Common Law Division
Supreme Court
New South Wales

Case Name:	Darwin v Norman
Medium Neutral Citation:	[2020] NSWSC 357
Hearing Date(s):	5-9 August 2019 3-4 October 2019
Date of Orders:	8 April 2020
Date of Decision:	8 April 2020
Jurisdiction:	Common Law
Before:	Fagan J
Decision:	1 Judgment for the second plaintiff against the first defendant for $200,000 dollars. 2 Judgment for the third plaintiff against the first defendant for $200,000 dollars. 3 Judgment for the first and second defendants against the fourth plaintiff. 4 The first defendant is to pay the second and third plaintiffs' costs of the proceedings. 5 The second and third plaintiffs are to bring in within 14 days a minute of the form of a permanent injunction against further defamatory publication by the first defendant.
Catchwords:	DEFAMATION – defamatory matter – where material published in local newspaper and on the internet – where defendant admitted majority of pleaded imputations conveyed – remaining imputations found to have been conveyed – plaintiffs defamed – judgment for plaintiffs DEFAMATION – defences – defence of justification not established DEFAMATION – remedies – permanent injunction – aggravated damages
Legislation Cited:	*Defamation Act 2005* (NSW) *Environmental Planning and Assessment Act 1979*

	(NSW)
Cases Cited:	*Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 *Trkulja v Google LLC* [2018] HCA 25
Category:	Principal judgment
Parties:	Adrian Brennock - second plaintiff Phillip Dixon – third plaintiff Gillian Norman – first defendant
Representation:	Counsel: N Olsen - plaintiffs Gillian Norman - self represented 5-9 August 2019; J L Harrison 3-4 October 2019 Solicitors: Rose Litigation - plaintiffs N/A
File Number(s):	2017/81825
Publication Restriction:	No

JUDGMENT

1 The plaintiffs claim damages for the publication in October 2016 of allegedly defamatory material in a local newspaper circulating in Nimbin in northern New South Wales. They make a similar claim in respect of matters published on the internet in October and December 2016 and in April 2017.

2 The first plaintiff discontinued his claim against the second defendant on 30 October 2017 and against the first defendant on 5 August 2019. The solicitor for the fourth plaintiff filed a notice of ceasing to act on 29 May 2018. The fourth plaintiff has taken no active part in the proceedings since his solicitor ceased to act and he did not appear at the trial. There will be judgment against the fourth plaintiff, in favour of both defendants.

3 Only the second and third plaintiffs, Adrian Brennock and Phillip Dixon, appeared at the trial of the action that commenced on 5 August 2019 and continued for five days thereafter, with a further two days in October. I will refer to them as "the plaintiffs". They were represented by counsel and solicitors. They pursued their action only against Ms Norman, the first defendant. I will refer to her as "the defendant". She was self-represented until the last two days of the trial, 3 and 4 October 2019. Over those last two days Mr Harrison of counsel represented her and he provided helpful written submissions after the close of evidence. Mr Harrison's intervention introduced a measure of order and focus in the defendant's case that had been lacking until then. Both counsel provided valuable assistance to the Court, Mr Harrison under the handicap of having been briefed very late in the piece.

4 There is no dispute about publication of the impugned material. A brief description of each of the Matters is as follows:

(1) An article entitled "The Truth About Bhula Bhula". The defendant wrote this and caused it to be published in The Nimbin Good Times, a newspaper that circulated in Nimbin and surrounding areas carrying news items of local interest. The article concerned the alleged disillusionment of people who had invested in a proposed land sharing project under the name Bhula Bhula at Mount Burrell near Murwillumbah. The second defendant was at material times the publisher of The Nimbin Good Times. This article appeared on p 4 of the October 2016 edition of the paper.

(2) A "Wanted" poster. This concerned only the first plaintiff, Mark Darwin, and is not relevant to the part of proceedings that continued to trial.

(3) A "Wanted" poster referring to the plaintiffs, written by the defendant and displayed by her on a blog website entitled "thetruthabouttruthology". The defendant controlled and published the blog website. The poster asserted that the plaintiffs had colluded with Mark Darwin in the fraudulent marketing of investments in the Mount Burrell land sharing project and

had caused investors to be defrauded. The poster was first displayed on the blog website on 11 October 2016.

(4) An article under the heading “The Truth About Bhula Bhula”, written by the defendant and published on her blog website entitled “thetruthabouttruthology”. The article was a word for word reproduction of most of the text of Matter 1. It also reproduced the “Wanted” poster from Matter 3. It was published on 8 December 2016.

(5) An article entitled “Mt Burrell Land Scam Exposed in Criminal Prosecution” written by the defendant and published on her blog website “thetruthabouttruthology”. The article purported to report upon a private prosecution that had been initiated by the defendant against the second plaintiff and others. The charges were said to concern fraud in the promotion of the Mount Burrell land sharing project. The article was posted on 4 April 2017.

(6) An article entitled “Mt Warning Eco Village – A Warning” written by the plaintiff and published on a second blog website operated by her under the name “mountwarningecovillagescam”. The article concerned allegedly misleading promotion of the Mount Burrell project and the subsequent promotion, by Mark Darwin and the plaintiffs, of a similar project at Mt Warning. The article incorporated a republication of Matter 4. It was published on 4 April 2017.

(7) An article entitled “Mt Burrell Land Scam Exposed in Criminal Prosecution” written by the defendant and published on her blog website “mountwarningecovillagescam”. This was a republication of Matter 5. It was published on 3 April 2017.

(8) An article entitled “Medical Cannabis Scam Alert: Nimbin University Cannabis Community at Mt Burrell” written by the defendant and published on her blog website “mountwarningecovillagescam”. The article referred to a proposed cannabis research and medical treatment campus

on the Mount Burrell property and to an alleged “land scam” in relation to that property. The article was posted on the website on 15 April 2017.

5 The plaintiffs have pleaded approximately 80 separate imputations said to have been conveyed by the published Matters. With respect to the second plaintiff the principal imputations are that he fraudulently promoted the Bhula Bhula land sharing project by misrepresenting that investors would be able to build multiple dwellings on the land and that they would have either shares in a company or shares in direct title to the land. Further alleged imputations are to the effect that the second plaintiff failed to honour agreements under which investors loaned funds to the project, stole property, illegitimately took control of the Bhula Bhula land, infringed planning laws, was involved in the “disappearance” of a person and is a bully. Similar imputations are said to be conveyed concerning the third plaintiff.

Defences

6 The defendant admits that all but approximately 20 of the alleged imputations were conveyed of and concerning the plaintiffs. As she has for the most part been unrepresented in the proceedings and her defence is in an unconventional form I have had to satisfy myself that the pleaded imputations were conveyed of and concerning the plaintiffs. The defendant pleaded the defence of truth under s 25 of the *Defamation Act 2005* (NSW) to those imputations that she admits were conveyed. In final submissions the defendant did not attempt to persuade the Court of the truth of some of the imputations to which s 25 was pleaded.

7 The impugned publications are more readily understood against the background of events that brought the parties into contact and into conflict. I will therefore record my findings regarding those background circumstances before turning to consider what defamatory meanings were carried and whether the imputations or any of them are true.

Circumstances leading up to the publications

Mr Darwin's promotion of alternative lifestyles, 2013-2015

8 In 2013, 2014 and 2015 Mr Darwin engaged in disseminating information, opinions and theories at seminars and on the internet. His seminars were convened at the Lighthouse Café at Byron Bay and other similarly informal locations in northern New South Wales. In about September 2014 Mr Darwin conducted seminars on a larger scale in Sydney, Brisbane and Melbourne. Each of these was conducted under the title "Freedom Summit". The information and opinions offered at all of these gatherings and on the internet concerned alternatives to conventional Western lifestyles, alternatives to mainstream scientific healthcare and alternatives to traditional Western diets. In 2014 and 2015 Mr Darwin promoted his opinions under the name Truthology. The second plaintiff said that Mr Darwin described Truthology as "the study of the truth" and that he promoted "alternative views on any topic at all".

9 During 2013, 2014 and early 2015 the second plaintiff provided technical assistance for Mr Darwin's seminars. Mr Darwin prepared notes of the content that he wished to present and the second plaintiff incorporated that content into PowerPoint slides. He supplied information technology services, generally, to assist Mr Darwin with the dissemination of his views.

The Bhula Bhula community – land and legal structure, March-June 2015

10 By early 2015 the second defendant was aware that Mr Darwin proposed to establish what he called an "intentional community" in the Northern Rivers region of New South Wales. This was to be a community of people who would share the use and occupation of a parcel of rural land. In about early 2015 Mr Darwin selected a property of 640 acres (258.8 ha) at 3222 Kyogle Road in the Mount Burrell locality. This lies about halfway between Murwilumbah and Kyogle. The property comprised two lots to the west of Kyogle Road both of which had a frontage onto the Tweed River. Lot 2 at the eastern end comprised 81.5 ha. Lot 20 adjoined Lot 2 to the west and comprised 177.3 ha.

Some of the land had been cleared prior to 2015 and was under pasture. There was a dilapidated homestead on the property. Mr Darwin proposed that this land should be purchased for the purpose of establishing an intentional community, to be known as Bhula Bhula.

11 In early 2015 Mr Darwin retained Mr Wroth Wall, a solicitor practising at Mullumbimby, to advise on the legal structure under which the land at Mount Burrell should be purchased and managed for the intentional community. He also obtained advice and assistance from Michael Hajek, whom the second defendant understood to be "an international lawyer". In about mid-March 2015 Mr Darwin and Mr Hajek together made a promotional video in which Mr Hajek explained a legal structure that had been devised for ownership and management of the Mount Burrell property.

12 The video depicts the two men in joint discussion, with Mr Hajek explaining that a proprietary limited company would purchase the land and would enter into a deed pursuant to which the land would be held on a unit trust for the benefit of all community members ("the Bhula Bhula Trust"). Community members would be those who subscribed funds and were issued with unit certificates. The unit holders would also be members of an incorporated non-profit association. That association would become the sole shareholder of the land-owning trustee company. The incorporated association would appoint three directors to constitute the entire board of the company and would make bylaws that would, amongst other things, allocate a part of the land to each community member for his or her personal use, with the rest of the land being for common use.

13 This video explanation was used from March 2015 in connection with Mr Darwin's promotion of interest amongst potential community members; that is, potential subscribers for units in the Trust. Mr Darwin emailed the video to people who expressed interest in the proposed intentional community. A flowchart held up for the camera by Mr Darwin during the video, accompanied by explanatory notes similar in content to Mr Hajek's oral explanation, was also distributed by Mr Darwin to people who enquired about the project.

14 Prior to the preparation of this video and flowchart Wollumbin Dreamtime Pty Ltd had been incorporated with Mr Darwin as a director and shareholder. It was intended that this company would be the purchaser and trustee of the Mount Burrell land. Also at about this time an unincorporated non-profit association was formed and registered under the name Together in Harmony. This association was intended to become the sole shareholder in Wollumbin Dreamtime Pty Ltd. By June 2015 it had become necessary for Mr Darwin to borrow funds to complete the purchase of the land. Prospective financiers would not make a loan to a company owned and controlled by Mr Darwin. This led to the incorporation in June 2015 of Wollumbin Horizons Pty Ltd ("Wollumbin Horizons"), with the second plaintiff as sole director and shareholder. As described below, Wollumbin Horizons became the purchaser and trustee of the land instead of Wollumbin Dreamtime Pty Ltd.

Promotion of Bhula Bhula up to June 2015

15 From early 2015 Mr Darwin promoted the Bhula Bhula intentional community at seminars convened under his Truthology banner. He sought subscription of funds from interested persons for units in the Trust, on the basis that the money would be applied to completion of the purchase of the land by the trustee company and that the legal structure referred to above would be established. Mr Darwin introduced the project to a number of investors by direct personal approaches.

16 The defendant was permitted to give her evidence in chief by adopting on oath the assertions of fact in her amended defence of 23 April 2018. She said that representations about the Bhula Bhula project were first made to her by Mr Darwin on 15 February 2015 during a tour of the property that she undertook together with 15 other potential investors. The following representations are said to have been made by Mr Darwin on this occasion – summarised so far as relevant to this judgment:

(1) a land share community was permissible on the property;

(2) "existing permissions would be extended";

(3) investors would receive a shared proprietary interest in the property and the right to co-management of the land;

(4) investors would have exclusive use of a 5 acre home site;

(5) investors would have the right to shared use of the remaining unoccupied land, the homestead, “potential infrastructure” and the natural resources of the property;

(6) professional town planners had been contracted to work with Tweed Shire Council to ensure compliance with the process of development approval and

(7) temporary residence was permissible on the land and permanent dwellings could be constructed according to standard building specifications prior to completion of the “development approval process”.

17 The defendant said that at this time she was told payment of $80,000 would be required in order to secure an interest in the project, to be deposited to Mr Wroth Wall’s trust account. As will be seen, if representations (1), (6) and (7) were made they were incorrect. Because Mr Darwin has discontinued his claim against the defendant, there is no live issue in the proceedings as to whether the imputations of fraud against Mr Darwin, conveyed by the defendant’s published matters, are true. It will therefore not be necessary for the Court to determine whether the above statements, if made by Mr Darwin, were deliberately incorrect or were made recklessly or innocently.

18 The third plaintiff said that in about April 2015 Mr Darwin invited him to purchase a unit. Mr Darwin informed the third plaintiff that there was no current development approval with respect to the land. He showed the third plaintiff the flowchart referred to at [13] above and sent him an internet link to the video description of the proposed legal structure of the Trust and landholding, as described at [12] above. In April or May 2015, the third plaintiff paid $80,000 for one unit in the Trust. He was not told that he would obtain

separate legal title to any parcel of land or a right to construct any improvements on any part of the land. He was content to have a joint interest through the trust structure, as it had been explained to him, whereby a company would hold the land on behalf of all unit holders and he would be permitted to camp on the land for short periods from time to time. Mr Dixon was not aware that any investors were told by Mr Darwin at any time that an application to the Tweed Shire Council for development approval in respect of the Mount Burrell land was under way.

19 Mr Richard Mote received information about the Bhula Bhula project in about May or June 2015 from Mr Darwin, in person-to-person discussions and through video presentations. Mr Darwin told Mr Mote that the organisers of the proposed community were seeking legal and town planning advice about multiple occupancy of the property and would in due course try to secure Council consent to a Development Application that would permit this. Mr Darwin told Mr Mote that as at May/June 2015 nothing could be built on the land and that no development consent was in place. Mr Mote was willing to pay for a unit with that knowledge and he did so, jointly with an associate, prior to completion of the purchase of the land by the trustee company. He understood that he and others who contributed to funding the project would be able to visit the land and to camp out for short periods but not to live there permanently or build anything unless development consent was obtained.

20 Ms Melissa Hersh paid for two units in the Trust, intending to retain only one and to be repaid her subscription for the second unit as soon as another investor could be found after settlement of the purchase. Ms Hersh paid $80,000 for each unit prior to settlement. She expected to receive back $120,000 upon resale of the second unit. From late 2014 through to March 2015 Ms Hersh received information about the project by email from Mr Darwin and in meetings, one with Mr Hajek and another with Mr Darwin. In April 2015 she attended one or two meetings with Mr Darwin in company with others who had either invested or expressed interest.

21 Ms Hersh gave evidence that she was initially told by someone that each investor would have, as an incident of holding a unit in the trust, exclusive use of 10 acres of the Mount Burell land. This was later reduced to 5 acres and then to 3 acres, although Ms Hersh did not specify who informed her of the original 10 acres or the reductions. She said that she understood from what she was told that she would not be the legal owner of the area that was to be available for her exclusive use.

22 Ms Hersh said she and others were told:

> it would be a health retreat and there would be employment for everyone. We were told that there was a man […] he had a farm share thing situation where he would set up a […] fully functional orchard and market garden where there would be employment for us and we would also be selling fruit and vegetables, and that […] would be basically started as soon as the land […] was purchased.
>
> […] we were told that even though they didn't have a DA in council at that stage, a DA was being put together, that it […] would be one of the priorities so that we could […] go ahead with the residential section. […] There would be a community centre there that would be built. They had architects coming along for that as well. They invited architects to show us their plans, and the permissible land was basically that it would - they had town planned the land and how it would be divided up.

23 When asked who said these things, Ms Hersh named Mr Darwin, Mr Andrew Cody, Mr Tamati Kirkwood and the second plaintiff. She also referred to emails and "advertising" but I have not found amongst the emails tendered or amongst the documentary and electronic advertising material any of the above representations, authored by either of the plaintiffs. When asked whether she had been told by either Mark Darwin or the second plaintiff that it was intended the land be used for "permanent residents in a multiple occupancy" she said:

> I didn't receive anything from [the second plaintiff] prior to the purchase the land. I definitely received from Mark Darwin. My understanding was they were business partners. Mark Darwin was the person who dealt with the people at the front, and [the second plaintiff] dealt with all the other issues as he did not want to deal with people necessarily, so that was Darwin's job. So anything - I believed anything that came from Darwin was a business decision that [sic] the two men.

24 This evidence was adduced by the defendant at a stage of the hearing when she was self-represented. Ms Hersh's understanding that Mr Darwin was, in effect, an agent for the second plaintiff is irrelevant. It is not evidence upon which I could find that statements made by Mr Darwin prior to Ms Hersh's subscription for units in the Trust are legally attributable to the second plaintiff. With respect to the period after Ms Hersh had made her investment in the project in June 2015, she gave evidence about representations concerning utilisation of the land that were made during the second half of that year. She said:

> Were we given any information, yes we were. There were emails, your Honour. We received quite a few emails about how to build, what to build, the kind of buildings to build, and one of the things that [the second plaintiff] and Mark Darwin had emailed us, and I actually heard them say, is don't worry, we've got council sorted. We've got them under control.
>
> HIS HONOUR
>
> Q When were these emails, please?
>
> A I think you will find any time between the purchase of the land and December 2015 we would have received up to five to ten emails, and [the second plaintiff] sent one in particular that said the type of footings he would like to be using and that we all should buy these footings so that we could buy them in bulk and get them cheaper.

25 When this evidence was given I made it clear to the defendant that I could not rely upon the witness' four-year-old recollection of emails without receiving the documents in evidence. Amongst the material tendered by the defendant I have not found emails to the effect described by the witness. When asked whether she was told anything else about being able to build on the land Ms Hersh said she heard the second plaintiff and Mr Darwin saying words to the following effect:

> We were told that they had no DA, … we were told that they would get a DA. We were told that the residential section was at the back. They had actually divided the land up into lots and we were allocated our lots, and we were told that we were able to build as long as it was an eco building, and we were also told that they had council in their hands and they had council under control, and they were dealing with council.

26 I do not accept that during the second half of 2015 either Mr Darwin or the second plaintiff told Ms Hersh or other investors in her presence, or that either of them informed her in writing, that they were "able to build as long as it was an eco building". This would have been in direct contradiction of the legal advice of Mr Wall, which I am satisfied was given to an assembled group of the investors on the property in late 2015. Ms Hersh herself recalls the attendance of Mr Wall, which she says was on an occasion in October 2015, when the plaintiffs and 95% of the investors were present. Ms Hersh said that Mr Wall "talked about being able to build and then retrospectively go through DA". I do not accept that he spoke in those terms. I prefer the evidence of Mr Mote that Mr Wall strictly warned the investors against erecting any improvements on the property prior to Council approval (see [69] below). Mr Mote was not challenged on his evidence regarding the advice of Mr Wall on that occasion. In general terms I found Ms Hersh imprecise and unreliable with respect to things that were said whereas Mr Mote gave the impression of a clear recollection.

27 All of Ms Hersh's evidence was led in unsatisfactorily vague terms, referring to what "they" told "us" and what "we" believed. The defendant relies upon this evidence to establish that false representations were made by the second plaintiff, thereby justifying imputations conveyed by the Matters she published to the effect that he acted fraudulently. I cannot rely upon Ms Hersh's evidence as a basis for finding that any particular representations were made by the second plaintiff at any time. During the defendant's questioning of Ms Hersh the Court made strenuous and repeated efforts to have the evidence led in admissible form and with sufficient precision to enable a judgment to be made as to whether any false representation was made by either of the plaintiffs in connection with the Mount Burrell project. These efforts failed conspicuously.

28 The defendant called Mr Ron Berry, an investor who deposited $80,000 in payment for a his unit into Mr Wall's trust account on 12 February 2015. She also called Mr Andrew Cody. In 2014 he had identified the land to Mr Darwin as suitable for establishment of the community. He was credited with $40,000

toward the price of a unit to be issued to him, on the basis that he was entitled to a $20,000 “finder’s fee” and that he would carry out earthworks on the property to the value of another $20,000 after settlement. Neither of these witnesses gave evidence that they had received any representation from or on behalf of either of the plaintiffs to the effect that Local Government permission for building multiple dwellings on the land had been obtained or was assured.

29 The defendant read an affidavit of Mr Brian Alderman sworn 20 August 2019. For medical reasons he was unable to attend for cross examination. His affidavit included the following:

> 5 I was told I could build a dwelling on our allocated lot, subject to Council Approval, which we were led to believe was in process, however it was not.
>
> 6 I was told that a Multiple Occupancy was possible and was under way and I found out later that it was not.

Mr Alderman deposed to a number of other misrepresentations, all of which were similarly not attributed to any named representor.

Frequently asked questions

30 The defendant tendered 12 pages of “Frequently asked questions”, accompanied by answers, that she said had been displayed during the first half of 2015 on a website containing promotional material concerning the Bhula Bhula project. The second plaintiff gave evidence that these questions and answers were written by Mark Darwin. There is no evidence to the contrary, nor any basis for attributing the publication of this material to the either of the plaintiffs.

31 One of the questions was, “What exactly am I investing in?”. This was followed by an explanation of the proposed legal structure of the project, consistent with the explanations given in the video and flowchart referred to at

[12] and [13] above. A further question was "What are the plans for seeking Council approval?" The answer was in these terms:

> The Lawyer has put us in touch with a local Town Planner who is well known and respected by Tweed Council and Byron Council. [The second plaintiff] and Mark will be meeting with him to discuss the various options and relative costs here. The initial advice from the Lawyer is to seek approval for a Multiple Occupancy arrangement, but to what level we are unsure at this juncture. Encouragingly, the owner of the surrounding [3,000] acre property has Council approval for subdivision of 423 lots. This holds us in good stead [as] a precedent. We are meeting with this owner as he has approached us to [possibly] extend our community to this land. These discussions are very infant and not to be [taken] out of context.

32 Another question was addressed to how individual parcels of land would be allocated amongst unit holders. The answer given was that a formal process of allocation would in due course be set out in a unit holders' agreement. A further part of the answer stated:

> it is envisaged that all 30 families will be able to reside where they are very happy with.

33 Further questions concerned "restrictions on what I can build", "restrictions on when I must build", "restrictions on how many dwellings I can build" and whether there was "a preference as to what we build". These questions and the answers to them would be understood by the reader as directed to the internal controls of the community, not to permission under planning law or requirements of Local Government. The answers given to these questions do not detract from the statements quoted at [31] above, to the effect that Council approval for multiple occupancy of the land would be necessary but had not yet been obtained and that definitive advice had not yet been received about what should be applied for, let alone what approval might be forthcoming.

Investor subscriptions and borrowing, first half of 2015

34 The purchase price of the Mount Burrell land was $1,175,000. Up to the second half of June 2015 Mr Darwin had raised by way of subscriptions for units in the proposed Bhula Bhula Trust all but about $550,000 of the price. People wishing to be part of the intentional community had paid their

subscriptions, varying from $40,000 to $120,000 per trust unit, into Mr Wroth Wall's trust account. It is not clear from the evidence whether the subscribed funds were held by Mr Wall on trust for the intending community members, respectively, pending completion of the land purchase and establishment of the Trust, or whether these subscriptions amounted to outright payments to Mr Darwin, so that the solicitor then held the money for him. If the latter was the position then Mr Darwin held the money for the purposes of the proposed Bhula Bhula community, to be applied towards completion.

35 The second plaintiff did not himself do anything to assist with advancing the project until, in April 2015, Mr Darwin asked him to help obtain finance to enable settlement of the land purchase. The second defendant had a background in the finance industry and was experienced in purchasing and developing land. He agreed to assist Mr Darwin to raise a loan of $550,000, secured by mortgage. The second defendant had procured such a loan by June 2015. As referred to at [14] above, this required the incorporation of Wollumbin Horizons, which became the purchaser and mortgagor.

Mr Doolan's town planning advice, first half of 2015

36 During 2015, at some time before completion of the purchase of the Mount Burrell land on 30 June of that year, Mr Wall introduced Mr Darwin to a town planner, Mr Rob Doolan. The second plaintiff attended a meeting with Mr Wall at his office in Mullumbimby, together with Messrs Darwin and Doolan. The second plaintiff's understanding of the advice given by Messrs Wall and Doolan on that occasion was that the Mount Burrell land was subject to a Tweed Shire Local Area Plan that was in force under the *Environmental Planning and Assessment Act 1979* (NSW). He understood that this permitted construction of one dwelling for every 100 acres. Hence, six dwellings could be placed on the land.

37 The second plaintiff also understood from Messrs Darwin and Doolan that a higher rate of multiple occupancy could be permitted on the land pursuant to State Environmental Planning Policy No 15 – Rural Landsharing Communities

("SEPP No 15"). He thought that a greater number of dwellings could be constructed pursuant to that planning instrument if they were "off-grid", that is, without connection to water, electricity or sewerage services. The second plaintiff believed the advice to be that there was available a "window" over the following 18 months within which an application could be made to the Tweed Shire Council for approval under SEPP No 15 for as many as 30 dwellings.

38 I accept that the second plaintiff understood the advice of Mr Doolan in the sense summarised above. If he correctly understood Mr Doolan, the advice tendered was wrong. As advised by Mr Darryl Anderson in December 2015, occupancy of the land in multiple separate dwellings was not a use that could be permitted by Council under planning instruments that were in force in 2015.

39 At the time when the above oral advice was received by the second plaintiff, Mr Andrew Cody knew the Mount Burrell land well and was keen to see the Bhula Bhula intentional community established. He had identified 58 separate locations on the land that would be suitable for the construction of dwellings. The second plaintiff understood that the number of units marketed would have to be limited to less than 20 in order to avoid the project coming under the supervision of the Australian Securities and Investment Commission as a managed scheme. He thought that in addition to the 20 marketed units there could be some additional units taken up by "family and friends".

Wollumbin Horizons' purchase of land and execution of Trust Deed, June 2015

40 In about June 2015 the second plaintiff retained Ms Robyn Bourne and Ms Nicole Stanton, solicitors practising under the firm name Noble Law, to incorporate Wollumbin Horizons in Queensland. This was done on 22 June 2015. The second plaintiff was the sole shareholder, director and secretary of Wollumbin Horizons at incorporation. It was his intention, in accordance with the legal structure described by Mr Hajek, that after settlement and upon all subscribers for units becoming members of the incorporated non-profit association Together in Harmony, he would transfer his single share in

Wollumbin Horizons to the association. At that time he would also resign his directorship in favour of three new directors to be nominated by the association.

41 On 23 June 2015 Wollumbin Horizons executed a deed of trust by which the Bhula Bhula Trust was established. The company also executed a contract to purchase the property, with a completion date of 25 June 2015. Late on the afternoon of 23 June 2015 Mr Darwin sent out by email to each of the people who had paid funds into Mr Wroth Wall's trust account a copy of the Trust Deed, with a request that they should complete and return a Unit Application document that was appended as the Third Schedule to the Deed. The Unit Application was in the following terms:

> I/We … of … hereby apply for one ordinary Unit for the sum of $... in Bhula Bhula Community Village Trust which was established by Deed on 23 June 2015 and agree to be bound by the terms of the Deed and to hold the Unit subject to the terms and conditions of Deed.
>
> I/We hereby also acknowledge my/our understanding that becoming a Unit Holder does not confer on me/us any legal title to any parcel of land and understand that any consents required by law for a development and construction of residential dwellings on any Land forming part of the Trust Fund may not be in place at the time of my/our application.
>
> I/We also undertake to be bound by the terms of any supplemental Deed.

42 The purchase of the land was settled on 30 June 2015. Wollumbin Horizons utilised the funds that had been subscribed for units in the Trust and drew down a loan of approximately $500,000 on security of a first mortgage over the land. In cl 1(a)(4) of the Trust Deed the Trust Fund was defined as including all moneys paid to and accepted by the trustee on the issue of units and "the investments and property from time to time representing the said money". From completion the Mount Burrell land was therefore held by Wollumbin Horizons for the unit holders on the terms of the Trust Deed.

Further promotion of Bhula Bhula after settlement, August-September 2015

43 After settlement of the purchase Mr Darwin continued to conduct seminars and PowerPoint presentations to promote subscription for further units in the

Trust. He also accompanied prospective investors on inspections of the land. His objective was to raise sufficient capital to be able to repay the mortgage debt. The second plaintiff provided technical assistance for the seminars and presentations, converting Mr Darwin's notes into PowerPoint slides. In the second half of 2015 the third plaintiff became a member of a construction and planning committee that was formed amongst unit holders. The evidence does not establish the extent to which he engaged in ongoing promotion of the Bhula Bhula project or the terms of any representations he may have made to investors.

44 The defendant gave evidence that she undertook a second tour of the property with Mr Darwin in July 2015 at which time he repeated the representations referred to at [16] above except that he told her the area for exclusive use for a home site for each community member was reduced to 3 acres. At this time Mr Darwin told the defendant that the price of a unit was now $120,000. He provided her with an unsigned copy of the Trust Deed, a copy of the legal structure diagram referred to at [13] above and a link to Mr Darwin's and Mr Hajek's video explanation of the legal structure, as referred to at [12] above. The plaintiff paid the $120,000 in August 2015.

45 By verifying on oath par 84 of her amended defence the defendant gave this evidence:

> During 2014-2015, as described above in 51-56, the first and second plaintiffs made representations to some prospective investors to effect that land share and multiple occupancy was permissible on the designated property. Other investors were fully informed that land share and multiple occupancy was not permitted.

46 Paragraphs 51-56 do not attribute any specific representation to the second plaintiff. The representations by Mr Darwin referred to at [16] and [44] above are attributed only to him, in pars 51 and 56 of the amended defence and in the defendant's evidence adopting her pleading as a whole. The defendant did not give evidence that the second plaintiff spoke to her at all by way of explanation or promotion of the Bhula Bhula community prior to her investment. Neither in par 84 or elsewhere in her amended defence does she

specify an occasion upon which any such representation was made by the second plaintiff to any other investor. She does not name any investor to whom she heard the second plaintiff make representations nor does she describe any occasion when this may have occurred. I admitted par 84 as evidence despite it not being in quoted speech and not containing any particularity. I did so as a concession to the defendant, she being self-represented. But on the most generous view of par 84 it is unsatisfactory evidence, unreliable and unusable as the basis of any finding that any representation was made by the second plaintiff to any investor.

47 After settlement of the purchase one of Mr Darwin's PowerPoint presentations took place on 15 August 2015 and was video recorded. An edited version of the recording, of about 15 minutes duration, was subsequently posted on a website. Approximately 12 potential subscribers for units were in the audience on 15 August. Mr Darwin and the second plaintiff both spoke from the front of the room. They made the presentation jointly. A PowerPoint slide shown to the audience stated that four units were available at $120,000 each and that after they had been subscribed another six would be offered at $200,000 each. Mr Darwin updated this orally, saying that only one unit at $120,000 was left and that the next six would be sold at between $180,000 and $200,000. He said that after the last unit at $120,000 had been subscribed, the next unit taken up would provide sufficient funds to repay the mortgage and leave the land unencumbered.

48 A PowerPoint slide informed the audience that it was envisaged 25-30 families would move onto the land and that they would choose amongst 58 locations. Mr Darwin said that there were currently 22 units in the trust. He said, "We envisage that there's going to be 25" and that there was "talk of possibly 36 families". He said that 36 units would be the maximum.

49 The following statements were made concerning the legal position with respect to multiple occupancy of the land:

Mr Darwin:

[We] are going to come up against the purported or alleged authorities and we have to push through all that sort of stuff.

[Tweed Shire Council have] already contacted our real estate agent, a lawyer, the other side's lawyer […] trying to find out who we are and what we're doing. So our lawyer is in communication with them. […]. They have accused us of carrying out illegal works and all sorts of stuff. But we want to develop a relationship with them. […] We're in communication with a town planner called Rob Doolan who's very well known for doing a lot of [multiple occupancies]. […] There's sweeping legislation that says [..] you can have one dwelling per 100 acres. So we can have six and a half dwellings.

So our advice from Wroth Wall, our lawyer - by the way, Wroth is the community expert in Australia. He has done the legal work for well over 100 communities. […] His advice to us is to just seek some kind of approval, probably not for the full amount, and then have that grow as time goes on. [V]irtually all of the people that have bought into Bhula Bhula know that we don't have DA approval.

So if you're looking for DA approval the exit signs are clearly marked. That's not what we're looking for at this point in time. We will explore those things as time goes on. But a lot of the communities – so Wroth Wall will tell you but the majority of communities and [multiple occupancies] in the area don't have approval.

[Two named persons] are going to work with Wroth … to liaise with the council and navigate us through all that sort of stuff.

Mr Brennock:

I don't think we're not going to get Council approval but we're not going to go and get a DA, like next door's 423 lot approved … . That's not what we're about, lights, power, all that stuff because $300,000 a kilometre is what the roads are if you go to Council standards. […] We're just exploring that and getting the current approval status that we've got now extended and we will go and make the appropriate approaches to the right people at the right time. So we're not being bullied by them at this stage but we've ruffled a few feathers down there at this point.

[Mr Darwin explained the legal structure substantially in the terms summarised at [12] above and displayed the flowchart. He said there were two lots and that "most of the residences" will be on the back lot, furthest from Kyogle Road, comprising 346 acres].

Mr Brennock:

You then just have to get your head around I guess your advisers, your accountants and lawyers, understanding that they need to understand that you aren't buying a parcel of land and you need to understand that you're not buying a parcel of land. You're not. Well, technically I guess you are. You're buying 650 acres of land. But your one unit entitles you to a three acre parcel for your own private use of your land, of our land essentially, as it comes into it.

> Mr Darwin:
>
> You are going to have the private use of three acres. That's an internal document amongst all of us. So you are buying a unit in a trust. Now, what we want is for people - and I feel it already - is when you open up the front gate you're opening up the front gate to your property. Stop thinking about your three acres. […] The reality is that a small portion of what you're paying is actually going to your three acres. The rest of it is going to the other 500 plus acres that you get to use and you get to use the community centre. We're going to build an amazing community centre with a wet edge pool and a gym and a pool table and a commercial grade kitchen. It's going to be yours […]. It's all our land.

50 The second plaintiff attended between four and six presentations such as this between settlement of the purchase on 30 June 2015 and the end of September in that year. The content presented on each occasion was substantially to the same effect. In addition to the audiences at those presentations some prospective investors would have seen the recording of the 15 August presentation online.

51 During the presentation of 15 August 2015 Mr Darwin did not represent that "land share and multiple occupancy was permissible on the designated property", as asserted in par 84 of the amended defence. He made clear that the community did not have Council consent for multiple occupancy and that no application had been made. He said that legislation permitted up to 6½ dwellings on the land and that the legal advice of Mr Wall, "the community expert in Australia", was "to just seek some kind of approval, probably not the full amount, and then have that grow as time goes on". The second plaintiff's contribution to the presentation also made clear that an application to the Council and approval from that body would be necessary in due course, to enable the intended use of the land to proceed.

52 At [24]-[27] above I have referred to Ms Hersh's evidence that representations were made in the second half of 2015 concerning permissible use of the land. I do not find in that evidence a reliable basis for determining whether any representations were made or, if so, by whom. In any event, this evidence concerned statements made to people who had already bought units in the trust. It could not support the defendant's case that the plaintiffs gave false

inducements to prospective investors. This part of Ms Hersh's evidence therefore has no bearing upon the defendant's defence of truth in relation to the imputations against the plaintiff's that they promoted the Bhula Bhula project through deceit.

53 Mr Terry Poulios was called by the defendant and adopted a statement in which he said that he and his wife Natasja attended a Freedom Summit at Byron Bay in October 2015 where Mark Darwin and the second plaintiff were promoting units in the Bhula Bhula Trust. The statement continued as follows:

> After this Byron seminar we were invited to inspect the land at Mount Burrell. We were told that Council approval and all legalities were dealt with, we believed this as a number of "lot owners" had commenced building and construction of dwellings on "lots".

54 In oral evidence Mr Poulios initially said the statement "Council approval and all legalities were dealt with" was made by Mr Darwin and the second plaintiff. He said that during his inspection of the land he observed at least some dwellings "already up with solar panels on them" and site preparation or construction work taking place on additional lots. His evidence of the number of dwellings and/or construction sites was unclear but he appears to have recalled about three dwellings and five additional sites.

55 Later in his evidence in chief Mr Poulios said that he and his wife were not accompanied by Mr Darwin and the second plaintiff when they inspected the land in October 2015. He said that he saw "commencement of some type of structures on that occasion" but that he returned to make a second inspection in November 2015 on an "open day", at the invitation of Mark Darwin. He said that on this occasion he and his wife had a "proper tour, and you could see the dwellings – like, there had been productivity". He did not expressly state that the second plaintiff was present on this occasion.

56 Mr Poulios said that he met with Mark Darwin and the second plaintiff at a hotel in Camperdown in early 2016 to discuss the possible purchase of a unit in the Trust. Up to and including that time a price of $120,000 was spoken of. The second plaintiff agreed that he and Mr Darwin met with Mr Poulios in

Camperdown. He said this occurred before 17 February 2016, being the day he was informed that his resignation as a director of Wollumbin Horizons had been lodged with ASIC (see [87] below). Sometime after the meeting in Camperdown but before the end of May 2016 Mr Poulios said he was informed that he could acquire Mr Ron Berry's unit for $80,000.

57 According to Mr Poulios, by May 2016 he had decided to purchase a unit for $80,000 but his evidence is not clear as to who he communicated this decision to, on behalf of Wollumbin Horizons. His statement asserts that the second plaintiff requested him, by phone, in May 2016 to deposit the $80,000 to Mr Wall's trust account, from which it would be applied to pay out Mr Berry. The second plaintiff disputes that it was he who gave this instruction. A trust account receipt dated 1 June 2016 shows that this sum was duly paid into the solicitor's trust account on that day.

58 I cannot place reliance upon Mr Poulios' evidence that he was told by Mr Darwin and the second plaintiff, together, on the land at Mount Burrell, that "Council approval and all legalities were dealt with". His uncertainty about the occasion undermines this recollection to some extent. More importantly, he has not given evidence of any further part of the conversation, to provide context from which one could understand what "approval" and what "legalities" were being spoken of. With respect to other conversations concerning the Bhula Bhula project Mr Poulios' evidence was internally inconsistent and at times explicitly uncertain as to the identity of the person(s) he spoke with, the occasion(s) and the content. This raises doubt as to his initial identification of the second plaintiff as a person who spoke to him on the land in either October or November 2015.

59 In cross-examination Mr Poulios agreed that the only occasions on which he had spoken to the second plaintiff were at a Freedom Summit in Balmain in early 2015 and at the hotel meeting in Camperdown in early 2016. In agreeing that those were the only occasions he said:

> Yeah, I agree with that, because they were [scil would] use other people like Mark Darwin and the McSweens and Richard Mote and everyone. They were

> doing their jobs at the time. There was a whole team of – these people did sales, and yeah […].

60 Later in cross-examination he reiterated his claim that he had spoken by phone to the second plaintiff in May 2016, when he was advised how to make the transfer of funds to Mr Wall. I prefer the second plaintiff's evidence about that, namely, that he did not have such a conversation and that he was not involved in the affairs of the Bhula Bhula project at that time both because he had become concerned about the solvency of Wollumbin Horizons and because long before May 2016 he had ceased to be a director.

61 I consider it against the probabilities that either Mr Darwin or the second plaintiff would have made a representation to Mr and Mrs Poulios in either October or November 2015 that Council approval was in place, in the sense of permission for multiple occupancy and for construction of multiple dwellings on the land. In October and November 2015 they were awaiting a report from their town planner, Mr Anderson, as to how to proceed with obtaining Council consent. I accept the second plaintiff's evidence that he expected no difficulty in obtaining that consent. He had no reason to misrepresent the position to Mr Poulios. It is apparent from the August 2015 seminar referred to at [47]-[50] above that in the latter part of 2015 both Mr Darwin and the second plaintiff were well aware that Council approval was not yet in hand and they were making no secret of this in explaining the project to prospective investors.

62 When it was directly put to Mr Poulios that no representation had been made to him about Council permission to build on the land, it is significant that he ascribed such a representation to Mr Darwin, not to the second plaintiff. He answered as follows:

> Q Nobody ever told you that Council had granted permission to build dwellings on the Bhula Bhula land; is that true?
>
> A No one – no one told me? We got – we got told by Mark Darwin that the council and all that was dealt with. So, we were unaware of anything to do with not being able to build.

63 For reasons given above I do not accept that, if this was ever said by Mr Darwin, it was said in the presence of the second plaintiff in circumstances that would amount to him adopting or concurring in the representation. Further, I conclude that such belief as Mr Poulios had regarding Local Government permission for building on the land was assumed by him on the basis of seeing construction activity when he inspected the land. I found Mr Poulios to be not sufficiently consistent and reliable as an historian to be able to distinguish between a state of affairs that he inferred from what was taking place on the land and matters represented to him by one or more of the promoters.

64 That Mr Poulios made assumptions from what he observed on site visits is suggested by some of his answers. When he was asked in chief whether he had been told at any prior time prior to 1 June 2016 that construction work on the land was unlawful he said:

> A No. There were people living there, as I said, families with three kids running around, like, no, in tents. So, there were people there and there were people building and there were people with this big vision of a really beautiful dream, that's what I do know and it hasn't panned out that way.

To similar effect Mr Poulios gave this evidence:

> A It took so long for us to make a decision that if there was anything not like – yeah – if anything felt funny or not right, I wouldn't have made a transfer. Like, it's not – yeah – so – yeah – there were people building and it – yeah – there was just – yeah – it was very, very believable and, yeah, what can I say.

Camp-outs and commencement of the defendant's dispute, second-half 2015

65 After the purchase had been settled Mr Darwin, the second plaintiff and others organised monthly weekend visits to the land for people who had subscribed for units and others who had expressed interest in doing so. These were referred to as "camp-outs". During the 15 August 2015 presentation Mr Darwin invited those present to attend such an event later that month. At each camp-out the attendees remained on the land on Saturday and Sunday, camping out on Saturday night. The second plaintiff first saw the defendant at

one of these events in August 2015. He did not speak to her on that occasion. As mentioned earlier, the defendant had subscribed $120,000 for a unit after settlement, in about early August. The second plaintiff was not involved in introducing her to the project or in any presentation or representation to her.

66 One of the unit holders at the time of settlement was Mr Tamati Kirkwood. Soon after June 2015 he and his partner, Sarah, and their three or four children moved into the homestead on the land and into a caravan adjacent to it. The house was located on a rise above the general level of the property. During the second half of 2015 and into 2016 Mr Kirkwood acted as a caretaker of the land.

67 At one of the camp-outs in about September 2015, the defendant set up her camp within 50 m of the bank of the Tweed River. This was understood by second plaintiff and, so far as he was aware, by all other unit holders as an exclusion zone designated by the Tweed Shire Council within which human habitation was prohibited as a protection for the waterway. Following the camp-out at which the defendant set up in this location she did not depart on the Sunday afternoon or Monday morning as other unit holders did. Instead she remained in occupation and made her camp steadily more permanent. She placed a campervan on the site and established a garden.

68 In about September 2015 a dispute erupted between the defendant and Sarah Kirkwood concerning the deaths of two calves that had strayed onto the property. Ms Kirkwood said that the defendant was responsible for the deaths and the defendant denied this. Mr Darwin attempted to mediate the dispute but the defendant became hostile towards him and alleged, in emails circulated to other unit holders, that the finances of the project were not transparent and that Mr Darwin's conduct was "bullying". By December 2015 the defendant had communicated to Mr Darwin and the second plaintiff and to others that she wished to leave the community.

69 In late 2015 Mr Wall attended a camp-out and addressed the unit holders/community members who were present. The second plaintiff recalled

that Mr Wall "explained very clearly that night about the MO [modus operandi] to all there, including [the defendant], that the way the process was going to unfold from here". The second plaintiff did not explain in his evidence what exactly was said about the "MO" or about the unfolding of "the process". According to Mr Mote, Mr Wall said on that occasion that there should be no building or development carried out on the land until a DA had been lodged with the Council. Mr Wall urged that this deferral of erecting improvements should be strictly observed.

70 Despite this warning the defendant maintained her permanent camp into 2016. From late 2015 up to September 2016 other community members erected dwellings on the land and/or placed other structures or mobile accommodation units on the land without Council approval. By about the middle of the year there were approximately six individual "improvements" on the property including community members' caravans, a yurt, some shipping containers and the defendant's campervan. An old bus was parked on the land for some time.

Mr Anderson's town planning report, December 2015

71 The second plaintiff never saw any written advice from Mr Wall or from Mr Doolan to confirm what he understood to have been the oral advice Mr Doolan had given before settlement about multiple occupancy of the land. In the second half of 2015 Mr Darryl Anderson prepared a town planning report for the property on the instructions of the registered proprietor, Wollumbin Horizons. Instructions for this were conveyed to Mr Anderson primarily by the third defendant in his capacity as a member of a construction planning committee that had been formed amongst unit holders following settlement. Mr Anderson's report was delivered to Mr Darwin and the second plaintiff during December 2015. It was emailed out to unit holders during that month and hard copies of the report were distributed to unit holders at the next camp-out, either in December 2015 or January 2016.

72 The report contained the following summary of the position under the Tweed Local Environmental Plan 2014:

> [3.1] Tweed Local Environmental Plan 2014 came into force on 4 April 2014 and is the principal Planning Instrument controlling land use within the Tweed Local Government Area. Under the provisions of this Plan, the subject land is zoned RU2 Rural Landscape … .
>
> [The report quoted the objectives of the RU2 Rural Landscape zoning and the permitted and prohibited uses]
>
> In summary, [Tweed Local Environmental Plan 2014] does not address development for the purpose of a Rural Land sharing Community because State Environmental Planning Policy No 15 applies.
>
> The subject land is within a mapped drinking water catchment area … . [The report then set out cl 7.7 of Tweed Local Environmental Plan 2014, which specified stringent considerations to be taken into account before determining a development application with respect to land within a mapped drinking water catchment].
>
> Map 002 - Existing and Future Water Storage Facilities [being a map comprised in the Tweed Local Environmental Plan 2014] indicates that about 70% of Lot 20 is mapped as part of the future Byrill Creek Dam. … Identification of a part of the site as a "future water storage facility" is a significant, if not absolute, constraint to any development within the mapped areas. [The report then set out certain resolutions of the Tweed Shire Council concerning the proposed Byrill Creek Dam and a summary of the Council's resolutions with respect to future water supply, taken from a publication of the Council entitled "Tweed Link"]. In view of the Tweed Link article it is highly unlikely that the Council would amend the Existing and Future Water Storage Facilities Map to delete the water storage facility from Lot 20.

73 Mr Anderson's report then addressed SEPP No 15. The report quoted cl 2 of that policy, which explained its aims. Broadly the purpose of the policy was to enable people to own a single parcel of land collectively and to erect multiple dwellings on it, preferably in a clustered style, in a manner that would not involve subdivision, strata title or any other form of separate land title. Mr Anderson's report stated the following with respect to SEPP No 15:

> This Policy is the principal Planning Instrument regulating Rural Landsharing Communities. The policy prevails over [Tweed Local Environmental Plan 2014] in the event of any inconsistency.

74 Mr Anderson's report explained the formula for density of development that was prescribed in SEPP No 15 and stated that if it applied to the Mount Burell land a maximum of 66 dwellings would be permitted. Further considerations

and criteria were referred to, which might reduce this maximum number. However most importantly Mr Anderson identified that SEPP No 15 would be inapplicable to the subject property because cl 3(2)(k) expressly excluded its operation in relation to any water catchment area.

75 Sections 4.1, 4.2 and 4.3 of the report referred to maps showing that parts of the land were mapped as bushfire prone, protected as Regional Fauna Corridors and/or host to vegetation communities that Council would likely wish to protect. Mr Anderson identified these as impediments to obtaining Council approval for a land sharing use under SEPP No 15, even if the application of that Policy were not entirely excluded by the designation of the area as a water catchment.

76 Mr Anderson's conclusions were expressly subject to legal advice, in so far as they involved the interpretation of statutory instruments. He summarised the position at Section 1.0 of the report, repeated at Section 5.0, in these terms:

> Our preliminary high-level investigations revealed that the site is in a "water catchment".
>
> Therefore, [SEPP No 15] does not apply to the site by virtue of Clause 3, Schedule 2, item (k) and accordingly a Rural Land Sharing Community is **not** a permissible use. As this is a critical issue you may wish to obtain a legal opinion in relation to the interpretation of this Clause.
>
> […] As indicated in this Report, the site has multiple constraints and even if a Rural Land Sharing Community is a permissible use under [SEPP No 15], there is no certainty that Tweed Shire Council would approve a Development Application for a Rural Land Sharing Community on its merits.

Community members' meeting at Uki Hotel, late December 2015

77 By late December 2015 Ms Bourne and Ms Stanton had set up a legal office in the homestead on the Mount Burrell property and were conducting their practice, Noble Law, from there. In the last week of December 2015 a number of community members met with Ms Bourne at a hotel in Uki, a small settlement near Mount Burrell. Both plaintiffs were present. At this meeting Mr Anderson's report was discussed. I accept the second plaintiff's evidence that

prior to receipt of the report he was unaware that the majority of Lot 20 was mapped by Council as part of a future Byrill Creek Dam. Other unit holders who attended the meeting also expressed surprise about this. The second plaintiff intended that the community would allocate residential sites on ridges and high ground, not on the low land that would be flooded. Therefore, so far as he was concerned, the proposed inundation had no impact upon the community members' plans for the land.

78 Both the second and third plaintiffs gave unchallenged evidence that prior to receipt of Mr Anderson's report they did not know that the whole of the property was designated a water catchment or that SEPP No 15 would therefore be inapplicable. According to the second plaintiff, notwithstanding the terms of the report Mr Dixon "was quite comfortable with the report and the ability to proceed in some way, shape or form". It is not apparent what the third plaintiff may have had in mind at this time but, as it happened, the possibility that the Council might be able to approve multiple occupancy opened up with an amendment to planning laws that took effect from 5 August 2016: see [100]-[101] below.

79 At the Uki Hotel meeting the second plaintiff, in his capacity as the sole director of Wollumbin Horizons, instructed Ms Bourne to issue certificates of ownership of the Trust units for which funds had been subscribed. Ms Bourne proposed that, as the defendant wished to leave the community, instead of issuing a unit certificate to her she should simply be given a refund of her subscription money. The second plaintiff agreed to that course. He considered that if a unit certificate was issued to the defendant she would have difficulty selling it to a replacement community member because of "her demeanour". Despite the second plaintiff's request that certificates should issue to all other unit holders, this did not occur until about August 2016.

The defendant's public dispute with the community, from January 2016

80 In late December 2015 and early January 2016 the second plaintiff understood that there were potential investors interested in taking up the unit

for which the defendant had paid and that if Wollumbin Horizons should allocate the unit to such an investor it would receive funds from which to repay the defendant's investment, enabling her to leave the community. However no such investor came forward and, to the second plaintiff's understanding, at least one person was discouraged from investing as a result of allegations made by the defendant concerning the administration of the community. The second plaintiff did not take any part in promotion of units in the Trust after the beginning of 2016. He considered it would be futile to try to promote the project in view of allegations that the defendant was at that time making by email and on the internet.

81 In the same period the third plaintiff attended the property to show it to prospective purchasers of units. On at least three such occasions the defendant approached visitors to whom the third plaintiff was showing the property and asserted that he and others concerned in promotion of the Bhula Bhula project were "scammers". She followed the investors around the land and repeated her allegations, warning them not to invest. None of the people who were spoken to by the defendant in this manner made an investment.

82 On 8 January 2016 the defendant circulated an email to all existing unit holders asserting that Mr Darwin had treated her "in a disrespectful, dishonest and menacing way". She said that she wished to leave the community but was unable to transfer her unit because no certificate of ownership had been issued. The defendant asserted in this email that she was "concerned by lack of Bhula Bhula financial transparency and covert property deals by Community Leaders with no Community consultation".

83 At the end of January and in the first few days of February 2016, Mr Darwin, the second plaintiff, Ms Bourne and Ms Stanton agreed that a meeting of unit holders should be convened to vote on removal of the defendant from the community. Mr Darwin claimed at that time that negative sentiments about Bhula Bhula, publicised by the defendant in extravagant terms, had sabotaged the sale of three units in the Trust and had deprived the project of $360,000 of funds that might otherwise have been invested.

Financial crisis of the community, February 2016

84 In late January 2016 a statutory demand was served on Wollumbin Horizons by Marylou and John Cantrell for repayment of $120,000. They had provided this sum to the company after June 2015 to enable it to pay out its mortgage loan. Mr and Mrs Cantrell had initially subscribed for one unit in the Trust and had subsequently subscribed for a second unit at $120,000, on the basis that after the mortgage loan had been repaid the second unit would be sold to another investor and they would be paid back their second subscription. Three other parties had done the same thing, one of them being Ms Hersh. The company was thus liable to four separate parties for a total of $480,000.

85 A "crisis meeting" of community members was held on 9 February 2016. This failed to produce agreement on any plan for securing further unit sales or otherwise acquiring sufficient funds to pay out the $480,000. By 13 February 2016 the second plaintiff considered that Wollumbin Horizons could not meet its debts as and when they fell due. In those circumstances, as the company's sole director, he requested Worrells, a firm of accountants and insolvency practitioners on the Gold Coast, to take the company under their administration. On 13 February 2016 the second plaintiff wrote to all unit holders in the Trust to advise that he had suspended the activities of the company and placed it in the hands of Worrells. A few days later Worrells advised the second plaintiff that it may be possible for the company to trade out of its difficulties and that external administration should not be commenced immediately.

Directorship of Wollumbin Horizons during 2016

86 During the meeting at Uki at the end of December 2015 Ms Bourne requested the second plaintiff to sign a resignation as director. She said this would be a demonstration of good faith, showing that he was not purporting to usurp control of the project. She said it would help to rebut the defendant's allegations of dishonesty and malfeasance in the management of the project. The second plaintiff provided Ms Bourne with a signed resignation at that time as requested. He did not expect it to take effect until the incorporated

association of community members had nominated three replacement directors.

87 Ms Bourne lodged with ASIC on 16 February 2016 a notification of the second plaintiff's resignation specifying the effective date as 4 January 2016. Ms Bourne informed the second plaintiff by phone on about 17 February 2016 of the lodgement. After this the second plaintiff had no further involvement in management of the affairs of the Bhula Bhula community or the Trust for over one year until April 2017. The notification to ASIC dated 16 February 2016 apparently stated that Mr Tamati Kirkwood had been appointed as a director commencing on 4 January 2016. From 3 May 2016 Mr Steven McSween, another community member and unitholder, was appointed a director. Mr Kirkwood's directorship ceased from 15 June 2016. Mr McSween continued as sole director up to 30 January 2017.

Council's enforcement action, removal of defendant's camp, late 2016

88 By March 2016 the Tweed Shire Council had received numerous complaints from neighbours of the Mount Burrell land concerning improvements that had been unlawfully erected on it. Council officers made repeated inspections during 2016 and directed that structures be removed. On 28 September 2016 the Council filed a summons against Wollumbin Horizons in the Land and Environment Court seeking a declaration that the erection of structures and the placement of shipping containers and other items on the land had occurred in breach of s 76A of the *Environmental Planning and Assessment Act*. Orders were sought restraining the company from using the Mount Burrell land for residential purposes and requiring it within 28 days to remove the offending structures and reinstate the property.

89 Either Mr McSween, as sole director up to 30 January 2017, or someone else who had assumed management of Wollumbin Horizons arranged for the defendant's personal items on the land to be removed in about early December 2016. The area she had occupied was returned to more or less its natural state. In the early days of January 2017 the defendant protested about

this to Mr McSween by email and threatened to have him and Mr Mote charged with larceny and malicious damage. Mr Mote was the sole director from 30 January 2017. The defendant's emails threatening litigation continued through February 2017. She commenced various Local Court proceedings against the second plaintiff during 2017, including a charge of obtaining financial advantage by deception that was summarily dismissed. On 6 April 2017 Wollumbin Horizons consented to orders in the Land and Environment Court substantially to the effect sought by the Council in its summons of 28 September 2016.

Dysfunction of Bhula Bhula Trust and Community, August 2016-August 2017

90 The commencement of SEPP 2016 from 5 August 2016 meant that the status of the Mount Burrell land as a designated water catchment was no longer a fundamental obstacle to obtaining development consent for a Rural Landsharing Community (see [100]-[101] below). However impediments to obtaining Council consent identified by Mr Anderson remained (see [72]-[76] above). No one on behalf of Wollumbin Horizons, the Trust or the Community made any attempt after 5 August 2016 to seek Council consent for a development application for the now permissible use of a Rural Landsharing Community. That was because from August 2016, if not earlier, the Community was paralysed by disputes amongst its members and between them and the Council.

91 The defendant and three other investors who had paid for units were informed in August 2016 by the then sole director, Mr McSween, that their applications for units were rejected. All of these investors had been raising questions with Mr Darwin, the second plaintiff, Mr McSween and the solicitors, Ms Bourne and Ms Stanton, concerning the receipt and application of funds for the community project. The questions had in some cases assumed the form of strong accusations, particularly from the defendant. The three investors additional to the defendant, whose applications for units were rejected, had placed makeshift dwellings and associated structures on the land. These

items, like those of the defendant, were removed. I infer that this was done at the direction of Mr McSween.

92 The proceedings brought by the Council in the Land and Environment Court would have made it impractical for Wollumbin Horizons to seek Council consent for a Rural Landsharing Community in the latter part of 2016 or in the first half of 2017. In addition, Wollumbin Horizons faced claims from several investors for repayment of the funds they had contributed to acquire units in the Trust. The company had no funds from which to meet these claims. It was in no position to pursue a development application at any time between 5 August 2016, when SEPP 2016 commenced, and 8 August 2017, when a liquidator was appointed.

Winding up of Wollumbin Horizons, August 2017

93 From 30 January 2017 Mr McSween was replaced as sole director of Wollumbin Horizons by Mr Richard Mote. Then on 19 April 2017 Mr Mote was replaced by the second plaintiff, who was re-appointed with effect from that date. Upon resuming directorship he concluded that Wollumbin Horizons was hopelessly insolvent. The defendant had served a statutory demand for repayment of her investment. She had also commenced a number of legal proceedings against the company and persons involved in the project. The second plaintiff had exhausted his personal resources in attempting to fund defences to some of these proceedings. A creditors' meeting was convened and Mr Staatz was appointed administrator on 4 July 2017. From 8 August 2017 the company commenced to be wound up with Mr Staatz as the liquidator.

Third defendant's proposed purchase of the Mount Burrell land, June 2017

94 On 27 June 2016 the third plaintiff caused a company to be incorporated in Queensland with the name Nightcap Forest Pty Ltd. The name was changed to Mount Warning Eco Village Pty Ltd from 2 November 2016 and then to Nightcap Village Pty Ltd from 9 November 2017. I will refer to it as "Nightcap". In June 2017 the third plaintiff caused Nightcap to make an offer to Wollumbin

Horizons to purchase the Mount Burrell land for $2.225m on terms that $1.225m of this would not be paid on settlement but would be left in as vendor finance, secured by a mortgage over the property from Nightcap.

95 At that time the third plaintiff had ascertained that 12 of the 22 investors in the Mount Burrell project were willing to support the sale of the property to Nightcap on these vendor finance terms because they did not require Wollumbin Horizons to derive from the sale sufficient funds on settlement to enable their investments to be repaid immediately. They were willing to forego repayment and instead to receive a parcel of land in the Nightcap project in exchange for forgiveness of so much of the $1m vendor finance as represented their respective claims upon Wollumbin Horizons.

96 There is some evidence that since March 2018 the liquidator of Wollumbin Horizons has wished to adopt this contract and complete it. There is also evidence to the effect that this is been opposed by some creditors of the company, including the defendant. It is not necessary for me to enquire into whether the sale of the Mount Burrell land has been or will be completed.

Third plaintiff's Mt Warning/Nightcap Village project, June 2016 to 2019

97 In 2016 a large landholding on the northern boundary of the Mount Burrell land, together with a strip extending down the western boundary, was owned by Zimmer Land Pty Ltd. Mr Peter Von Lieshout was the sole shareholder of that company. The total area of this land was 1584.3ha ("the Nightcap Land"). In about early 2016, the third plaintiff commenced discussions with Mr Von Lieshout concerning development of part of that land for multiple occupancy. With the assistance of Mr Darryl Anderson and a surveyor the third defendant developed a proposal for establishing on the Nightcap Land a Rural Landsharing Community comprising 331 dwellings and ancillary facilities.

98 There was already in place a development consent dated 29 June 2009 for the development of this land for certain residential and limited commercial purposes. A condition of the consent was that works should be substantially commenced within five years. The third plaintiff maintains that this condition

was complied with and that therefore at all times since 2009 there has been approval for residential use of the Nightcap Land.

99 From the second half of 2016, the third plaintiff proposed to have Nightcap purchase the Nightcap Land for the purpose of establishing on it the proposed Rural Landsharing Community of 331 dwellings. In a preliminary discussion with the Development Assessment Panel of Tweed Shire Council on 31 May 2017 the third plaintiff and Mr Anderson sought an indication of whether this development was permissible and could be approved, subject to satisfaction of any conditions Council might impose.

100 In this discussion the third plaintiff relied upon State Environmental Planning Policy (Integration and Repeals) 2016 ("SEPP 2016"), which came into force on 5 August 2016. Clause 3(i) of that Policy repealed SEPP No 15. By cl 1(q) of Sch 1 of SEPP 2016, the operative provisions of that schedule applied as if they formed part of, inter alia, Tweed Local Environmental Plan 2014. Clause 2 of Sch 1 provided as follows:

> This Schedule aims to encourage and facilitate the development of rural land sharing communities committed to environmentally sensitive and sustainable land use practices by:
>
> > (a) enabling people who collectively own a single lot to erect multiple dwellings on that lot without dividing the lot (such as by subdivision or by contractual arrangements) […].

101 Clause 3 of Sch 1 of SEPP 2016 excluded certain land from the operation of the schedule but the exclusion did not extend to water catchments or any other general category that would prevent application of SEPP 2016 to the Nightcap Land. Clauses 4, 5, 6 and 7 enabled the Tweed Shire Council to grant consent for development on land to which the schedule applies "for the purposes of three or more dwellings" if satisfied of certain prescribed conditions and after taking into account nominated considerations. Clause 6(2) of SEPP 2016 provided that it would be automatically repealed two years after its commencement; that is, on 6 August 2018. At the meeting on 31 May 2017 Council's Development Assessment Panel told Mr Dixon and Mr Anderson that:

> the proposed development appears permissible with consent […] (Until 5 August 2018) subject to meeting the provisions of [SEPP 2016].

Marketing of Nightcap shares, from mid-2017

102 A contract dated 27 June 2017 was executed, pursuant to which Nightcap agreed to purchase the Nightcap Land from Zimmer Land Pty Ltd for $4.2m. The contract settlement period was six weeks. This contract was apparently never completed. When a concept development application in respect of the combined Nightcap Land and Mount Burrell land was lodged with Tweed Shire Council on 15 May 2019, as described below, Zimmer Land Pty Ltd claimed to be the owner of the Nightcap Land and Mr Von Lieshout signed the owner's consent form on that company's behalf. On 21 December 2018 Zimmer Land Pty Ltd granted to a different purchaser, NCV Enterprises Pty Ltd, an option to purchase the Nightcap Land within the following seven months. NCV Enterprises Pty Ltd was incorporated on 18 September 2018 and its shares are owned by Nightcap Constructions Pty Ltd, another entity apparently controlled by third plaintiff.

103 From March 2017 there were 511 ordinary shares in Nightcap of which Rainmaker Group Holdings Pty Ltd held 510. The third plaintiff had at least a substantial interest in Rainmaker Group Holdings Pty Ltd and possibly complete ownership of it indirectly through other entities and he controlled the company. Hence, he was indirectly the effective owner of Nightcap. Since about mid 2017 Mr Dixon has been inviting interested people to purchase shares in Nightcap for $250,000 each on the basis that such shares would confer rights in respect of the proposed land sharing development of the Nightcap Land. Over 800 shares have been on offer. Mr Dixon proposes that about half of these shares, when issued, would carry an entitlement to exclusive use of 1ha of the land in a rural setting and that the other half would carry exclusive rights to a plot within a proposed village area. To date only 30 shares have been taken up. Mr Dixon says that regulation of the rights of the shareholders in Nightcap is and will be in accordance with corporations law.

104 Mr Mote is the principal of Nightcap Realty, which has an exclusive agency to market shares in Nightcap. He and other sales staff have endeavoured to interest investors in the shares since mid-2017. They use an online enquiry system. The first contact by a prospective investor is by registration online. This is responded to by sending out approximately 28 pages of information concerning the proposed development of the Nightcap Land. Mr Mote or one of his staff then follow up by phone or email. All communications are logged and recorded electronically. The plaintiffs tendered printouts of the enquiries of 20 prospective investors, dating from 8 May 2017 to 4 July 2019.

105 None of the 20 logged enquiries resulted in the sale of a share. In some cases the prospects expressly stated that they believed the promoters had a reputation for dishonesty, as a result of viewing posts by the defendant on her blog websites, Matters 3-8. In other cases the salesperson concluded from the terms of discussions with the prospect that negative opinions about the business ethics of the promoters had been formed on the basis of information published by the defendant. A number of inquiries revealed concern on the part of the prospective investor as to whether Nightcap actually had development consent for the proposed utilisation of the Nightcap Land and for the grant to individual shareholders of rights of residence and occupation. The following are examples from two different enquirers:

> 4 April 2019: Hi before I spend too much time I am wondering if you have a response to the online claims about the eco-village? Sounds like there has been a scandle [sic]? Have people been paid back, do you actually have development approval for the current plans? Also, is there full financial transparency with respect to the past and current project?
>
> 12 April 2019: Do not email. Update only when blog disproven and DA approved.

Absence of consent for the Nightcap development as at 2019

106 On 15 May 2019 a planning consultant prepared for Nightcap a detailed Statement of Environmental Effects ("SEE") for submission to Tweed Shire Council in support of an application to develop multiple rural landsharing communities on the Nightcap Land. The submission was prepared as a

Concept Development Application, setting out the overarching proposed outcome for the land. This included subdivision of 41 lots to be managed by the community living on the land, for the purposes of staging the development. It was proposed to construct an internal road network, to provide some utilities and to clear some vegetation. A number of community spaces and facilities and up to 440 dwelling plots were planned.

107 SEPP 2016 was repealed from 6 August 2018 but State Environmental Planning Policy (Primary Production and Rural Development) 2019 ("SEPP 2019") contains a Sch 5 that prescribes, in substantially the same form, the terms of Sch 1 of SEPP 2016. Thus, Nightcap's Concept Development Application to the Council involved a development that was permissible under SEPP 2019, subject to Council's conditions and consent. On 26 July 2019 Council's Technical Officer – Planning sent to Nightcap's consultant a 13 page requisition for further information and clarification concerning the Application of 15 May 2019. Significant difficulties identified by the Technical Officer would have to be overcome in order to progress this application.

Summary of the published matters and defamatory meanings

108 In order to establish their respective causes of action on each Matter, the plaintiffs bear the onus of proving that the Matters would have conveyed to the ordinary reasonable reader one or more of the pleaded imputations. Adapting the words of the High Court in *Trkulja v Google LLC* [2018] HCA 25 (where the capacity of published matter to convey a particular meaning was under consideration), the Court's task is to attempt to envisage a mean or midpoint of temperaments and abilities amongst prospective readers and on that basis to decide whether ordinary reasonable people at the midpoint would derive from the impugned words the meanings for which the plaintiffs contend, or any of them, considering each publication as a whole.

109 The assumed characteristics of the ordinary reasonable listener are as described by Hunt CJ at CL in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 – another decision on the capacity of

published matter to convey alleged imputations. The authorities have identified numerous considerations that may have a bearing upon how the ordinary reasonable reader or listener may understand a publication. The relevant factors vary according to the medium and the subject matter. The authorities are collected in *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [68]-[91]. I accept that the principles are as extracted by Wigney J in that case and I have applied them in the following examination of the imputations pleaded in the present action. For this purpose I have extracted portions of the published Matters that I consider sufficient to illustrate how the imputations are conveyed.

Matter 1

110 Matter 1 published in the Nimbin Good Times newspaper in October 2016 was a 700 word article. It is sufficient to quote the following extract:

> 1. The truth about Bhula-Bhula.
>
> 5. Legal action is in process by disillusioned investors in the community at Mt Burrell, founded by Mark Darwin through his organisation, "Truthology".
>
> 6. Disillusioned investors warn that "Truthology" presents a matrix of lies, using misleading marketing to facilitate acquisition of multimillion dollar properties. […]
>
> 7. Investors paid up to $120,000 for fake shares in the 640 acre property […] falsely assured by Mark Darwin that development applications were in process. Tweed Council's warnings that no community would be permitted on the property were kept hidden. Only an inner circle knew that the advertised lots were protected for water catchment to a proposed dam at Byrrill [sic] Creek.
>
> 10. […] Those who sniffed a scam and called for accountability were menaced and driven out of the community.
>
> 11. Investors were driven off the property without return of their funds and without share titles. Loans were not repaid. Despite calls for transparency, all books were hidden. […]
>
> 13. Scorning ethics and government regulation as irrelevant, Mark Darwin's clique continued marketing fake shares in property where no habitation is permitted. They […] expanded their hot offer to include sale of unapproved lots with cabins on 3000 acres of adjoining property in Nightcap Forest.
>
> 16. Mark Darwin […] is a mentor to Adrian Brennock who for a year controlled the Mt Burrell property holding a single share of value $1 in

> Wollumbin Horizons Pty Ltd. This shell links to a web of other companies managed by Rainmaker Eco Investments.
>
> 17. In contrast to the losses of investors, the directors of Rainmaker Eco did quite well last year. Living in beachfront luxury with holidays in Bali, Adrian Brennock and Philip Dixon bid on various million-dollar properties and successfully acquired the commercial precinct at Mt Burrell […].

111 The plaintiffs have pleaded that Matter 1 conveys with respect to each of them imputations that they have:

> a marketed shares in a property when such shares do not exist;
>
> b engaged in deceptive conduct by promoting the sale of shares in a community at Mount Burrell when in fact no habitation on the property is allowed;
>
> c ripped off investors in a community at Mount Burrell in order to fund [their] lifestyle including living in beachfront luxury and having holidays in Bali.

112 The article is primarily directed at Mark Darwin but the following aspects identify the plaintiffs. It is stated at par 2 that the Mount Burrell community was founded "through his organisation, Truthology", thereby conveying that other persons were complicit with him in the alleged fraudulent promotion. At par 7 there is reference to an "inner circle" and at par 13 to "Mark Darwin's clique". From pars 16 and 17 there is a clear inference that the plaintiffs are members of this inner circle and clique. In par 16 it is said that Mark Darwin "is a mentor to" the second plaintiff and that for a year the second plaintiff controlled the Mount Burrell property. In par 17 it is stated that both plaintiffs are directors of Rainmaker Eco Investments, said to be linked to the company associated with the Mount Burrell project, and it is implied that both extracted significant wealth from that project, at the expense of others.

113 The defendant admits that each of these imputations is conveyed and was published in respect of both plaintiffs. She has maintained a defence of truth in relation to all three imputations, against each plaintiff.

Matter 3

114 Matter 3, the "Wanted" poster displayed on the defendant's blog website from 11 October 2016, is quite brief. It contains a portrait photograph of Mark

Darwin under the headings “WANTED” and “$15,000 REWARD”. Beneath the photograph is the following text:

> Reward for capture of this abusive psychopath who scammed investors of over $1.5 million, selling fake shares in a “village” on Mt Burrell properties where no habitation is allowed.
>
> Also wanted for collusion: Adrian Brennock, Phillip Dixon and Kelly McSween, who use deceptive and misleading marketing through “Truthology” and Rainmaker Eco, offering “ethical investment” in a scam.

115 The plaintiffs have pleaded that Matter 3 conveys with respect to each of them imputations that they:

> a# are members of a gang of thieves led by Mark Darwin;
>
> b have colluded with Mark Darwin in the property scam at Mount Burrell;
>
> c# are fugitives who ought be arrested;
>
> d engaged in misleading and deceptive marketing in relation to a property scam at Mount Burrell.

116 The defendant has admitted that imputation b is conveyed with respect to both plaintiffs and that imputation d is conveyed with respect to the second plaintiff. I am satisfied that imputations a-d are all conveyed by Matter 3 with respect to both plaintiffs. With respect to the imputations marked “#” the defendant does not maintain a defence of truth so far as these are conveyed against the second plaintiff. There is an inconsistency in her counsel’s submissions dated 17 October 2019 concerning imputation a as against the third plaintiff but I treat that as an error. I proceed on the basis that the defendant does not seek to justify imputation a or c against either plaintiff but the defence under s 25 is maintained in respect of b and d.

Matter 4

117 Matter 4, published on the defendant’s blog website from 8 December 2016, contains all of the text that has been extracted at [110] above from Matter 1, together with the text and photograph of the “Wanted” poster that constitutes Matter 3, quoted at [114] above. The plaintiffs have pleaded that the

imputations set above out at [111] a-c and [115] a-d are conveyed in respect of both of them. I am satisfied that those imputations are conveyed.

Matters 5 and 7

118 Matters 5 and 7 are in identical terms, having been published, respectively, on the defendant's blog website entitled "thetruthabouttruthology" from 4 April 2017 and on her blog website relating to the Mount Warning Eco Village from 3 April 2017.The text of each of these publications contains the following passages:

> 1. The Truth About Truthology.
>
> 2. Mt Burrell Land Scam Exposed in Criminal Prosecution.
>
> 5. An alleged multi-million-dollar investment fraud offering fake shares in a Mt Burrell "Eco Village" was challenged in a private prosecution at Murwillumbah Court, NSW, on March 28th. Mark Darwin and Adrian Brennock with company directors […] were charged with criminal fraud and larceny. They declined to appear in court but were represented by [a solicitor] instructed to plead "Not Guilty". […]
>
> 7. The private prosecution was initiated by defrauded investor Gi Linda [the defendant], who also filed a statutory demand on the company Wollumbin Horizons Pty Ltd, starting winding up procedures to stop the land-share scam. With a federal police investigation of the alleged fraud in progress and civil litigation by defrauded investors stalled, the criminal prosecution was initiated to fast track justice. The aim is to achieve restitution for creditors with urgent claims now totalling over $2.7 million, including failed investments, delinquent loans, misappropriation of superannuation, defamation and destruction and theft of property.
>
> 9. Supporting evidence documents a fraud that began in 2014, involving sale of lots in "Bhula Bhula Community" without advising potential investors that the advertised land-share sites were located on environmentally protected land where no dwellings are permitted. The community failed, leaving angry investors bereft a year ago, yet the audacious fraud was continued with an ambitious new adventure – Mt Warning Eco Village – an even larger proposed "Intentional community" at Mt Burrell. Misleading advertising offers residential lots with optional cabins on 3500 pristine acres with lilly-clad lagoons and mountain views, where it is clearly known by the accused that habitation is prohibited.

119 Matters 5 and 7 do not name the third plaintiff. The second plaintiff, only, has pleaded that the Matters convey with respect to him imputations that he has:

> a engaged in a land scam at Mount Burrell;

b engaged in a multi-million dollar fraud;

c engaged in fraudulent conduct that is so serious that he warrants criminal prosecution;

d offered shares in an Eco Village at Mount Burrell when such shares do not exist;

e# engaged in larceny;

f engaged in fraudulent conduct that is so serious that he is being investigated by the Australian Federal Police;

g failed to repay loans to investors that are due;

h# misappropriated superannuation funds belonging to investors in an Eco Village at Mount Burrell;

i# defamed investors in an Eco Village at Mount Burrell;

j# destroyed property belonging to investors in an Eco Village at Mount Burrell;

k# stole property belonging to investors in an Eco Village at Mount Burrell;

l sold lots in the Bhula Bhula community whilst withholding from investors the fact that dwellings would not be permitted on the land;

m deceptively advertised residential lots in the Mt Warning Eco Village whilst he knows this habitation is prohibited.

120 In relation to Matter 5 the defendant admits that all of the pleaded imputations are conveyed except d. However, imputation d is clearly conveyed by the reference to "fake shares" at par 5. Confusingly, the defendant does not admit that any of the imputations are conveyed by Matter 7, despite its identical wording. I am satisfied that all of the imputations are conveyed by both Matters. The defendant does not maintain a defence of truth to any of imputations e or h-k, marked "#".

Matter 6

121 Matter 6, published on a second blog website of the defendant on 4 April 2017, includes the following text:

3. Mount Warning Eco Village – A Warning

4. Buyer be warned! Mount Warning Eco Village is a fresh face and a different name for an old “bait-n-switch” toxic snake-oil game!

6. […] [I]f you are all cashed up and a bit credulous, then there are deep blue eyes spinning sweet honey lies with captivating cadence, eager to embrace your life savings in a notorious Mt Burrell property scam.

7. Attractive online facades with changing names and faces conceal a long line of defrauded creditors pressing for restitution. Headed by Mark Darwin and his partner Adrian Brennock, the current lure, “Mount Warning Eco Village” […] is presented as an exciting opportunity to be part of an up-market “intentional community” dedicated to an alternative lifestyle. The sales pitch sounds smooth, but baited buyers are unaware that habitation is not permitted on the residential sites offered for sale.

8. Once hooked and bled dry of funds, financiers soon wake up to the reality behind the trance-like delusion; a hidden history of hurt, harm and betrayal that has spat out many disillusioned investors.

10. Beginning in 2014, followers of Mark Darwin were enticed to fund the scam […]. [T]he fraudsters spun a land-share scam offering residential sites in an unapproved community on environmentally protected property where no habitation is permitted.

11. Potential investors were not told about existing restrictions on use of the land, and employment of a town planner enhanced a false appearance that permits were in process. […]

12. One defrauded investor, [the plaintiff] […], joined the community at […] Mt Burrell and was promised shared use of the 640 acre property with exclusive use of 3 acres. Investors were given no share titles and soon discovered they had bought into a scam. Those who called for accountability and restitution were threatened, driven off the land without return of their funds and their belongings were stolen.

13. [The plaintiff] says, “I was fooled by deceptive marketing and bought a fake ‘share’ in the ‘Bully-Bully Community’ at Mt Burrell in August 2015. When I saw the scam and demanded financial accountability the books were hidden and I was threatened and harassed […]”.

14. “[I]n December 2016 […] the bully-boyz blocked the entrance to my site and smashed my camp. My belongings were hauled away in a skip. Adam Green, who was caretaking my flower garden before it was demolished, is missing. The police were misinformed and refused to assist, so I started private criminal prosecution of Mark Darwin and his gang of thieves”.

18. After driving investors off the Mt Burrell property without return of their money, Mark Darwin’s partner Adrian Brennock, holding a single share of value $1, remained as sole shareholder in the company Wollumbin Horizons Pty Ltd, and still asserts control as the illegitimate yet legal sole owner of the land asset. The couple then appointed themselves co-directors of a new company, Rainmaker Eco Investments Pty Ltd, and together with […] and Philip Dixon, bought the commercial precinct adjoining Bhula Bhula.

20. The Mt Burrell property scam was first exposed in October 2016 in a Nimbin Good Times article by [the plaintiff], “The Truth About Bhula Bhula”.

21-23 [The Nimbin Good Times article was partly reproduced, including the material extracted at [110] above in pars 5, 7 and 18].

25. […] Instead of ending the fraud and making restitution after being exposed, Darwin’s gang, with the new front company, Rainmaker Eco Investments, went fishing for more investors, and the land-share scam resurfaced as they continued selling fake shares in the failed Bhula Bhula Community.

26. The advertised [Mt Warning] Eco Village was promoted nationally and internationally and to silence their opponents, the bully-boyz aggressively confronted and made defamatory ad hominem attacks on those who had exposed them.

27. Tweed Council affirms, as with the Bhula Bhula property, the area designated for residential lots in Mt Warning Eco Village is reserved for future water-catchment – no habitation is permitted. No application has been accepted for the establishment of the village on the protected land, and despite dishonest assurances by Darwin’s boyz that they do have green-lit DA approval, no Development Application has even been initiated.

35. While Mark Darwin is a charming salesman […] his diminutive partner Adrian Brennock […] is a loan shark, a master of chameleon disguise lurking in the background. […]

38. After being exposed in several local newspapers, Darwin and cohorts simply scrubbed online references to Bhula Bhula Community, issued threats of extreme litigation to their opponents, then popped up a new front and continued marketing a “once in a lifetime opportunity to own a town”.

40. Working closely with Philip Dixon, Darwin says they’re “recreating the village”. He promotes the venture as “ethical, sustainable and green” as he continues flogging fake shares in a community fiasco built on environmentally protected land where habitation not [sic] allowed.

122 The second plaintiff has pleaded that 21 imputations are made against himself in Matter 6, namely, that he:

a is a bully;

b# has destroyed property belonging to the defendant;

c# has stolen property belonging to the defendant;

d# misinformed the Police about alleged damage done at the defendant's site at the Mt Burrell Eco Village;

e# is connected to the alleged disappearance of Adam Green;

f has engaged in conduct at Mt Burrell that is so serious that he warrants criminal prosecution;

g# has driven investors in the Mt Burrell community off the property without returning their investment funds;

h illegitimately owns and controls the Mt Burrell property;

i# is a member of a gang of thieves led by Mark Darwin;

j is a loan shark;

k is characteristically untrustworthy;

l menaces those who attempt to expose the alleged fraud engaged in at the Mt Burrell community and Mount Warning Eco Village;

m has colluded with Mark Darwin in a property scam at Mt Burrell and Mt Warning;

n has deceptively advertised and sold residential lots in the Mt Burrell Eco Village, despite knowing that they could not be legally inhabited;

o# has threatened extensive litigation to anyone who opposes him;

p* has engaged in conduct which is so serious he is involved in a legal action commenced by Tweed Shire Council;

q has engaged in conduct which is so serious that if the private prosecution commenced against him by the defendant is successful, he could be heavily fined or sent to prison;

r had engaged in conduct that is so serious that he is being investigated by the Australian Federal Police;

t to the extent that Matter 6 contains material that is substantially the same as Matter 1, the second plaintiff repeats and refers to the imputations set out at [111] a and c above;

u to the extent that Matter 6 contains an image of the poster comprised in Matter 3 the second plaintiff repeats and refers to the imputation set out at [115] c above.

123 I will not address items t and u separately in these reasons because they are dealt with in connection with Matters 1 and 3. The defendant admits that Matter 6 conveys against the second plaintiff all the above imputations with the exception of item i but I am satisfied that that meaning is conveyed. I am satisfied as to all of the other alleged meanings except item p. The defendant

does not maintain a defence of truth to any of imputations b-e, g, i or o, marked "#".

124 The third plaintiff has pleaded that Matter 6 conveys 15 imputations against him. They are that the third plaintiff:

a is a bully;

b# has destroyed property belonging to the defendant;

c# has stolen property belonging to the defendant;

d# misinformed the Police about alleged damage done at the defendant's site at the Mt Burrell Eco Village;

e# is connected to the alleged disappearance of Adam Green;

f has engaged in conduct at Mt Burrell that is so serious that he warrants criminal prosecution;

g is engaged in a land scam with the Mark Darwin at Mt Warning;

h* has engaged in conduct which is so serious he is involved in a legal action commenced by Tweed Shire Council;

i has engaged in conduct which is so serious that if the private prosecution commenced against him by the defendant is successful, he could be heavily fined or sent to prison;

j has engaged in conduct that is so serious that he is being investigated by the Australian Federal Police;

l to the extent that Matter 6 contains material that is substantially the same as the Matter 1, the third plaintiff repeats and refers to the imputations set out in [111] a-c above;

m to the extent that Matter 6 contains an image of the poster contained in matter 3, the third plaintiff repeats and refers to the imputations set out in [115] a and c above.

125 The defendant does not admit that any of the above imputations are conveyed by Matter 6 with respect to third plaintiff. I am satisfied with respect to all of them except item h. The defendant's closing submissions do not advance a case of justification with respect to any of these imputations. However, most of them overlap with imputations in Matters 1 and 3 that the defendant has endeavoured to justify. Having found that the imputations against the third plaintiff in Matter 6 are conveyed, I will therefore proceed on the basis that the

truth or otherwise of these imputations must be determined – except with respect to b-e, marked "#", as these correspond with imputations against the second plaintiff that the defendant does not contend are true.

Matter 8

126 Matter 8, published from 15 April 2017 on the defendant's blog website concerning the Mount Warning Eco Village, includes the following text:

> 1. Mount Warning Eco Village – A Warning
>
> 3. Medical Cannabis Scam alert: Nimbin University Cannabis Community at Mt Burrell.
>
> 6. "Nimbin University" – a community cannabis research and medical treatment campus at Mt Burrell was launched […] on Saturday, 15th April. […]
>
> 12. Buyer Beware! The sick and vulnerable who are eager to receive forbidden weed for only $1 should note that the contact address for the "Nimbin University" is 3222 Kyogle Rd, Mt Burrell, NSW – notorious home of the Bhula-Bhula land scam. The ongoing land-share fraud is headed by Mark Darwin, who […] is currently confronted by criminal charges and class-action by angry, defrauded investors with claims now exceeding $2.7 million.
>
> 14. [P]ulling strings in the background are the unseen scam-masters of chameleon disguise; […] followers of marketeer Mark Darwin and loan shark Adrian Brennock […]. Co-creators of the Bhula-Bhula fiasco, they're always found luring financiers with a "worthy" ideology linked to a pioneering business with a profitable data-base.
>
> 16. You've got to give credit where it's due, masters of misleading marketing, Mark Darwin and the Boyz certainly have audacity and imagination! No longer satisfied with acquiring million-dollar properties by selling residential lots on land that cannot be inhabited, the Boyz have now expanded their Mt Burrell scam to include mass-marketing medicinal cannabis to sick and vulnerable people. The illicit medicinal herb is falsely advertised as a licensed industrial hemp, and with sleight of hand [the] "Cannabis Community" links directly to the land fraud.
>
> 26. In 2015, […] the Boyz started draining other people's wallets to build an "intentional community" on land where no habitation is allowed […]. The Mt Burrell land-scam was also obscured by an alternative reality of falsehoods in the name of "Truthology" and "Freedom Summits" […].
>
> 27. In less than a year the Boyz had scammed investors in the Bhula-Bhula Community of over $1.5 million and the fraud was exposed in local newspapers. Tweed Council was suing the Boyz to remove illegal dwellings from the protected land, repair damage and recoup unpaid

rates; defrauded investors were litigating and a federal police fraud investigation was underway. […].

32. Unseen behind the curtain, the bully Boyz quietly acquired another big fat database to bleed dry, as they warned opponents they would be "washed like flies from the windows of their lives".

34. The 2016 pop-up-front for the Mt Burrell land-scam was "Mt Warning Eco Village" […].

36. The Boyz now say they are all cashed-up with new deposits. They may have forgotten to inform investors about Council's warnings that no multiple occupancy/community is permissible on the environmentally protected land they are selling.

38. The lack of development approval doesn't worry the Boyz, they say they have friends in high places who can lend a boot to ram a DA through the courts before anyone notices the criminal charges they face.

39. When charges of fraud and larceny were brought against them in a private prosecution by defrauded investor [the plaintiff] […] the Boyz reacted with an empty offer of payout, that came with the whiff of yet another rat.

49. The Mt Burrell Boyz […] say they are "sovereign citizens" who reject the rule of law and operate with assumed legal impunity "in private not public commerce". In reality they fly by bluster, bullying and the Law of the Brute […].

127 The second plaintiff has pleaded that Matter 8 conveys 13 imputations against himself, namely, that he:

a engaged in a property scam at Mt Burrell;

b has defrauded multiple investors in a community at Mt Burrell to the extent that he is facing criminal charges;

d is a scam-master;

e is a loan shark;

f is a master of misleading marketing;

g# has acquired million-dollar properties by deceptively selling residential lots on land that cannot be inhabited;

h# preys on sick and vulnerable people by marketing medicinal cannabis to them which is falsely advertised as licensed industrial hemp;

i engaged in fraud in the order of $1.5 million which was exposed in local papers;

j* was being sued by Tweed Council to remove illegal dwellings that he placed on […] protected land, repair damage done by him to the land and recoup unpaid rates;

k was being investigated by the Australian Federal Police for fraud;

l is a bully;

m deceptively failed to inform investors in Mt Warning Eco Village that no multiple occupancy or community is permissible on the environmentally protected land;

o# committed larceny.

128 The defendant has admitted that all of the above imputations are conveyed with respect to the second plaintiff, except those marked i and j. In my view imputation i is conveyed in par 27 of Matter 8 but imputation j is not conveyed. The identification of the second plaintiff is apparent from par 14. There is a clear implication that the second plaintiff is one of "the Boyz" to whom frequent reference is made throughout the balance of the Matter. I infer that a significant proportion of readers of Matter 8 would also read Matter 6 that was posted on the same blog webpage only 11 days earlier and had closely related content including common images. In Matter 6 the second plaintiff is repeatedly named as Mark Darwin's partner and is thus identified as one of Darwin's "gang" and "Boyz". The publication of Matter 6 is relied upon by the second plaintiff as an extrinsic fact capable of proving that Matter 8 was published of and concerning him: see *Baltinos v Foreign Language Publications Pty Ltd* (1986) 6 NSWLR 85 at 96 (Hunt J). The defendant does not maintain a defence of truth to imputations g, h or o, marked "#".

129 The third plaintiff has pleaded that Matter 8 conveys 12 imputations against himself, namely, that he:

a engaged in a property scam at Mt Burrell;

b has defrauded multiple investors in a community at Mt Burrell to the extent that he is facing criminal charges;

d is a scam-master;

e is a master of misleading marketing;

f# has acquired million-dollar properties by deceptively selling residential lots on land that cannot be inhabited;

g# preys on sick and vulnerable people by marketing medicinal cannabis to them which is falsely advertised as licensed industrial hemp;

h engaged in fraud in the order of $1.5 million which was exposed in local papers;

i* was being sued by Tweed Council to remove illegal dwellings that he placed on from protected land, repair damage done by him to the land and recoup unpaid rates;

j was being investigated by the Australian Federal Police for fraud;

k is a bully;

l deceptively failed to inform investors in Mt Warning Eco Village that no multiple occupancy or community is permissible on the environmentally protected land;

n# committed larceny.

130 The defendant denies that the third plaintiff is identified as a person in respect of whom any of these imputations are conveyed. Although the third plaintiff is not named at all in Matter 8, he is named in Matter 6, on the same blog website, as someone with whom Mark Darwin is "working closely" on "flogging fake shares in the community fiasco built on environmentally protected land where habitation is not allowed". On the basis that a significant portion of readers of Matter 8 would also read Matter 6, the third plaintiff is identifiable in Matter 8 as one of the "Boyz". The principle stated in *Baltinos v Foreign Language Publications Pty Ltd* is again applicable.

131 I find that the above imputations are conveyed by Matter 8 of and concerning the third plaintiff, with the exception of i. The defendant has not pleaded the truth of these imputations with respect to the third plaintiff but, for reasons similar to those given at [125] above in relation to Matter 6, I will determine the truth of them. As the defendant does not argue for the truth of three of the imputations conveyed by Matter 8 against the second plaintiff I assume that she also does not contend that those imputations are true in so far as I have

found that they are published in respect of the third plaintiff. They are imputations f, g and n, each marked "#".

Defence of truth concerning imputations against second plaintiff

132 In order to simplify the Court's consideration of the defence of justification I find it necessary to identify factual issues that are common within groups of imputations drawn from multiple published Matters. The factual issues are identified in the following subheadings, under which the affected imputations are listed and the evidence is considered.

Did the second plaintiff promote the Bhula Bhula project fraudulently?

133 This issue arises from the defence of truth to the following imputations published of the second plaintiff:

Matters 1 and 4: imputations a, b and c at [111];

Matter 3 and 4: imputations b and d at [115];

Matters 5 and 7: imputations a-d, f and l at [119];

Matter 6: imputations f, m, n, q and r at [122];

Matter 8: imputations a, b, d, f, i and k listed at [127].

134 The defendant's case that the second plaintiff promoted the Bhula Bhula project fraudulently comprises the following elements:

(1) representations were made to one or more investors, either by the second plaintiff directly or by Mr Darwin with the second plaintiff's knowledge and approval, to the effect that

(a) investors could lawfully erect dwellings upon un-subdivided portions the land at Mount Burrell;

(b) to the extent Development Approval was required from Tweed Shire Council it would be obtained and

(c) investors would acquire either shares in a company that would own the land or a direct interest in the land;

(2) the representations were not true and

(3) the second plaintiff knew they were not true or at least acted recklessly as to their truth or falsehood.

135 The plaintiff bears the onus of proving these propositions on the balance of probabilities. As to representations (a) and (b), I have not found it necessary to determine whether anything to this effect was said to the plaintiff herself by Mr Darwin on 15 February 2015, as she alleges (see [16] and [17] above). Even if that did occur there is no evidence that the second plaintiff knew such representations had been made to her or that he in any way authorised or adopted them. For reasons given at [18]-[29] I am not satisfied that representations to the effect alleged were made by the second plaintiff, or by Mr Darwin with the second plaintiff's knowledge and authority, to the third plaintiff, to Mr Mote, to Ms Hersh or to any other investor up to June 2015. No such misrepresentation was made by the second plaintiff through the Frequently Asked Questions: see [30]-[32].

136 For reasons given at [44]-[46] and [52]-[64] I am also not satisfied that any such representations were made by the second plaintiff to any investor during the ongoing promotion of the project in the second-half of 2015. The video-recorded presentation of 15 August 2015 summarised at [47]-[51] shows that at that time Mr Darwin and the second plaintiff positively disclaimed that there was a present legal entitlement to erect multiple dwellings on the land or that Development Approval had been obtained for this purpose, or that there was any assurance of obtaining Development Approval. I accept the evidence of the second plaintiff that he was not involved in promotion of the project after 17 February 2016 for at least the rest of that year. He could not be regarded

as having misled Mr Poulios by silence during the first five months of 2016, in the lead up to Mr Poulios' investment on 1 June 2016. I am not satisfied that the second plaintiff had any communication with Mr Poulios after 17 February 2016 or that he had any authority or obligation to discuss the Anderson report, of December 2015, with him in that period.

137 If representation (a) had been made by the second defendant at any time during his involvement in promotion of the project, up to 17 February 2016, it would have been incorrect. A representation in terms of (b), that Development Approval would be forthcoming for multiple dwellings, would also have been incorrect. The defendant has not proved that the second plaintiff made any such representation. Further, as stated at [38] above, I am satisfied that until late 2015 the second plaintiff accepted the advice of Mr Doolan to the effect that one dwelling per 100 acres was presently permissible and that Council could approve a higher rate of multiple occupancy under SEPP No 15.

138 Contrary to Matter 1 at par 7 (see [110]) and Matters 5 and 7 at par 9 (see [118]), it has not been proved that the second plaintiff knew of and kept hidden a warning from Council that no community would be permitted on the land. It has not been proved that there was an "inner circle" that knew the land was protected as a water catchment or that the second plaintiff was part of such a group. I accept the second plaintiff's evidence that he did not know of any such facts until the receipt of Mr Anderson's report and that he did not make representations to investors about permissible land use after that date. The defendant has failed to prove that the second plaintiff fraudulently promoted Bhula Bhula by making deliberate or reckless misrepresentations, at any time, in terms of (a) and (b) above.

139 As to representation (c), I am not satisfied that the second plaintiff represented to any investor that he or she would acquire a share in a company or a direct interest in title to land or, indeed, anything other than a unit in a trust. Nor am I satisfied that Mr Darwin made any such representation. The proposed structure of ownership, under which a company would hold the land on trust and investors would be issued with units in the

trust, was consistently explained by Mr Darwin: see [11]-[13] and [49] above. The Third Schedule to the Trust Deed that was sent out to all investors also explained clearly that they were applying for a unit in a trust and that they would not obtain direct legal title to land. The defendant acknowledged in par 57 of her defence that she received a copy of the Trust Deed, unsigned, before completing the purchase of her unit. She agreed in cross-examination that she read the Third Schedule. I can find no evidence of any misrepresentation in relation to what would be acquired by each investor, such as would support the defendant's case that the second plaintiff promoted the project fraudulently.

140 The lack of planning consent to enable each of 20 to 36 unit holders to construct his or her own dwelling on the land made the purchase of a unit in the Bhula Bhula Trust a risky and unsatisfactory investment. Establishment of a community of people living at Mount Burrell was an express objective of the project. From what Mr Darwin and the second plaintiff said to prospective investors on 15 August 2015 and disclosed in the Third Schedule to the Trust Deed, quoted at [41], the possibility of being able to do this lawfully remained to be explored. Many people, even with only a modest awareness of planning law, would be unwilling to pay $80,000 or $120,000 in the expectation of being able to live on this property given the disclosure of no present planning approval. But the principal issue raised by the defence of truth is whether fraudulent misrepresentations were made by the second plaintiff, not whether the project was poorly conceived by its promoters or foolishly subscribed by its investors.

Did the second plaintiff promote the Nightcap Land project fraudulently?

141 This issue arises from the defence of truth to:

Matters 5 and 7, imputation m at [119];

Matter 6, imputation m at [122];

Matter 8, imputation m at [127].

142 As explained below when considering similar imputations against the third plaintiff, I am not satisfied that any fraudulent misrepresentations have been made in connection with promotion of the Nightcap Land project, otherwise referred to as the Mount Warning Eco Village. In relation to the second plaintiff there is the additional circumstance that no evidence has been adduced of his involvement in promoting this second project. There is evidence that he may have prepared PowerPoint slides for it but there is no proof that he has himself utilised these slides to present the project to prospective investors or that he has in any other way endorsed their content. The defence under s 25 is therefore not established in relation to these imputations.

Did the second plaintiff fail to honour investors' loan agreements?

143 The question in this heading arises in connection with the defence of truth to the following imputations:

Matters 5 and 7: imputation g at [119];

Matter 6: imputation j at [122];

Matter 8: imputation e at [127].

144 The defendant has attempted to justify these imputations, that the second plaintiff failed to repay loans and is a "loan shark", by reference to an agreement dated 23 June 2015 between Emanuele Agus and Wollumbin Horizons. The operative part is as follows:

> In consideration of [Mr Agus] subscribing for the additional unit [in the Trust] for the sum of […] ($80,000) the Company shall upon completion of the purchase of the Land act as agent for [Mr Agus] and offer the additional unit for sale for the sum of […] ($120,000) and hereby agrees to forward $40,000 from the sale of the first Unit sold thereafter, and $80,000 from the sale of the second Unit sold thereafter, making a total of $120,000.

145 It is common ground that Mr Agus has not been paid any part of the $120,000. The unit subscribed for by the defendant in August 2015 was the first unit sold after completion of the purchase of the land. When the

defendant subscribed her funds, Mr Agus should have been paid $40,000. That did not occur. The transaction with Mr Agus is not a loan agreement. Non-performance of it could not provide justification for the imputations now being considered. Further, the non-performance is that of Wollumbin Horizons, not of the second plaintiff. The company also had a substantial mortgage debt in August 2015. The evidence does not disclose the full picture of its other liabilities and liquidity. Without proof of those matters it has not been shown that the second plaintiff was at fault, in his capacity as director, with respect to the company not honouring its obligations to Mr Agus. The imputations are not justified.

Is the second plaintiff a bully?

146 This question arises in connection with the defence of truth to Matter 6, imputations a and l at [122] and Matter 8, imputation l at [127]. The imputations that the second plaintiff is a bully mean, in substance, that he uses his power to harm or to frighten others and is overbearing. I am not satisfied on the balance of probabilities that there is any truth in this. On the contrary, the second plaintiff appears to have been on the defensive to a publicity and litigation campaign waged against him by the defendant. The publicity has been written in intemperate terms, containing scandalous accusations that are insupportable so far as the evidence before the Court discloses. Litigation initiated by the defendant has taken the form of private prosecutions, which have been summarily dismissed. Far from acting as a "bully", the second plaintiff has had to try to withstand the defendant's attacks.

147 The imputation that the second plaintiff "menaces those who attempt to expose the alleged fraud" said to have been committed in relation to the Bhula Bhula and Nightcap Land projects is also unjustified. There is no evidence of the second plaintiff having menaced anybody about anything. The plaintiff has failed to establish the defence under s 25 of the *Defamation Act* in relation to any of these imputations.

Did the second plaintiff assume illegitimate control of the Mount Burrell land?

148 This question is raised by the defence of truth to the following imputations:

Matters 5 and 7: imputation i at [119];

Matter 6: imputation h at [122];

Matter 8: imputation l at [127].

149 The defendant sought to justify the imputations that the second plaintiff assumed illegitimate control of the Mount Burrell land upon the basis that he failed to transfer his share in Wollumbin Horizons. Ownership of this share did not give the second plaintiff either ownership or control of the land. Ownership of the land remained with the company and control was at all times in the hands of the director or directors of the company. I accept the second plaintiff's evidence that he was at all times willing to transfer the share to the community association and resign his directorship in favour of nominees of that association. I find that the only reason these steps did not take place was that the unit holders fell into such dispute that the implementation of the intended structure, including the second plaintiff's cessation of shareholding and directorship, was neglected. There is no evidence that the second plaintiff took any advantage of this to exercise independent decision-making with respect to the property in disregard of unit holders' wishes. I am not satisfied that the truth of these imputations has been proved.

Defence of truth concerning imputations against third plaintiff

Did the third plaintiff fraudulently promote the Bhula Bhula project?

150 This question arises in connection with the defence of truth to the following imputations:

Matters 1 and 4: imputations a, b and c at [111];

Matter 3 and 4: imputations b and d at [115];

Matter 6: imputations f, g, I and j at [124];

Matter 8: imputations a, b, d, e, h, and j at [129].

151 The defendant has not formulated against the third plaintiff any particular of fraud in the promotion of the Bhula Bhula project that would sustain the truth of these imputations. It has not been established that the third plaintiff played any material part in the promotion of the proposed community to any prospective investor. There is no evidence of the terms of any communication between the third plaintiff and any investor. The Court has no basis upon which it could find that the third plaintiff made any representation about the project, fraudulent or otherwise, at any time. The defendant's case on truth of these representations is entirely unsupported and I reject it.

Did the third plaintiff promote the Nightcap Land project fraudulently?

152 This issue arises from the defence of truth to Matter 8, imputation l at [129]. Some of the imputations referred to at [150] above are general as to allegedly fraudulent and criminal conduct of the third plaintiff and the defendant asserts that those imputations are also proved true by its evidence concerning the marketing of the Nightcap Land project.

153 Multiple occupancy of the Nightcap Land in a Rural Landsharing Community had not been approved by Tweed Shire Council as at 26 July 2019, being the latest date to which the evidence before the Court relates: see [99]-[101] and [106]-[107] above. I am not satisfied on the evidence before me that the third plaintiff has "deceptively failed to inform investors in the Mt Warning Eco Village that no multiple occupancy or community is permissible". The evidence shows that multiple occupancy may be allowed but this depends upon Council granting permission and prescribing conditions. Only sketchy and manifestly incomplete evidence has been given concerning the manner in which the Nightcap Land project has been marketed. No evidence has been called from any potential investor to establish a failure on the part of the third plaintiff, or anyone else concerned in the project, to disclose the need for

Council permission or to disclose the fact that such permission has not yet been obtained. These imputations have not been justified.

Is the third plaintiff a bully?

154 This question is raised by the defence of truth to Matter 6, imputation a, at [124] and Matter 8, imputation k, at [129]. Having due regard to the meaning of the expression "bully", as considered at [146] above, I find that there is no evidence capable of proving the truth of these imputations.

Failure to prove the truth of the imputations

155 From the above findings it follows that the defendant has most seriously defamed both the second and third plaintiffs. The imputations published of the second plaintiff, none of which has been proved true, are:

Matter 1: a-c at [111];

Matter 3: a-d at [115];

Matter 4: a-c at [111] and a-d at [115];

Matters 5 and 7: a-n at [119];

Matter 6: a-o and q-r at [122], a-c at [111] and a-d at [115];

Matter 8: a-i and k-o at [127].

156 The imputations published of the third plaintiff, none of which has been proved true, are:

Matter 1: a-c at [111];

Matter 3: a-d at [115];

Matter 4: a-c at [111] and a-d at [115];

Matter 6: a-g and i-m at [124], a-c at [111] and a-d at [115];

Matter 8: a-h and j-n at [129].

Injunction

157 On 9 August 2019, when the defendant sought to interrupt the hearing after four days and to have it adjourned for nearly two months, the Court issued interlocutory injunctions to restrain continued publication of the Matters. Notwithstanding these interlocutory injunctions a substantial amount of the defamatory material remained accessible online as at the date of the resumed hearing in early October 2019. The plaintiffs' solicitor affirmed an affidavit of 2 October 2019, attaching hard copies of search results, demonstrating the continuing online availability of this material. In relation to one blog website upon which the material was still displayed the defendant said she was unable to take down the offending posts because she had lost her login details for the relevant site.

158 I find that there is a substantial risk that the defendant will continue to publish or republish the defamatory Matters or other content to similar effect. This risk is indicated by the continued publication of material notwithstanding the interlocutory injunctions and also by what I perceive to be an irrational attitude of the defendant towards the plaintiffs. Her persistence in the defence of truth, in the absence of evidence, is a strong indication of her fixated, crusading belief that they are fraudsters.

159 The Bhula Bhula project was undoubtedly a debacle. It was folly for Mr Darwin to have solicited investments on the basis that an "intentional community" would be established without having first reliably verified that Council could approve multiple occupancy and without having obtained such approval. The defendant has shown no justification for her assertion that the conduct of Mr Darwin, still less that of the plaintiffs, went beyond folly to fraud. Nor does she recognise the degree to which her own lack of care and judgment contributed to her loss. She made a substantial investment without obtaining independent professional advice as to whether her intentions for use of the land could be carried out.

160 Also, the defendant does not acknowledge the extent to which her own conduct contributed to failure of the project. When Mr Anderson's report came to hand and Council forbade construction on the land, the defendant responded to the difficulties faced by the community with a barrage of vitriolic emails, making accusations for which she had no evidence against those who were trying to organise the unit holders' affairs. She also defied the Council and remained in occupation of the land in knowing breach of planning laws. Having regard to the change in planning law from August 2016 it may have been possible for the Bhula Bhula community in due course to have obtained approval for multiple occupancy. The internecine warfare initiated by the defendant and her defiance of existing land use restrictions cut off that possibility. Since then the defendant has been consumed by hostility toward Mr Darwin and his associates.

161 Taking into account the above circumstances I conclude that this is an appropriate case for the grant of a permanent injunction to restrain continued publication of the defamatory Matters or other material containing substantially similar imputations.

Damages

162 I have no hesitation in inferring that each of the plaintiffs has sustained significant damage to reputation from the publication of these defamatory Matters, particularly as a result of the imputations upon their honesty in business. They are both entitled to a substantial component of damages to vindicate their reputations and to signify that the defamatory accusations against them are without foundation. Both plaintiffs have demonstrated, from the manner in which they gave evidence, that they have suffered significant hurt to feelings. I accept the third plaintiff's evidence that his close family members have expressed strong disapproval and criticism of him upon the basis of the published Matters, apparently accepting them at face value. The damages to be awarded will recognise all of these components. There is no definitive evidence of the extent to which the defamatory newspaper article, Matter 1, was circulated or the number of people who have downloaded the

defamatory internet content. The Matters on the internet have remained visible to the public for an extended period. Evidence from each of the plaintiffs supports an inference that their friends, family members and prospective employers have seen the material. It is clear that a number of persons enquiring about the Nightcap Land have also read one or more of the Matters.

163 Each plaintiff should have an award in the same amount. Their respective circumstances are not materially distinguishable. Both plaintiffs have endeavoured to prove an unquantified loss of business and/or earnings as a head of general damages, relying upon statements of principle in *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 252 (Glass JA) and 258-259 (Mahoney JA). The second plaintiff gave evidence that he has been unable to secure work for himself in the finance industry, where he formerly worked in a broking capacity, because prospective employers or clients undertake internet searches of his name and find the defamatory Matters. This evidence was not challenged by the defendant. The second plaintiff is bankrupt. There is insufficient evidence to permit anything like a qualification of the decline in his financial position that may have been caused by the defamation. Nevertheless I consider that there is sufficient basis in the material before me to justify a significant component of general damages for overall loss of opportunity for gainful employment.

164 The third plaintiff described his present financial circumstances as “dire”. His only source of income is consultancy fees from the Nightcap Land development. However, as described at [102]-[105] above, that project is not progressing in a manner that could support any significant payments to a consultant. I accept that in some measure the progress of the Nightcap development has been impeded by the defendant’s defamatory publications concerning the third plaintiff, who is very visibly a principal of Nightcap. However I infer that lack of progress in marketing the Nightcap project would also be significantly contributed to by the absence of a finalised and signed off consent from Council: see [106]-[107]. That factor is explicit in some of the

responses that have been received by the marketing agents from prospective investors. Loss attributable to that cause is not compensable in this action.

165 The plaintiffs are entitled to aggravated damages on the grounds of recklessness on the part of the defendant in publishing the Matters and unjustifiable maintenance of the defence of truth. The defendant's publication of the Matters was irresponsible. She struck out at two people connected with the Bhula Bhula development without any caution as to whether her targets really bore personal responsibility and without any apparent thought for the distinction between an ill-advised venture and a fraudulent one. The imputations in respect of which the defendant maintained her defence of truth right up to the final stage of the proceedings included serious allegations of dishonesty, to the level of criminal liability, as well as such unsupported assertions as those concerning theft and destruction of property and "the disappearance of Adam Green".

166 Taking all of these factors into consideration I assess damages for each of the second and third plaintiffs at $200,000. There will be judgment for each of the second and third plaintiffs in that sum. For each of them, respectively, this will be a combined award for their several causes of action arising from the several published Matters. The defendant will be ordered to pay the second and third plaintiffs' costs. Upon publication of these reasons the plaintiffs will be directed to bring in within 14 days a minute of the form of permanent injunction that they seek. This will be required to be in simpler terms than the form appended to counsel's submissions, omitting recitation of the myriad imputations that have been litigated and substituting simpler wording.

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I certify that this and the preceding 166 paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Fagan.
DATED: 8 April 2020
ASSOCIATE: Therese Armstrong