registrar writes the date and terms of an order on a file or on a document on the file, then, unless or until the order is filed, the writing is sufficient proof of the making of the order, its date and terms.
>
> (2) An order of a court is filed in the court if a document embodying the order and the date the order was made is drawn up by a party and signed by the registrar.

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11 See *Holtby v Hodgson* (1889) 24 QBD 103, 107, per Lord Esher MR.

…

(4) Unless an order is filed—

(a) the order may not be enforced under chapter 19 or by other process; and

(b) no appeal may be brought against the order without the leave of the court to which the appeal would be made.

(5) However—

(a) an order appropriate on default of an earlier order may be made without the earlier order being filed; and

(b) costs payable under an order may be assessed without the order being filed."

[62] The effect of an order pronounced, but not filed, is described in *Harrison v Harrison*:[12]

> "… although the judgment dates from the day of its pronouncement it is not perfected until drawn up, passed and entered, and anyone who acts on it beforehand must take such risk as there is that it will be drawn in the form in which it was heard to be pronounced.
>
> We think that an order pronounced by the judge can always be withdrawn, or altered, or modified by him [or her] until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced. For example, the granting of an injunction, though open to review, would generally operate immediately, that is, as soon as the relevant words are spoken. …"

Was an Order pronounced on 1 November 2019?

[63] In my opinion an order was pronounced in court by Judge Sheridan before she adjourned on 1 November 2019.

[64] In *O'Grady v Magistrates Court of Victoria*[13] Mukhtar AsJ gave a thoughtful and sensible consideration to when an order will be made by a judge who uses less formal language than, say "I order that …". He said, "The requirement that it be a formal pronouncement as a matter of punctilious conduct or verbiage is, I think, problematic and unreal in the day to day work of the courts" – [53]. Mukhtar AsJ concluded that whatever language is used there needs to be "some form of pronouncement in a way to reveal objectively that an order is being made; that is, judicial authority has been exercised …" – [53].

[65] Mukhtar AsJ referred to the Northern Territory Court of Appeal decision in *Trippe Investments Pty Ltd v Henderson Investments Pty Ltd*.[14] There the primary judge delivered a document headed "Reasons for judgment" and said:

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12 [1955] Ch 260, 276; see also *Cavanagh-Lang v O'Callaghan & Ors* [2000] SASC 187, [31]-[39].
13 [2016] VSC 156, [50]ff.
14 (1990) 72 NTR 18.

> "I refuse the remedies sought by the plaintiffs. The defendants are not entitled to any damages. There will be declarations along the lines sought by the defendants in their further amended defence. I will hear counsel as to the precise terms of those declarations and as to any other machinery orders which ought to be made to enable the delivery of the remainder of the 1985 shortfall to be made to the plaintiffs by the defendants. I will hear counsel as to costs."

[66] Four months later the primary judge reconvened the court. Draft orders were presented. The judge said, "… there will therefore be orders in the terms of paragraph 1 of the draft minutes initialled by me, dated today and placed on the court file". By majority, the Court of Appeal held that it was not until the second hearing that orders were made. This conclusion was based on what the majority judges discerned as the primary judge's intention from the transcript of his remarks.

[67] On the afternoon of 1 November 2019 both counsel and the judge were in agreement as to the precise wording of the order to be made. Considerable trouble was taken to achieve that result, and the process did not end until the words had been agreed, and the judge had indicated that the precise words of the order were acceptable to her.

[68] The question is whether the judge's agreement with counsel as to the words of the order, and her assent to the terms of the order, amounted to pronouncement of an order, with the draft to be sent in as a matter of record-keeping, or whether no-one meant there to be orders made until a copy was sent to the judge in her chambers and she signed it. Signing, or more commonly initialling, an order has no basis or effect under any statute or rule, but is a common practice to identify the document in terms of which a judge makes an order, so that when it is placed on the file, the Registry can identify the order made.

[69] In my view a fair reading of the transcript indicates that Judge Sheridan pronounced the order in court. I think it is significant that Judge Sheridan expressed the desire to have the order sent through "so that I can sign off on that this afternoon" so, "then I can sign it and place it with the file." Those words are very similar to the words at UCPR r 661(1), above. As discussed, r 661 does not refer to the making of an order, but the process of recording it. There was an obvious reason for Judge Sheridan to be concerned that the order be recorded in the file that afternoon. By its nature it was contentious, an injunction. She was departing for a circuit town, so that if the order were not properly recorded on the file that afternoon, the respondent would not have been able to file the order, had it wished to do so, on the following Monday.

[70] In my view the clear intention from the very detailed discussion between Judge Sheridan and the two counsel as to the exact words of the order; that discussion ending only when Judge Sheridan said that the proposed terms were acceptable to her, and Judge Sheridan's concern that the order be documented and placed on the file that afternoon, reveal that, despite the lack of formal language, an order had been made before the court was adjourned on 1 November 2019.

Beyond reasonable doubt

[71] Submissions were made under this heading in the appellant's written outline, they did not relate to any appeal ground. The first paragraph under the heading in the outline was as follows:

"70. The Respondent did not prove beyond reasonable doubt that:

a. an order was made as required by rule 660(1) of the UCPR;

b. that the terms of the order are clear, unambiguous and capable of compliance;

c. the Appellant's representatives notified the Appellant of the terms of the Alleged Interim Order after it was signed by the Learned Trial Judge

d. The Appellant had knowledge of the actual orders prior to writing the comments the subject of the contempt application;

e. the Appellant breached the Alleged Interim Orders."

(reproduced as per the original).

[72] The paragraph amounts to a submission that the entire case before Judge Clare was not proved to the requisite standard. The written submissions go on to acknowledge that nothing further can be said as to the points at 70(a) and (b) and those arguments have already been dealt with above. It is unnecessary to deal with the point at 70(c) as it was not necessary for that to be proved in the proceeding before Judge Clare.

[73] As to point 70(d), Judge Clare proceeded on the basis that the appellant could not be found to be in contempt unless she had prior knowledge of the injunction made by Judge Sheridan. She proceeded on the basis that the appellant had been in court for the jury's verdict, but that she had then left the courtroom.

[74] There was no evidence that the respondent had served the appellant with a copy of the order, however, there is a passage in *Pelechowski* (above) which seems particularly apt here:

> "The other question is whether the opponent had sufficient notice of the terms of the order. A sealed copy of the order was not served before the breaches committed on 29 April and 9 July, but service was not essential. The *District Court Act* and Rules make no provision for the service or enforcement of restraining orders. Compare DCR Pt 31 r 17. Proceedings to enforce restraining orders made by the District Court must be brought in the Supreme Court pursuant to s 203 of the *District Court Act* unless the breach occurred in the face of the court or in the hearing of the court (s 199). SCR Pt 42 r 8 requires service or notice of orders before committal or sequestration can be sought for their breach. I am not satisfied that those Supreme Court Rules apply to the enforcement, in the Supreme Court, of orders of the District Court but this does not matter because those rules codify the earlier law.
>
> The opponent was in court when the order was made by Judge Christie QC. In *Hearn v Tennant* [1807] EngR 331; (1807) 14 Ves Jun 137 (33 ER 473) Lord Eldon said:
>
> > 'If these parties by their attendance in Court were apprised, that there was an Order, that is sufficient; and I cannot attend to a distinction so thin, as that persons, standing here until the

> moment the Lord Chancellor is about to pronounce the Order, which from all, that passed, they must know will be pronounced, can by getting out of the Hall at this instant avoid all the consequences'.

[75] Experienced senior counsel for the appellant remained in the courtroom, and during the discussion of the terms of the order, said to Judge Sheridan:

> "MR MORRIS: That may be so, your Honour, but this is not a question of what might persuade your Honour is a useful thing to do. It's a ques – situation where the court's jurisdiction to grant an induction against the commission of a tort, has been engaged, and that jurisdiction is limited to the torts that have been made out, not the tort on – in respect of which my client has been found not to have a cause of action made out. Now, as I've said, and as I will advise my client, the practical effect is that – is largely the same, but there are different things in the second and third statements, for example, the statement that Bruder Expedition is a bully, Bruder Expedition commences legal proceedings without proper reason. Likewise, in the third statement – sorry, that was the third statement. In the second statement:
>
> > *Bruder Expedition bullies its customers, threatens its customers, asserts superiority over its customers –*
>
> and so on, which are not covered by the finding that a tort has been made out in respect of the first and fourth statements. My client will also be advised, in no uncertain terms, that the fact that the jury has found that to date there has been no loss suffered as a result of those statements, which the jury has found to have been made maliciously, doesn't protect my client in the future if she repeats those statements and some loss is suffered as a result of that. But that is not a basis for granting an injunction as final relief in a tort action. It just isn't." (my underlining).

[76] Judge Clare concluded, "It is reasonable to expect that once the order was made, [the appellant's] lawyers, in accordance with their duties, would have done what they reasonably could to inform [the appellant] of the restraint upon her as soon as possible". I can see no error in her Honour making that finding on the available evidence.

[77] The post which the appellant published at 10.31 pm on 3 November 2019 shows that at that point she knew of the terms of the injunction made by Judge Sheridan, see [33] above. This was the second of the two posts published by the appellant. The first was published at 9.20 pm. The primary judge reasoned as follows:

> "[35] The evidence is unclear as to whether [the 10.31 pm] post was before or after the alleged contempt, but it was certainly during the same weekend. It showed Ms Leigh knew the terms of the order by Sunday 3 November 2019, which points to advice from her trial lawyers, which in turn suggests she had been told on the Friday (l November 2019). In the absence of contrary evidence from the defence, the irresistible inference was that Ms Leigh knew of the order before she had posted anything that weekend."

[78] In fact I think it is possible to say on the evidence before Judge Clare that the Responses were published after 10.30 pm. The 9.20 pm article was a reflection by the appellant on the wisdom, or otherwise, of her having decided to post comments about the respondent and then defend the resulting litigation. There was no mention of what the appellant thought of the respondent's caravans in that article and in particular, nothing about patents.

[79] The second article was published at 10.31 pm and began:

> "BRUDER MISLEADS AND DECEIVES CONSUMERS ABOUT HAVING TWO REGISTERED PATENTS ... BUT THEY DIDN'T.
>
> I am restricted right now from publishing anything in relation to the First to Fourth publications in the Statement of Claim in the case of Bruder Expedition Pty Ltd v Tracy Leigh.
>
> This doesn't include Bruder's claim that they had a registered patent for the suspension and for the lift mechanism for the roof.
>
> They don't. They lied."

[80] The article continued; the subject matter was patents. People commented on the 10.31 pm article and the appellant published the Responses. The subject matter of the Responses was patents. There seems to me to be a compelling inference that the Responses were published after the 10.31 pm article was published. This was not something relied upon by Judge Clare, but it, together with the other material she did rely upon, was sufficient to prove publication of the Responses with knowledge of the order to the requisite standard, ie., beyond reasonable doubt.

[81] As to point 70(e), the Responses were on the appellant's website and were claimed to be written by the appellant. They are written in the first person and speak about her experience at the trial and her views. It seems to me that there was sufficient material before Judge Clare to allow her to conclude beyond reasonable doubt that it was the appellant who published the Responses.