ORDER PROHIBITING PUBLICATION OF UNREDACTED VERSION OF THIS JUDGMENT

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1651
[2022] NZHC 1854

IN THE MATTER	of an appeal against Orders under the Harmful Digital Communications Act 2015
BETWEEN	PEBBLES L'ESTRANGE HOOPER Appellant
AND	BERNADETTE MARIE GEE Respondent

Hearing: 1 March 2022

Counsel: RM Mansfield QC and AO Graham for the Appellant
MC Staines for the Respondent

Judgment: 29 July 2022

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 29 July 2022 at 4.00pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: McVeagh Fleming, Auckland

To: R Mansfield QC, Auckland
A Graham, Auckland

Introduction

[1] The appellant, Ms Hooper, styles herself as a self-employed social commentator. Prior to the matters the subject of this appeal, she had never met or had any knowledge of the respondent, Ms Gee, or her business Magnolia Kitchen Ltd.[1] However, in 2020 Ms Hooper became aware of certain posts Ms Gee had made to Magnolia Kitchen's Instagram account, some of which featured Ms Gee's children.

[2] Ms Hooper gave evidence that she "felt this woman had crossed the line from 'light hearted family online cataloguing' to a 'dangerous, inappropriate and deeply concerning woman seeking to exploit her children for entertainment'." Ms Hooper's response to what she saw on the Magnolia Kitchen account is best summarised by her evidence that "I consider that I was not only entitled to take her on for what she posted, but that I should and so should others".

[3] Ms Hooper's opinion of Ms Gee's online posting led to a series of posts and counter-posts by Ms Hooper and Ms Gee, as well as other social media users. It continued over a number of months, starting with online backlash at what users perceived to be the Magnolia Kitchen business generally continuing to operate during the Level 4 lockdown, before moving to what Ms Hooper (and others) saw as Ms Gee's exploitation of her children in her online marketing of the Magnolia Kitchen brand, as well as emotional (and potentially physical) child abuse.[2]

[4] Ms Gee ultimately sought and was granted interim orders in the District Court under the Harmful Digital Communications Act 2015 (the Act) prohibiting Ms Hooper from posting any further material concerning Ms Gee, Magnolia Kitchen and its associated brand. Following a defended hearing in the District Court, Judge N R Dawson made those interim orders final.[3] Ms Hooper now appeals against that decision.

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1 Magnolia Kitchen is a café and catering business (employing at the relevant time 11 staff), with an associated brand, Magnolia Kitchen Boutique Ltd, trading as a flower retailing business.

2 Focussed on Ms Gee and her husband giving their young children small amounts of alcohol and a video in which one son has a black eye. This led to multiple complaints being made to Oranga Tamariki about Ms Gee, including one made by Ms Hooper. Oranga Tamariki investigated the complaints but found nothing substantiated and closed its files.

3 *Gee v Hooper* [2021] NZDC 14245 [District Court judgment].

[5] There is no doubt that aspects of Ms Gee's and in particular, Ms Hooper's posts are offensive and crude. Both are frequent users of profanities. The conduct in question is also to be viewed in the broader context of the nature of social media in today's environment, both in terms of businesses using it to promote and market their products and services, as well as its darker and more disturbing aspects. The focus for the present appeal is not, however, whether Ms Gee's own posts transgressed the norms of any online group, which involves a moral and ultimately subjective judgment on Ms Gee's online activity, which is not the function of this Court. Rather the issue for determination is whether Ms Hooper's posts in response transgressed the threshold for harmful digital communications set by the Act.

Factual background

[6] I first outline the factual background to the appeal.

[7] Magnolia Kitchen's business relies predominantly on advertising through social media. Ms Gee says that Magnolia Kitchen has over 200,000 followers on its Instagram account. Ms Gee further says that over the years, she realised that Magnolia Kitchen's products were not all that her business has to offer, and that there was a "demand from my followers to gain insight into my personal life, as well as life as a small business owner". Ms Gee states that prior to the events the subject of this proceeding, she would post on Instagram each day, updating followers on happenings within her business and family. Ms Gee said in evidence at the District Court hearing that it was important for her followers and her customers to "see all aspects of my life, therefore giving value to the product that they're buying from me". Ms Gee stated that she appreciated that some people may not like aspects of what she posted and that she did not "claim to be for everyone", but that her business is about showing "an authentic person". There is no evidence to suggest that Ms Gee or Magnolia Kitchen were the subject of any substantial online attack before the events the subject of this appeal.

[8] As noted, Ms Hooper is a social commentator. She says that she has approximately 10,000 followers. Ms Hooper describes her platform as a "personal place that many follow for my transparent views and blunt opinions". Ms Hooper's position is that many social media influencers fail to recognise their reach and their platforms of privilege. Ms Hooper is of the view that people who use commercial platforms to make money should be held accountable if their conduct is unacceptable and (as she says is the case in relation to Ms Gee and Magnolia Kitchen), they use children for commercial gain.

[9] As a final point by way of introduction, a number of the posts made by Ms Hooper about Ms Gee and Magnolia Kitchen were of "screen grabs", or screen shots, of one aspect of a longer video that had originally been posted by Ms Gee to the Magnolia Kitchen Instagram account. By way of background, Instagram allows users to share photos and videos that disappear from their account after 24 hours, unless saved as a highlight or other form of post which does not automatically expire. A number of the original videos posted to the Magnolia Kitchen account were no longer available (having expired), and thus in some cases, only the screen grabs or shots remaining in Ms Hooper's possession were produced in evidence. Some issue was taken with whether Ms Gee could have nevertheless retrieved the original videos from her Instagram archive, though Ms Gee's evidence was that she could not.[4] No further or expert evidence was given at the District Court hearing in relation to these matters, nor were orders sought as to the retrieval and production of the original videos. It is not therefore a matter I can comment on any further.

[10] Turning to the chronology of relevant events, on 23 March 2020, as a response to the COVID-19 pandemic, the Prime Minister announced that New Zealand would move immediately to Alert Level 3 for 48 hours, and then to Alert Level 4 for a minimum of four weeks after 48 hours.[5] This marked New Zealand's first nationwide

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4 Ms Gee's evidence was that she was unable to access material that might have been archived, given the size of her Instagram account. Ms Gee also said that she had been advised by NetSafe to remove some of the posts from Magnolia Kitchen's Instagram account, which she would not have done had she known the matter would proceed to court proceedings.

5 Prime Minister "New Zealand moves to COVID-19 Alert Level 3, then Level 4 in 48 hours" (press release, 23 March 2020).

lockdown. Essential services were allowed to operate, albeit under strict guidelines. Non-essential businesses were asked to close.

[11] Also 23 March 2020, Ms Gee posted a series of videos to Magnolia Kitchen's Instagram account. In the videos, Ms Gee referred to the impending lockdown and said she would keep in touch with followers in a positive way and dismissed those evidently making negative comments about the Magnolia Kitchen business continuing to operate, Ms Gee referring to them as "cunts" and stating that "you guys can fuck off". She also referred to maintaining her business and refusing to "roll over". Another video posted at this time recorded one of her children crying in the background while Ms Gee worked in the kitchen, Ms Gee asking him "what the hell is your problem" and then momentarily "mocking" him by making a crying face and then laughing.

[12] On 25 March 2020, Ms Hooper posted an image to her Instagram account in response to the Magnolia Kitchen videos. It showed a woman with a gun pointed at the viewer, accompanied by a sticker saying "Stay Inside" and the caption: "These are the people who will make the lockdown longer, so yeah. I'm not having it. Fuck Magnolia Kitchen you greedy fuxking cunt".

[13] Around this time, Ms Hooper also posted the following to her Instagram account:

(a) A screenshot of Ms Gee (presumably taken from Magnolia Kitchen's Instagram story or feed) with the caption: "Because the owner seems to think that three tiered wedding cakes are essential during this time. Confused I think".

(b) A repost of the Magnolia Kitchen Instagram story where Ms Gee said she would not "roll over", with the caption:

> Reminding everyone who will undoubtedly face buisness [sic] closures and bankruptcy because they chose to help their community, you "rolled over and took it". And she's not a loser like us! So humble!!!

(c) An image showing Magnolia Kitchen appearing in the search results for the COVID-19 Wage Subsidy Employer Search, with the caption: "Stop telling the public you're opening because of your staff. They've been paid."

(d) A post with a sticker saying "How can I help? Magnolia is launching baking boxes in lockdown 🙄🤦‍♀️" and the caption: "Who wants to buy cakes made by a psychopath anyway?"

[14] On 25 March 2020 at 11.59 pm, New Zealand moved into Alert Level 4.

[15] During the early part of the lockdown, specific businesses were not granted express and bespoke permission to operate, but rather the Ministry of Primary Industries (MPI) issued guidelines as to which businesses could continue to operate, which included, in broad terms, those in the food supply chain. Such businesses were required to register as an essential service. Ms Gee had earlier applied to be registered on the basis of the wholesale aspect of her business, which supplied sweets and confectionary to various retailers. Ms Gee produced in evidence a response she had received from MPI dated 27 March 2022 which stated:

> Thank you for completing MPI's essential service safe practice registration form. Please continue to implement safe practices to protect workers and prevent the spread of COVID-19, and please continue to operate unless you hear otherwise.

[16] Ms Gee accordingly continued to operate her wholesale business. She did not operate her café or supply cakes to customers during the lockdown. She also gave evidence of her business being visited in person by an MPI representative during the lockdown to ensure her business was operating in accordance with the health and safety rules then in place.

[17] On 6 April 2020, Ms Gee posted a video to Magnolia Kitchen's Instagram story of her cutting a cake, accompanied by one of her young children. The same day, Ms Hooper reposted a screenshot of the video to her own Instagram story with the caption: "Let's not try and play the victim when the online backlash is simply the result of your hideous online behaviour".

[18] On 8 April 2020, Ms Gee posted an image of herself to Magnolia Kitchen's Instagram story with the caption: "Cut my own fringe today". Ms Hooper posted several tweets in response:

> First Magnolia Kitchen shows us how she packs up food without gloves, masks or aprons and stacks boxes on the floor [illegible] don't worry! she got a mask today [illegible] chucked on AFTER cutting her own hair in her office. Cool
>
> [New tweet with repost of Magnolia Kitchen post featuring Ms Gee] UPDATE! Magnolia Kitchen is fully operational as a self proclaimed "essential business" and while she's got a break between packing food stuffs without PPE gear, she's taken full advantage of applying the kitchen utensils for self grooming! You couldn't write this shit

[19] Ms Hooper followed this with a repost of a Magnolia Kitchen Instagram story showing Ms Gee waiting at hospital for a medical procedure, with the caption:

> OH JUST AN UPDATE! Our dear friend at Magnolia Kitchen is in the hospital for an appointment and will shortly after be packing food without gloves or a change into PPE gear! Mean!

[20] A number of events occurred on 9 April 2020. The New Zealand Herald published an online article about Magnolia Kitchen receiving online abuse regarding operating during the lockdown, despite being deemed an essential business.[6] In this article, Ms Gee indicated her belief that the abuse was linked to the perception of her business as purely selling cakes, and said she had blocked about 500 people online in the past fortnight.

[21] Shortly after this, Stuff Ltd published an online article about small businesses being bullied and receiving death threats for selling essential items during the lockdown.[7] In the article, Ms Gee said that despite being approved as an essential business by the Government, people "trolled her" and accused her of "cheating the system".

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6 "Covid 19 coronavirus: Cakemaker Magnolia Kitchen deemed essential, bullied for trading" The New Zealand Herald (online ed, Auckland, 9 April 2020).

7 Anuja Nadkarni "Coronavirus: Businesses face abuse for operating during Covid-19 lockdown" (9 April 2020) Stuff <www.stuff.co.nz>.

[22] Also on 9 April 2020, a shop selling cupcakes and baking supplies posted to its Facebook page explaining that it did not classify making cakes as an essential service and that it didn't "seem right [to] trade due to a loophole".

[23] Around this time, a number of Instagram users other than Ms Hooper made posts about Magnolia Kitchen/Ms Gee:

(a) An Instagram user reposted a story featuring a "zoomed in" photo of Ms Gee's face, with the caption (it not being clear whether all of this caption was written by the Instagram user or some might have been added by Ms Hooper):

> You havnt [sic] been "trolled" @magnoliakitchen
>
> You've been called out by concerned members of the public
>
> Cakes are non essential regardless of how entitled & egotistical you feel about it
>
> We've all worked hard and we're all taking a hit you're not special we're just asking if you could not endanger the health of the country cheers 🤬😉😀
>
> @pebbleshooper3.0

(b) An unidentified Instagram user posted a story depicting the *Magnolia Kitchen: Inspired Baking with Personality* cookbook with the caption: "ALERT! Be careful and do not order from this business! I found a dead mouse in my baking box! I will be donating (sic) authorities! This business needs to be shut down!"

[24] Around this time, Ms Hooper posted to Instagram a close-up image showing Ms Gee licking a stack of two macarons, with a red, arrow-like line across Ms Gee's face and the following text over each macaron:

> Taking the government subsidy
>
> Opening a non essential business during Lockdown

[25] On or about 9 April 2020, Ms Hooper posted a zoomed in image of Ms Gee's face with the caption: "Or just stop being evil. It's way easier."

[26] Instagram users can choose to feature Instagram stories permanently on their profile as "highlights", even after the stories disappear. On or about 10 April 2020, Ms Hooper became aware of Magnolia Kitchen's "Family Caos" and "Funnies" highlight reels, which featured videos of Ms Gee interacting with her partner and her children, including with alcohol present. These videos show, for example, Ms Gee's son with a glass in his hand and intimate that he has been given some alcohol and that he appears to want some more. In one video Ms Gee comments to him "fuck you're a dag kid" and says "just drink it you're lucky you've got any". The son has some scratches around one eye, but seems happy and normal in the videos. Another video shows Ms Gee trying to get a photograph with her son in front of a large dinosaur model at what appears to be a park, with the caption "trying to get a photo with one of my pussy bitch kids". Amongst this material is also a post by Ms Gee to her "History" Instagram highlight a picture of an ultrasound of her son and the caption "then this fucken destroyed my world like a true destroyer of worlds that he is #[son's name]".

[27] Ms Hooper then reposted this material to her own story in a series of posts, which comprised:

(a) A screenshot of Ms Gee's then three-year-old son with his eye circled and the caption:

> And why the fuck does this poor child have a fucking black eye!? CAN SOMEONE ANSWER ME WHY THIS IS ONLY BEING ADDRESSED NOW????? WHERE THE FUCK ARE THE 50,000 FOLLOWERS AT WHEN SHE POSTS THIS???

(b) A second image of the same child, with the caption: "11/04/2020 Don't forget when Bernadette shared a series of videos feeding her young child alcohol to her business account".

(c) A still from The Simpsons depicting Homer Simpson tripping over a towering rubbish bin, with the caption:

> I'm sorry but wow it just keeps getting so much worse.
>
> Supporting her business will keep her young kids sinking piss for content
>
> Cool

(d) A further screenshot of Ms Gee's son from the "Family Caos" highlight reel, with the caption:

> @thehitsnz @nzstuff
>
> Gonna do another fucking interview on how amazing Magnolia Kitchen is? Do your fucking job and spend 3 minutes to watch her content before you start buying into her bullshit that she's being treated unfairly because she's a "Boss Babe".

[28] On 10 April 2020, a Twitter user replied to a tweet by Ms Hooper, saying: "I just reported this to three different family members that work at oranga. It's not okay." Ms Hooper replied: "Thank you!!!".

[29] On 11 April 2020, Ms Gee posted a livestream video to Magnolia Kitchen's Instagram account, in which she told viewers to "ignore any hate". A number of negative comments were then posted on the livestream:

(a) A user commented: "The not nice comments are because she's awful".

(b) Ms Hooper used her private Instagram account "underwaterscrapbook"[8] to comment: "Fuck these white privileged women next" and "You've failed as a mother so this is pointless".

(c) A user commented "Child youth and family are actually concerned about what has come out today and will be investigating, starting with the many videos that have been shared by concerned parents".

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[8] Ms Hooper acknowledged that "underwaterscrapbook" is one of her Instagram accounts.

(d) "Underwaterscrapbook" (as noted, an account operated by Ms Hooper) replied "@pebbleshooper3.0 for the FACTS". A user asked "Who the fuck is pebbles" and "underwaterscrapbook" replied "Pebbles exposed Bets".

[30] Ms Hooper (from her account "pebbleshooper3.0") then shared a screenshot of the Magnolia Kitchen livestream to her story, with the caption: "Maybe jump on to the @magnoliakitchen live right now and see if she shares any insights to her narcissism".

[31] Also on 11 April 2020, Ms Gee made a complaint to Netsafe.

[32] On or about 14 April 2020, Ms Hooper reposted a Magnolia Kitchen Instagram story to her own story. The post showed Ms Gee's kitchen, with Ms Gee's fridge decorated with children's drawings in the background, and the caption: "The pictures on the fridge say it all really".

[33] There are a number of other posts by Instagram users, other than Ms Hooper, which criticise Ms Gee/Magnolia Kitchen for remaining open during lockdown and accuse her of child abuse. Unfortunately, they do not have date stamps so the precise dates cannot be ascertained, though from the surrounding content, they appear to have been posted in or around late March/early April 2020. They included:

(a) An Instagram story showing an image of a heroin user holding a spoon and lighter, with Ms Gee's face superimposed on the head and the caption:

> @magnoliakitchen
>
> Sorry hun. Just google junkie and this came up?
>
> XOXO [user name]

(b) An Instagram story featuring a screenshot of the Magnolia Kitchen Instagram page with the caption:

> To my follower [sic] that are kind enough to follow her, please watch EVERY story she posts ..... without skipping through.

> I'm not trying to defame this account . Nore [sic] do I give a shit about the baker you are. What I care about is accountability and treating humans with respect, especially if they are your own children.
>
> I'm sorry I feel so passionate about LOVE and showing it in the CORRECT way,
>
> XOXO [user name]

[34] Three Instagram users posted comments addressed to Magnolia Kitchen. One user mentioned Magnolia Kitchen in a comment saying: "Unfollow @magnoliakitchen". Another user commented on a Magnolia Kitchen post: "People like you are the reason we need to self isolate and have to be forced by the bloody government in the first place...What in the fuck cakes aren't an essential service". On the same post, another user commented:

> "LOL be kind to the community by self isolating. There is only a selfish gain for businesses to stay open, and it's money. It's literally the opposite of being kind to stay open. We are ALL required to put effort in together for people that are vulnerable to a virus."

[35] Magnolia Kitchen also received the following private messages from various Instagram accounts:

(a) "You're damaging your kids mentally they are going to end up awful people. So sad to see. You can't say things like that to little kids".

(b) "Why are you so horrible to your son 💔 can you see what you do is breaking his heart? It's no ok to post u taking the piss outa him. Boycott magnolias kitchen let's get this trending bitch bullies her son".

(c) "How the hell do you think your business is worth more than public health" and "I hope you get coronavirus".

(d) "Wow you are cancelled! My family loved your cakes but there's no chance we would ever buy from you again".

(e) "Pebbles Hooper is now encouraging her followers on Twitter to report you to Oranga Tamariki for child abuse. You might want to call your lawyer or the police.

(f) "Did you give your kid alcohol? Idiot! If you were a black dude you'd be in trouble. Fucken look at yourself. Dumb fuck" and "Your husband seems just as fucken stupid! Poor kids" and "Stop abusing your kids 👀😳🙏".

(g) "Why did you take the government subsidy even though you are still operational?" and "also why the fuck do you let your not even 6 year old child drink alcohol?".

(h) "Hey, just a quick message to let you know that you're a trash parent. Hope you improve soon".

(i) "Ew you fucking disgusting child abusing pig!!!! You talk to your son like that il fucking come to ur work and kick ur head u filthy disgusting pig!! And I mean it!!!".

(j) "You are a truly vile repulsive pathetic excuse for a human being who should not be allowed near children let alone albe [sic] to "care" for them. Openly giving your children alcohol, coffee, teasing them, having a laugh at their expense – you're so quick to play the victim a typical narcissistic trait and there's no telling you because you truly believe that what you're doing is okay well I will tell you this right now everything will be reported to Oranga Tamariki".

[36] On Twitter, a user posted a reply to Ms Hooper and others saying: "Seriously, what parent gives their young kid alcohol and makes jokes about it 😉".

[37] On 14 April 2020, Oranga Tamariki received a report about material posted by Magnolia Kitchen. Ms Hooper accepted under cross-examination that she had made one such report to Oranga Tamariki.

[38] On 15 April 2020, Ms Gee was interviewed by Oranga Tamariki. That same day, Oranga Tamariki received a further report about the same material posted by Magnolia Kitchen. In cross-examination in the District Court, Ms Hooper denied making any reports beyond the single report she admitted making. Also on 15 April 2020, Oranga Tamariki advised Ms Gee that it would not be taking the matter any further.

[39] On 20 April 2020, the Prime Minister announced that New Zealand would return to Alert Level 3 on 27 April 2020.[9]

[40] On 21 April 2020, Oranga Tamariki received a further complaint about material posted on the Magnolia Kitchen Instagram account.

[41] On 23 April 2020, Netsafe closed Ms Gee's complaint and advised her that she could apply to the District Court for an order under the Act.

[42] On 27 April 2020 at 11.59 pm, New Zealand moved to Alert Level 3.

[43] On 30 April 2020, Ms Hooper published a blog-style post to her Patreon account. Patreon is a crowdfunding platform that enables fans (or patrons) to financially support content creators by paying a subscription fee to access exclusive content. Accordingly, only Ms Hooper's patrons could access her Patreon posts. Ms Hooper wrote that others had forwarded to her the Magnolia Kitchen Instagram stories prior to her reposting them, and that she was "equally as nauseated by [Ms Gee's] opinions and classless brutish delivery". She described Ms Gee as a "narcissist" and "a righteous arsehole" for approaching the media about online bullying.

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9 Prime Minister "PM announces date for move to Alert Level 3" (press release, 20 April 2020).

[44] On or about 9 May 2020, Ms Gee posted a video to Magnolia Kitchen's Instagram story addressing the alert level changes and corresponding changes to her business operations. She said she would "practice kindness" in response to online criticism. Later that day, Ms Hooper reposted the story to her own Instagram story with the caption: "Narcissism is a disease".

[45] On 13 May 2021 at 11.59 pm, New Zealand moved to Alert Level 2.[10] On 8 June 2020 at 11.59 pm, New Zealand moved to Alert Level 1.[11]

[46] On 1 July 2020, Ms Gee visited her General Practitioner (GP). She advised [Redacted]. Ms Gee's GP recorded that [Redacted].

[47] On or about 3 July 2020, Ms Gee posted a video to Magnolia Kitchen's Instagram account addressing online backlash, and stating that during the Level 4 lockdown a particular person encouraged their followers to report her to the police to close her business down (and that the police had attended her business to "incorrectly" close her down).

[48] On 3 July 2020, Ms Hooper made another post to her Patreon account. She encouraged patrons to read her previous posts outlining Ms Gee's "crude display of greed". She said the Magnolia Kitchen highlight reels displayed "videos of Bernadette tormenting, feeding alcohol and deliberately frightening her young (under 5) children for the entertainment of her 200K following", and that Ms Gee suffers from "a crippling ego and narcissistic personality traits".

[49] On 5 July 2020, Newstalk ZB interviewed Magnolia Kitchen and discussed the backlash from remaining open during the lockdown.[12] Ms Gee mentioned "someone" on social media who directed their followers to attack her.

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10 Prime Minister "Level 2 announcement" (speech, 11 May 2020).

11 Prime Minister "New Zealand moves to Alert Level 1" (press release, 8 June 2020).

12 "Magnolia Kitchen owner opens up about online abuse during lockdown" (5 July 2020) Newstalk ZB <www.newstalkzb.co.nz>.

[50] On 7 July 2020, Ms Hooper made a post to her Patreon account entitled "HEY, BERNADETTE!". She referred to "dismantling the pyramid of social media sociopaths" and criticised Ms Gee's "deranged sense of self importance" and use of her platform "to exploit her children and now, feed her ravenous ego". She told Ms Gee to "take your narcissism off social media before your hubris destroys the shattered shards of dignity you still possess".

[51] On 22 July 2020, Ms Hooper made another post to her Patreon account, where she commented on the Court process[13] and said she would respond to every threat and accusation by "entitled, deranged and panicked narcissists".

[52] On or about 26 August 2020, Ms Gee posted a video to Magnolia Kitchen's Instagram story. The video showed Ms Gee and her partner interacting with their children at a birthday party, in which one of her sons is trying or wanting to "get at" the other son's birthday cake, and when told it is not his, he walks off towards his father who can be heard saying in the background, in a calm, non-threatening tone, "come here or you will get smacked in the face again." Ms Hooper then reposted the story with the caption:

> Disgusting that these people are still exploiting their kids for entertainment online
>
> "come here or you're going to get smacked in the face again" Watch my highlight reel "kindness" for context

[53] On 27 August 2020, Oranga Tamariki received a further report detailing that the complainant had seen a video online, with reference to Ms Gee smacking her child in the face. The complainant said this was not the first time they had seen videos posted like this.

[54] On 1 September 2020, Ms Hooper made a Twitter post stating:

> Let's see if this fucking thread will get me my "third strike". Arresting the person pointing out the abusers, and not the abusers themselves, is so fucking insane I can't even think of an analogy to fit because my brain isn't capable of such extreme stupidity.

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[13] Presumably other court proceedings in which Ms Hooper was then involved, these proceedings not being commenced until some time later.

[55] On 15 September 2020, Ms Gee emailed Netsafe requesting to reopen the earlier report.

[56] On or about 16 September 2020, Ms Gee posted a video to the Magnolia Kitchen Instagram account with a sticker saying "BE NICE BE KIND BE HUMAN", addressing online harassment and bullying. She stated she refused to engage with "trolls and bullies" and "people who are interested in harassing me online", and said she might have in the past engaged with these people in a mature way, but "that ship has now sailed" and that she would now leave that up to the authorities.

[57] On 18 September 2020, Oranga Tamariki phoned Ms Gee to arrange an interview. Following this call, Ms Gee posted a video to the Magnolia Kitchen Instagram account. Commencing the video by stating "disclaimer, this is going to be hard to watch", Ms Gee appears (genuinely) distressed and crying, saying that the repeated reporting to Oranga Tamariki was "out and out harassment" that was affecting her mental health and family. She stated that it stems from a "psycho bully who has decided they hate me", that they "are not concerned about my children", that "they are not even a parent" and "have no fucken idea….".[14] She also provided further context for the birthday Instagram story (see [52] above).

[58] Later that day, Ms Hooper reposted the video to a Instagram highlight reel she had apparently dedicated to Magnolia Kitchen/Ms Gee entitled "Grow up". She also posted her own video response, in which she said the following:[15]

> So, dear friend Magnolia Kitchen, crying, blubbering away because Oranga Tamariki had contacted her, apparently. … we need to be reminded that when I brought this up, because you keep reporting my fucking account which is why I brought it up, I didn't reshare the videos cos I was uncomfortable about it …
>
> … if I wouldn't treat my dog like that, I think I have a gauge on how children should be treated. I think it's just like [scoffs] the moral compass that is built into most people not you, but most of us. …

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14 The audio cuts out at this point.

15 Among other matters, Ms Hooper also denied hating Ms Gee; acknowledged it was difficult for those without children to comment on parenting; denied her postings were a campaign or harassment.

> Who gets a phone call from the authorities for a serious matter and instead of dealing with that, picking up the fuckin' phone, putting it in selfie mode that you can record you crying because you've thought "This will make people feel sorry for me because I'm a victim". You haven't considered the fact that maybe your parenting has caused trauma for your children. And you've spent a fraction of your day to continue to sell yourself because your ego is all you care about. So stop crying and grow the fuck up.

[59] The video was interspersed with a number of images, including screenshots of messages between various Instagram users and Ms Hooper, with the Instagram users criticising Ms Hooper's posts about Ms Gee. Ms Hooper replied to one user: "Oh so you're indifferent towards psychological abuse? Maybe call OT and get a second opinion?". A further image showed Ms Hooper smiling, with the caption:

> And no Bernadette, I do not feel accomplished, proud or happy in anyway about this. Unlike you, and our endless crusade to accumulate fanfare, this is a horrible reality that gives me no pleasure. I don't want to see children being fed alcohol, being sworn at, mocked and frightened for your business account with a 200,000 following. This isn't a competition of ego. You're the only one racing in that category.

[60] Ms Hooper also posted an image of herself (presumably in response to Ms Gee's emotional post about the further Oranga Tamariki investigation) with the caption: "I just rolled my eyes so hard I lost a fucking contact".

[61] That same day, on 18 September 2020, Ms Hooper posted a series of tweets:

> Fuck, image [sic] being so infinitely lost in a fog of your own self importance and the remedy for your situation is so simple, being spelled out for you so obviously. But you can't accept any fault, jeopardising your kids mental health further by publicly exposing your
>
> [New tweet] Ongoing OT investigation while blubbering away crocodile tears, not realising that in itself exemplifies your privilege further and may contaminate the process for their safety. Maori and Pacific Island families are dismantled for accusations less than this.
>
> [New tweet] If you wanna back up bets, that's your prerogative. But post the videos. Make sure you post the videos. Caption how they're "not" exactly what they are.

[62] Ms Hooper also posted the following to her Instagram account (again, the dates of the posts are unclear but a number of them appear to postdate Ms Gee's Oranga Tamariki video):

(a) At some stage, Ms Gee posted a video of her making hot cross buns accompanied by her young son. In the video, her son enters the kitchen holding a beer bottle. He tells Ms Gee he is putting it in the bin for his father. Ms Hooper posted a screenshot of the video to her Instagram story with the caption "Kid wandering around with a bottle of lager" and then again with the caption "An hour ago". This post was picked up by another Instagram user and republished with a further caption: "Plus lets her young kids drink alcohol, what a cool mum 👎".

(b) Ms Hooper reposted an image by another Instagram user to her story, which featured the following text:

> Reporting an abuser doesn't ruin their life. They did that themselves.
>
> Reporting an abuser doesn't damage their reputation. It makes it more accurate.
>
> Reporting an abuser doesn't hurt their family. It protects them from abuse.
>
> Reporting an abuser isn't gossip. It's integrity.

(c) Ms Hooper posted an Instagram story with the caption: "And by 'someone' I mean our dear friend at magnolia kitchen who keeps getting her gaggles of witches to report me".

(d) Ms Hooper replied to another user's comment on Instagram, saying: "I'm sick of being blamed". The user responded to the effect that Ms Hooper should stop watching Ms Gee's stories if she is sick of her. Ms Hooper replied: "turning a blind eye is literally the definition of enabling abuse".

(e) Ms Hooper posted an Instagram story with the caption "GOOD MORNING TO EVERYONE EXCEPT BERNADETTE". On another occasion she posted the captions:

> WASTING POLICE TIME FOR YOUR OWN PRIVILEGED SELFISH AGENDA IS THE DEFINITION OF A KAREN
>
> MORENA TO EVERYONE EXCEPT KARENS WHO THINK THEY'RE BEING BULLIED BECAUSE PEOPLE ARE SICK OF THEIR SHIT

(f) Ms Hooper created an Instagram highlight reel of content relating to Ms Gee and Magnolia Kitchen, labelled "Be Kind" and featuring a cover picture of Ms Gee. She also posted an Instagram story with the caption: "My highlights will provide everyone with the information they seek".

(g) Ms Hooper posted a screenshot of a warning that her Instagram story was removed for bullying or harassment with the caption "Oh fuck off bets".

(h) Ms Hooper reposted a Magnolia Kitchen post with various annotations (for example changing "I will not engage" to "I will not accept responsibility" and "I know my truth" to "I know 'my truth' isn't the actual truth") and the caption: "Stop playing the victim :)".

[63] On 20 September 2020, Ms Gee applied for a Harmful Digital Communication Order against Ms Hooper. That same day, Ms Hooper posted a screenshot from the "Family Caos" highlight reel featuring Ms Gee's three-year-old son to her Twitter account.

[64] On 23 September 2020, Ms Gee and her children were interviewed by Oranga Tamariki to determine whether further investigation or steps were required.

[65] On 29 September 2020, Judge de Ridder in the District Court granted a without notice interim order against Ms Hooper pursuant to s 18 of the Act.

[66] On 2 October 2020, Oranga Tamariki texted Ms Gee to confirm that it would be closing her file, noting that "nothing has been substantiated".

[67] On 3 February 2021, Ms Gee visited her GP for a consultation and [Redacted].

The evidence in the District Court

[68] Both Ms Gee and Ms Hooper filed lengthy affidavits in support of and in opposition to Ms Gee's application, and gave evidence and were cross-examined at the District Court hearing. Other than being a vehicle for putting into evidence the various posts in issue, explaining the roles each play on social media, summarising the factual background and providing the details of the harm which Ms Gee says she suffered as a result of the posts, I have not found that evidence particularly helpful. As might be expected on an application of this kind, much of it is commentary or submission on why Ms Gee or Ms Hooper's position is justified (as the case may be). It is accordingly not necessary to say anything detailed about that evidence, and the key aspects of it relevant to the issues I must determine have already been mentioned in this section of my judgment in any event.

District Court decision

[69] The Judge began by summarising the broad factual background to the appeal, including details of each party's social media "brand" and the size of their respective followings.

[70] The Judge then noted that it could not be said that Ms Hooper should not raise her concern about Ms Gee's business during the COVID-19 lockdown, given lockdown breaches could have serious consequences for the community. However, the Judge said that once Ms Gee clarified that she was operating her business legally, Ms Hooper did not accept any responsibility to correct her earlier, "very serious accusations".[16]

[71] In terms of Ms Hooper's concerns that Ms Gee was exploiting her young children to promote her business, the Judge commented that Ms Gee's children are not

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16 District Court judgment, above n 3, at [7].

pressured in any way to be involved. He considered that Ms Gee is entitled to her view that involving her children is part of her brand; equally, Ms Hooper is entitled to think otherwise and to share her view with her followers. The Judge said this was "entirely a matter of personal taste and preference".[17]

[72] Next, the Judge considered Ms Hooper's posts questioning whether Ms Gee's children had been physically abused and threatened with violence by her husband. The Judge quoted the two posts featuring images of Ms Gee's son and captions referring to a "fucking black eye" and "come here or you're going to get smacked in the face again". The Judge said that Ms Gee's explanation for the allegations was firstly that her son did not have a bruise but rather a scratch under his eye from day care, and in terms of the second post, her son had earlier been hit in the face while "roughhousing" with his brother and her husband's warning to him was in that context. The Judge commented that the video from the latter event was "entirely consistent" with Ms Gee's explanation, and that:[18]

> It is difficult to understand how the respondent could have drawn any inference of threatened violence by the applicant's husband from that video. The respondent appears to be wanting to find something to be offended about.

[73] The Judge then referred to Ms Hooper reposting images of Ms Gee's son with captions referring to Ms Gee "feeding her young child alcohol" and "Kid wandering around with a bottle of lager". The Judge accepted that the original videos posted by Ms Gee were consistent with her explanation that she had filmed her son consuming a very small amount of alcohol on Christmas Day and, on another occasion, carrying an empty bottle of lager to the rubbish bin for his father. The Judge said that Ms Gee is entitled to her view that children can have a small taste of alcohol on such occasions, and while others can have the opposite view, "these videos are not evidence of child abuse as inferred by [Ms Hooper] in her posts".[19]

[74] The Judge considered that "no credence" could be given to Ms Hooper's concern that Ms Gee was frightening her children by chasing them with a toy

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17 At [8].
18 At [11].
19 At [14].

dinosaur.[20] The Judge observed that Ms Gee and her child were clearly having fun, and only a person wanting to be offended could be offended by the video.

[75] In respect of Ms Hooper's other posts about Ms Gee, the Judge noted that they "frequently contained swearing, sarcasm, and derogatory comments" and "showed a willingness to draw as many inferences as possible to accuse [Ms Gee] of bad business practices and lamentable parenting".[21] The Judge took the view that the evidence did not support those inferences. He said Ms Hooper encouraged her followers to disapprove of Ms Gee, to boycott her business and to lay complaints with authorities. He referred to the fact Ms Hooper laid a complaint with Oranga Tamariki about Ms Gee's parenting and approved of one of her followers who had also laid a complaint. The Judge noted that, after a full investigation, Oranga Tamariki took no action.

[76] In respect of posts by other users, the Judge noted that Ms Gee had been subject to online trolling characterised by the use of swear words and extreme language. He accepted Ms Gee's contention that this trolling arose as a result of Ms Hooper's posts, commenting:[22]

> The "trolling" has similar themes to those raised by the respondent and it is a reasonable inference that they had their origins in the respondent's posts. There is no other explanation advanced for this "trolling" to have occurred.

[77] The Judge then turned to consider the relevant provisions of the Act. The Judge referred to a submission by Ms Hooper that Ms Gee was not entitled to bring the proceedings because Magnolia Kitchen is not an individual (as required by s 11 of the Act), because the online account she used was for the business promotions of a limited liability company. The Judge rejected this submission as "sophistry", noting that there is no requirement about the type or ownership of the platform used by the affected individual.[23]

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20 At [15].
21 At [16].
22 At [17].
23 At [22].

[78] Next, the Judge considered the meaning of "harm" under s 11(1)(a) of the Act, noting that under s 4, "harm means serious emotional distress". The Judge referred to Ms Gee's evidence that she was very upset about the accusations about breaching lockdown and that her business had been adversely affected by Ms Hooper's posts. He noted that Ms Gee was more distressed about the public accusations of child abuse and being reported to Oranga Tamariki. He said Ms Gee was also disturbed and extremely distressed that Ms Hooper used images of her children to make those allegations.

[79] The Judge noted that Ms Gee had responded to Ms Hooper's posts correcting factual errors and refuting her allegations, despite which Ms Hooper continued to criticise Ms Gee with derogatory posts. He said:[24]

> The respondent makes it very clear that she is not in the least concerned about any distress she or her followers have caused to the applicant. The respondent's post of a video of herself commenting upon the applicant's concerns and distress is narcissistic and brutally uncaring about any distress she may have caused to the applicant and her family. Her response is summed up in one of her posts in response to the applicant where with an image of herself, the respondent says: "I just rolled my eyes so hard I lost a fucking contact." The respondent's posts are intemperate, they lack any intention to exhibit any fairness or balance, and she interprets everything to support her predetermined judgments of the applicant, regardless of what the facts may be.

[80] The Judge concluded that Ms Gee had established that she had suffered serious emotional distress, as supported by her evidence and her GP's letter (which he referred to as uncontested). The Judge commented that, in all the circumstances, it would have been surprising if Ms Gee had not been distressed to the required standard.

[81] The Judge also considered that it had been established that it was Ms Hooper who caused the harm to Ms Gee. He noted that Ms Gee was not trolled online prior to Ms Hooper taking "what can mildly be described as a determined and continuing campaign of denigration against [Ms Gee], that went far beyond simply expressing opinions".[25]

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[24] At [27].
[25] At [29].

[82] The Judge concluded that Ms Hooper was in breach of communication principles 2, 3, 5, 6 and 8,[26] observing that:[27]

> The respondent has been very irresponsible in the manner she has exercised her right to freedom of expression to make continuous, serious, unfounded and abusive posts about the applicant. Her posts about the applicant go well beyond being a free expression of her opinions. The applicant is entitled not to be treated in this manner and to be protected by the law.

[83] The Judge therefore ordered that the earlier interim orders be made permanent. Those orders directed that Ms Hooper:

(a) take down or disable material relating to Ms Gee, Magnolia Kitchen Limited and Magnolia Kitchen Boutique Limited;

(b) cease posting any online content regarding Ms Gee, Magnolia Kitchen Limited and Magnolia Kitchen Boutique Limited; and

(c) was not to encourage anyone else to engage in such communication.

Application to admit further evidence on the appeal

[84] In support of her appeal, Ms Hooper seeks to adduce affidavit evidence from Charde Helena Leota-Poipoi and Steven Rex Fernandez. I summarise the content of the proposed evidence at [86] to [88] below.

[85] The legal principles applicable to an application to admit new evidence on an appeal are not in dispute. Under r 20.16 of the High Court Rules 2016, a party to an appeal may adduce further evidence only with leave of the Court, which will only be granted if there are special reasons to admit it. The new evidence must generally be fresh, cogent and credible.[28] When considering whether or not to grant leave to adduce leave on appeal, the Court will generally consider:[29]

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26 See the text of the communication principles set out at [114] below.

27 At [31].

28 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192; affirmed in *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

29 *VP v RH* [2015] NZHC 260, (2015) 22 PRNZ 545 at [7].

(a) whether the evidence could have been obtained with reasonable diligence for use at the trial;

(b) whether evidence appears to be cogent and credible;

(c) whether the evidence would have an important influence on the outcome of the case — in other words, whether it is material; and

(d) whether admitting the evidence would require evidence from other parties in cross-examination.

[86] Ms Leota-Poipoi is a social media influencer and content creator. She has created a number of social media pages across Facebook, Instagram and Tik Tok, which is centred around her page "Memoirs of a Maori". In introducing her affidavit, Ms Leotat-Poipoi states:

> An important issue that arises for me, and I am sure other social media commentators or users, is whether, and to what extent, should the Harmful Digital Communications Act 2015 protect businesses from criticism or comment by social media users if their posts or content offends commercial or personal values.

[87] Ms Leota-Poipoi goes on to provide detail as to how social media influencers use social media platforms, such as Instagram, to market and advertise themselves or their businesses. In addition to this generic commentary, a section of Ms Leota-Poipoi's affidavit sets out her analysis and personal opinion of Ms Hooper and Ms Gee's presence on social media, how Ms Gee operates her Instagram accounts, how she perceives Ms Gee's digital communications, a commentary in relation to the Act, and the merits of the current proceedings.

[88] Mr Fernandez holds a Bachelor of Commerce majoring in marketing and a Post-Graduate Diploma in Communications Studies. He has worked in the field of marketing for over 10 years. Mr Fernandez gives evidence of how social media platforms such as Instagram are used, and how businesses can leverage these platforms to create online communities and develop their brand.

[89] Ms Hooper submits that the proposed evidence of both witnesses is highly relevant and seeks to inform the Court in relation to the broader context of social media, Instagram and the use of that platform by businesses for marketing purposes. Ms Hooper says that the need for such evidence directly arises as a result of the "clear lack of understanding on the part of the District Court as to the nature of social media, social media marketing and the relevant application here utilised by Magnolia Kitchen as an advertising platform".

[90] Ms Gee opposes the evidence being admitted on the appeal. Firstly, she says that the evidence is not fresh and could with reasonable diligence have been produced by Ms Hooper in the District Court proceeding. Further, Ms Gee challenges the expertise of both experts. She notes that Ms Leota-Poipoi appears to have no qualifications in respect of the topics she addresses, and that neither expert deposes that they have read and had regard to the code of conduct for expert witnesses set out in Schedule 4 of the High Court Rules 2016. Ms Gee is also critical of Ms Leota-Poipoi's affidavit which she says presents as advocacy for Ms Hooper.

[91] While acknowledging that Mr Fernandez holds certain qualifications, Ms Gee submits that he appears to have no qualification in respect of or experience with the Act, and notes that he appears to be a friend or former work colleague of Ms Hooper, thus calling into question his independence.

[92] At the appeal hearing, I conveyed to counsel that I did not consider Ms Leota-Poipoi's evidence ought to be admitted on the appeal. It is not fresh and nor do I find it particularly cogent. Parts of it are also in the form of advocacy which is more appropriately the domain of counsel's submissions.

[93] Notably, and ultimately determinative of the application to admit Ms Leota-Poipoi's affidavit, significant aspects of Ms Leota-Poipoi's affidavit copy, almost word for word, significant sections from Ms Hooper's own affidavit filed in the District Court proceeding. This gives rise to the concern that Ms Leota-Poipoi's affidavit, or large parts of it, have in fact been drafted by either Ms Hooper herself or her legal advisers, which is inappropriate and unpersuasive. On this ground alone, I

concluded that Ms Leota-Poipoi's affidavit did not meet the threshold for substantially helpful expert evidence, and accordingly declined to grant leave to admit it.

[94] Mr Fernandez's affidavit is more helpful. It provides a balanced overview of social media and its growth in recent years, including the various social media platforms now available. Mr Fernandez also discusses Instagram, explaining how it works, the various types of accounts that can be utilised and what it is used for. Mr Fernandez also provides an explanation of the various types of posts that can be made to Instagram, including posting, creating stories and reels. Mr Fernandez also addresses social media marketing, explaining how social media has become a powerful marketing platform through which people, brands and businesses can broadcast themselves to a worldwide audience. Mr Fernandez also addresses social media influencers and their place in the social media marketing environment.

[95] Mr Fernandez's evidence is also not fresh. I nevertheless accept that Mr Fernandez appears to have relevant qualifications and experience such that his expert opinion could be considered substantially helpful. As I communicated to counsel at the appeal hearing, I was likely to grant leave for Mr Fernandez's affidavit to be admitted on the appeal. Ultimately, I have found it helpful in explaining the broader context to social media and marketing through social media. Most if not all of it is uncontentious. It does not stray into areas of advocacy or areas on which I apprehend Mr Fernandez is not qualified.

[96] I accordingly grant leave for Ms Hooper to admit Mr Fernandez's affidavit on the appeal.

Approach on appeal

[97] The appeal is a general appeal. It proceeds by way of rehearing.[30] The approach to be taken on a general appeal was discussed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[31] The Court set out the following principles:

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30 High Court Rules 2016, r 20.18.

31 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

(a) The appellant bears the onus of satisfying the appellate Court that it should differ from the decision under appeal.

(b) It is only if the appellate Court considers that the appeal decision is wrong that it is justified in interfering with it.

(c) The appellate Court has the responsibility of arriving at its own assessment on the merits of the case.

(d) No deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because, for example, credibility is important.

(e) The appellate Court is entitled to use the reasons of the first instance decision maker to assist it in reaching its own conclusions, but the weight the Judge places on them is a matter for the Court.

The Act — legal principles

Legislative background

[98] I first outline the legislative background to the Act.

[99] The Act was passed first as a response to growing concerns about the incidence of cyberbullying amongst young people and secondly, as a result of a Law Commission project reviewing the adequacy of the regulation of media in the digital era.[32] The Act largely implemented the recommendations of a 2012 Ministerial briefing paper published by the Law Commission.[33] In this paper, the Commission

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[32] David Harvey and Rosemary Tobin *Media Law – A to Z of New Zealand Law* (online ed, Thomson Reuters) at [40.9.4]; and Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, August 2012) [Ministerial briefing paper] at [1]–[6]. The Law Commission's project began in 2010 and was expedited in 2012 in response to growing concerns about cyberbullying: Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, December 2011) [Issues Paper] at 3; and Ministerial briefing paper at [4].

[33] Harmful Digital Communications Bill 2013 (168-1) (explanatory note) at 1; and Ministerial briefing paper, above n 32.

highlighted the particular harms associated with digital communications in contrast with offline communications, stating:[34]

> The distinguishing feature of electronic communication is that it has the capacity to spread beyond the original sender and recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing.

[100] In concluding that the emotional harms that can arise from digital communications were of such a serious nature as to justify a legal response, the Commission stated:[35]

> For the first time in history individuals with access to basic technology can now publish, anonymously, and with apparent impunity, to a potentially mass audience. This facility to generate, manipulate and disseminate digital information – which can be accessed instantaneously and continuously – is producing types of abuse which simply have no precedent or equivalent in the pre-digital world. In other words, ordinary citizens, with no specialist expertise or technical assistance can, in effect, cause irreparable harm to one another's reputations and inflict enduring psychological and emotional damage.

[101] The Commission also highlighted the problem of "mob-like bullying" online, stating:[36]

> The viral nature of the internet and digital communication can magnify the impacts of bullying by creating potentially large "audiences" of bystanders and/or recruiting peers to participate in the bullying activity.

[102] While acknowledging that cyberbullying between adolescents was a key consideration in its inquiry, the Commission emphasised that the issue of harmful digital communications is "by no means confined" to young people, noting that Netsafe had reported that approximately half the people it assists with harmful digital communications are adults.[37]

[103] The Commission emphasised the need for speedy, efficient and relatively cheap remedies for those who had been harmed by digital communications,[38] a point

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34 Ministerial briefing paper, above n 32, at [5.51].
35 At [2.96] and see [1.35]–[1.36].
36 Ministerial briefing paper, above n 32, at [2.42(c)] and see [3.69].
37 At 2 and [2.15].
38 At [5.10]; and see Issues Paper, above n 32, at [8.44].

later highlighted by the Hon Amy Adams in her speech moving that the Harmful Digital Communications Bill (the Bill) be read a third time:[39]

> [The Law Commission's] findings confirmed concerns held by New Zealanders that efforts to remove abusive material from the internet under existing laws are often difficult, drawn out, and costly, and there are limited sanctions available to aid such efforts to hold offenders to account. So Parliament decided to act. This legislation tackles cyber-bullying head-on. It sends a clear message to cyber-bullies and puts on notice anyone wanting to use the internet to spread abhorrent abuse or material online.

Interaction with the New Zealand Bill of Rights 1990

[104] It is also helpful to briefly comment on the interaction between the Act and the right to freedom of expression as affirmed in s 14 of the New Zealand Bill of Rights 1990 (the Bill of Rights Act).

[105] Mr Mansfield QC, counsel for Ms Hooper, accepts that to the extent a breach of the communication principles in the Act is found, and orders are properly made in accordance with the Act, this represents a justifiable limit on the right to freedom of expression.

[106] Mr Mansfield was right to take this approach. The legislative history of the Act confirms that while the remedial measures under the Act constrain digital communications and so necessarily limit the right to freedom of expression, those limits are justified under s 5 of the Bill of Rights Act. As Crown Law stated in its advice to the Attorney-General, which concluded that the Bill was consistent with the Bill of Rights Act:[40]

> The two coercive mechanisms provided by the Bill – the making of orders by the District Court and the new and amended offence provisions – are both contingent upon the infliction or threat of some form of serious harm.
>
> There is broad acceptance that while it is not justifiable to limit expression simply because it causes offence, expression may be limited to the extent necessary to avoid or redress serious emotional or other harm or incitement of harm …
>
> …

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39 (25 June 2015) 706 NZPD 4831.

40 Crown Law *Harmful Digital Communications Bill: Advice to Attorney-General on the Harmful Digital Communications Bill* (1 November 2013) at [14]–[15] and [17].

> It follows that these limitations on expression appear justifiable under s 5 of the Bill of Rights Act.

[107] In addition, as noted by the Hon David Clendon in his speech on referral of the Bill to the Justice and Electoral Committee, the Act has taken a "belts and braces approach" to consistency with the Bill of Rights Act, with s 6(2) providing that:[41]

> (2) In performing functions or exercising powers under this Act, the Approved Agency and courts must—
>
> (a) take account of the communication principles; and
>
> (b) act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

[108] Similarly, s 19(6) of the Act provides that in making an order under s 19 (for example to take down material, or to cease or refrain from the conduct concerned), "the court must act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990".

[109] Given the above legislative history, which confirms that the Act represents a justified limit on freedom of expression, the statutory directive contained in ss 6 and 19 of the Act, and in light of the position taken by counsel in this case, I need take this point no further.

Relevant provisions of Act

[110] The Act seeks to deter, prevent and mitigate harm caused to individuals by digital communications; and provide victims of harmful digital communications with a quick and effective means of redress.[42] The Act establishes both civil and criminal regimes. Central to each is the term "harm", which, pursuant to s 4 of the Act, "means serious emotional distress".

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41 (24 March 2015) 704 NZPD 2550.

42 Harmful Digital Communications Act, s 3.

[111] Section 11 of the Act provides for certain persons to apply to the District Court for orders under ss 18 or 19 of the Act. It relevantly states:

> **11 Who may bring proceedings**
>
> (1) Any of the following may apply to the District Court for an order under section 18 or 19:
>
> (a) an individual (the **affected individual**) who alleges that he or she has suffered or will suffer harm as a result of a digital communication:
>
> …

[112] Section 12 of the Act sets out certain prerequisites before the District Court can consider making an order or orders under ss 18 or 19 of the Act, providing as follows:

> **12 Threshold for proceedings**
>
> (1) An applicant referred to in section 11(1)(a), (b), or (c) may not apply for an order under section 18 or 19 in respect of a digital communication unless the Approved Agency has first received a complaint about the communication and had a reasonable opportunity to assess the complaint and decide what action (if any) to take.
>
> (2) In any case, the District Court must not grant an application from an applicant referred to in section 11(1)(a), (b) or (c) for an order under section 18 or 19 unless it is satisfied that—
>
> (a) there has been a threatened serious breach, a serious breach, or a repeated breach of 1 or more communication principles; and
>
> (b) the breach has caused or is likely to cause harm to an individual.
>
> (3) The court may, on its own initiative, dismiss an application from an applicant referred to in section 11(1)(a), (b), or (c) without a hearing if it considers that the application is frivolous or vexatious, or for any other reason does not meet the threshold in subsection (2).
>
> (4) The court may, on its own initiative, dismiss an application under section 11 from the Police if satisfied that, having regard to all the circumstances of the case, the application should be dismissed.

[113] It will be apparent from the directive that the District Court "must not" grant an application made under s 11 unless there is a "serious" threatened or actual breach, or a "repeated" breach, of one or more of the communication principles, *and* that the breach has caused or likely to cause "serious emotional distress", that a high threshold is intended before the District Court can grant such an application.

[114] As evident from s 12, an application for an order pursuant to ss 18 or 19 of the Act centres on there being certain types of breaches of the Act's communication principles. Those communication principles are set out in s 6 of the Act and provide as follows:

> **6 Communication principles**
>
> (1) The communication principles are—
>
> *Principle 1*
>
> A digital communication should not disclose sensitive personal facts about an individual.
>
> *Principle 2*
>
> A digital communication should not be threatening, intimidating, or menacing.
>
> *Principle 3*
>
> A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual.
>
> *Principle 4*
>
> A digital communication should not be indecent or obscene.
>
> *Principle 5*
>
> A digital communication should not be used to harass an individual.
>
> *Principle 6*
>
> A digital communication should not make a false allegation.
>
> *Principle 7*
>
> A digital communication should not contain a matter that is published in breach of confidence.
>
> *Principle 8*
>
> A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual.
>
> *Principle 9*

> A digital communication should not incite or encourage an individual to commit suicide.
>
> *Principle 10*
>
> A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.
>
> (2) In performing functions or exercising powers under this Act, the Approved Agency and courts must—
>
> (a) take account of the communication principles; and
>
> (b) act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

[115] The communication principles employ straightforward and plain language which should be given its ordinary meaning. Indeed, there is no real dispute between the parties over the meaning of the principles in this case. It is worth noting, however, that in the context of principle 5, the Act contains no definition of "harass". As counsel for Ms Hooper notes, however, "harassment" is defined in s 3 of the Harassment Act 1997 as:

> [A] pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specific act to the other person at least on 2 separate occasions within a period of 12 months.

[116] I adopt a similar approach to the concept of "harass" in the Act.

[117] As noted, a further a pre-requisite to granting an application made under s 11 is that the relevant breach relied on has caused or is likely to cause "harm" to an individual. As also already mentioned, "harm" means "serious emotional distress". The Law Commission, in its Ministerial briefing paper, commented on how serious emotional distress might be established, and whether difficulties would arise in that regard. It said:[43]

> Proof of significant emotional distress may be thought to be problematic. *Usually it will be sufficiently demonstrated by the nature of the communication itself*: much of the material coming before the tribunal is likely to be of such a kind that it would clearly cause real distress to any reasonable person in the position of the applicant. This blended objective/subjective standard is reflected in the Harassment Act which requires, as a condition of making a

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[43] Ministerial Briefing Paper, above n 32, at [5.56] (emphasis added).

> restraining order, that the behaviour causes distress to the applicant, and is of such a kind that would it cause distress to a reasonable person in the applicant's particular circumstances. The Privacy Act requirement that an interference with privacy must cause damage including "significant humiliation, significant loss of dignity or significant injury to the feelings of the complainant" appears not to have been problematic.

[118] The concept of harm as defined in the Act was also the subject of comment by Downs J in *Police v B*.[44] The Judge made the following observations about the concept of harm (with which I respectfully agree):

(a) First, that the definition is exhaustive, and is concerned only with emotional rather than physical harm.

(b) Second, and again consistent with its legislative history, the Act eschews minor emotional distress. However, Downs J endorsed the District Court Judge's conclusion in that case that the Act does not equate harm with mental injury, nor requires the establishment of an identifiable psychological or psychiatric condition. That must be right in my view, given the plain and ordinary language by which "harm" is defined, which does not require any such matters to be established.

(c) Third, a determination of whether a breach has caused or is likely to cause harm as defined is part fact, part value judgment,[45] reinforced by what Downs J described as the somewhat elastic concept adopted by Parliament as part of the s 12 threshold.

(d) Fourth, in determining whether serious emotional distress has been or is likely to be caused, consideration should be given to obvious factors such as the nature of the emotional distress, its intensity, duration, manifestation and context, including whether a reasonable person in the complainant's position would have suffered serious emotional distress. This imports an objective element to the inquiry.

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44 *Police v B* [2017] NZHC 526, [2017] 3 NZLR 203.

45 The Judge compared this to the assessment of whether a complainant has sustained "really serious bodily harm" in the context of s 188 of the Crimes Act 1961, with reference to *R v Waters* [1979] 1 NZLR 375 (CA).

(e) Finally, Downs J expressed doubt as to whether the interpretation or application of the phrase "serious emotional distress" is helped by reference to dictionary or thesaurus definitions. I agree. The words are everyday terms, rather than unusual or unfamiliar concepts where reference to a dictionary or thesaurus may be of assistance.

[119] Section 22(2) is also relevant to the approach to "harm". While s 22 appears in that part of the Act dealing with offences, subs (2) provides that when determining whether a post would "cause harm", the court may take into account any factor it considers relevant, including:

(a) the extremity of the language used;

(b) the age and characteristics of the victim;

(c) whether the digital communication was anonymous;

(d) whether the digital communication was repeated;

(e) the extent of circulation of the digital communication;

(f) whether the digital communication is true or false; and

(g) the context in which the digital communication appeared.

[120] Given the concept of harm is defined in the same way for both civil and criminal proceedings, there is no reason why these factors would not also be of assistance when determining in a civil proceeding whether harm as required by s 12 has been established.

[121] Section 19 (and in particular, subs (5)) is also relevant to the present appeal. It is helpful to set out its contents in full:

19 Orders that may be made by court

(1) The District Court may, on an application, make 1 or more of the following orders against a defendant:

(a) an order to take down or disable material:

(b) an order that the defendant cease or refrain from the conduct concerned:

(c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual:

(d) an order that a correction be published:

(e) an order that a right of reply be given to the affected individual:

(f) an order that an apology be published.

…

(4) The court may also do 1 or more of the following:

(a) make a direction applying an order provided for in subsection (1) or (2) to other persons specified in the direction, if there is evidence that those others have been encouraged to engage in harmful digital communications towards the affected individual:

(b) make a declaration that a communication breaches a communication principle:

(c) order that the names of any specified parties be suppressed.

(5) In deciding whether or not to make an order, and the form of an order, the court must take into account the following:

(a) the content of the communication and the level of harm caused or likely to be caused by it:

(b) the purpose of the communicator, in particular whether the communication was intended to cause harm:

(c) the occasion, context, and subject matter of the communication:

(d) the extent to which the communication has spread beyond the original parties to the communication:

(e) the age and vulnerability of the affected individual:

(f) the truth or falsity of the statement:

(g) whether the communication is in the public interest:

(h) the conduct of the defendant, including any attempt by the defendant to minimise the harm caused:

(i) the conduct of the affected individual or complainant:

(j) the technical and operational practicalities, and the costs, of an order:

(k) the appropriate individual or other person who should be subject to the order.

(6) In doing anything under this section, the court must act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

[122] Again, there is no dispute about the interpretation of the statutory provision. I comment on the interaction between ss 12 and 19 of the Act later in this judgment.[46]

The parties' submissions

Ms Hooper's submissions

[123] Ms Hooper is highly critical of the District Court judgment, submitting that it is both deficient in terms of the extent of reasons given, and that the Judge erred in his approach to the legislation and the parties' respective posts.

[124] In terms of the Judge's reasoning, Ms Hooper submits that while the Judge referred to some of the relevant aspects of the legislation, he did so with little discussion or analysis of the relevant principles and how they applied to the posts in question. Rather, Ms Hooper submits that the Judge provided his decision by way of a series of general declarations, the result being it is unclear which particular online material he found breached which of the communication principles, and why. As a result of the suggested absence of proper reasons, Ms Hooper submits that this Court must approach Ms Gee's application afresh.

[125] Turning to the substance of the appeal, Ms Hooper first emphasises the parties' respective positions, including that Ms Gee is responsible for the Magnolia Kitchen account, which is a commercial account used as an advertising platform to promote the Magnolia Kitchen business. Ms Hooper argues that Ms Gee is a sophisticated user of social media and her posts, which are posted in a form for any member of the public to see, are posted with the intent of advertising and monetising her business. Ms Hooper says this is important context which was not taken into account, or sufficiently taken into account, by the Judge, particularly given the Act is not intended to silence or censor the unwanted criticism of the conduct of corporates.

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[46] See [153] to [155] below.

[126] Leading on from this first point, Ms Hooper says that Ms Gee does not have standing to bring an application under the Act and the Judge was wrong to conclude otherwise. Ms Hooper emphasises that her posts were all in relation to material on the Magnolia Kitchen account, owned and operated by a corporate as an advertising platform. Ms Hooper submits that the Judge's finding that the form of the particular account is not determinative misses the point, arguing that Ms Gee's posts are all advertising or promotion for the Magnolia Kitchen business, and that it is not Ms Gee who is being criticised but the conduct of her company. Ms Hooper says that if Ms Gee is found to have standing on the current application, "any number of individuals could bring a complaint on behalf of a company, if they felt harmed by any criticism." Ms Hooper further submits that the orders made by the Judge highlight the standing issue in this case, given those orders expressly extend to and protect "Magnolia Kitchen Limited" and "Magnolia Kitchen Boutique Limited".

[127] Ms Hooper next argues that in failing to analyse the posts complained of against the relevant legal principles, the Judge wrongly asked and answered the question whether Ms Hooper's communications were, as far as he was concerned, morally or socially justified. While accepting that such an approach may be appropriate when the allegation is that false posts are being made, Ms Hooper submits that even in this context, the Judge's assessment must be made against what the respondent knew at the time, rather than as against broader context information put before the Court and not available at the time of the posts. In this context, Ms Hooper submits that there is no evidence justifying a conclusion that she knowingly made false allegations, and any objective assessment of the Magnolia Kitchen posts establish that there was genuine justification for concern and criticism. Ms Hooper accordingly submits that the Judge was wrong to place reliance, as he clearly did, on Ms Gee's after-the-event explanations for the content of her posts.

[128] Ms Hooper also submits that the Judge wrongly took into account Ms Hooper's and others' complaints to Oranga Tamariki, which is not online conduct covered by the Act, but which Ms Hooper says clearly coloured the Judge's approach to the online material. Ms Hooper says that the Judge also failed to have regard to the role and conduct of Ms Gee in the online conduct "or in enticing a response" from Ms Hooper. Ms Hooper says in this context that the Judge failed to refer at all to Ms Gee's own

posts, and notes it was Ms Gee herself who posted publicly about the complaints to Oranga Tamariki.

[129] Turning to the posts themselves, Ms Hooper submits that her posts concerning the Magnolia Kitchen business continuing to operate during the level 4 lockdown were justified and indicative of wider views and opinions of many online viewers. She submits that the posts were not incorrect in the context of the information then available at the time, and simply reflected her own genuine opinion. Ms Hooper also says that her posts were no more inflammatory than any other types of posts to social media, accepting that while they do sometimes contain crude and vulgar language, such language and content, while "unpleasant for the elderly and conservative, is ordinary on social media platforms".

[130] In terms of the remaining posts, Ms Hooper submits that it is reasonable to suggest that Ms Gee was promoting her children consuming alcohol, and similarly a post showing one of her sons with a black eye, followed by another where his father could be heard saying "come over here or else you're going to be smacked in the face again" raised legitimate concerns of child abuse. She submits that there is nothing inappropriate for such matters to be the subject of concern and debate. Further and more broadly, Ms Hooper submits that it is entirely legitimate for her (and others) to criticise and express their genuinely held opinions on what she considers to be the unrestrained use of children by parents of "so-called social influencers or businesses in advertising online gain or to sell products."

[131] Finally, even if some of her online material sufficiently breached one or more of the communication principles, Ms Hooper submits that the evidence does not establish that Ms Gee suffered serious emotional distress, either at all, or as a result of Ms Hooper's online posts.

[132] Ms Hooper accepts that in some cases, the fact of serious emotional distress might be inferred from the very nature of the online content in question. But she submits that cannot be the case here. In such cases, Ms Hooper says that the sole claim of an applicant will rarely be sufficient. This is said to be particularly so when the applicant is, as in this case, a mature adult, running a business and experienced in

online social media. She submits that other than the post Ms Gee made in an (apparently) upset state, the manner in which Ms Gee portrays herself in all other videos or posts is not indicative of serious emotional distress, but "posting quite boldly and giving as good as she thought she was getting". Further, while serious emotional distress might be inferred from what a parent considers to be false complaints of child abuse made to Oranga Tamariki, Ms Hooper notes that any such serious emotional distress is a response to a complaint made to that agency, and *not* in response to online posts.

[133] Ms Hooper says the Judge was therefore wrong to rely on Ms Gee's emotional state in her post following being contacted by Oranga Tamariki. Ms Hooper further submits that Ms Gee's evidence of her GP's letters were insufficient to satisfy the Judge that Ms Gee suffered serious emotional distress, and indeed, undermine a finding to that effect. Ms Hooper submits that Ms Gee's approach to her GP in February 2021, on the same day she filed her reply affidavit, was clearly an attempt to [Redacted].

[134] Finally, even if this Court were minded to make orders pursuant to s 19 of the Act, Ms Hooper submits that those orders need to be framed in a more restricted way, consistent with the direction in s 19(6) of the Act that any steps taken by the Court under s 19 are to be consistent with the New Zealand Bill of Rights Act. Ms Hooper refers in this context to s 19(1)(b) of the Act, which requires any order to be directed to the "conduct concerned", meaning the conduct concerned needs to be properly defined. Ms Hooper submits an alternative approach if orders cannot be appropriately framed in a narrow or restricted way, is that the orders subsist for a defined period of time only. In this context, Ms Hooper submits that the Judge's orders were unduly broad and open-ended, and thus in breach of the directive contained in s 19(6) of the Act.

Ms Gee's submissions

[135] Ms Gee first submits that the District Court Judge's reasoning, while succinct, was adequate, noting that the Court of Appeal has acknowledged that reasons may be

abbreviated and that "in some cases they will be evident without express reference".[47] Against this backdrop, Ms Gee submits that the Judge's reasons for finding the posts in issue in this case to be in breach of the Act is sufficiently clear from the judgment as a whole, including an express finding of the relevant communication principles the Judge considered to be breached.

[136] In terms of standing, Ms Gee supports the District Court's conclusion that Ms Hooper's submissions on this point are sophistry. Ms Gee refers in this context to the Law Commission's observation in its Ministerial briefing paper that:[48]

> We conclude that the right to complain should be confined to natural persons. However an attack on a small business will often be read as an attack on the proprietor personally, in which case she or he would have standing to complain.

[137] Ms Gee also refers to the approach taken in *Tranter v Kemp*, in which various posts were directed to a small business, but held by this Court to also be directed at the principal of that business.[49]

[138] Ms Gee further submits that the application was not brought in the name of Magnolia Kitchen, but in her own name, and directed to material posted against her personally. She submits that many of the "human-like" qualities referred to in Ms Hooper's posts cannot be attributed to a company.

[139] Turning to the posts themselves, Ms Gee submits that they demonstrate that Ms Hooper "embarked on a crusade" against Ms Gee, commencing from her (uninformed) view as to Magnolia Kitchen operating unlawfully during the Level 4 lockdown. Ms Gee refers to Ms Hooper's posts concerning Magnolia Kitchen operating during the lockdown and submits that they go beyond mere criticism of a business "flouting" the lockdown rules, notwithstanding her position that Magnolia Kitchen's wholesale business was lawfully permitted to operate as an essential business during the lockdown. She submits the posts are deliberately insulting to her

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47 Referring to *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [81] and [83].
48 Ministerial briefing paper, above n 32, at [5.14].
49 *Tranter v Kemp* [2020] NZHC 1257 at [20] and [21].

personally, menacing and harassing in the ordinary sense of the words, and grossly offensive to a reasonable person in her position.

[140] Ms Gee submits that Ms Hooper then clearly then engaged in a "deep dive" of the Magnolia Kitchen account and copied and manipulated various items which Ms Gee had posted, and reposted them onto Ms Hooper's own accounts with overlaying text and emojis to portray that Ms Gee was abusing her own children. Ms Gee notes Ms Hooper's acceptance in cross-examination that she "abstracted the ones that were highly offensive and concerning". Ms Gee notes that Ms Hooper also accepted in cross-examination that in some cases she received material about Ms Gee from her followers, which she then posted to her own account without checking the full context of the material (such as viewing the full video from which the screenshot had been taken). Ms Gee refers in this regard to Ms Hooper's post of Ms Gee's son in the background of a video of Ms Gee making hot cross buns, where her son is holding a beer bottle. Ms Hooper posted that screenshot as an example of Ms Gee abusing her son by letting him drink alcohol, whereas the video makes clear that her son is simply taking the empty bottle to the kitchen rubbish bin for his father. Ms Gee submits that this approach supports the Judge's finding that Ms Hooper had been "very irresponsible" in the manner in which she has posted.

[141] More broadly, Ms Gee submits that Ms Hooper's posts about her were false, menacing and harassing, and is supportive of the Judge's conclusion that Ms Hooper engaged in "what can mildly be described as a determined and continuing campaign of denigration against the applicant, that went far beyond simply expressing opinions".

[142] Ms Gee accordingly submits that the Judge was right to conclude that Ms Hooper's posts had breached communication principles 2, 3, 5, 6 and 8.

[143] In terms of demonstrating serious emotional distress, Ms Gee says that there is no basis in the legislation or the authorities for the proposition that in cases where the requisite degree of harm cannot be inferred from the nature of the material in question, something more than the evidence of an applicant is required. Ms Gee also disputes Ms Hooper's submission that given the draconian nature of the orders that can be made under s 19, actual medical evidence that establishes the required serious emotional

distress should be required. Ms Gee submits that the approach suggested by Ms Hooper would be to impose "an abnormally heavy burden of proof on an applicant" and would make relief under the Act inaccessible to victims of harmful communications. Ms Gee endorses Downs J's finding in *Police v B* that an assessment of harm requires a Judge to make a part value, part fact determination on the evidence.

[144] Ms Gee refers to her evidence given before the District Court as to her emotional distress as a result of the campaign against her, and [Redacted]. Ms Gee notes that she was not cross-examined at all in respect of the harm she said she had suffered, Ms Hooper being under a duty to cross-examine if she was to challenge Ms Gee's evidence in that regard. Ms Gee finally submits that any reasonable person in her position would suffer serious emotional distress:

> … not only as a result of the appellant's harmful digital communications but also at the thought of a stranger sharing pictures of one's young children on an Instagram account to convey unfounded allegations of child abuse.

Analysis

Introduction

[145] It is important to emphasise that it is not this Court's function to rule on or descend into the debate of whether Ms Hooper was right to be critical of aspects of Ms Gee's online posts. So, for example, it is not necessary nor appropriate for me to express a view on the "rights or wrongs" of parents letting their children have a small amount of alcohol; whether Ms Gee's interactions with her children were or were not inappropriate; or whether using her children in posts to the Magnolia Kitchen account is a form of abuse or at the least, inappropriate. I accept that it is part and parcel of the right of freedom of expression for persons to debate and comment on such matters, including through social media. I further accept that this is particularly so when the debate and comment is in response to material deliberately and actively posted online to the public at large, in the context of promotion of a business. As Simon France J observed in (somewhat) similar circumstances in *Tranter v Palmer*:[50]

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[50] At [24] (emphasis added). I say "somewhat" as Mr Tranter had been the user of the Palmers' business's services, and his online critique stemmed from his dissatisfaction as a result. Here, Ms Hooper is not a dissatisfied customer of Magnolia Kitchen.

> Any business and any individual involved in a business must accept that there may be criticism, *valid or otherwise as they see it*, and that that right to freedom of expression allows aggrieved persons to publish those grievances. Sometimes those publications will be objectively disproportionate without justifying intervention of the type sought here.

[146] I accordingly accept Ms Hooper's submission that the Judge erred in placing significant weight on what he considered to be the "right or wrongs" (my words, not the Judge's or Ms Hooper's) of Ms Hooper's concerns and critiques. I also accept that the Judge erred in placing too much emphasis on the further context given by Ms Gee for some of her posts in her evidence and further materials produced at the hearing, some of which was not available to Ms Hooper at the relevant times.

[147] I also accept that in today's social media environment, it is unsurprising that some "critique" or "debate" will be in what some might consider to be vulgar and offensive terms. That is evident from the majority of the posts that are the subject of this proceeding. But I also take into account that social media can be and often is an abusive and vicious form of communication. The courts have commented on the disturbing and damaging nature of social media in other contexts where it intersects with the law, such as in relation to the principle of open justice and the law of suppression. In *X v R*, for example, and while recognising the importance of open justice, the Court of Appeal observed that there can be no reasonable expectation that reportage on social media will be fair or accurate, no realistic way of controlling its content or spread, and that it is a communication forum in which persons (and young persons in particular) are vulnerable to trolling, doxing and internet vigilantism.[51] The Court further noted that the statutory principles concerning suppression (drafted some years ago) did not give consideration to the "universality and toxicity of social media's current form", and the even more recent phenomenon of "cancel" or "call-out" culture, in which "social media is weaponised against those deemed to have transgressed the norms of any online group (or mob)".[52] Jagose J made similar observations more recently in *R v AB,* taking judicial notice of "the present vindictive social media climate".[53]

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51 *X (CA226/20) v R* [2020] NZCA 387 at [51].
52 *X (CA226/20) v R*, above n 51.
53 *R v AB* [2022] NZHC 1339 at [31].

[148] I mention these matters because the fact that certain posts might be just as vulgar or offensive as much of other social media posting does not itself provide an answer to, and indeed obscures, the real issue in this case. That is, whether the manner in which Ms Hooper has gone about her online critique of Ms Gee has crossed the line from critique and debate in a modern social media environment to harmful digital communications.

Does Ms Gee have standing?

[149] Turning now to the issues arising on the appeal, I deal first with the question of standing.

[150] It is plain in my view that Ms Gee had standing to make an application. It is correct that the content to which Ms Hooper was responding was posted by Ms Gee on the Magnolia Kitchen corporate Instagram account. It is also true that some of Ms Hooper's posts concerned Magnolia Kitchen more generally. It is equally true that the purpose of much of this posting by Ms Gee was to promote the Magnolia Kitchen business. However, it would be entirely artificial to suggest that Ms Hooper's posts did not also concern and critique Ms Gee *personally*, rather than the Magnolia Kitchen corporate entity.

[151] Ms Hooper's own evidence (referred to at the outset of this judgment) of seeing the need to "take on" Ms Gee (or "this woman") makes that abundantly clear. So too does her evidence that Ms Gee's initial posts during lockdown "alerted me to *this woman*, and her constant unwavering crude responses to people asking very reasonable questions" (emphasis added). The content of Ms Hooper's posts is also consistent with Ms Gee having standing. For example, the posts are replete with images (including zoomed close-ups) of Ms Gee. They are also replete with commentary suggesting certain attributes in relation to Ms Gee personally, including that she is a psychopath; commenting on Ms Gee's post about cutting her own fringe; commenting on Ms Gee's hospital visit; a post showing a zoomed in image of Ms Gee's face stating "or just stop being evil"; comments that Ms Gee is feeding her young children alcohol; a range of comments suggesting that Ms Gee is abusing her children (together with the associated complaint to Oranga Tamariki); that Ms Gee is

a narcissist; that Ms Gee is a "righteous asshole" (for approaching the media about online bullying); referring in posts to "Bernadette" and "Bets"; commenting on what Ms Hooper considers to be Ms Gee's "deranged sense of self-importance" and use of her platform "to exploit her children and now, feed her ravenous ego"; posts that "these people" (being a reference to Ms Gee and her husband) are still exploiting their children; and references to "Dear friend Magnolia Kitchen, crying, blubbering away" following the second Oranga Tamariki investigation. These are not qualities that can be attributed to a company. It is also plain that posts made by other Instagram users, including Ms Hooper's followers, were clearly targeting Ms Gee personally, rather than Magnolia Kitchen as a corporate entity.

[152] In these circumstances, it defies common sense to suggest that it is solely Magnolia Kitchen that is the subject of the posts. The Judge was right to conclude that Ms Gee had standing.

The interaction between ss 12 and 19 of the Act

[153] I next address a preliminary point in relation to the interaction between ss 12 and 19 of the Act.

[154] Section 12 is headed "Threshold for proceedings". As noted earlier, this provides that the District Court "must not" grant an application made under s 11 unless is it satisfied of those matters at subs 2. Section 19(5) provides that when deciding whether or not to make an order under s 19, or when determining the form of any order, the Court must take into account various listed factors.[54]

[155] I do not read the Act as requiring the Court to take into account the factors referred to in s 19(5) when considering whether the threshold for granting an application has been met for the purposes of s 12. Rather, s 12 is an evaluative exercise to determine whether the evidence demonstrates that the requisite threshold for orders has been met. If it has been, the task then becomes an exercise by the Court of a discretion, namely *whether* to make an order under s 19 and if so, in *what form*. It is

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[54] Replicated at [121] above.

in that context that the Court is required to take into account the factors listed in s 19(5).

Communication principle 6 – knowledge required?

[156] I make one further preliminary point. In terms of communication principle 6, I do not accept Ms Hooper's submission that there can only be a breach of this principle where the person making the communication knows that the allegation being made is false. If communication principle 6 was directed to *knowingly* making false allegations, it would have plainly have said so. Further, I note that one of the factors to be taken into account pursuant to s 19(5) of the Act is the purpose of the communicator, and in particular, whether the communicator was intending to cause harm. Knowingly making a false allegation might be readily viewed as intending to cause harm. Accordingly, knowledge that the relevant allegation is false is a factor to be taken into account pursuant to s 19(5), and is not a pre-requisite for a breach of communication principle 6.

Did Ms Hooper's posts breach the communication principles?

[157] Turning now to the posts themselves, I put aside those posts concerning the Magnolia Kitchen business operating in the Level 4 lockdown. I consider it was not unreasonable or inappropriate for persons, including Ms Hooper, to question whether businesses were permitted to operate in the lockdown. The Judge rightly accepted that also. The nature of Ms Hooper's posts in this regard were in parts vulgar and offensive. But had Ms Gee's application been limited to those posts, I would not have ordered relief under the Act. Irrespective of whether those posts breached any of the communication principles in the requisite way, I would not have found Ms Gee suffered serious emotional distress as a result. I accept that she would have been upset and annoyed, but her own posts at the time demonstrate a confident business woman responding to the posts and essentially "giving as good as she got".

[158] I consider Ms Hooper's subsequent posts concerning Ms Gee, her personal attributes and parenting skills to be in a different category, however. In a case of this kind, involving a multitude of different posts over a number of months, it is difficult (and somewhat artificial) to isolate out individual posts and measure them against

specific communication principles. Instead, rather than any one or more of the individual posts amounting to a serious breach of the communication principles, the series of Ms Hooper's posts amounted in my view to repeated breaches of the communication principles, and in particular, principles 3 and 5. As noted, I accept that it is legitimate and reasonable to engage in public debate about those aspects of Ms Gee's posts that Ms Hooper was either concerned about or did not agree with. Ms Gee is a prolific user of social media, and must be prepared for both those who like her content and those who do not. I also agree that if Ms Hooper was concerned about child abuse, it was her right make a complaint to Oranga Tamariki. Any form of suspected child abuse ought to be put in the hands of the authorities to determine if any such abuse exists. But the submissions made on Ms Hooper's behalf, and her evidence, refer to the right to "debate" such matters. Such debate need not of course be in a formal sense, and can be in the informal and sometimes crude manner seen in social media. But publicly and repeatedly posting about an individual and describing them as, for example, a narcissist, a psychopath, a righteous arsehole, evil, a greedy fucking cunt, a failed mother, likening Ms Gee to an "entitled, deranged and panicked narcissist", and stating or insinuating she is an emotional and, potentially, physical abuser of her children, is not debate or critique, but personal attack. This is particularly so in the context of what Ms Hooper must have been aware was a developing and equally nasty, if not worse, campaign of conduct against Ms Gee by Ms Hooper's followers and others. I accordingly consider Ms Hooper's series of posts to be grossly offensive to a reasonable person in Ms Gee's position (principle 3) and used to harass Ms Gee (principle 5), and that these principles have been breached on multiple occasions.

[159] In the context of the posts being used to harass Ms Gee, I also take into account that Ms Hooper's shaming of Ms Gee continued well past Ms Hooper's initial concern about what she considered to be child abuse (in terms of giving young children alcohol) and reporting her concern to Oranga Tamariki. Ms Hooper accepted in cross-examination that she continued her own posts after that point because Ms Gee's own posts continued. I take from this evidence that Ms Hooper considered that she was entitled to continue to post in the manner she did about Ms Gee, so long as Ms Gee kept posting in the same manner as she did; as Ms Hooper said in her evidence in chief, "if Ms Gee did not like the community response to her posts, she should refrain

from doing so". The irony is that Ms Hooper's approach effectively seeks to undermine Ms Gee's exercising the very right which Ms Hooper seeks to protect in these proceedings, namely the right of freedom of expression.

[160] Given my findings in relation to repeated breaches of communication principles 3 and 5, I have not found it necessary to reach any concluded views about breaches of other communication principles, and in particular, principles 6 (making a false allegation) and 8 (inciting others to send messages to an individual for the purpose of causing harm to that individual). All I need say is that to the extent Ms Hooper's posts intimated that Ms Gee physically abused her children (or permitted them to be physically abused), then the evidence demonstrates that is a false accusation, and such an assertion was repeated.[55] I would have been unlikely to have concluded that principle 8 was breached. While I have no doubt that many of Ms Hooper's followers' posts came about because of and in the context of Ms Hooper's own posts, that is a different proposition to Ms Hooper inciting or encouraging others to direct posts to Ms Gee "*for the purpose of* causing harm to [Ms Gee]" (emphasis added). That attributes a degree of intentional conduct on Ms Hooper's part which is not clearly established on the evidence. Rather than her purpose being for others to cause harm (as defined) to Ms Gee, to the extent Ms Hooper incited or encouraged others (rather than those others "jumping on the bandwagon" of their own volition), her purpose was to "call out" Ms Gee for what she considered to be Ms Gee's unacceptable conduct.

[161] Whether or not posts or a series of posts on social media cross the line from critique and debate into harmful digital communications will often be difficult to determine. There is no "bright line" between what is an appropriate exercise of the right of freedom of expression and what amounts to conduct governed by the Act. This judgment accordingly cannot and does not form the basis of any such bright line. Self-evidentially, every case will turn on its own facts, and will reflect the particular content, nature of and surrounding context to the communications in issue.

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[55] Ms Hooper's views on the use of children in the Magnolia Kitchen posts, and that Ms Gee on occasion allowed her children a small amount of alcohol, and that those matters amounted to "abuse", is more a matter of opinion rather than making a false allegation.

Was serious emotional distress established?

[162] I turn now to whether the Judge was right to conclude that Ms Gee suffered harm as a result of Ms Hooper's posts. Unlike the Judge, I put little weight on distress resulting from the Oranga Tamariki investigations. While those investigations were conducted in the context of the online posting, the undoubted serious distress that Ms Gee suffered as a result was not caused by the posts themselves. To put the point another way, Ms Gee would have undoubtedly experienced serious emotional distress from being notified by Oranga Tamariki of an investigation into whether she was abusing her children irrespective of Ms Hooper's posts. Ms Hooper making a complaint to Oranga Tamariki and the resulting investigation is not conduct covered by the scope of the Act.

[163] I am satisfied, however, that Ms Gee did suffer serious emotional distress as a result of the combined effect of Ms Hooper's posts. Establishing serious emotional distress is obviously not as simple as proving objective facts, or medical or mental conditions which can be subject to expert diagnosis. The Law Commission's observations recorded at [117] above reflect this. I reject the submission made on Ms Hooper's behalf that medical evidence of harm is required in a case such as this. I also reject that because, on occasion, Ms Gee "gave as good as she got" means she did not suffer harm; many people put on a brave (or strong) face in public. Ms Gee gave evidence of the distress she suffered, and it was open to the Judge who saw and heard her give evidence to accept her evidence on that point. Ms Gee was not cross-examined directly on the distress, or the extent of distress, that she suffered. The letters from her GP do not add materially to the picture in my view. Plainly there were many stressors acting on Ms Gee at the relevant time. What is most important in my view, is the content and sustained nature of the posts themselves. Public attacks in the form noted at [151] above, and in particular, repeated allegations that a mother is emotionally and potentially physically abusing her children, will inevitably give rise to serious emotional distress.

[164] Cross-checking this conclusion against the factors listed in s 22(2) of the Act does not alter the outcome. Plainly Ms Gee is an adult and well-versed in social media. The extremity of the language used by Ms Hooper is probably language that Ms Gee

would not ordinarily be upset by, but is to be viewed in the context of being deployed against her in a highly personal and public way. The digital communications were not anonymous. They were repeated (in type and broad content) over a sustained period of time and were widely circulated, drawing in more, and sometimes more extreme, posts against Ms Gee. The context in which the posts were made, namely in response to marketing conduct which Ms Hooper deemed unacceptable, does not negate serious emotional distress.

Should orders under s 19 of the Act have been made?

[165] The threshold for orders being made under s 19 having been met, I turn next to whether the Judge was right to have exercised his discretion to make orders in relation to Ms Hooper's posts, and if so, the form of the orders.

[166] In my view, the Judge was right to make orders pursuant to s 19. Many of the matters discussed earlier apply equally to this inquiry, taking into account those mandatory factors listed in s 19(5) of the Act. The content of many of the posts was gratuitously abusive and nasty, and I have found that collectively, they gave rise to serious emotional distress (though noting that was of a mature adult, not a young vulnerable teenager or child) (factor (a)). I have already discussed the broader context to the posts, Ms Hooper's purpose in posting in the way she did, and that as a matter of principle, there was nothing wrong with Ms Hooper expressing her opinion on the manner in which Ms Gee posted in the context of her Magnolia Kitchen business (factors (b) and (c)).

[167] The communications obviously spread widely and involved a large number of other Instagram users (factor (d)), as Ms Hooper was no doubt aware. As already noted, Ms Gee is an adult, experience in social media. She is accordingly not especially vulnerable (factor (e)). Aspects of Ms Hooper's posts, or what was insinuated by her posts, were false (factor (f)). A debate about the manner and content of social media advertising can be said to be in the public interest. But personal and abusive attacks on an individual are not (factor (g)). And once a complaint had been made to Oranga Tamariki and thus matters were in the hands of the appropriate

authorities, continued personal and public abuse of Ms Gee about her interactions with her children was not in the public interest (factor (g)).

[168] It seems Ms Hooper did not take any particular steps to verify or check if any screen shots she was sent were taken out of context, or ensure appropriate context was provided to any screen shots or grabs she made herself, before "annotating" and reposting them (factor (h)), particularly as she would have been aware of the vitriol from others that was being generated in the wake of her posts. In terms of Ms Gee's conduct (factor (i)), I accept that some aspects of the posts she made to the Magnolia Kitchen account were open to debate and critique. As note earlier, those who choose to post details of all aspects of their lives on public social media, particularly in the context of marketing a business, must expect and put up with others' views on such posts, good and bad. But again, that does not licence the extent of personal abuse seen in this case. I do not consider factors (j) and (k) to be relevant.

In what form should orders have been made?

[169] Having concluded that the Judge was right to make orders pursuant to s 19, I turn to the form of the orders. I accept Ms Hooper's submission that the orders in this case were framed in an overly broad manner. Consistent with the obligation on the Court to act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act, any orders ought to be framed as narrowly as is appropriate to respond to the conduct concerned, which in turn, requires consideration of what the "conduct concerned" is (for the purposes of s 19(1)(b) of the Act).

[170] An example of the High Court making tailored or narrowed orders is those orders made by Simon France J in *Tranter v Kemp*.[56] It seems that the District Court had made orders prohibiting Mr Tranter from posting content relating to Ms Kemp and her business more generally. [57] On appeal, Simon France J narrowed those orders to prohibiting Mr Tranter from publishing comment on the underlying dispute between the parties, and not to encourage anyone else to engage in similar conduct and communications about Ms Kemp or her partner. While the orders were not directed

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56 *Tranter v Kemp*, above n 49.
57 *Kemp v Tranter* [2019] NZDC 25308.

to Ms Palmer's business itself, Simon France J nevertheless observed that "attacks on the business by Mr Tranter or someone he has encouraged are very likely to be seen as attacks on Ms Kemp".[58]

[171] Given only an individual has standing, the orders in this case ought to have been limited to Ms Gee, rather than also expressly including Magnolia Kitchen and its associate brand. Given the broad ranging nature of the posts against Ms Gee, I do not consider it appropriate or indeed possible to tailor the orders to certain type of comment or posting. For example, the posting went well beyond commenting on Ms Gee's interactions with her children. It is vital that any orders made under s 19 are clear in their scope. For example, if the order was framed as "not posting anything which involves a personal attack on Ms Gee", there may simply be further debate and argument as to whether any future posts by Ms Hooper about Ms Gee do or do not involve a "personal attack" (rather than valid critique or debate).

[172] I accordingly conclude that an order ought to be made that Ms Hooper is not to post to any social media platforms about Ms Gee (or encourages any other person to do so). I consider this does not unnecessarily infringe on Ms Hooper's rights pursuant to the Bill of Rights Act. There is no reason why Ms Hooper will need or want to post about Ms Gee in particular going forward. Ms Hooper's own evidence was that she did not have "any personal grievances towards [Ms Gee]" and that "[Ms Gee] is not a lucky one person".[59] But given the scope of this order, I consider it ought to be time bound rather than open ended as the District Court orders were. The order will therefore lapse on 1 August 2023, approximately one year from the date of this judgment. I would hope that by that time the inevitable "heat" and/or emotion from these proceedings will have receded, and both Ms Hooper and Ms Gee will have been able to move on to more productive aspects of their lives.

Result and costs

[173] The appeal is allowed in part. The orders made in the District Court pursuant to s 19 of the Act are quashed. There is instead an order that Ms Hooper is not to post

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58 *Tranter v Kemp*, above n 49, at [26].

59 Ms Hooper also confirmed in response to a question from the Judge that she did not want to continue with online postings about Ms Gee or her companies.

to any social media platform about Ms Gee, or to encourage any other person to do so. That order will lapse on 1 August 2023.

[174] The appeal is otherwise dismissed.

[175] The parties are encouraged to agree costs. I make the following preliminary and non-binding observations. It was not unreasonable for Ms Hooper to appeal against the District Court judgment. I have found that the Judge erred in some respects. I have also made a more tailored and time-bound order pursuant to s 19 of the Act. Nevertheless, the substance of Ms Gee's complaint under the Act has been upheld. In these circumstances, an appropriate outcome may be for costs of the appeal to lie where they fall.

[176] If despite these observations, the parties cannot agree costs, any party seeking costs may file a memorandum within 15 working days of the date of this judgment, and the other party may respond within a further five working days. No memorandum is to be longer than five pages in length (excluding any schedules). Unless I need to hear further from the parties, I will thereafter determine costs on the papers.

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Fitzgerald J

Addendum:

Paragraphs [46], [67], [133] and [144] of this judgment contain redactions. I make an order prohibiting publication of the unredacted version of this judgment.