IN THE DISTRICT COURT
AT WAITAKERE

CIV 2012-090-986

	BETWEEN	MADELEINE JANE FLANNAGAN Applicant
	AND	JACQUELINE KIM SPERLING Respondent

Hearing: 13 May 2013

Appearances: Applicant in person
Respondent no appearance

Judgment: 4 June 2013

DECISION OF HIS HONOUR JUDGE DAVID J HARVEY
[On Application for a Restraining Order]

Introduction

[1] On the 15th June 2012 I delivered a decision in an application by Deborah Ann Brown and the present applicant refusing a restraining order against Jacqueline Sperling, the respondent.[1]

[2] That case arose as a result of a web log or blog created by Ms Sperling under the name of Wonderful Now (www.wonderfulnow.blogspot.co.nz). Over a period of time Ms Sperling had published a number of messages or articles (known as posts) upon that blog particularly referring to Ms Brown and Ms Flannagan which had caused them some concern. They were concerned that the frequency of the posts, their content, the nature of the information divulged in them and their tone. They made application for restraining orders pursuant to the Harassment Act of 1997.

[3] In my decision I addressed three issues:

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[1] *Brown v Sperling* [2012] DCR 753.

(a) Whether the blog posts can fall within the ambit of the Harassment Act 1997 as a means of performing a specified act and if so in what circumstances. In my decision I answered that question in the affirmative.

(b) In such circumstances the next issue was whether the behaviour of the respondent amounted to harassment for the purposes of the Act. Once again I answered that question in the affirmative.

(c) The final issue was what remedy or remedies may be available to the applicants and the matter which caused me some concern in that regard was whether or not a restraining order should issue against Ms Sperling. Having regard to the particular circumstances of the case I considered that a restraining order was not justified.

The Present Proceedings

[4] On the 10th July 2012 Ms Flannagan commenced these proceedings. It will be noted that the proceedings were filed less than a month after my decision. Those proceedings were based upon subsequent comments that were made by Ms Sperling in respect of which the applicant considered that a restraining order should, under the circumstances, issue.

[5] In her application she considered that a restraining order should issue for a period of 10 years – a substantial period of time given that the usual position under the Harassment Act is that restraining orders should subsist for one year. She also sought special conditions as follows:

(i) "That the respondent be constrained from publishing my name, particulars likely to lead to my identification, or any other details about me, explicit or implied, on her blog Wonderfulnow or any other on-line forum accessible by the public which she can moderate.

(ii) That the respondent removes from public view all references to me, explicit or implied, from her blog *Wonderfulnow* and any other on-line forum that can be accessed by the public which she can moderate.

(iii) That the respondent publish on her blog statement that she had no basis for saying that:

a. I am or was ever a pain drug addict;

b. I have engaged in harassment of her;

c. I have breached any professional duties lawyers are required to uphold."

[6] In support of her application she filed an affidavit dated 10 July 2012 and in addition has filed affidavits dated 7 September 2012, 12 March 2013 and 13 May 2013. She also relies upon an affidavit of her husband Mathew Flannagan dated 12 July 2012.

[7] No steps have been taken by Ms Sperling. She has filed neither an opposition nor affidavits in reply. She has not appeared at any hearing.

[8] In summary Ms Flannagan's concerns are these:

(a) That the respondent has continued to post upon her blog derogatory material of a personal nature alleging *inter alia*, dishonesty, fraud, addiction to pain killers and disparaging remarks about her professional abilities.

(b) That despite the fact that the respondent "took down" her blog in August 2012 and made it accessible by way of password only she nevertheless revitalised and made public the blog in December 2012 and continued to post derogatory material about Ms Flannagan.

(c) That in "revitalising" her blog in December of 2012 Ms Sperling made available all of the earlier material which had been identified in my decision of June 2012 as constituting specified acts which amounted to harassment. The current proceedings were served upon Ms Sperling on the 8th August 2012. She has taken no formal steps to enter an appearance of filed a notice of opposition or affidavits although, as I shall detail subsequently in this decision, she has commented upon the fresh proceedings.

The Legal Test

[9] The Harassment Act makes a civil remedy available to any victim of harassment. It makes the most serious types of harassment criminal offences. It empowers the Court to make orders to protect victims who are not covered by domestic violence legislation,[2] and provides effective sanctions for breaches of the criminal and civil law relating to harassment.[3]

[10] The object of the Harassment Act is stated in section 6. This is the primary guide for Courts and persons exercising powers conferred by the Act. The range and relative gravity of various behaviours that could constitute harassment are recognised:

> **6. Object-** (1) The object of this Act is to provide greater protection to victims of harassment by-
>
> (a) Recognising that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context; and
>
> (b) Ensuring that there is adequate legal protection for all victims of harassment.
>
> (2) This Act aims to achieve its object by-
>
> a. Making the most serious types of harassment criminal offences:
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> b. Empowering the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation:
>
> c. Empowering the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation:

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[2] *Woodman v* Brooks (1998) 17 FRNZ 612 is authority for the point that the Harassment Act specifically applied to those relationships not covered by the Domestic Violence Act 1995. 'Domestic Relationship' is not defined in the Harassment Act 1997. Section 9(4) of the Harassment Act provides that a person in a domestic relationship may not apply for a restraining order against the other person in the domestic relationship. 'Domestic Relationship' is however defined in the Domestic Violence Act 1995: section 4.

[3] Harassment Act 1997, Section 6.

d. Providing effective sanctions for breaches of the criminal and civil law relating to harassment.

(3) Any court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1).

[11] This requires the Court to recognise that behaviour that may appear innocent or trivial when viewed in isolation, may amount to harassment when viewed in context.[4] This is beneficial when considering the application of this Act to online harassment, as emails, for example, may appear trivial in isolation, but when viewed in context, clearly could constitute harassment.

[12] "Harassment" is defined in s.3 of the Harassment Act 1997:

> "A person harasses another if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing ***any specified act*** to the other person on at least two separate occasions within a period of 12 months."

[13] Civil harassment which enables the Court to make a restraining order occurs when the following requirements are met:

> (a) The respondent has harassed or is harassing the applicant; and
> (b) The behaviour causes the applicant distress or threatens to cause the applicant distress, and that behaviour would cause distress or would threaten to cause distress to a reasonable person in the applicant's circumstances and in all the circumstances the degree of distress caused or threatened by that behaviour justifies the making of an order and the making of an order is necessary to protect the applicant from further harassment.

[14] It is also significant to note that the Act specifically does **not** apply to people who have been in a domestic relationship[5] where one of the objects of the Act is to provide greater protection to victims of harassment by empowering the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation.

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[4] P v H [1988] DCR 715; C v G [1998] DCR 805, 806; H v S [2000] DCR 90,95.
[5] See s.9(4) and also note s.6 Harassment Act 1997

The Legislative Scheme

[15] The legislative scheme of the Harassment Act has been described thus by the Court of Appeal[6]

> [12] Criminal harassment, stated by s 6 to apply to the "most serious types of harassment", requires either an intent to cause the person harassed to fear for his or her safety or the safety of a family member or knowledge that in the particular circumstances the harassment is likely reasonably to cause fear for safety. This is made clear by s 8 which provides:
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> 8. Criminal harassment – (1) Every person commits an offence who harasses another person in any case where –
>
> (a) The first-mentioned person intends that harassment to cause that other person to fear for –
>
> (i) That other person's safety; or
>
> (ii) The safety of any person with whom that other person is in a family relationship; or
>
> (b) The first-mentioned person knows that the harassment is likely to cause the other person, given his or her particular circumstances, to reasonably fear for –
>
> (i) That other person's safety; or
>
> (ii) The safety of any person with whom that other person is in a family relationship.
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> "Safety" is defined to include a person's "mental well-being".
>
> [13] Where the necessary elements of intent or knowledge are not present there is no criminal aspect, but a person being harassed may apply for a restraining order under s 9. A restraining order may be made by the Court under s 16(1) where the respondent has harassed or is harassing the applicant and additional requirements are met
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> (i) The behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress; and
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> (ii) That behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances; and
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> (iii) In all the circumstances, the degree of distress caused or threatened by that behaviour justifies the making of an order; and
>
> (c) The making of an order is necessary to protect the applicant from further harassment.

[6] R v D [2000] 2 NZLR 641 para 12 - 19

[14] A restraining order, if no longer or shorter period is specified, expires after one year. It may be made under s 21 only for such period "as the Court considers necessary to protect the applicant from further harassment."

[15] It is an offence under the Act to contravene a restraining order. For a first offence of breaching a restraining order, the offender is liable to imprisonment for a term not exceeding six months. Repeat or serial breaches are punishable by imprisonment for three years.

[16] Under s 3 "harassment" is defined as a "pattern of behaviour" that is directed against the complainant which includes any of the acts specified under s 4 "on at least 2 separate occasions within a period of 12 months." Section 4(1) defines "specified act" for the purposes of the Act to mean "in relation to a person" any of the following:

> (a) Watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:
> (b) Following, stopping, or accosting that person:
> (c) Entering, or interfering with, property in that person's possession:
> (d) Making contact with that person (whether by telephone, correspondence, or in any other way):
> (e) Giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person:
> (f) Acting in any other way –
>
> > (i) That causes that person ("person A") to fear for his or her safety; and
> > (ii) That would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

[17] Subsection (2) provides, "to avoid any doubt", that subs (1)(f) includes the situation where:

> (a) A person acts in a particular way; and
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> (b) The act is done in relation to a person ("person B") in circumstances in which the act is to be regarded, in accordance with section 5(b), as done to another person ("person A"); and
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> (c) Acting in that way –
> > (i) Causes person A to fear for his or her safety; and
> > (ii) Would cause a reasonable person in person A's particular circumstances to fear for his or her safety, –
>
> whether or not acting in that way causes or is likely to cause person B to fear for person B's safety.

Subsection (3) provides that subs (2) does not limit "the generality of subsection (1)(f)."

[18] Williams J, in the High Court, was of the view that the relationship between s 4(1)(f) and s 8(1)(b) was of some difficulty because s 4(1)(f) imposed an objective standard (that which would cause a reasonable person in the complainant's particular circumstances to fear for his or her safety) whereas s 8(1)(b) requires the accused to

> know that the harassment is likely to cause the other person, "given his or her particular circumstances", to reasonably fear for his or her safety.
>
> [19] In the present case because the "specified acts" fall within the other acts recognised by s 4(1)(a) – (e) we do not have to reach a final view on that aspect of para (f). In any event, it is not at all clear that there is likely to be any difficulty in practice in the application of s 4(1)(f) to a criminal charge under s 8. The two tests are directed at separate inquiries: s 4(1)(f) identifies the constituent acts of harassment; the test in s 8(1)(b) is concerned with the accused's knowledge of the effect likely to be caused. Since s 4(1)(f) is a provision designed to catch unusual acts outside the categories identified in s 4(1)(a) – (e), some qualitative restriction (as is provided by the "reasonable person" test) was clearly thought by Parliament to be necessary. The test in s 8(1)(b) does not invoke the "reasonable person": the fear known likely to be engendered in the particular complainant must be "reasonably" held "given his or her particular circumstances".

[16] In my decision in *Brown v Sperling*[7] at paragraph [27] I considered whether or not harassment could take place on-line and concluded that it did after an analysis of the Statute together with recent case law set out at paragraphs [42] to [55] of that decision.

[17] I also considered the nature of information flows and the circumstances by which it may be anticipated that the requirement in the Harassment Act of leaving offensive material where it would be found by, given to or bought to the attention of that person may take place (section 4 sub-clause 1 sub-clause (e).

[18] Once harassing conduct has taken place it then becomes necessary to consider the power to make a restraining order pursuant to s 16 of the Harassment Act 1997 which states:

> **16 Power to make restraining order**
> (1) Subject to section 17, the court may make a restraining order if it is satisfied that—
> (a) the respondent has harassed, or is harassing, the applicant; and
> (b) the following requirements are met:
> (i) the behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress; and
> (ii) that behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances; and
> (iii) in all the circumstances, the degree of distress caused

[7] Above n. 1.

or threatened by that behaviour justifies the making of an order; and

(c) the making of an order is necessary to protect the applicant from further harassment.

(2) For the purposes of subsection (1)(a), a respondent who encourages another person to do a specified act to the applicant is regarded as having done that specified act personally.

(3) To avoid any doubt, an order may be made under subsection (1) where the need for protection arises from the risk of the respondent doing, or encouraging another person to do, a specified act of a different type from the specified act found to have occurred for the purposes of paragraph (a) of that subsection.

[19] Essentially the requirements are:

(a) Harassment of the applicant by the respondent;

(b) The behaviour in respect of which the application is made causes the applicant distress or threatens to do so and

(c) The behaviour would cause distress or threaten to cause distress to a reasonable person in the applicants particular circumstances and

(d) In all the circumstances the degree of distress caused or threatened by that behaviour justifies the making of the order and

(e) The making of the order is necessary to protect the applicant from further harassment.

The Evidence

[20] The affidavits that have been filed by Ms Flannagan contain a large amount of information. Essentially that information can be divided into the following categories:

(a) Actions done by the respondent on her blog.

(b) The circumstances of the applicant and her particular position which gives added "sting" to the comments made by the respondent.

(c) The surrounding context of the applicants activities and

(d) The nature of the distress caused to the applicant.

[21] Before going into the details of Ms Flannagan's concerns some aspects of the behaviour of the respondent need to be noted.

[22] In August of 2012 Ms Sperling discontinued her blogging activities and her blog became accessible only by means of a password. She asserted at that time that she was going to discontinue blogging and had that been the case the continuation of this proceeding would probably not have been necessary.

[23] However Ms Flannagan had observed this type of conduct by Ms Sperling on previous occasions where the blog was taken down and then later revitalised with all of the previous content available on it. She was sceptical of Ms Sperling's protestations that she had discontinued blogging. That view turned out to be justified.

[24] In December of 2012 Ms Sperling revitalised the blog which contained all the previous material that had been posted and which was the subject of the 2012 decision.

[25] Ms Flannagan was of the view that Ms Sperling had taken the blog down because of a number of issues, not the least of which was a fresh proceeding instituted by a Mr Spearitt who was seeking to have a restraining order that he obtained in the Manukau District Court against Ms Sperling extended for a further indefinite period. By taking the blog down, it was suggested, Ms Sperling was reducing her profile on the Internet possibly in the hope that a continuation of the restraining order in such circumstances would not be made.

The Effect of "Revitalising" the Blog

[26] The revitalisation of the blog in my view has a significant consequence as far as the provisions of the Harassment Act are concerned. The Act states that specified

acts must take place within a period of 12 months.[8] That is what is necessary to establish the pattern of behaviour which is necessary for harassment. By taking the blog site down and then subsequently revitalising it in my view Ms Sperling has "wound the clock back" and the publication of the blog together with the publication of the earlier material can fall for consideration of a specified act within a 12 month period.

[27] By continuing to make posts about Ms Flannagan after the application was filed essentially means that if those posts fall within the definition of a specified act they too can be taken into account in considering whether or not there is a pattern of behaviour.

[28] Certainly from Ms Flannagan's point of view it is part and parcel of the pattern of behaviour that Ms Sperling takes her blog down for a period of time and then revitalises it later. This issue was considered by the Law Commission in its Ministerial briefing paper of August 2012 entitled "Harmful Digital Communications: the adequacy of the current sanctions and remedies". The Law Commission states as follows:

> 4.108 While the current provision is therefore capable of covering electronic communication such as blog posts, it would be useful, in our view, if the statute was explicit about this. An explicit provision would assist to raise awareness of the law and make clearer to bloggers and to the community the potential liability that may arise in making offensive comments on-line.
>
> 4.109 We recommend the separate paragraph in the section to the following effect "places offensive material in any electronic media and either the victim views that material or it is reasonably likely that it will be bought to his or her attention".
>
> 4.110 Thirdly section 3 of the Harassment Act requires that the constitute harassment there must "a pattern of behaviour" and that this includes "doing a specified act on at least 2 separate occasions within a period of 12 months". Yet a single Internet posting which continues for a lengthy period causes as much, or perhaps even more, damage and distress than two discrete individuals acts.
>
> 4.111 The Law Commission considered this question as part of its review of the law of Privacy, recommended that section 3 be amended so that a pattern of behaviour can be constituted either by a single protracted act, as well as 2 or more specified acts within 12 months.

[8] Harassment Act s. 3.

> 4.112 We continue to support that recommendation and consider that just as a single protracted act of surveillance should qualify as a specified act of harassment, similarly a single offensive Internet posting that persists over a period of time should also qualify as potential harassment. ...
>
> 4.113 We see no need to prescribe any particular length of time that a specified act of harassment must persist. A restraining order can only be made when distress is caused: this is a sufficient criterion.[9]

[29] Having regard however, to my holding that the revitalisation of the blog recommences the period of time within which the pattern of behaviour may take place, the "continuous" act approach suggested by the Law Commission would not apply. I now turn to consider the matters raised by Ms Flannagan that she says amount to specified acts.

The Specified Acts

[30] In addition to those posts which where the subject of my decision of the 15th June 2012, and which I do not intend to repeat here, as at the 10th July Ms Sperling created 9 new pages on her blog containing offensive material together with comments. In addition Ms Flannagan was concerned that Ms Sperling had posted comments on other blogs.

[31] These posts were drawn to Ms Flannagan's attention by colleagues, clients and friends who noticed them and commented upon having noticed them to her.

[32] Ms Flannagan also suggested that Ms Sperling had made a groundless and vexatious complaint to the Law Society about Ms Flannagan's conduct. She considered that, because of the finding of the Law Society that the complaint was vexatious and without foundation it should qualify as a specified act. I expressed my reservations about such a conclusion because to so hold could act as a clog upon an individual's rights to seek recourse to the Courts or disciplinary or statutory tribunals to seek relief or redress. Notwithstanding Robert Hughes' critique of "the culture of complaint"[10] which is now a feature of life in the 21st century, citizens should not be

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[9] NZ Law Commission Harmful Digital Communications: the adequacy of the current sanctions and remedies (NZ Law Commission, Wellington 2012) para 4.108 – 4.113 p. 101 – 102.

[10] Robert Hughes *The Culture of Complaint:The Fraying of America* (Oxford University Press, Oxford, 1993).

discouraged from exercising their rights to complain or seek redress through Courts or Tribunals.

[33] Shortly after the decision of the 15th June 2012 Ms Sperling posted an article entitled "Justice for me!" In that post Ms Sperling considered the decision a vindication of what she had done but that post contained the following remark: "Simon Buckingham and Madeleine Flannagan should hand in their LLB's and go back to Law School. This kind of abusive and vexatious litigation is not what these Courts are for".

[34] This clearly suggested that Ms Flannagan was incompetent and given to the abuse of the Court process by bringing abusive and vexatious litigation – an allegation which of course is professionally harmful to a lawyer and one which, in the context of one's profession, is a serious one.

[35] In the comments section there were supporters who joined in Ms Sperling's derision of Ms Flannagan's professional skills.

[36] In making that comment Ms Sperling seems to have overlooked paragraph [222] of my 15 June decision which reads as follows:

> "In addition comments had been made of a derogatory nature regarding Ms Flannagan's religious beliefs and her competence as a law practitioner which have no substance and are clearly designed to hurt".

In that respect the implication that Ms Flannagan is incompetent and abuses the Court process by vexatious litigation is made even more serious.

[37] In addition Ms Flannagan notes that a number of comments appeared upon the blog operated by her and her husband – m&m.org – relating to the decision. However the allegations which must be the focus of this case must relate to Ms Sperling. However from the point of view of context it assists in understanding and comprehending the stress alleged by Ms Flannagan.

[38] On the 17th June 2012 Ms Sperling blogged further about the case, including a cutting from the New Zealand Herald which she had digitised and made available

on her blog. The text contained misrepresentations of the decision some of which is opinion but which becomes derisive and insulting. Once again Ms Flannagan's competence as a lawyer and her use of the Court process is referred to:

> "Had Debbie Brown and Madeleine Flannagan not attempted to bully me with vexatious legal proceedings – no one would be the wiser regarding their identities in relation to the few times I had mentioned my interactions with them on my blog".

Ms Flannagan also referred to the complaints that had been made by Ms Sperling about her to the Law Society together with concerns that were expressed on the part of her employer.

[39] Later in June Ms Sperling expanded the scope of her posts about Ms Flannagan to include her husband. Mr Flannagan had been invited to travel to the United States to attend a conference and deliver a paper. Ms Flannagan naturally wished to accompany him. Nevertheless their financial situation was not good and they used their www.mandm.org blog as a means of fund raising. This came to Ms Sperling's attention. Somehow or another Ms Sperling had obtained a copy of the Flannagans' bank statement and had posted it on her blog. This, of course, was a private document but it was used by Ms Sperling ostensibly to challenge the assertions that Mr and Mrs Flannagan required funds to travel overseas. Ms Flannagan made it clear that the money was mortgage money set aside so that she could purchase a contract for services, for renovations and clearly had been ear marked for other purposes. Ms Sperling made the following comment: "why are they begging for money from their readers... those people are dishonest and morally repugnant cons".

[40] Once again this is a very serious allegation to make especially about a lawyer containing, as it does, a suggestion of dishonesty and fraud by utilisation of the word "cons". Such an allegation could be professionally damaging.

[41] A further post was made on the 3rd July 2012 entitled "Lawyer Runs Begging Thermometer." The post read:

> "Madeleine Flannagan is running a begging thermometer to get to something that she has not been invited to.(sic) The last time she ran a begging

> thermometer – she couldn't go because she stole a horse. She then did not return the money that was donated when she couldn't go".

[42] The implication that was drawn from this was that Ms Flannagan had stolen a horse the year before, could not travel to a conference and acted unethically regarding the money that was donated. She had in fact been invited to speak at the conference. She acknowledged that at the age of 18, many years ago, there had been the theft of a horse but she had never been before Court since in an unlawful capacity. The crime was covered by the Clean Slate legislation but does have implications as far as her visa is concerned. However the use of that information and the post by Ms Sperling clearly continues the pattern of behaviour that she adopted alleging "con" activities by Ms Flannagan. It should also be noted that Ms Flannagan has completed a law degree, passed her professionals and has been admitted as a Barrister and Solicitor of the High Court and as such must be found to be a person of good character.

[43] On the 8th of July 2012 Ms Sperling made a comment on a blog page run by Peter Aranye entitled "The Paepae"[11] where Ms Sperling reiterated her allegation that Ms Flannagan was addicted to pain killers. The comment reads as follows:

> "Madeleine Flannagan has been on pain killers since a car accident in 2008 I believe it was. That is four years on pain killers. She blogs about this fact as well as publicly announces the changes to her medication and how she is still in pain on her facebook page. I suspect she is still in pain because her body has developed a tolerance – as all bodies do when continually on medication or drugs. You cannot tell me that during her 4 years on pain killers that she has not developed a level of dependency and tolerance to the drugs that she is on. That would be a physical impossibility. If going by what Madeleine herself has told the world on her blog and on fb is true then according to the DSM vi criteria for substance dependence she meets several of the criteria".

[44] In this post, admittedly not to her own Wonderfulnow blog, it is quite clear that Ms Sperling is suggesting that Ms Flannagan is addicted to pain killers. It is also correct that on occasion Ms Flannagan has blogged about the accident that she suffered and some of the difficulties encountered in obtaining settlement of her claim from ACC. In this respect, therefore, the information is "out there". Yet the concern that Ms Flannagan has is the conclusion that Ms Sperling has reached about a dependence upon pain killers. She refers to the Diagnostic and Statistical Manual of

[11] www.paepae.com (last accessed 16 May 2013)

Mental Disorders – a publication the authority and approach of which is currently the subject of some controversy.

[45] The issue about pain killer dependency was a matter that gave Ms Flannagan some concern in the earlier posts the subject of the June proceedings.

[46] There did not seem to be any further attention directed towards Ms Flannagan up until August of 2012 when Ms Sperling took her blog down.

[47] Ms Flannagan comments in her affidavit of 7 September:

> "On or about 20 August 2012 Ms Sperling changed her blog settings to private so that it can only be accessed by invitation. The significance of the timing of Ms Sperlings doing this was that 20 August 2012 was the day that the latest application and *Spearrit v Sperling* (CIV-2011-092-2512) was set down for its first call. Bruce Spearrit has applied to the Manukau District Court to extend his existing restraining order against Ms Sperling. It was he who alerted me to this having happened.
>
> Ms Sperling has a history of either announcing that she will end her blog, or temporarily removing all offending posts at the point the Court conducts a hearing in respect of her blog content. Once the dust settles, the posts have always gone back up again – the only exception has been when a restraining order has been issued, she seems to by and large abide by such orders.
>
> I have given evidence of Ms Sperling doing precisely this in respect of my previous case against her in my first affidavit. This phenomena can be observed by examining her blog feed and comparing her announcements and conduct to this effect with the various harassment act Court dates she has faced.
>
> This time she has made her blog private. I have no confidence in this lasting too long after both this proceeding and the current *Spearrit v Sperling* proceeding set down for 24 September 2012 have been heard if orders are not made in each."

[48] On 16 December 2012 Ms Flannagan received information that the Wonderfulnow blog was back on-line. Every single post complained about previously by Ms Brown, Mr Buckingham and Ms Flannagan was present but nothing was on her blog in respect of Mr Spearrit. In addition the new blog contained links to postings about her case. On the blog assertions about Ms Flannagan, her professional confidence and her honesty were available to all. One such example reads as follows:

> "I have been served with morrrrre papers. The mad lawyer just doesn't give up... the filing of these new proceedings is an abuse of process. She is basically trying to bypass the appeal process – because she had no grounds for appeal and left it too late anyway – and have the matter reheard by another Judge.
>
> And she is still ranting on about me saying that someone I met at a pub one night is addicted to painkillers. Someone is protesting too much. Two of the criteria for substance dependence are increased tolerance and using the substance for longer than expected with repeated attempts to abstain. It would be a physical impossibility for someone who has been on pain killers for four years (as Madeleine has been) to not have developed a tolerance for them. I suspect that no one expects to be on pain killers for four years. Just because a Doctor prescribes the pain killers in question does not mean you are not addicted to them. One can only have sympathy for the learned Judge as he is faced with another stream of incoherent legal ramblings."

[49] In addition in the various posts that Ms Sperling has made available on the Wonderfulnow blog there are associated tags or labels which link to other blog posts on the Wonderfulnow site with the same labels. These include "bonkers", "harassment" and "Madeleine Flannagan".

[50] In addition to the comments that she has made about Ms Flannagan's abilities as a lawyer and her use of what Ms Sperling refers to as vexatious proceedings – an allegation that is a serious one against an officer of the Court – Ms Sperling has also posted comments that directly or by inference allege perjury on the part of Ms Flanngan.

[51] There are four separate instances where allegations of perjury are made. One of these was in the comments section of Mr Aranyi's "The Paepae" blog of 23 June 2012 where Ms Sperling stated:

> "[Ms Flannagan] is complaining that i am harassing her and breaching her privacy by blogging information that she swore was true in her affidavit – yet now is claiming is not true"

[52] On 23 June 2012 on the WonderfulNow blog, Ms Sperling stated in a post headed "Term One all Done" "Most of what they included in their affidavits was false". "They" refers to Ms Brown and Ms Flannagan.

[53] On 8 August a post entitled "Cameron Slater on Madeleine Flannagan" Ms Sperling made the following comments:

> More lies. More vexatious legal proceedings. More omissions of the truth".... "Madeleine again has lied in a sworn affidavit and fabricated evidence"

A copy of the page and the post are annexed to Ms. Flannagan's affidavit of 7 September (Exhibit A, Page 3) although a check of the WonderfulNow archive shows that those particular comments are not present. This seems to confirm the suggestion that Ms Sperling will remove and repost material as and when it suits her.

[54] The fourth reference deposed to by Ms Flannagan is a post originally dated 30 May 2012 (just before the hearing of 5 June) which was republished on 4 December 2012 when Ms Sperling "revitalised" her blog. The post (still available) contains the following:

> "I wanted to respond to Madeleine and ask her if she or Debbie Brown take any responsibility for any damage that had been done to them - considering they filed a *very dishonest sworn affidavit and legal proceedings based on absolute lies against me.*"
>
> ".... their own choice to spend 18 months obsessing over every single word that i have written, then serve me with *extremely dishonest legal proceedings* and then go to the media about those proceedings might - just MIGHT - be what has damaged their careers - if any damage has been done."

[55] Such allegations against a lawyer alleging dishonesty in affidavits and in bringing vexatious proceedings are extremely serious and would be viewed as such.

The Pervasiveness and Possible Consequences of the Specified Acts

[56] Another matter of concern is that whilst Ms Sperling's blog is available on the Internet and contains information about Ms Flannagan, that information is picked up by search engines such as Google. Because of the algorithms used by Google, web sites accessed regularly increase their rankings in Google searches and the higher the ranking the more likely it is to be on the first page of any Google search results.

[57] Ms Flannagan's concern is that with the declining use of telephone directories people use the Internet frequently to search for lawyers to obtain a telephone number or physical address. The association of Ms Flannagan with the various blog posts by

Ms Sperling mean that Ms Sperling's blog frequently appears in searches for Ms Flannagan's name either individually or as a lawyer or with other search parameters.

[58] On the 16th March 2013 Ms Sperling posted an article on her blog entitled "I am no fan of ink" which ostensibly is an article about Millie Elder and a tattoo that she had had done. This was directed to Ms Flannagan's attention by others and on the face of it is not objectionable as far as Ms Flannagan is concerned until one reads the comments. On March 21st 2013 a comment by "Anonymous" reads as follows:

> "Isn't Madeleine one of the lawyers suing you because you have more than one live page on your blog saying she is a pain drug addict. No prizes for guessing what it will take for her to move on. Assuming she's not got better things to do than comment on your blog (a quick peruse) (sic) of blog lines feed reader shows the cues 3 different people of owing that IP address".

Anonymous when on to state on the same date a few minutes later:

> "Who's long suffering wife do you think Madeleine doesn't want to confront you because of the truth. Your stories are hard to follow when you edit and delete so selectively."

[59] The suggestion is, and certainly it may be inferred from the post by Anonymous, that there is a reference to an earlier comment or post made by Ms Sperling which she has deleted. Ms Sperling then goes on to state on March 22nd 2013 at 7.20am:

> "As far as I am aware there are no current court cases regarding Madeleine Flannagan. The last I heard was that her latest lame brained attempt to get a judgment against me was heard on Feb 5th (a full 7 or 8 months since I forgot about her and moved on) since I heard nothing after that I assume she lost again re your comment of the last couple of days. I am sure that I read in Judge Harvey's last ruling against Flannagan and Brown that they caused their own distress by coming to me – and that bringing to someone's attention something that is being said about them – or going to them (like having Michael Lawes girlfriend phone my landline in regards to court cases) is harassment. This is exactly what you have been doing for the last 8 months. Re the IP address. It is fairly clear to anyone with half a brain that has seen how that IP address is stalked me and the pages that it always looks at (only ones to do with Flannagan) that it is either Flannagan, Brown or their crazy blogging friend ScrubOne. Yes I have live pages still up defending myself against their harassment of me. It takes only a simple Google search of my name to see how they have used their crazy friend ScrubOne to slander and defame me so I will continue you leave those pages up. Hopefully Judge Harvey will have googled my name and seen their sneaky attempt at harassing me while trying to play the innocent victim. As recently as January – that illiterate blogger was commenting in regards to me

> in printing false and slanderous lies about me not only on his own blog but on others blogs at every chance he got. It has amazed me how I have managed to get inside these people's heads and stay there while not even trying – long after I have completely forgotten about them. I can't even pretend to know how it feels to be that unwell. You know what tho? I don't care what they say about me. One would think with Madeleine and Browns (obviously not ScrubOne's because he is an illiterate nutter) educations – at some stage they might have grasped the concept of information literacy. Part of information literacy is researching and assessing how credible information that we read is. I know that information written about me by an obvious psycho stalker is not credible so I am not worried about lecturer's peers or potential employers reading what they have written about me – because it is obviously not credible but rather the rantings of a crazy man – prompted by his equally crazy friends. Perhaps they should take their meds, sit back, and realise what is written on my blog is only my truth and no one else out there really gives a toss about it that is what an educated person would do.
>
> Now this is the last time you – or those crazy women get my attention. Despite your/their best efforts at destroying my academic future and ability to support my family and despite what that crazy blog says that ... I have class to get to. I have placement to get to and I have a life that does not involve worrying about their harassment. The blister that the new officey looking shoes that I had to purchase for my placement – because you didn't succeed in destroying my life – has caused on my heel is more of a concern right now for me than crazy people who spend their whole life thinking about me. Have a great day."[12]

[60] Quite clearly this post calls into question Ms Flannagan's mental abilities and challenges her intellect.

Pattern of Behaviour

[61] There can be no doubt that over the 12 month period prior to the 10th July 2012 and until the 20th August 2012 Ms Sperling engaged in a pattern of behaviour regarding Ms Flannagan.

[62] There can be no doubt that that pattern of behaviour has continued since the revitalisation of her blog in December of 2012 down to the present. The pattern of conduct has been to publish posts concerning or commenting upon the affairs activities or actions of Ms Flannagan. Given that her blog is a continuum, her blog postings are archived and many of them contain links particularly to Ms Flannagans

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[12] The reference "ScrubOne" is to the author of a blog which may be found at http://halfdone.wordpress.com. The author has several posts on the interaction between Ms Flannagan and Ms Sperling - http://halfdone.wordpress.com/2012/08/17/madeleine-flannagan-lawyer-and-jacqueline-sperling-blogger-whats-the-big-deal/ (last accessed 16 May 2013)

place of work or to the blog site operated by her and her husband it is easy to follow the history of Ms Sperlings comments upon Ms Flannagan.

[63] As I found in my decision of 15 June 2012 I am of the view that posting information on a blog falls within the ambit of material in section 4(1)(e) of the Harassment Act where it is intended that other persons will be able to view it and/or also that its contents will be drawn to the attention of Ms Flannagan. There must be an awareness of the actions of communications to engage the provisions of s 16. As I said in that decision a person cannot be harassed if they are unaware of the specified act or acts. In June of 2012 Ms Sperling was writing a blog with the intention of drawing an audience or informing an existing one and members of that audience or members of the blogging community, having once drawn that information to Ms Flannagan's attention in the past, would be likely to do it again.

[64] Unlike the previous case Ms Flannagan has not engaged with Ms Sperling but on occasions when Ms Sperling has posted material about her, others who have read Ms Sperling's blog have drawn it to Ms Flannagan's attention. Given that that was a way in which the material came to Ms Flannagan's attention previously it is clear that Ms Sperling could conclude that it was foreseeable that others would see her posts and bring them to Ms Flannagan's attention. Unlike the earlier case or the earlier case it does not seem to me that Ms Flannagan has "put herself in harms way" by randomly accessing the blog to keep an eye on Ms Sperling's activities.

Was the material offensive?

[65] As far as Ms Flannagan is concerned allegations have been made about pain killer addiction, her integrity as a lawyer, her use of the court process and her honesty and reputation. Although these could be described as reputational allegations that could be remedied by defamation proceedings for reasons that I shall give shortly I consider they fall within the ambit of the Harassment Act. She has cast dispersions upon Ms Flannagan's religious beliefs and clearly the material posted by Ms Sperling is offensive. It does not have to be offensive to all readers but within the context of harassment and the necessitity for the specified act to be directed towards the applicant there can be no doubt that many of the posts made by Ms

Sperling, indeed most of them about Ms Flannagan, fall clearly within the ambit of the definition of offensive. Not only would Ms Flannagan consider them offensive but in the circumstances they would seen to be offensive to any reasonable person. The posts disclose personal and private information and include disparaging remarks about morality, integrity, professional ability, intelligence and honesty that go beyond the robust exchange that one sees on the Internet.

Distress and Causation

[66] I now turn to the issue of distress.

[67] As I said there is an overlap of allegations that may be damaging to one's reputation and allegations of harassment.

[68] Harassment involves a pattern of behaviour and although it may be limited to two specified acts within a 12 month period. in this particular case the specified acts have continued for a considerable period of time and, with the revitalisation of the website in December of 2012 have recommenced the publication of earlier harassing material. Since June 2012 much of the material contains attacks upon Ms Flannagan's honesty, integrity and ability as a lawyer and her use of the court process to obtain redress. Because this material is available on the Internet it means not only has Ms Flannagan seen it, which is distressing for her, but she is aware that others will see it as well during the course of their use of the Internet. This is not an unforeseeable consequence as individuals seek information about a lawyer or look for a lawyer in a local area such as that where Ms Flannagan practises.

[69] The availability of the Internet and the amount of information that is available about organisations, businesses, accommodation, restaurants and people and professionals means that, before engaging in a professional relationship or booking a table at a restaurant or a room at an hotel, searches may be made to establish the reputation of a person or organisation, other people's experiences and the like. There can be no doubt that, given the high ranking of Ms Sperling's blog in Google searches, and given the presence of derogatory and harassing information about Ms Flannagan upon it, it is likely that potential or existing clients will locate it.

This could have an impact on Ms Flannagan's professional reputation, the likelihood of clients remaining with her or engaging her services and may also impact upon her employment. These are the consequences of the blog run by Ms Sperling and the comments that she has made about Ms Flannagan on them that cause Ms Flannagan continued and unrelieved distress and fear of these consequences. Ms Sperling is well aware of the very public nature of her blog. That awareness is highlighted by the fact that she took it down in August 2012. She is aware that the contents of her blog are available to search engine spiders which gather information to enhance search engine accuracy and that she and her blog feature on Google searches. That is clear from her comment to "Anonymous".

[70] This situation is different from the earlier one where Ms Flannagan and Ms Brown, to a certain degree, engaged with Ms Sperling. I was not prepared to grant relief because I did not consider that the harassment was causative of the distress. This case is different. Considering the requirements of section 16 and the power to make an order there is no doubt in my mind that the respondent has harassed Ms Flannagan. There is no doubt that her behaviour has caused Ms Flannagan distress and threatens to do so for the reasons that I have already stated. I have no doubt that that behaviour would cause distress or threaten to cause distress to a reasonable person in Ms Flannagan's circumstances. Any allegations of professional misconduct breach of one's duty to the Court, dishonesty or fraud are allegations of a most serious nature against any lawyer.

[71] In all the circumstances, given the continuous unrelenting utilisation of the blog as a weapon of harassment and taking into account the continued degree of distress that is being cause by Ms Sperling's behaviour I consider that an order is justified and furthermore, having regard to her conduct after my decision of 15 June I consider that the only way in which Ms Flannagan's concerns can be met would be by making a restraining order. Certainly the behaviour of Ms Sperling justifies that course of action and the making of the order is necessary to protect Ms Flannagan from further on-going harassment by Ms Sperling which does not seem to be relieved even although she may take the blog down from time to time. I therefore make the following orders.

The Restraining Order

[72] Ms Flannagan seeks on order that a number of blog posts and comments associated with them be removed. In a few cases she seeks removal of the comments only. She has provided me with a list of the posts and comments along with print outs. She seeks an order that those posts be taken down together with the comments listed that are associated with them. I have read all the posts and consider that as a continuum they amount to a pattern of conduct amounting to harassment and that an order is necessary to protect Ms Flannagan as I have stated above. According I order that the following posts and associated comments be removed by Ms Sperling who, I am satisfied, has the ability to do so, both in respect of the posts themselves and the comments which she is able to (and does) moderate. The posts are identified by their title and date and are italicised. The comments are indentified as such together with date and time stamps

I have just been served papers 09/05/2012
- Comment by Jacqueline 11/05/2012 at 3.48 PM

Don't be a /00/-1 10/05/2012
-Comment by Jacqueline 10/05/2012 at 1.45 PM

Lies number 1 and 2 10/05/2012
-Comment by Jacqueline 11/05/2012 at 1.17 PM
-Comment by Jacqueline 15/05/2012 at 8.19 PM

Lie number 3 10/05/2012

Lie number 4 10/05/2012
-Comment by Jacqueline 10/05/2012 at 5.52 PM
-Comment by Jacqueline 10/05/2012 at 6.00 PM
-Comment by Jacqueline 10/05/2012 at 6.56 PM
-Comment by Anonymous 10/05/2012 at 6.58 PM
-Comment by Jacqueline 10/05/2012 at 7.15 PM
-Comment by Jacqueline 10/05/2012 at 7.33 PM
-Comment by Jacqueline 10/05/2012 at 6.40 PM

Wouldn't it be nice 13/05/2012
-Comment by Mr Mister 13/05/2012 at 12.15 PM
-Comment by Jacqueline 13/05/2012 at 12.39 PM
-Comment by Jacqueline 13/05/2012 at 2.28 PM
-Comment by WhatWasSheThinking 13/05/2012 at 2.44 PM
-Comment by Jacqueline 13/05/2012 at 3.42 PM
-Comment by Jacqueline 13/05/2012 at 4.13 PM

-Comment by Jacqueline 13/05/2012 at 8.29 PM

One more thing before I go 15/05/2012
-Comment by Jacqueline 24/05/2012 at 3.52 PM
-Comment by Jacqueline 24/05/2012 at 5.02 PM
-Comment by Jacqueline 24/05/2012 at 4.30 PM

Just a brief update 19/05/2012
-Comment by Anonymous 20/05/2012 at 8.32 AM
-Comment by Jacqueline 20/05/2012 at 9.02 AM
-Comment by Jacqueline 20/05/2012 at 10.50 AM
-Comment by Jacqueline 20/05/2012 at 11.13 AM
-Comment by Jacqueline 20/05/2012 at 4.26 PM
-Comment by Jacqueline 21/05/2012 at 7.57 AM

Slammed again 26/05/2012
-Comment by Jacqueline 29/05/2012 at 11.26 AM

This woman is nuts 25/05/2012

What is it going to take 27/05/2012
-Comment by Jacqueline 28/05/2012 at 5.37 PM
-Comment by Jacqueline 28/05/2012 at 9.16 PM
-Comment by Jacqueline 29/05/2012 at 9.04 AM

What a balls up 29/05/2012
-Comment by Jacqueline 31/052012 at 9.35 AM

Crazy lawyers are doing my head in 30/05/2012
-Comment by Jacqueline 31/05/2012 at 11.06 AM
-Comment by Anonymous 31/05/2012 at 12.11 PM
-Comment by Jacqueline 31/05/2012 at 3.08 PM

Still going at 11.35pm last night 31/05/2012

Give it to me 1/06/2012
-Comment by Jacqueline 02/06/2012 at 12.12 PM
-Comment by Jacqueline 02/06/2012 at 9.52 PM
-Comment by Jacqueline 03/06/2012 at 1.13 PM

What the heck 05/06/2012

Try to be more understanding 09/06/2012
-Comment by Jacqueline 09/06/2012 at 4.29 PM

Justice for me! 16/06/2012
-Comment by Anonymous 16/06/2012 at 1.17 PM
-Comment by Mr Mister 16/06/2012 at 3.15 PM
-Comment by Anonymous 16/06/2012 at 4.07 PM
-Comment by Jacqueline 16/06/2012 at 6.50 PM

-Comment by Jacqueline 20/06/2012 at 8.43 AM

Internet Intrigue 17/06/2012
-Comment by Ali 18/06/2012 at 10.21 AM
-Comment by surburban boy 21/06/2012 at 10.44 AM
-Comment by Jacqueline 21/06/2012 at 10.59 AM
-Comment by Jacqueline 21/06/2012 at 5.13 PM
-Comment by Jacqueline 26/06/2012 at 11.18 AM

I don't get it 19/06/2012

Full disclosure when begging for money 21/06/2012
-Comment by Jacqueline 21/06/2012 at 9.00 PM

Term one all done! 23/06/2012

They still don't get it... 28/06/2012
-Comment by Jacqueline 28/06/2012 at 12.55 PM
-Comment by Fred 29/06/2012 at 6.35 AM
-Comment by Jacqueline 29/06/2012 at 8.27 AM
-Comment by Jacqueline 30/06/2012 at 8.34 AM

Lawyer runs begging thermometer 03/07/2012
-Comment by Jacqueline 04/07/2012 at 10.29 AM
-Comment by Jacqueline 04/07/2012 at 11.26 AM
-Comment by Jacqueline 10/07/2012 at 2.29 PM
Complaint regarding Simon Buckingham 06/07/2012
-Comment by Jacqueline 10/07/2012 at 3.51 PM

Maximise this day 02/08/2012

Cameron Slater on Madeleine Flannagan 08/08/2012

[73] The following posts of themselves are unobjectionable, but some of the comments that are associated with them refer to Ms Flannagan either directly or indirectly. I order that the comments that are associated with the posts that follow should be removed, although the posts themselves may remain.

15 things you should give up to be happy 09/07/2012
-Comment by Jacqueline 10/07/2012 at 12.25 PM
-Comment by Jacqueline 10/07/2012 at 1.52 PM
-Comment by Jacqueline 10/07/2012 at 2.20 PM
-Comment by Jacqueline 10/07/2012 at 4.01 PM
-Comment by Jacqueline 11/07/2012 at 5.26 PM
-Comment by Jacqueline 11/07/2012 at 6.42 PM

I am no fan of ink 16/03/2012
-Comment by Jacqueline 22/03/2013 at 7.20 AM

I have mastered the art of procrastination today 13/05/2013
-Comment by Jacqueline 15/05/2013 at 9.45 PM
-Comment by Jacqueline 18/05/2013 at 3.44 PM

Quote of the day 16/05/2013
-Comment by Jacqueline 16/05/2013 at 3.48 PM
-Comment by Jacqueline 16/05/2013 at 6.56 PM
-Comment by Jacqueline 16/05/2013 at 5.05 PM
-Comment by Jacqueline 17/05/2013 at 7.57 PM

[74] The order that I have made addresses material posted after my decision of 15 June 2012 as well as material that was considered in that earlier decision but in respect of which I was not prepared to make an order at that time. However, by revitalising her blog in December 2012, Ms Sperling has, together with the material published after June 2012, renewed her attacks upon Ms Flannagan. As I have remarked in this decision and on earlier occasions, a blog is a continuum of comment and it would be artificial to grant Ms Flannagan relief in respect of some material that is harassing but not others. Her concerns are based upon the totality of Ms Sperling's harassing conduct and the distress caused not only arising from the consequences of attacks upon her professional capacity but also generally upon her character which could adversely affect her ability to perform effectively in her chose profession justifies the removal of earlier material.

[75] In making the order that I have which, although it is described as a restraining order, falls within the ambit of a "take down" order contemplated by the Law Commission in its Ministerial Paper *Harmful Digital Communications* I have given careful consideration to Ms Sperling's rights of free expression under s. 14 of the New Zealand Bill of Rights Act 1990. I have weighed each post and considered whether, in terms of content and the competing interests of the parties, the removal of the post would amount to a justifiable limitation upon Ms Sperling's free expression rights.

[76] I further order that Ms Sperling be restrained from publishing Ms Flannagan's name or any material that may directly or by inference lead to her identification or any other details about her or her family, explicit or implied, on her

blog WonderfulNow or any other on-line forum accessible by the public which she can moderate.

[77] Ms Flannagan also seeks an order that Ms Sperling publish a retraction of certain matters. I am not prepared to make such an order. I consider it beyond the scope of a restraining order and compromises the integrity of the future restrain on publication of material regarding Ms Flannagan that I have made in the preceding paragraph.

The Duration of the Order

[78] Under s 21 the Court may make a restraining order for such period either longer or shorter than one year as the Court considers necessary to protect the applicant from further harassment. Normally an order subsisting for one year is sought but in this case Ms Flannagan seeks an order lasting longer. She sought one lasting for 10 years in her application but extended it for an indefinite period along the lines of the order made in favour Mr Spearrit in his proceedings in the Manukau District Court.

[79] A restraining order by its nature interferes with an individual's liberty in a free and democratic society. In some cases freedom of movement may be the subject of interference by a restraining order. The freedom to communicate within an individual may be the subject of a restraining order. In the context of blogs, as I mentioned in my decision of 15th June 2012, there are implications for the freedom of expression pursuant to the New Zealand Bill of Rights Act 1990. In considering the nature and duration of the order one must take into account whether or not an order and its duration are justifiable limitations upon the guarantee of freedom of expression.

[80] In this case serious aspersions have been made against Ms Flannagan's character which are causing her distress and will continue to do so. Those aspersions will probably last throughout her professional life if allowed to continue. The "take down orders" that I have made have taken into account the importance of interfering with Ms Sperlings freedom of speech as little as possible but to obtain sufficient

relief for Ms Flannagan. As in all cases of this nature it is necessary weigh the interests of parties.

[81] If Ms Sperlings behaviour had been in "real space" and her communications been in the nature of letters or pamphlets posted upon a wall an order restraining her from doing so in the future for a set period of time would be realistic. However the new environment of the Internet has qualities associated with digital communications technologies that are paradigmatically different from those of the pre-digital paradigm intrude.

[82] Like the printing press which brought with it characteristics that were not present in scribal communications, digital communications technologies contain with them characteristics or qualities that are peculiar to the medium and underlie the message. One of those qualities is that of persistence of information summed up in the phrase "the document that does not die". Whilst phenomena such as link rot or the takedown of web sites may provide a form of immediate relief, traces of the information will always be present especially if some of that information has been re-communicated or alternatively stored on the Internet archive.

[83] A restraining order will have a mitigating effect of this quality in the sense that by removing the information it will no longer be available for search engines and consequently any ranking will decline on search sites such as Google. I recognise, as does Ms Flannagan, that the "persistence of information" quality of Internet material will not remove the information entirely. A further problem is that with a limited term order, say for one year, it would be perfectly capable for Ms Sperling to repost the information again upon the expiry of the order and the whole process would commence anew. The problems suffered by Ms Flannagan would once again rear their head. In this respect it seems to me that there is justification for an order that would subsist for more than a year and the restraining or take down orders that I have made in respect of the various pages identified in the previous section should subsist until further order of the Court. In that way if Ms Sperling considers that there is justification for reposting the material she may apply for a discharge of the order under s 23 of the Harassment Act or for variation thereof under s 22.

Costs

[84] Miss Flannagan seeks costs. Under normal circumstances a self represented litigant is not entitled to costs but pursuant to Rule 4.17 of the District Court Rules 2009 a solicitor who is a party to a proceeding and acts in person is entitled to solicitors costs.

[85] Miss Flannagan seeks costs in relation to two sets of proceedings. One is that of Brown and Sperling. The other is the present proceeding.

[86] I consider Miss Flannagan's application for costs in the matter of *Brown v Sperling* to be misconceived. She was unsuccessful in that proceeding and is not entitled to costs. With respect I consider that she has conflated these two proceedings and cannot claim costs in respect of a proceeding at which she was unsuccessful.

[87] Miss Flannagan considers that I should make an exception to the general rule that the party who fails with respect to a proceeding should pay the costs to the party who succeeds. She cites the case of *Cates v Glass* [1920] NZLR 37, 68 where it was stated that the nearest perfect test that can be arrived at in considering whether or not there is sufficient ground for interfering with the rule that the costs should follow the event as to consider whether or not it would be more fair as between the parties that some exception should be made to the general rule. Miss Flannagan points to the way in which the case was pleaded and presented, whether the hearing was lengthened or shortened by the conduct of either party and the fact that although a party might have succeeded they were nevertheless substantially in the wrong.

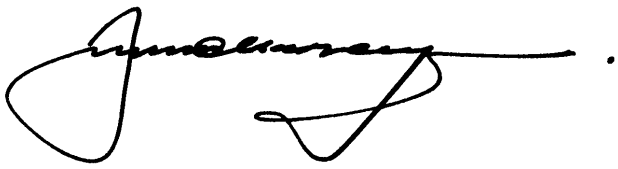
[88] Miss Flannagan points to Miss Sperling's behaviour, who broadcasting of the fact that there were Court proceedings against her in the matter of *Brown v Sperling* and posting some of the proceedings as part of her blog. However she failed to take any steps. Notwithstanding Miss Flannagan's lengthy submission detailing what she considers to be Miss Sperling's conduct – and that would seem to be more in relation to the comments on the blog rather than any steps or lack of them that she took in the proceeding – I do not see that there are any circumstances that render an award of

costs in the matter of *Brown v Sperling* to be conflated with the current proceeding. Indeed, with the greatest of respect to Miss Flannagan, some of her submissions seemed to lack the objectivity that one would expect in a costs submission.

[89] However Miss Flannagan is entitled to costs in respect of the current proceeding and I am prepared to award costs on a 2B scale pursuant to schedules 2 and 3 of the District Court Rules 2009. I detail the costs as follows:

(i)	Preparing application	$ 2,325.00
(ii)	Preparation of 5 affidavits	$ 3,487.50
(iii)	Preparation for hearing	$ 1,550.00
(iv)	Appearance before Judge Taumaunu	$ 775.00
(v)	Appearance before Judge Harvey	$ 775.00
(vi)	Disbursement printing & copying	$ 50.00
(vii)	Disbursements fee for sealing an order For costs	$ 48.30
	Total	$ 9,010.80

[90] I order costs accordingly and that sum to be paid by the respondent to the applicant.



David J Harvey
District Court Judge