DISTRICT COURT OF QUEENSLAND

CITATION:	*D.G. Certifiers Pty Ltd & Another v Hawksworth* [2018] QDC 88
PARTIES:	**D.G. CERTIFIERS PTY LTD** (first plaintiff) and **DARRYL ANTONY GREEN** (second plaintiff) v **STEVEN GEORGE HAWKSWORTH** (defendant)
FILE NO/S:	3749 of 2015
DIVISION:	Civil
PROCEEDING:	Trial
DELIVERED ON:	17 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	8 - 10, 21 and 23 November 2017
JUDGE:	Rosengren DCJ
ORDER:	**1. The plaintiffs' claims are dismissed.**
CATCHWORDS:	DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – REFERENCE TO PLAINTIFF – IDENTIFICATION – where the defendant posted reviews pertaining to both plaintiffs on various review websites – where the second plaintiff was not named in full in any of the reviews published – whether second plaintiff sufficiently identifiable DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – PARTICULAR STATEMENTS – IMPUTATION – PLEADINGS – whether the imputations alleged by the plaintiffs made out – whether imputations defamatory DEFAMATION – DEFENCES – COMMON LAW – QUALIFIED PRIVILEGE – where the defendant pleaded the defence of qualified privilege at common law - where the reviews were published online – where the plaintiffs' argued that the publication of the reviews was motivated by express

malice – whether the reviews were published to the world at large - whether publication occurred on a privileged occasion – whether community of interest – whether defendant motivated by express malice

DEFAMATION – DEFENCES – STATUTORY – QUALIFIED PRIVILEGE - where the defendant pleaded the defence of statutory qualified privilege – whether the defendant's conduct in publishing the reviews was reasonable in all the circumstances

DEFAMATION – DEFENCES – STATUTORY – HONEST OPINION – where the defendant pleaded the defence of honest opinion – whether an ordinary, reasonable reader would consider the reviews to be statements of opinion – whether the reviews addressed a matter of public interest – whether views honestly held

DEFAMATION – DEFENCES – TRIVIALITY – where the defendant sought to rely on the defence of triviality – whether defendant discharged onus to show that the plaintiffs were unlikely to suffer harm from the publications

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – GRAPEVINE EFFECT – where the plaintiffs sought to rely on the grapevine effect in the assessment of damages – where reviews were posted online – whether readers of the reviews were likely to tell other people about them

DEFAMATION – DAMAGES - AGGRAVATED DAMAGES – ASSESSMENT – where the plaintiffs claimed aggravated damages – defendant's conduct of litigation – lack of apology – publication for improper purpose - whether plaintiffs entitled to aggravated damages

Defamation Act 2005 (Qld) ss 9(1), 9(2)(b), 30, 31, 33, 34, 39
Uniform Civil Procedure Rules 1999 r 149(1)(e), r 150(1)(k)
Gardener v Nationwide News Pty Limited [2007] NSWCA 10, cited
Steele v Mirror Newspapers [1974] 2 NSWLR 348, cited
McManus v Beckham [2002] 1 WLR 2932, cited
Kilpatrick v Vam Staveren [2003] QCA 303, cited
Queensland Newspapers Propriety Limited v Palmer [2012] 2 Qd R 139, cited
Woolcott v Seeger [2010] WASC 19, cited
Lewis v Daily Telegraph [1964] AC 234, cited
Chapman v Australian Broadcasting Corporation (2000) 77 SASR 181, cited
Amalgamated Television Services Pty Limited v Marsden (1998) 43 NSWLR 158, cited
Favell v Queensland Newspapers Pty Ltd (2005) 221 ALR

186, cited
Watney v Kencian & Anor [2017] QCA 116, cited
Nationwide News Pty Ltd v Warton [2002] NSWCA 377, cited
Hallam v Ross [2012] QSC 274, cited
Higgins & Ors v Sinclair [2011] NSWSC 163, cited
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460, cited
John Fairfax Publications Pty Ltd v Rivkin (2003) 201 ALR 77, cited
Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632, cited
Haddon v Forsyth [2011] NSWSC 123, cited
Stephens v West Australian Newspapers Ltd (1994) CLR 211, cited
Papaconstumtinos v Holmes a Court (2012) 249 CLR 534, cited
Adam v Ward [1917] AC 309, cited
Howe McColough v Lees (1910) 11 CLR 361, cited
Australian Broadcasting Corporation v Comalco Ltd (1986) 12 FCR 510, cited
Telegraph Newspaper Co Ltd v Bedford (1934) 50 CLR 632, cited
Guise v Kouvelis (1947) 74 CLR 102, cited
Baird v Wallace James (1916) 85 LJPC 193, cited
Watt v Longdon [1930] 1 KB, cited
Horrocks v Lowe [1975] AC 135, cited
Roberts v Bass (2002) 212 CLR 1, cited
Calwell v Ipec Australia Ltd (1975) 135 CLR 321, cited
Channel Seven Adelaide Pty Ltd v Manock (2007) 232 CLR 245, cited
London Artists Ltd v Littler [1969] 2 All ER 193, cited
Bellino v Australian Broadcasting Corporation (1996) CLR 183, cited
McEloney v Massey [2015] WADC 126, cited
Broadway Approvals Ltd v Odhams Press Ltd (No 2) [1965] 1 WLR 805, cited
Smith –v- Lucht [2016] QCA 267, cited
Jones -v- Sutton (2004) 61 NSWLR 614, cited
Cerutti and Another v Crestside Proprietary Limited and Another [2016] 1 Qd R 89, cited
Feo v Pioneer Concrete (Vic) Pty Ltd [1999] VSVA 83, cited
Kay v Chesser [1999] VSCA 83, cited
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44, cited
Clark v Ainsworth (1996) 40 NSWLR 463, cited
Powell v Gelston [1916] 2 KB 615, cited

Broome v Cassel & Co Ltd [1972] AC 1027, cited
Roberts v Prendergast [2014] 1 Qd R 357, cited
Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388, cited
Allen v Lloyd-Jones (No 6) [2014] NSWDC 40, cited
Steel v Mirror Newspapers Ltd [1974] 2 NSWLR 348, cited
Zaia v Eshow [2017] NSWSC 1540, cited
Graham v Powell (No 4) [2014] NSWSC 1319, cited
Hallam v Ross [2012] QSC 407, cited

COUNSEL: A Newman for the plaintiffs
The defendant appeared on his own behalf

SOLICITORS: Goldsmiths Lawyers for the plaintiffs
The defendant appeared on his own behalf

[1] The first plaintiff is owned and operated by the second plaintiff. He is the sole director and principal of the first plaintiff and is an accredited building surveyor and a licensed building certifier. The first plaintiff's business is one of building certification, inspections and approvals. It has been in operation for some 12 years. The defendant was a client who engaged the first plaintiff to perform some certification services for him in relation to a residential block of land at Narangba.

[2] The claim by the plaintiffs is primarily for compensatory damages in the amount of $150,000, and aggravated damages in the amount of $30,000, for defamation. These damages are claimed in relation to three reviews written by the defendant which first appeared on four different websites on 6 August 2015. The plaintiffs also seek a permanent injunction restraining the defendant from making further defamatory allegations.

[3] The defendant denies that each review conveyed the meanings alleged by the plaintiffs and that any such meanings were defamatory. He also denies the reviews identified the second plaintiff. In addition, he pleads a number of defences, namely the common law and statutory defences of qualified privilege and the statutory defence of honest opinion. He also appears to rely on the defence of triviality.

[4] The trial was by judge alone. It proceeded before me on 8, 9, 10, 21 and 23 November 2017. The defendant had legal representation until 17 October 2017, but was not represented at the hearing and appeared in person. The second plaintiff and his supporting witnesses gave evidence, as did the defendant.

First plaintiff's cause of action

[5] In the defence, the defendant challenged the right of the first plaintiff as a corporation to bring the proceedings. Under s 9(1) of the *Defamation Act* 2005

(Qld) *('*the Act'), a corporation is prohibited from bringing proceedings. However, subsection 2 provides an exception in relation to an 'excluded corporation'. This is defined as covering two classes of corporations which are not public bodies. It is contended for on behalf of the first plaintiff that it is an excluded corporation under s 9(2)(b) of the Act, in circumstances where it employs fewer than 10 persons and is not related to another corporation. The unchallenged evidence of the second plaintiff conclusively established this and I find the first plaintiff is entitled to bring the proceedings.

Uncontentious background facts

[6] In December 2013, the defendant contacted the first plaintiff with the view to engaging their certification services in relation to building a two storey house on a vacant block of land that he owned at 76-88 Maine Street, Narangba ('the vacant block'). The original plans for the two storey house were changed to incorporate a three car garage. This change in the plans resulted in an increase in the number of required inspections from two to three and a price increase of $250. The fee estimate for the services to be provided by the first plaintiff was $3,164.[1]

[7] By an Engagement Agreement dated 18 March 2014, the defendant engaged the first plaintiff to perform the certification services in relation to the revised plan and paid an upfront fee in accordance with the fee estimate.[2] This comprised lump sum figures for completing and lodging energy efficiency and plumbing applications, and obtaining a development approval. It also included a number of itemised disbursements. Incorporated in the lump sum fee for the development approval, were the three inspections.

[8] The second plaintiff attended to the matters necessary to obtain an energy efficiency assessment and report and a plumbing compliance permit. In relation to the development approval, on 21 May 2015, the Moreton Bay Regional Council ('the Council') advised the second plaintiff that a code assessable application would need to be lodged in light of "overlays" affecting the vacant block and that it could take a couple of weeks to process it. The defendant agreed to engage the second plaintiff's business to undertake the necessary work in relation to this additional application and paid the second plaintiff's business an additional upfront fee of $480, plus GST. The application was lodged with the Council on 31 May 2014.

[9] A few weeks later, the second plaintiff was informed by the Council that the defendant had cancelled his bin services to the vacant block and this had triggered the need for a material change of use application to be lodged and processed. The

[1] Exhibit 4.
[2] Exhibit 6.

second plaintiff completed and lodged this further application on behalf of the defendant at no cost to the defendant. It was approved on 22 July 2014.

[10] The first plaintiff's office manager, Debbie Yarrow, emailed the defendant on 13 August 2014 to inform him that the second plaintiff had completed the assessment process and issued the building approval. This enabled the defendant to commence construction on the vacant block. The three inspections which had been incorporated in the development approval lump sum fee, were to be undertaken by the second plaintiff at various stages after construction commenced.

[11] In late 2014, the defendant learnt that there had been changes to the town planning laws with the consequence that town houses could be built on land in the vicinity of his vacant block. He decided that he no longer wanted to build a two storey house where there was the potential for it to be surrounded by town houses.

[12] There were no further communications between the parties for some five months, until 6 January 2015. On this date the defendant forwarded an email to the first plaintiff, addressed to Ms Yarrow. The defendant informed her that he was no longer looking at building the two storey house on the vacant block. He enquired as to whether he could just build the first floor of the approved plan or alternatively, look at a new demountable plan. The defendant was informed by Ms Yarrow that both of these options would require a new building approval and may trigger the need for an amended development approval.

[13] In early March 2015, the defendant again emailed Ms Yarrow. He told her that he had purchased a relocatable home to put on the vacant block and that he had engaged a draftsperson to draw the plans and an engineer to advise on the necessary structures. The following day, he enquired as to whether any unused portion of the $3,164 in fees that he had paid could be put towards the new approval. Ms Yarrow responded in an email dated 11 March 2015, which included the following:

> "*The only unused portion of fees are for the three inspections not yet performed which we [sic] at a very reduced rate for you, as your property is only minutes of [sic]our office. Usually, we do not refund any fees, as all are absorbed in administration, disengagement lodgement to Council etc. However, we would be happy to transfer those inspection fees over to the new approval for yo*u."[3]

[14] The second plaintiff followed this email up with a further email confirming that the defendant would be required to go through a new building approval process which would involve lodging another development application. The defendant

[3] Exhibit 23.

responded informing the second plaintiff that he had attended a pre-lodgement meeting and had been informed that all that would be required would be an amendment to the existing approval which had been obtained for him by the second plaintiff. In his email in reply, in reiterating the need for a new building approval, the second plaintiff commenced his email in the following way:

> "*Thanks so much for your email.*
>
> *After I pick myself up off the floor from laughing so much. The b/s you have been told is a classic. ...*"[4]

[15] The builder engaged by the defendant in relation to the relocatable home contacted the first plaintiff and requested that a quotation be provided for the provision of their certification services. The quotation referred to the three inspections but noted that they had already been paid for by the defendant. The plaintiffs did not hear anything further in relation to the relocatable home.

[16] A few months later, the second plaintiff was driving past the vacant block and observed the relocatable house. By email to the defendant dated 12 June 2015, the second plaintiff indicated that it was apparent that he was not proceeding with the building approval. Enclosed with the letter was a Form 22 Notice of Discontinuance of Engagement. The defendant responded by requesting details of the amount refundable for work not done, which he considered was at least the costs associated with the three inspections.[5] A few weeks later the defendant forwarded an email to the second plaintiff accusing him of trying to cause the defendant issues with the Council. In evidence, the second plaintiff denied having done this and I accept his evidence in this regard. The defendant stated in the email that if he was not refunded the money owing to him for work not completed, being the three inspections, that he would report the plaintiffs to '*Fair Trading Australia and if necessary issue a claim through QCAT to [sic] including costs*".[6]

[17] By email dated 29 June 2015, Ms Yarrow explained to the defendant that a certifier has a discretion whether to refund any money and that a refund would not be provided to him. This is because he had not been charged for additional attendances by the second plaintiff when dealing with the Council regarding the material change of use application.[7]

[18] On the same date, the defendant lodged a complaint with the Queensland Office of Fair Trading ('the OFT'). He explained that his contract for certification services had been cancelled due to the defendant's decision to alter his plans for his vacant block. The substance of the complaint was that the second plaintiff

---

[4] Exhibit 23.
[5] Exhibit 26.
[6] Exhibit 27.
[7] Exhibit 31.

had not carried out the three inspections that he had paid for, on the basis that they were no longer required. The defendant was seeking a refund of $750, on the basis that each inspection would have cost $250.

[19] On 27 July 2015, the OFT advised the defendant that the enquiry into his complaint did not provide sufficient evidence to substantiate a breach of legislation administered by the OFT, for which enforcement action could be taken. He was advised that he could consider lodging a claim in QCAT or alternatively, seek independent legal advice about the options available to him.[8]

[20] Around this time, the first plaintiff had entered into an advertising package with Sensis Pty Ltd. The products purchased included Yellow Pages On Line ('YPOL'), TrueLocal and Sensis Network. There was an arrangement whereby Yelp could republish a user's comments on its website to another website, including YPOL. The websites invited clients of the first plaintiff to write reviews to help others by sharing their experiences with the plaintiffs. The reviews could be responded to by the plaintiffs.

[21] On 6 August 2015, the defendant's reviews were uploaded by the defendant to the Yelp, TrueLocal and Service Seeking websites. The review on the Yelp website was republished on the YPOL website.

[22] Ms Yarrow first became aware of the defendant's reviews on the YPOL, True Local and Service Seeking websites on 9 August 2015. She brought them to the second plaintiff's attention. She became aware of the defendant's review on the Yelp website approximately one week later and similarly directed the second plaintiff's attention to it. Ms Yarrow made attempts to have the defendant's reviews removed from the YPOL and TrueLocal websites. She did not make a request for the defendant's review to be removed from the Service Seeking website. Her evidence as to the reason for this, was that she was focussed on having the defendant's other reviews removed from the other websites.

[23] On 10 August 2015, the plaintiffs wrote to the defendant stating the reviews were defamatory and requiring their removal and an apology by the following day. These suggested steps were not taken and on 26 August 2015, the defendant was served with a Concerns Notices pursuant to the Act. By email dated 9 October 2015, the then solicitors for the defendant informed the plaintiffs that there would be no offer to make amends and that the defendant would defend any defamation proceedings. This was on the basis that even if there were defamatory imputations in the reviews, the common law defences of qualified privilege and fair comment and the statutory defence of honest opinion were available to the defendant.

[8] Exhibit 54.

[24] The defendant made attempts to remove the TrueLocal review in October 2015. He could not recall when he requested the Yelp review to be removed. The last occasion Ms Yarrow saw the Yelp and TrueLocal online reviews was in early October 2015. The last occasion she saw the YPOL review online was in December 2015. The Service Seeking review was removed at the request of the defendant on 8 June 2016. His then solicitor recommended to him that it be removed.

[25] These proceedings were commenced by the filing of the Claim and Statement of Claim on 24 September 2015. Amendments to the pleadings of both sides have been made. The defendant relies on his Defence to the Amended Statement of Claim filed 12 July 2016. At the time this pleading was filed, the defendant was legally represented. On 26 May 2017, the plaintiffs filed a Second Further Amended Statement of Claim. No defence was filed in response to that pleading and therefore the defendant continues to rely on his defence filed on 12 July 2016. The plaintiffs were given leave to file an Amended Reply at the commencement of the trial on 8 November 2017.

Reviews and alleged imputations

[26] The four reviews complained of are reproduced in Schedules A-D of the Second Further Amended Statement of Claim. They were all published on 6 August 2015. The reviews in Schedule A and D are identical. The review appeared on both the YPOL and Yelp websites. It was initially posted on the Yelp website, and then was reposted on the YPOL website.[9] The second review appeared on the True Local website, and the third review appeared on the Service Seeking website.

[27] It is not in dispute that the defendant was the author of each of the reviews and that he uploaded them onto the Yelp, True Local and Service Seeking websites.

[28] There is a significant degree of overlap and similarity between the language and content of the imputations in the various reviews.

Yelp and YPOL reviews

[29] As explained above, these two reviews are identical and read as follows:

> *"this outfit are a nightmare. they are rude and obnoxious if you do not agree with Daryl. they also will not refund any money even for work they do not do. The council refund when an application is cancelled but not DG. they still have $750 of my money for 3 site visits they never did. Use another certifier, give these a miss, you will regret it if you use them!!!*"[10]

[9] Exhibit 48.
[10] Exhibit 39.

[30] The alleged imputations in relation to each plaintiff are:

First Plaintiff	**Second Plaintiff**
The first plaintiff, as a provider of building certification services:	The second plaintiff, as the principal of a business providing building certification services:
A. Is rude.	A. Is rude.
B. Is obnoxious.	B. Is obnoxious.
C. Wrongly refuses to refund money when it properly should.	C. Wrongly refuses to refund money when it properly should.
D. Rips off clients.	D. Rips off clients.
E. Charges fees for their services without being entitled to those fees.	E. Charges fees for services without being entitled to those fees.
F. Is so bad that it should not be retained.	F. That it is so bad, it should not be retained to provide building certification services.

TrueLocal review

[31] This review reads as follows:

> "*0.5/5 These make everything a nightmare, they blame the council for their delays. If Daryl disagrees with you is very rude and demeaning. If you cancel them they keep your money even for work they never did. DO NOT TOUCH THIS COMPANY. I am still waiting for a refund due of $750 which they refuse to issue. The council have refunded their part but not DG.*"[11]

[32] The alleged imputations in relation to each plaintiff are:

First plaintiff	**Second plaintiff**
The first plaintiff, as a provider of building certification services:	The second plaintiff, as the principal of a business providing building certification services:

[11] Exhibit 38.

A. Creates major problems for its clients.	A. Creates major problems for clients of the business.
B. Blames the Council for its own inadequacies.	B. Blames others for any inadequacies of the business.
C. Wrongly retains its clients' money.	C. Wrongly retains money properly belonging to clients of the business.
D. Is so bad that it should not be retained.	D. That it is so bad that it should not be retained to provide building certification services.
E. Wrongly refuses to refund money to clients when it properly should.	E. Wrongly refuses to refund money to clients of the business when it properly should.

Service Seeking review

[33] This review reads as follows:

> *"This company delay everything and blame the council. If you disagree with Daryl he will be rude and send unprofessional emails with comments like "Ha, ha that makes me laugh the typical council'."*[12]

[34] The alleged imputations in relation to each plaintiff are:

First plaintiff	**Second plaintiff**
The first plaintiff, as a provider of building certification services:	The second plaintiff, as the principal of a business providing building certification services:
A. Blames others for its own inadequacies.	A. Blames the Council for any inadequacies of the business.
B. Is guilty of delaying all of its clients' work.	B. Is rude.
	C. Is unprofessional.

[12] Exhibit 40.

The defendant's credibility

[35] The plaintiffs invite the court to draw adverse inferences as to the defendant's credit as a witness. A basis for this is that he maintains that he did not publish a comment about the plaintiffs on a website called 'Start Local' on 6 August 2015. I am not persuaded that the defendant's evidence on this matter necessarily calls into question his credibility.

[36] The comment appears to have been authored by the defendant. However, I am not satisfied that he uploaded it to this site. A similar situation may have occurred with this review, as occurred with the review on the YPOL website, namely that the defendant did not in fact post it on the Start Local website, but rather it was reposted from another website. Further, even if the defendant did upload the comment on the Start Local website, the fact that he cannot recall doing so is perhaps understandable. There are a few reasons for this. First, he published at least three other reviews on that date. Second, even though the plaintiffs refer to this comment and attach a copy of it to their correspondence dated 10 August 2015, the quality of the copy is such that I have been unable to read it. There is no evidence that the quality of the copy provided to the defendant was any clearer. Third, this is the only occasion prior to the cross-examination of the defendant, that the plaintiffs made reference to this website, in circumstances where they have subsequently pursued the litigation in relation to four unrelated websites. Fourth, at the time the defendant was cross-examined about this, he was being asked to recall events that had occurred some two and a quarter years earlier.

[37] While I would not accept that everything said to me by the defendant was entirely accurate, as would be the case with the vast majority of factual witnesses who come before the courts, in general I thought his evidence was reliable. Where I state something as a fact below, I accept the evidence of the defendant that supports that fact.

The defendant's evidence

[38] The plaintiffs correctly submit that the defendant's pleadings do not raise truth or justification as a defence. However, the accuracy or otherwise of the contents of the reviews is relevant to understanding the circumstances surrounding the publications and the interest, if any, of the readers of the reviews. It is also relevant to the contentions by the plaintiffs to the effect that the defendant was motivated by malice or that he did not honestly hold the opinions he expressed in the reviews. Further, these matters are relevant to the question of damages.

[39] There was much focus in the cross-examination of the defendant to the reference to the $750 in each of the reviews. The defendant explained that this amount reflected the three inspections which had not been performed by the second plaintiff, but had been incorporated into the fees which he had paid to the first plaintiff.

[40] The second plaintiff gave evidence that when allowing for these inspections in the fee estimates provided to potential clients, the figure attributed to them would depend on the travel time involved and the time it would take to carry out the inspection. He explained that because there was minimal travel time involved given that the defendant's vacant block was only a short drive from his offices, he would have allowed approximately $75 for each of the three inspections. No specific sum was itemised for these inspections in the fee estimate or in any other document forwarded to the defendant.

[41] The defendant's evidence was that he had assumed he was being charged $250 per inspection. The reason for this is that there was a price increase of $250 between the original and subsequent fee estimates provided to him by the second plaintiff. He understood that this increase reflected the additional inspection that was required, on account of the change in the plans to add a three car garage. His assumptions in this regard, were understandable in the circumstances.

[42] In an answer to an interrogatory, the defendant said that prior to authoring the reviews on the Yelp and TrueLocal websites, he was aware of the reason given by the second plaintiff for not having refunded the $750. This was that the only unused portion of the fees were for three inspections which had not yet been performed and which had been allowed for at a reduced rate on account of the close proximity between the office of the second plaintiff's business and the subject block of land. Further, it was not normal practice to refund fees to clients.

[43] Although it was the position of the plaintiffs that it was in their discretion as to whether to refund money to the defendant for work not undertaken, the defendant remained of the view that he was entitled to have the $750 refunded to him.[13] This was as a matter of principle. Further, in an email from Ms Yarrow dated 11 March 2015, she stated *'We would be happy to transfer those inspections over to your new approval.*[14] The defendant thought this meant that the money relating to the outstanding inspections would be transferred to any new approval he applied for, irrespective of whether the plaintiffs were involved with the approval process.[15] His views in this regard were somewhat reinforced when he was advised by the OFT that he could consider lodging a claim in QCAT or

[13] Transcript, p.3-44, ln 43-47.
[14] Transcript, p.3-43, ln 9-39.
[15] Transcript, p.3-44, ln 1-11.

alternatively, seek independent legal advice about the options available to him for recovering the $750.[16]

[44] There is references in both the TrueLocal and Service Seeking reviews regarding the plaintiffs blaming the Council for delays in the approval process. The defendant gave evidence that on 19 November 2014, he attended a meeting with two representatives from the Council to explore other building options for his vacant block. His evidence was that one of the representatives told him at the meeting that his application, which had been lodged by the second plaintiff on his behalf, had been processed within three to four weeks. The defendant inferred from this that the plaintiffs had misled him in earlier correspondence in attributing blame for delays to the Council.[17] The earlier correspondence was an email from the defendant to Ms Yarrow dated 23 June 2014, in which he states:

> *"Is there any news on our approval.*
>
> *I would like Daryl to provide a weekly update as this does seem to be taking a very long time to deal with. I think we originally were told 2-3 weeks.*
>
> *The land already had approval for a single dwelling CaTA. and [sic] we are building in the same place as the previous house."*[18]

[45] Ms Yarrow responded to this email a few hours later. It included an email from the second plaintiff that had been forwarded to the defendant on the previous day which explained the delays. It included the fact that the Council was still insisting on material change of use documents. Ms Yarrow agreed that it had taken some time to get the approval progressed.[19]

[46] In the various reviews, there are references to the plaintiffs being rude, obnoxious and demeaning if there was a disagreement with him. The defendant's evidence was that he was intending to convey that the plaintiffs did not provide any customer service.[20] His views in this regard arose out of two emails from the second plaintiff. One of these is dated 11 March 2015, and was forwarded to the defendant at 7.48 am. It was after the defendant had informed the second plaintiff that he was considering replacing the two storey house with a relocatable home. In the email, the second plaintiff expressed his disappointment that the defendant had '*decided to go down this trac*k'. The defendant's evidence was that he felt that this was an obnoxious and demeaning comment and he took it to mean that the second plaintiff was inferring that he was pursuing the '*cheap*' solution.[21] The

---

[16] Transcript, p.4-5, ln 20-23.
[17] Transcript, p. 3-39; p.3-49, ln 32-46.
[18] Exhibit 12.
[19] Exhibit 12.
[20] Transcript, p.3-46, ln 1-25.
[21] Transcript, p.3-42, ln 23-39.

second email he considered demonstrated such conduct was the one forwarded to him approximately two and a half hours later where the second plaintiff stated '*After I pick myself up off the floor from laughing so much. The b/s you have been told is a classic. ...*".[22] Perhaps not surprisingly, he considered this email to be unprofessional. He also considered the contents of it to be obnoxious, demeaning and rude.

[47] The defendant's evidence was that he did not seek to have the reviews removed earlier as he considered their contents to be true and that it was an '*attack on free speech*' to require a review to be removed simply on the basis that it contained information which reflected negatively on the plaintiffs.[23]

[48] It is common ground that the defendant has not provided an apology. He said the reason for this is that the reviews simply expressed his honest opinion as to his experience with the customer service provided by the plaintiffs and that he has nothing to apologise for.[24] He categorically denied the suggestion put to him in cross-examination that he wrote and uploaded the reviews to deliberately punish the plaintiffs or as an act of revenge. [25] He explained that he did not end up making a claim through QCAT as suggested in the letter from the OFT dated 27 July 2015. This is because he subsequently phoned the OFT and was told by the person who took his call, that making such a claim could cost more than the $750 he was seeking to have refunded from the plaintiffs. His motivation for making the reviews was to protect other potential customers from a having a similar experience with the plaintiffs, to that which he had encountered.[26] He hoped his reviews might prompt the plaintiffs to provide better customer service to other clients.[27]

Was the second plaintiff identifiable

[49] For the reviews to be actionable, both plaintiffs must be identified. There is no issue of identification in relation to the first plaintiff. The second plaintiff is not named in full. The question becomes whether he has discharged his onus of proof in establishing that he is identifiable to the readers of the reviews, by the reference to '*Darryl*' in each of the reviews. The court needs to be satisfied that such identification is reasonable in the circumstances.[28]

[50] It is the second plaintiff's case that certain readers of the reviews had knowledge of extrinsic facts that would enable them to identify him. These extrinsic facts are that he was the sole director and principal of the first plaintiff and was the

---

[22] Transcript, p.4-24, ln 23-32, Exhibit 23.
[23] Transcript, p.3-55, ln 3-21.
[24] Transcript, p.3-52, ln 30-44.
[25] Transcript, p.3-54, ln 18-27.
[26] Transcript, p.3-54, ln 11-16; p.4-6, ln 43-47.
[27] Transcript, p.3-55, ln 33-45.
[28] *Gardener v Nationwide News Pty Limited* [2007] NSWCA 10 at [43]-[46].

only person employed by or working for the first plaintiff with the name 'Darryl'. I am satisfied that an ordinary, reasonable person with knowledge of those extrinsic facts, would have reasonably understood each of the reviews to refer to the second plaintiff.

[51] There is direct evidence from Mr Dunn and Mr Nielson that they read all four reviews, and evidence from Mr Clignet that he read the YPOL and Service Seeking reviews. They all identified the second plaintiff in these reviews. While this evidence is not determinative of whether the ordinary, reasonable reader, with knowledge of those extrinsic facts would have identified the second plaintiff, it can be relevant as to how the ordinary, reasonable reader would have reacted to the matter.[29] I am satisfied that as a matter of law, the ordinary, reasonable reader, with knowledge of those extrinsic facts, could reasonably have identified the second plaintiff. I am also satisfied that it is reasonable in the circumstances for readers to have identified the second plaintiff as the person referred to in each of the reviews. Further, the second plaintiff's full name appeared on the TrueLocal website. It also appeared in other reviews above the defendant's review on the Service Seeking website.[30]

Republication of the Yelp review on YPOL

[52] It is the case of the plaintiffs that even though the defendant did not upload the review to the YPOL website, that he is liable for it, to the extent that it contains defamatory material. I find in favour of the plaintiffs with respect to this issue.

[53] At common law, any republication of defamatory material is itself a publication. There are a number of categories of case where an original publisher will be held liable for republication of defamatory matter. One such category is where the original publisher authorised the republication. Another category is where the third party's republication was the probable and natural consequence of the original publisher's initial publication of the defamatory material.[31]

[54] Both of these categories of case are relevant here. The defendant accepts that he uploaded the subject review to the Yelp website. In order to upload the review on the website, the defendant was required to create a user account and agree to terms of service. This gave Yelp extraordinarily broad powers to use the content published by a user on the website. These powers included the right to republish a user's comments on another website.[32] It was against this background that the defendant's review which he uploaded onto the Yelp website, was reposted on the YPOL website.[33]

---

[29] *Steele v Mirror Newspapers* [1974] 2 NSWLR 348 at 365 per Hutley J.
[30] Exhibits 38, 40.
[31] *McManus v Beckham* [2002] 1 WLR 2932 per Waller LJ; *Kilpatrick v Vam Staveren* [2003] QCA 303.
[32] Exhibit 49.
[33] Exhibit 49.

[55] I note the defendant's evidence that at the time of uploading this review to the Yelp website he did not consider the possibility that it would be likely to be produced on any other website.[34] However, it might reasonably have been expected that it could have received wider dissemination. This is because technological advances have been such that reviews are by their nature susceptible to being republished.

Proven imputations

[56] The plaintiffs carry the burden of proof as to the alleged imputations as set out in the tables above and whether they have been defamatory.

[57] It is a question of law as to whether each of the reviews are capable of bearing the imputations pleaded by the plaintiffs to the ordinary, reasonable reader.[35] It is then a question of fact as to whether the imputations are conveyed by the reviews to the ordinary, reasonable reader.

[58] The defamatory meaning need not be conveyed directly by the words themselves. It can arise from inferences drawn or by implication which is reasonably capable of arising from the words published.[36] It is ultimately a matter of impression.[37] Given the requirement to apply the reasonableness test, the intention of the defendant is not relevant.[38]

[59] The ordinary, reasonable reader is a person of unvarying attributes. They are said to be of fair average intelligence, fair-minded, not overly suspicious, not *'avid for scandal'*, not searching for forced meanings and not naïve. One approaches the interpretation of the subject publication in an objective and fair manner.[39] It involves a consideration of the publication as a whole, including the forum and context in which it is published and the mode or manner of the publication.[40]

[60] The plaintiffs have pleaded the imputations in general terms. A determination of whether statements about a particular incident, for example one involving untruthfulness, is capable of supporting a general imputation to the effect that a plaintiff is generally untruthful, is dependent on a careful analysis of the specific circumstances including the wording of the statements.[41] The subject websites allowed for and in fact invited clients of the plaintiffs to write reviews about their experiences with the plaintiffs. They were clearly forums allowing clients of the

---

[34] Exhibit 53.
[35] *Queensland Newspapers Propriety Limited v Palmer* [2012] 2 Qd R 139 at 19; see also *Woolcott v Seeger* [2010] WASC 19 at [10].
[36] *Mirror Newspapers Ltd v World Hosts Pty Ltd* [1979] 141 CLR 632 at 641 per Mason and Jacobs JJ.
[37] *Lewis v Daily Telegraph* [1964] AC 234 at 260 per Lord Reid.
[38] *Chapman v Australian Broadcasting Corporation* (2000) 77 SASR 181 at 189 per Lander J.
[39] *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at 165; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 [23]-[26].
[40] *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 at [17]; *Amalgamated Television Services Pty Limited* at 165; *Watney v Kencian & Anor* [2017] QCA 116.
[41] *Nationwide News Pty Ltd v Warton* [2002] NSWCA 377 at 56.

first plaintiff to provide to other potential clients their accounts of their respective personal experiences of aspects of the services provided by the plaintiffs. By virtue of these matters, I consider the contents of the defendant's reviews regarding his experiences with the plaintiffs, are not capable of supporting the more general imputations pleaded.

YPOL and Yelp reviews

[61] I am not persuaded that the pleaded imputations in A and B with respect to both plaintiffs are made out. The imputations are that they are rude and obnoxious generally. However, I consider that any ordinary reasonable reader would have understood from the reviews that the circumstances in which the plaintiffs would be rude and obnoxious were limited to where there was a disagreement with the second plaintiff.

[62] In relation to the pleaded imputations in C, I am not satisfied that an ordinary person in the general community would have implied from the reviews that the plaintiffs wrongly refuse to refund money when they properly should. The use of the word 'wrongly' implies that it is conduct contrary to a legal obligation. The review does not state or imply that the plaintiffs were legally obliged to refund the money. Rather, it states that the plaintiffs will not refund money for work which is not undertaken. In these circumstances, I consider the imputation goes too far.

[63] The pleaded imputations in D are not made out. This is because according to the Oxford English Dictionary, the expression '*rips off clients*' relevantly implies an element of fraud or intention in charging someone more than the service was worth. An ordinary reasonable reader would not have implied this from the contents of the reviews.

[64] I am also not satisfied that the pleaded imputations in E are made out. The defendant's complaint is not about the plaintiffs charging fees without being entitled to those fees. It is more about the retaining of fees paid for work that was ultimately not undertaken. Further, reference to the word '*entitled*' implies a legal right to charge, which an ordinary reasonable reader would not have understood to be the case from reading the reviews.

[65] The pleaded imputations in F are made out. The defendant states that '*this outfit are a nightmare'* and *'use another certifier, give these a miss, you will regret it if you use them!!!'*

TrueLocal review

[66] I consider the pleaded imputation in A is not made out. This is because while there is the statement that the plaintiffs '*make everything a nightmare*', the

defendant then goes on to limit his concerns to them blaming Council for their delays, refusing to refund money and being rude and demeaning.

[67] The pleaded imputations in paragraph B are made out. Any ordinary, reasonable reader would have realised that the defendant's complaint in this regard was limited to the plaintiffs blaming the Council for their own delays. In short, the imputations go too far.

[68] In relation to the pleaded imputations in C and E, I am not satisfied that an ordinary person in the general community would have implied from the reviews that the plaintiffs wrongly refuse to refund money when they properly should, or that they wrongly retain their clients' money. The use of the word 'wrongly' implies that it is conduct contrary to a legal obligation. The review does not state or imply that the plaintiffs were legally obliged to refund the money. Rather, it states that the plaintiffs will not refund money for work which is not undertaken. In these circumstances, I consider the imputations go too far.

[69] In my view, the pleaded imputations in D are made out, given that the review states '*DO NOT TOUCH THIS COMPANY*'.

Service Seeking review

[70] I am not persuaded the pleaded imputations in A are made out. This is because the references to *'blames others'* and *'own inadequacies'* are general and ambiguous. Rather, I consider an ordinary, reasonable reader would have implied from the statements made, that when the plaintiffs are responsible for a delay, they do not accept responsibility for it and instead blame the Council.

[71] The pleaded imputation in B with respect to the first plaintiff is made out. Support for this can be found in the statement '*the company delay everything*'.

[72] I am not persuaded that the pleaded imputation in B with respect to the second plaintiff is made out. The imputation is that he is rude generally. However, I consider that any ordinary reasonable reader would have understood from the reviews that the circumstances in which the second plaintiff would be rude was limited to where there was a disagreement with him.

[73] In my view, the pleaded imputations in C with respect to the second plaintiff go too far and are not made out. An ordinary reasonable person in the community would have understood from the reviews that the second plaintiff's unprofessionalism was in the context of his email communications.

Whether each proven imputation is defamatory

[74] Defamatory matter is not defined in the Act and therefore the common law test applies. Material which has a tendency to lower a plaintiff's reputation in the

estimation of right-thinking members of the community is defamatory.[42] The reputation of a person means the esteem in which they are held in respect of their personal qualities. It also obviously encompasses their professional qualities, competence or dealings.[43] The reasonableness test once again applies in determining whether the imputations are in fact defamatory of a plaintiff. [44] It is the broad impression conveyed by the publication as a whole which must be considered.[45]

[75] I am satisfied that each of the proven imputations are defamatory in that they would have a tendency to lower the plaintiffs' reputations in the estimation of right-thinking members of the community.

Defences

[76] The defendant relies on the common law defence of qualified privilege and the statutory defences under the Act of qualified privilege, honest opinion and triviality.

Common law qualified privilege

[77] The defence will be successfully made out if the defendant can establish that the publication of defamatory matter occurred on a privileged occasion, where the defendant had a duty or interest in publishing, and the recipients had a corresponding interest in receiving the matter.[46] This is frequently referred to as a reciprocity of interest. Having said this, a 'community of interest' has been considered to be a more accurate phrase as it does not suggest as necessary, a perfect correspondence of interest.[47]

[78] The mutuality of interest of duty, whether it be legal, social or moral, is essential.[48] It must be capable of being identified and refers to an interest in the subject matter relevant to the communication.[49] It does not arise simply because the defendant is desirous of publishing matter that recipients will or may be interested in. It is necessary for the recipient to have a particular interest that the law will recognise.[50] Gossip, news or other information which is purely of interest or of curiosity is not sufficient. The interest must be something tangible in form, such as a real and direct business, trade, social or personal concern which

---

[42] *Hallam v Ross* [2012] QSC 274; *Higgins & Ors v Sinclair* [2011] NSWSC 163.
[43] *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.
[44] *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77.
[45] *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632.
[46] *Haddon v Forsyth* [2011] NSWSC 123 at [298]; *Stephens v West Australian Newspapers Ltd* (1994) CLR 211 at 250 per Brennan J.
[47] *Papaconstumtinos v Holmes a Court* (2012) 249 CLR 534 at [8] per French CJ, Crennan, Kiefel and Bell JJ.
[48] *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson.
[49] *Howe v McColough v Lees* (1910) 11 CKR 361 at 377.
[50] *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510 at 541 per Smithers J.

would assist in the making of an important decision or determine a particular course of action.[51]

[79] The defendant's subjective belief of a duty or interest is not relevant if it does not in fact exist. The objective test is whether the occasion was one where a person who desired to do his or her duty to a neighbour, would reasonably believe that he or she ought to make that publication.[52]

[80] The relevant circumstances in determining whether an occasion is privileged, include by whom it was published, the circumstances in which it was published and to whom it was published.[53] Excessive or extreme language may preclude the finding of a privileged occasion.

[81] The plaintiffs contend that the necessary element of reciprocity of interest does not exist. This is because the reviews were placed on the internet, and therefore to all intents and purposes, published to the world at large. [54] While I accept that many internet publications can be categorised in this way, I am not persuaded that the facts of this particular case, including the forum and other circumstances in which the reviews were published, lead to this conclusion. The reasons for this are detailed below.

[82] The evidence establishes that in relation the YPOL listing, which remained online until December 2015, people clicked on it to find reviews about the first plaintiff on 62 occasions in August 2015. It is not known how many of these occurred prior to the defendant's review appearing on the website. There were a further 17 occasions in September 2015, 41 occasions in October 2015 and there is no evidence in relation to November 2015. There were seven occasions in December 2015 and it is not known how many of these occurred prior to the review being removed.[55] These numbers do not prove that the defendant's review was read on each of these occasions or that each time the listing was clicked on, that it was by a person who had not previously seen the review. Indeed, it was Ms Yarrow's evidence that once she became aware of the reviews, she frequently checked all of the websites to ascertain whether the respective reviews had been removed.[56] The second plaintiff also went onto the websites to read the reviews. Further, while the review was on the Service Seeking website for some 10 months, the reviews were only on the Yelp and TrueLocal websites for some two months, and on the YPOL website for some four months.

[83] Unlike a talk back radio broadcast, newspaper article, or an online restaurant review to the public at large, the defendant chose the recipients of his reviews.

---

[51] *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 662.
[52] *Guise v Kouvelis* (1947) 74 CLR 102 at 114.
[53] *Baird v Wallace James* (1916) 85 LJPC 193 per Earl Loreburn.
[54] Amended Reply, paragraph 4N; Plaintiffs' written submissions, paragraph 130.
[55] Exhibit 51.
[56] Transcript, p.3-3 ln 20-25; p.3-4, ln 9.

They were directed and intended at persons who may be interested in engaging the building certification services of the plaintiffs. They were on websites where the plaintiffs allowed and in fact invited clients to write reviews of their experiences with the plaintiffs for this intended purpose.

[84] The defendant had a real interest in publishing the reviews. This is because he desired to make known his concerns regarding his personal experiences of the services provided by the plaintiffs, to assist potential clients in their decision as to whether to engage the plaintiffs. In other words, he was publishing to potential clients of the plaintiffs who had an interest in knowing whether other clients had been happy. They had a legitimate interest in information concerning the defendant's experience with the building certification services provided by the plaintiffs, and the defendant genuinely believed that to be the case. Therefore, the existing relationship between the defendant as the maker and the readers as the receivers of the communications, was such that there was an interest to make and receive the information giving rise to a privileged occasion. They were made for a purpose or motive which was associated with the duty or interest protecting it. Accordingly, the publication of the defamatory imputations in the reviews attract protection from liability under the defence of qualified privilege at common law.

[85] The privilege can be can be defeated where a defamatory publication is actuated by malice or some other improper extraneous motive, or if the defamatory matter has 'gone beyond the limits of the duty or interest'.[57] It is the plaintiffs' case that the publication of the reviews was accentuated by express malice.[58]

[86] Where defamatory statements are published on a privileged occasion, a court should not be quick to find evidence of malice. This is because to do so would considerably restrict, and perhaps even defeat the legal protection conferred on privileged communications.[59] Malice must be the dominant motive for the defamatory publication.

[87] The question is whether there is any evidence upon which a reasonable finding could be made that the defendant was actuated by malice. It must be proven by the evidence. It is usually inferred from a defendant's conduct and what he knew and did.[60]

[88] The particulars of express malice on which the plaintiffs rely are:

(i) the fact that the only complaint which had been made by the defendant prior to the publication of the reviews was in relation to the refund of the $750;

(ii) the reviews were to punish and/or publically humiliate the plaintiffs and as an act of vengeance after the OFT dismissed the defendant's complaint;

---

[57] *Watt v Longdon* [1930] 1 KB at 142 per Scrutton LJ; *Horrocks v Lowe* [1975] AC 135 at 150 per Lord Diplock; *Roberts v Bass* (2002) 212 CLR 1.

[58] Amended Reply, paragraph 5.

[59] *Calwell v Ipec Australia Ltd* (1975) 135 CLR 321 at 332-3 per Mason J.

[60] *Horrocks v Lowe* [1975] AC 135 at 149 per Lord Diplock.

(iii) the defendant decided to '*take the law into his own hands*' even though the OFT had advised him of his right to apply to QCAT;
(iv) the fact that the matters complained of were published on unrelated websites is evidence of a motive to cause widespread damage; and
(v) the defendant fabricated his alleged experiences with the plaintiffs in the reviews and did not believe in the statements made.[61]

[89] Having regard to the factual findings I have made, I am not satisfied the plaintiffs have demonstrated that the publication of the defamatory imputations were actuated by malice. Moreover, I make a positive finding that they were not. The reasons for this are set out below.

[90] I do not accept the submission that just because the reviews were the first occasion when the defendant raised his concerns with matters other than the $750, that this is evidence of malice. It is in no way surprising that they were not raised in his complaint to the OFT. They related to his experience with the services provided by the plaintiffs and could not be the subject of any remedy that could be facilitated by the OFT. As much was explained by the defendant in his evidence.[62] The reviews were the appropriate forum to express his views regarding the customer service provided by the plaintiffs. From the defendant's perspective, little is likely to have been gained by raising his concerns in this regard with either Ms Yarrow or the second plaintiff. The fact that he did not, does not speak of an improper motive in writing and publishing the reviews.

[91] The contention by the plaintiffs that they were not obliged to provide any refund to the defendant, does not lend any support to the asserted malice on the part of the defendant. He could not be expected to understand the contractual argument which forms the basis for this submission. There is no mention of it in the Engagement Agreement. His view in relation to the refund of the $750 and how it was calculated, was clearly articulated in his complaint to the OFT and it was abundantly clear that he was requesting this amount to be refunded to him. As explained above, I have found that his process of reasoning in arriving at this figure was understandable in the circumstances.[63] As far as he was concerned, the plaintiffs could exercise their discretion to refund him the money and they were choosing not to.

[92] I am not persuaded that the purposes of the reviews were to punish or humiliate the plaintiffs, or as an act of vengeance, or as an opportunity by the defendant to '*take the law into his own hands*'. The defendant was cross-examined on these matters and he categorically denied the suggestions. I accept his evidence in this regard. Further, he explained in his evidence that he was advised by the OFT that pursuing a claim through QCAT could cost him more than the $750 that he was

[61] Amended Reply, paragraph 4.
[62] Transcript, p. 3-73, ln 16-20.
[63] Paragraph 41.

seeking to recover. I have no reason to doubt that the defendant was provided with this advice. Like many people who write internet reviews, I am satisfied that the defendant's motivation for making the subject reviews was as he explained in his evidence. This was to prevent other potential clients of the plaintiffs from having a similarly unhappy customer service experience to that which he had encountered.[64]

[93] The plaintiffs further contend that the defendant's admission to sending a complaint to a website called Hi Pages and his authoring of the comment which appeared on the Start Local website, support their claim to the effect that he was motivated by malice. As explained above, I accept that the defendant appears to be the author of the comment on the Start Local website.[65] However, I do not accept the fact of these matters give any credence to the plaintiffs' contention that the defendant was motivated by malice. I have not seen the complaint on Hi Pages and there is no evidence as to the nature of either of the websites. It may well be that they are similar to the other websites the subjects of this claim, in that they were directed or intended at persons who may be interested in engaging the services of small businesses, including those of the first plaintiff.

[94] Knowing that the defamatory matter is false or having a reckless indifference as to the truth or otherwise of it, can be strong evidence of malice. Conversely, it will be difficult for a plaintiff to establish malice where a defendant honestly believes in the truth of the published defamatory matter, even if the honest belief is irrational, careless, impulsive or negligent. [66] I am satisfied that the defendant falls into this latter category and that while his conduct was perhaps impulsive, that he did not fabricate his experiences. The defendant consistently presented as being totally convinced of the correctness of his own position. He had a fixed personal view that he has been dealt with wrongly by the plaintiffs.

[95] It is arguable that some expressions used by the defendant may have gone beyond what was reasonably necessary. Having said this, it does not follow that they afford evidence of malice. I am not satisfied that the language used here is so extreme that an improper motive towards the plaintiffs is the only explanation for it.

[96] Finally and for completeness, I do not consider that the failure of the defendant to inform the second plaintiff of his intention to publish the reviews, or to provide the plaintiffs with an opportunity to respond, or to have their responses included in the matters complained of, founds an inference of malice. It was the plaintiffs who had taken out the advertising package with Sensis Pty Ltd. These various websites enabled the plaintiffs to respond to the defendant's, and any other,

---

[64] Transcript, p.3-54, ln 11-16; p.4-643-47.
[65] Paragraph 36.
[66] *Horrocks v Lowe* [1975] AC 135 at 149 per Lord Diplock.

reviews, and in fact they had responded to some other negative reviews made by other reviewers.[67]

[97] For the reasons detailed above, I am satisfied that each of the reviews were made on an occasion protected by qualified privilege at common law and that the plaintiffs have failed to establish malice so as to defeat the defendant's reliance on this defence.

Qualified privilege – s 30 of the Act

[98] Pursuant to s 30 of the Act, to succeed in respect of this defence, a defendant must establish three matters. The first matter is that the recipients had an interest or apparent interest in receiving information on some subject. In respect of an apparent interest, the defendant must establish that at the time of the publication, it was believed on reasonable grounds that the recipients had that interest.[68] Mere curiosity is not sufficient. Similar issues arise as have been discussed in relation to the common law defence above. For the reasons detailed above[69], I am satisfied that the recipients, being the readers of the reviews, did have the necessary interest in receiving information regarding the defendant's views as to the services provided by the plaintiffs. Further, I am satisfied that at the time the reviews were published, that the defendant reasonably believed such an interest existed.

[99] The second matter is that the statements the subject of the complaint were published to the recipients in the course of giving to them information on that subject. This means that there needs to be a nexus between the giving of information on a subject of interest, or apparent interest, and the publication of the defamatory matter. For the reasons given above, I am satisfied that the relevant nexus existed. The reviews were published on websites where the plaintiffs invited and allowed clients to write about their personal experiences with the plaintiffs. It was in this context that the defendant provided information regarding his views as to the services which the plaintiffs had provided to him.

[100] The third matter is that the conduct of the defendant in publishing the matter is reasonable in the circumstances. The defendant bears the onus of proof of establishing that he acted reasonably in the circumstances of the publications. Proof of reasonableness is not dependent upon the defendant's honest belief in what he published. It may be though, that the defendant's honest belief in the truth of what he published is critical to the issue of whether he acted reasonably in the circumstances.

---

[67] Exhibit 38.
[68] s 30(2) of the Act.
[69] Paragraphs 83-84.

[101] The Act provides a non-exhaustive list of factors which a court may consider in determining whether or not the conduct of the defendant in publishing the reviews about the plaintiffs was reasonable in the circumstances.[70] These include the extent to which the matter published is of public interest; the seriousness of the defamatory matter; the extent to which the matter published distinguishes between proven facts, allegations and suspicions; whether it was in the public interest for the matter to be published expeditiously; the source of the information for the matter published and the reliability of those sources; whether a reasonable attempt was made to publish the plaintiffs' side of the story; the extent to which the matters published are of public interest; and any other steps taken by the defendant to verify the information published.

[102] In the application of those factors and having regard to the findings of fact that I have made, I am persuaded that the publication of the reviews was reasonable in the circumstances. The reasons for this are detailed below.

[103] In the Amended Reply, it is alleged by the plaintiffs that one reason the defendant's conduct in publishing the matters complained of was not reasonable, is because the contents of the reviews were fabricated and the defendant did not believe in the truth of them. I do not accept this and the reasons for this are addressed in relation to the issues of malice above and honest opinion below.[71]

[104] The only other basis on which it is alleged by the plaintiffs in their Amended Reply that there was not the requisite reasonableness on the part of the defendant in publishing the reviews, is on account of the seriousness of the defamatory meanings conveyed. I am also unpersuaded by this. The more serious the allegation, the greater the care prior to publication that will be expected of a defendant. For the reasons detailed below,[72] I consider the imputations proved fall into the less serious category and do not adversely reflect on the reasonableness of the defendant's conduct in publishing the reviews.

[105] In their written submissions, the plaintiffs have asserted further reasons as to why the defendant's conduct was not reasonable. These have not been pleaded in the Amended Reply. These include the fact that the defendant published the matters complained of and made comments on the Hi Pages and Start Local websites shortly after being informed that his complaint to the OFT '*would not bear fruit'*. It is contended by the plaintiffs, that instead of taking advantage of the options outlined by the OFT, to either lodge a claim with QCAT, or alternatively to obtain legal advice, the defendant proceeded to '*spray*' his comments of the websites. I am not satisfied that the defendant's decision making in this regard speaks of unreasonableness on his part. As explained above, I accept his evidence that he was informed in a telephone conversation that making a claim

[70] s 30(3) of the Act.
[71] Paragraphs 94, 136.
[72] Paragraph 168.

through QCAT could cost more than what he was seeking to recover. Seeking legal advice also would have had its associated costs. I reiterate my finding above in relation to the Hi Pages and Start Local websites.[73] Posting the reviews was reasonable in the circumstances, particularly given that the purpose of them was to inform potential clients of his less than satisfactory experience with the plaintiffs.

[106] The plaintiffs also submit in written submissions that the defendant's conduct was not reasonable because the reviews contain illogical and irrational inferences or conclusions that are not based on the evidence. I do not accept this. The reasons for this are addressed in paragraphs 41, 43-46, 91 and 94 above and 119-123 below.

[107] In my view, it is necessary to make a few other general observations as to the reasonableness of the defendant's conduct. For the reasons discussed in paragraphs 127-129 below, I am satisfied that the manner in which the plaintiffs provided services to their clients is a matter of public interest.

[108] Further, the forums on which the statements were posted were such that it would have been readily apparent that the contents of the various reviews, including those made by the defendant, were likely to involve personal views and recommendations. It would have been understood by an ordinary, reasonable reader of the reviews, that the defendant was giving his views about his own dealings with the plaintiffs from his own experiences. It would also have been readily apparent that there had been a disagreement between the defendant and the plaintiffs and that there are usually two sides to such disagreements. An ordinary, reasonable reader would also understand that two people can have an identical experience, yet have different views about that experience.

[109] I do not consider that the failure of the defendant to inform the second plaintiff of his intention to publish the reviews, provide the plaintiffs with an opportunity to respond or to have their responses included in the matters complained of, speaks of unreasonableness on the part of the defendant. It was the plaintiffs who had taken out the advertising package with Sensis Pty Ltd. The subject websites invited reviews and enabled the plaintiffs to respond to the defendant's, and any other, reviews.

[110] Therefore, I consider the defendant can rely on this statutory defence. For the reasons identified above in relation to the defence of common law qualified privilege, [74] the plaintiffs have failed to demonstrate that the defendant was actuated by malice.

Honest opinion – s 31 of the Act

---

[73] Paragraph 93.
[74] Paragraphs 85-97.

[111] The defence of honest opinion as pleaded by the defendant in reliance on s 31 of the Act, requires a consideration of three issues. First, the defamatory matter must be an expression of opinion rather than a statement of fact. Second, it must relate to a matter of public interest. Third, the opinion must be based on proper material for comment, being material which was published on an occasion of qualified privilege, whether at common law or under the Act. The defendant bears the onus of proof in establishing these three matters.

[112] The only way this statutory defence can be defeated is if there is evidence that the opinion was not honestly held by the defendant at the times the reviews were published.[75] The plaintiffs have not pleaded in their Amended Reply that the opinions were not honestly held by the defendant.[76]

[113] Turning to the first issue, the plaintiffs say that the matters complained of were, as a question of law, statements of fact rather than of opinion. They further contend that there is very little information provided to the reader, upon which it could be concluded that an expression of opinion had been made and that the matters complained of contain numerous statements of fact and not an expression of opinion.

[114] A statement of fact or an expression of a value judgment can be a statement of comment if it is clear that the ordinary, reasonable reader would understand that the statement is a criticism, remark, deduction or inference drawn from other statements of fact.[77] A clear allegation of fact may be treated as an expression of opinion if it would be understood by the reader not to be an independent imputation, but rather an inference from other facts.[78]

[115] Whether a statement is one of comment or opinion rather than fact, is to be assessed by reference to the ordinary, reasonable reader. It is necessary to look at the circumstances of the publication in its context. This includes the facts known to the reader at the time of the publication.

[116] As observed above, there is a significant degree of overlap and similarity between the language and content of the imputations in the various reviews.

[117] An important consideration in this case is the reasonable reader's understanding and appreciation of the circumstances in which the statements were made. The ordinary, reasonable reader would have been cognisant that the statements made by the defendant were on websites which clearly served the purpose of allowing, and in fact inviting, clients of the first plaintiff to write reviews with regard to the services provided by the plaintiffs. It would have been readily apparent to an ordinary, reasonable reader of the various websites that these were forums

---

[75] s 31(4) of the Act.
[76] Amended Reply to Defence court doc 28 [6].
[77] *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.
[78] Ibid.

whereby clients of the first plaintiff were providing to other potential clients, their accounts of their respective personal experiences of aspects of the services provided by the plaintiffs. By virtue of these matters, the contents of the reviews were likely to involve personal opinion, recommendations and suggestions. The websites also enabled the plaintiffs to respond to any review and the print outs of the various websites show that they did in fact respond to other negative reviews.[79]

[118] The manner of communicating in such a forum is another relevant consideration. It is uncontroversial and as can be seen from the positive and other negative reviews on the websites, [80] that the writers of such reviews usually keep their comments brief, write in incomplete sentences and can use language which may be regarded as somewhat over the top. These are features present in the defendant's reviews.

[119] It would have been understood by an ordinary, reasonable reader of the reviews, that there had been a disagreement between the defendant and the plaintiffs and that there are usually two sides to such disagreements.

[120] Further, it would have been readily apparent to any ordinary, reasonable reader that when the defendant described the second plaintiff as rude, demeaning or obnoxious in the reviews, that he was expressing his opinions about the customer service he had received from the second plaintiff.

[121] In relation to the Yelp and YPOL reviews, a reasonable reader would have understood that in the context of the disagreement between the defendant and the plaintiffs, that it was the opinion of the defendant that the second plaintiff or staff of the first plaintiff had conducted themselves rudely or obnoxiously. He was expressing his opinions about the customer service he had received from the second plaintiff. He has also told the readers of these reviews that the plaintiffs had charged $750 for three site visits which they did not do and that it was his opinion that this money ought to have been refunded to him. An ordinary, reasonable reader would have realised that part of the disagreement related to the fact that the plaintiffs were refusing to return $750, where the defendant thought that a refund was warranted. An ordinary, reasonable reader is likely to have realised that this was only one side of the story and that the plaintiffs may have been entitled to refuse to refund the $750. An ordinary, reasonable reader would have understood that the defendant was expressing opinions, which were not shared by the second plaintiff. The statements made that '*this outfit are a nightmare'*, '*give these a miss, you will regret it if you use them*' clearly indicate that the defendant was expressing his opinion as to his personal dealings with them and that it was based on the statements made about the plaintiffs refusing to refund the $750 and the customer service provided by them.

---

[79] Exhibit 38.
[80] Exhibits 38, 39, 40 and 41.

[122] In relation to the TrueLocal review, there are clear indications that the defendant was expressing his opinion of the services provided by the plaintiffs. This can be found in statements such as '*these make everything a nightmare*' and '*DO NOT TOUCH THE COMPANY*'. An ordinary, reasonable reader would have understood that it was the defendant's opinion that there had been delays on the part of the plaintiffs for which they blamed the Council for and that for this reason it was the defendant's opinion they made everything a nightmare for him. It is also apparent from the review that in the context of the disagreement between the defendant and plaintiffs, that it was the opinion of the defendant that the second plaintiff had been very rude and demeaning towards him. He was expressing his opinions about the customer service he had received from the second plaintiff. There is once again a reference to the $750 and the same observations can be made as have been made above in relation to the reference to it in the Yelp and YPOL reviews. An ordinary, reasonable reader would have understood that the defendant's opinion not to touch the company was based on his personal dealings with the plaintiffs and related to the plaintiffs blaming Council for their own delays, the customer service provided to him and their failure to refund the $750 to him.

[123] In relation to the Service Seeking review, an ordinary, reasonable reader would have understood that in the context of the disagreement between the defendant and the plaintiffs, that it was the opinion of the defendant that there were delays on the part of the first plaintiff for which the Council was blamed. It is also apparent that in the context of the disagreement between the defendant and the plaintiffs that he was unhappy with the customer service provided by the second plaintiff, as it was his opinion that the second plaintiff had been rude and had sent him emails that he considered to be unprofessional. He has included an example of this.

[124] For the reasons set out above, I am satisfied that the matters complained of by the defendant in each of the reviews were expressions of opinion rather than statements of fact.

[125] The second requirement for the defendant to establish this defence is that the matters complained of were made in the public interest. In *London Artists Ltd v Littler*[81], Lord Denning MR said:

> "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment."

[81] [1969] 2 All ER 193 at 198.

[126] This broad and flexible approach to the second requirement was confirmed by Brennan CJ in *Bellino v Australian Broadcasting Corporation*.[82]

[127] It the plaintiffs' case that the requisite public interest did not exist. This is because the defendant has attacked the character of the plaintiffs and there is no factual substance given in the matters complained of. However, it does not follow that just because the reviews reflect adversely on the plaintiffs, that they were not made in the public interest. Further, there is clearly factual context given to the defamatory imputations.

[128] In *McEloney v Massey,*[83] Schoombee DCJ accepted that the manner in which an accountant who provides a regular service to the public, conducts this service is a matter of public interest. Her Honour referred to *Broadway Approvals Ltd v Odhams Press Ltd (No 2),*[84] where an article was published by a newspaper criticising the way a stamp dealer had enticed children to buy stamps by sending them by mail order. The defence of fair comment on a matter of public interest was raised. It appears to have been accepted that the trading practices of the stamp dealer was a matter of public interest. Her Honour also referred to *Joseph v Spiller,*[85] where it was accepted that it was a matter of public interest as to the question of whether a group of musical performers had abided by their contract.

[129] With respect, I agree with her Honour's views and by analogy, the manner in which the plaintiffs conducted their business and provided services to their clients is also a matter of public interest.

[130] The third requirement is that that the opinion needed to be based on proper material in the sense that it was published on an occasion of qualified privilege under s 30 of the Act or at common law. For the reasons explained above, I am satisfied that the reviews were published on occasions of both common law and statutory qualified privilege.

[131] To defeat this defence, the plaintiffs carry the onus of proof in establishing that the opinions were not honestly held by the defendant. However, this has not been pleaded in the Amended Reply[86] when it ought to have been.[87] The first time it was raised was in written submissions. Any party, including a self-represented litigant ought to know the case being alleged against them.

[132] If I was required to make a finding, I am unpersuaded that the plaintiffs have discharged their onus.

---

[82] (1996) CLR 183 at 220-221.
[83] [2015] WADC 126 at [124].
[84] [1965] 1 WLR 805.
[85] [2011] 1 AC 852 [28].
[86] Amended Reply, paragraph 6.
[87] Rule 149(1)(e) and 150(1)(k) of the *Uniform Civil Procedure Rules* 1999 (Qld).

[133] As to the plaintiffs' written submissions, the fact that the defendant did not consider his communications with the second plaintiff or Ms Yarrow were rude, obnoxious or demeaning is in no way determinative of his beliefs as to his reasons as to why he described the plaintiffs in this way in the reviews. I am satisfied his beliefs regarding the customer service provided by the plaintiffs were honestly held. This is addressed in paragraph 46 above.

[134] Further, while in cross-examination the defendant was taken through some key aspects in the history of the dealings between the parties and acknowledged that on that history, there were no delays on the part of the plaintiffs and that it was not indicative of a 'nightmare' scenario, this too is not determinative of the issue. As the defendant explained when giving evidence, at the time of writing the reviews he was not familiar with the intricacies of the approval and the certification process.[88] What he did know from an email he received from Ms Yarrow on 23 June 2014, was that Ms Yarrow referred to the Council's involvement in the process and agreed with him that '*it had taken some time so far to get this progressed*'.[89] It was against this background that he attended the meeting with Council and was told that his approval application which had been lodged on his behalf by the plaintiffs, had in fact been processed within three to four weeks. This was in the context where there had been a period of some five months between the time the defendant engaged the plaintiffs to obtain the necessary Council approvals and when he was informed by the second plaintiff that the Council had issued the building approval.

[135] I have already addressed above the reasons why I consider that the defendant's view in relation to the refund of $750 was understandable.[90] I am satisfied that he held an honest belief in this regard. The plaintiffs had inferred through their communications with the defendant that they would not be refunding him the sum of $750 and as far as he was concerned, there was a dispute between them over this issue. For the reasons detailed above, I reject the plaintiffs' submissions that the defendant did not honestly believe that he was arming potential clients with his beliefs regarding his personal experiences with the services provided by the plaintiffs to assist them in making a decision as to whether to engage the services of the plaintiffs.[91]

[136] During the robust cross-examination of the defendant, he categorically denied that he considered any of the statements made in the reviews were false. They were based on what were his honestly held views of his experiences with the second plaintiff and his business. The reasons why he held these views are explained above and I accept his evidence on these matters.[92] He has consistently

[88] Transcript p. 3-83, ln 11-15.
[89] Exhibit 12.
[90] Paragraph 41.
[91] Paragraphs 84 and 92.
[92] Paragraphs 39 to 46.

maintained his views in this regard and this provides the bases for his refusal to apologise to the second plaintiff and for not taking the necessary steps to remove the reviews earlier than they were removed.

[137] The plaintiffs further submit in their written submissions that because the defendant stated in cross-examination that he considered certain imputations not to be carried by the matters complained of, he did not hold an honest belief in the defamatory meaning and any privilege he may have had, is destroyed.[93] However, the imputations that he did not consider arise from the reviews, accord with my findings as set out above.[94] These relate to the contentions by the plaintiff that the statements by the defendant extended beyond his personal experience with the plaintiffs and that the statements carry the imputations that the plaintiffs ripped off clients, that their building services were bad and that they were generally unprofessional.

[138] Therefore, I find the defence of honest opinion is made out.

Triviality

[139] The final basis on which the defendant seeks to avoid liability is by relying on the statutory defence of triviality. This can be found at s 33 of the Act. This section provides:

> "It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm."

[140] The defendant bears the onus of proving that the circumstances existing at the time of publication were such that the plaintiffs were unlikely to sustain any harm.[95] The circumstances of the publication include the nature and extent of the defamatory matter, the persons to whom it was published and the place where it was published. [96] In order to prove harm is unlikely, the defendant must show there is an absence of "*a real chance*" or "*a real possibility*" of any harm.[97] The more serious the imputation, the more likely the plaintiff will sustain harm regardless of how confined the publication is.[98]

[141] The findings of fact which I have made in relation to the defamatory imputations proved and the seriousness of them, the nature and extent of the publication of the reviews, the persons to whom they were published and the forums on which the reviews were made are analysed in other parts of this judgment. While the imputations fall into the less serious category and the extent of the publications of

---

[93] Plaintiffs' written submissions.
[94] Paragraphs 60 to 73.
[95] *Smith -v- Lucht* [2016] QCA 267 at [33] – [41] per Flanagan J.
[96] Ibid at [37] per Flanagan J.
[97] *Jones -v- Sutton* (2004) 61 NSWLR 614 at [45].
[98] *Smith -v- Lucht* [2016] QCA 267 at [47] per Flanagan J.

the reviews were limited for the reasons I have identified, I am not satisfied that the circumstances of the reviews were such that there was an unlikelihood of the plaintiffs suffering harm. This defence has not been made out.

Damages

[142] As I have found that the defendant has established the defences of common law and statutory qualified privilege and the statutory defence of honest opinion, the plaintiffs are not entitled to damages. However, in the event that my findings are wrong, I have addressed the question of damages.

[143] The plaintiffs seek $150,000 for compensatory damages and an additional $30,000 for aggravated damages.

[144] Pursuant to s 34 of the Act, in determining the amount of damages to be awarded, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiffs and the amount of damages awarded.

[145] A single sum of damages can be assessed even where there are multiple publications, as in the present case, four separate publications.[99] A single sum must be awarded in respect of each plaintiff.[100]

[146] In *Cerutti and Another v Crestside Proprietary Limited and Another*[101], Applegarth J discussed in detail and helpfully set out the applicable principles. An award of damages for the defamation of a plaintiff has to provide reparation for the harm done to their personal and business reputation, give consolation for the personal hurt and distress caused by the publications, and vindicate their reputation. The three purposes overlap, and the first two purposes are frequently considered together.

[147] Harm to reputation concerns the tendency of an imputation to lower the reputation of the plaintiff, meaning that proof of actual loss and damage is not necessary.[102] Rather, the court can infer that a likely consequence of the imputation was an adverse change in the attitude of persons towards the plaintiff. The fact that a defamatory review is published will be sufficient to infer damage to the reputation of a plaintiff.

[148] As to harm to the reputation of the first plaintiff, there is no evidence of any financial loss suffered by the business as a result of the defamatory publications. It is of course unnecessary to prove special damage. In *Cerutti,* [103] Applegarth J cited with approval the following observations of Winneke P in *Feo v Pioneer Concrete (Vic) Pty Ltd:*

---

[99] s 39 of the Act.
[100] *Sierocki & Anor v Klerck & Ors (No 2)* [2015] QSC 92 at [36].
[101] [2016] 1 Qd R 89; [2014] QCA 33 at [25]-[49].
[102] *Bristow v Adams* [2012] NSWCA 166.
[103] At [83].

> "That does not mean that the presumed damage to its reputation can only be compensated if calculable in precise money terms. As Ormiston JA said in *Kays* case[104] … Damages are not to be assessed for injury to the company's 'reputation as such', but are to be assessed 'having regard to financial and commercial considerations by which a corporation's reputation is ordinarily assessed'. In some cases the damages assessed may only be nominal; particularly where the court cannot be satisfied that the nature of the defamatory imputation, or the breadth of its publication, has caused significant harm to the trading reputation of the corporation defamed. However, that is not to say that the defamatory publication is not actionable at the suit of the corporation. If no proof is tendered of specific loss, the assessment of damages is to be made on the material available to the court and the view which it forms of the loss likely to have been suffered by the company as a consequence of the defamatory material which it finds to have been published of and concerning the entity in the way of its business…"[105]

[149] The second purpose of a damages award, namely to provide consolation for the hurt and distress caused by the publications, only applies to the second plaintiff. This includes a consideration of what the second plaintiff may think other people are thinking of him. It also incorporates psychological components, such as feelings, self-perceptions and self- esteem.

[150] Vindication of the reputation of a plaintiff up to the time of the judgment and into the future is the third purpose of a damages award. It is focussed on the attitude of others to a plaintiff. It must be at least the minimum necessary to signal to the public the vindication of the reputation of a plaintiff.[106] The theory is that an award of damages can undo part of the harm done by the defamatory statement. It enables a plaintiff to demonstrate to the world at large that the allegations in question were baseless. The more serious the allegations and the wider the publication, the greater the sum necessary to vindicate the plaintiff. The damages should reflect the circumstances, past and present, as well as what is required to vindicate a plaintiff's reputation in the future.[107]

[151] Evidence has been led as to the extent of the damage to the reputations of the plaintiffs. Thomas Dunn is a friend of the second plaintiff and has known him for more than a decade. He occasionally plays cards with the second plaintiff. He was considering a building extension to his home and conducted an internet search of the second plaintiff with a view to engaging him to assist with the extension. He had previously recommended the second plaintiff and his business to friends. The reviews caused him to be cautious of the plaintiffs and he ceased

---

[104] *Kay v Chesser* [1999] VSCA 83.
[105] [1999] VSVA 83.
[106] *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-1.
[107] Ibid at 69-70.

recommending them to friends. He did not proceed with his own building extension, but this was for reasons unrelated to the reviews.

[152] Warren Pollock was looking to build a new carport. He read the YPOL review in mid-August 2015. He did not know the plaintiffs. He did not consider the review gave a good impression of either plaintiff. His evidence was that despite this he rang the office of the first plaintiff and spoke with Ms Yarrow to obtain a price estimate. He said he did this because he had read reviews about other people that were not true. He did not go ahead with the carport but like Mr Dunn, this was for reasons unrelated to the review.

[153] Gavin Nielson has previously played soccer with the second plaintiff and would occasionally see him socially. He considered the second plaintiff to be honest and genuine. His neighbour asked him for a recommendation for some certification services in relation to a proposed building extension. Prior to recommending the second plaintiff, Mr Neilson undertook an internet search and stumbled across and read each of the reviews. His impression of the second plaintiff from the reviews was that there must have been another side to the second plaintiff. While Mr Nielson's evidence was that he would not have engaged the plaintiffs to carry out work for him, he provided the information to his neighbour to let the neighbour make up his own mind about engaging them.

[154] Robert Clignet has known the second plaintiff since 2008. He considered the second plaintiff to be moral and honest and had thought the business was well-respected. He was servicing an alarm system for the plaintiffs and during a conversation with Ms Yarrow, he was alerted to the existence of the defendant's negative reviews. It was as a result of this that Mr Clignet read the YPOL and Service Seeking reviews in August or September 2015. These reviews led him to question both plaintiffs. His evidence was that despite these negative reviews, he would probably still engage their services if he required them in the future.

[155] I accept the evidence of the second plaintiff that he enjoyed a good reputation as a building certifier prior to the matters complained of. I also accept his evidence as to the impact upon him of the reviews. It was Ms Yarrow who brought them to his attention on 9 August 2015. The second plaintiff gave evidence that he was shocked, bewildered and gutted when he read the reviews. He was concerned the reviews would be read by potential clients and other people who knew him. He was proud of the reputation that he had as a certifier and had worked very hard to establish it. He felt like the defendant was trying to destroy his business. He could not understand the reason for the content of the reviews, nor the number of them.

[156] The second plaintiff's evidence is that the reviews have adversely affected him professionally and personally. From a professional perspective, he spoke of a six or so month period where he withdrew from engaging with clients, except on

technical issues to do with certifications. Over this time he also refrained from attending professional seminars, as not all of the defendant's reviews had been removed.

[157] From a personal perspective, the second plaintiff gave evidence that the reviews negatively impacted on his relationship with Ms Yarrow as his de facto partner, their respective families and their friends. One of the main reasons for this is that he has needed to work longer hours, including weekends to address the fall-out from the reviews, including the defendant's complaint to the OFT and also to fund these legal proceedings. He has taken sleeping tablets at night to cope with the longer work hours and he '*has a little bit of anxiety problems every now and then*'. He can no longer find the time to play sports on weekends and otherwise exercise and he has gained weight. The second plaintiff did not adduce any medical evidence relevant to these matters.

[158] Ms Yarrow corroborated the impact of the reviews on the second plaintiff.[108]

[159] I turn now to the extent of the publications, as it is highly relevant to the assessment of damages.[109] I have addressed above the evidence about the number of people who clicked on to the YPOL listing between August and December 2015. There was no evidence in relation to November 2015. The evidence shows that on 127 occasions, the website was clicked on in the months of August, September, October and December 2015. These numbers do not prove that each time the listing was clicked on, that it was by a person who had not previously seen the review. Ms Yarrow frequently checked the various websites.[110] The second plaintiff also went onto the websites to read the reviews. It is not known how many of the 127 occasions occurred prior to the posting of the review in August 2015 and after its removal in December 2015. There is no evidence in relation to the other websites. What is known is that while the review was on the Service Seeking website for some 10 months, it was only on the Yelp and TrueLocal websites for some two months.

[160] The plaintiffs rely on the grapevine effect of the reviews and contend that the damages awarded ought to take into account this effect. This expression recognises that dissemination of defamatory material may occur between a broader group of people than those to whom the publication was made and that it may continue.[111] In *Broome v Cassel & Co Ltd,* [112] Kaye J explained it in the following way:

> "…no more than the realistic recognition by the law that, by the ordinary function of human nature, the dissemination of defamatory

[108] Transcript, p. 3-5 to 3-11.
[109] *Powell v Gelston* [1916] 2 KB 615 at 619 per Bray J.
[110] Transcript, p.3-3 ln 20-25; p.3-4, ln 9.
[111] *Roberts v Prendergast* [2014] 1 Qd R 357 and *Grattan v Porter* [2016] QDC 202.
[112] [1972] AC 1027 at 1071.

> material is rarely confined to those to whom the matter is immediately published … [I]t is recognised and understood that the "poison" of a libel may spread well beyond the confines of the person to whom it was immediately published."

[161] While the grapevine effect has been found to have particular application to some cases of electronic publications, particularly where those publications are publicly available, or can be easily downloaded or readily forwarded, [113] it depends on the facts of the particular case. These include the forum and other circumstances in which the statements were published, the nature of the statements and whether there is likely to have been a grapevine effect, and if so, the extent of it.[114]

[162] In all the circumstances and on balance, I am not persuaded that the grapevine effect is likely to have been significant. There would have been no particular reason to have spread the defendant's statements about the second plaintiff or his business unless the reader knew of the second plaintiff and/or his business, the reader knew that other people knew him and/or his business or the reader was asked by someone if they knew of a building certifier in the Narangba area. Absent these circumstances, I consider the contents of the reviews are such that readers would have been unlikely to have told other people about them.

[163] The forum on which these reviews were made is also relevant to the assessment of damages and has been addressed above. It would have been readily apparent to the ordinary, reasonable reader when looking at the various reviews on the websites that they were clients, including the defendant, talking about their own individual personal experiences of the services provided by the plaintiffs, and that such reviews are usually limited to the reviewer's side of the story. There were some other negative reviews and a number of positive reviews. An ordinary, reasonable reader would also understand that two people can have an identical experience yet have diametrically opposed opinions about that experience. The circumstances in which these reviews were made are no different to people reviewing both positively and negatively, the many different service providers that operate in our community, whether they be professionals, airlines, hotels, restaurants and so the list goes on.

[164] It is of course the case that there may well have been people who read the reviews and who knew the second plaintiff or his business but had not had dealings with them to form their own view of the statements made by the defendant. One such example is Mr Dunn. There may have been other people who knew the second plaintiff or his business and thought less of them after reading the reviews, to the extent that they would not use him in the future. Mr Nielson is an example of this. However, I am not persuaded the number of such persons is likely to have been significant. Indeed, the ordinary, reasonable reader would not be likely to

---

[113] *Higgins and Ors v Sinclair* [2011] NSWSC 163.
[114] *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at [89].

have remembered the contents of these reviews unless they knew the second plaintiff or lived in the Narangba area or had been looking to engage the services of the plaintiffs. It is also relevant that the defendant's reviews were not the only negative reviews of the second plaintiff's business. While Mr Nielson made the observation that these other negative reviews did not mention the second plaintiff personally, Mr Dunn frankly conceded that they too would have impacted on his view of the plaintiffs. [115]

[165] The seriousness of the imputations is another relevant consideration when assessing damages. This is often a question of degree as well as context. Imputations of criminal conduct are at the highest level of seriousness. Imputations of personality defects such as selfishness, arrogance or bullying, tend to fall at the lower end.[116] I consider all the imputations proved fall into the less serious category.

[166] The usual course is not to assess separately, but to include any component for aggravated damages in the award for compensatory damages.[117]

[167] Aggravated damages focus on the subjective experience of the plaintiff. They are for conduct by the defendant which aggravates the injury and increases the harm which the publication of the defamatory material originally caused.[118] They are compensatory in nature for conduct on the part of the defendant which is improper, unjustified or lacks bona fides.[119] The aggravating conduct may have occurred in making the publication, or at any time up to the assessment of damages.[120] It need not be malicious.

[168] Whether the relevant conduct warrants an award of aggravated damages depends on the circumstances of the case. In the Second Further Amended Statement of Claim, the plaintiffs claim aggravated damages on the following bases:

(i) the defendant did not promptly remove the reviews following receiving the Concerns Notice served upon him in late August 2015;
(ii) no apology has been provided by the defendant;
(iii) the reviews were authored with reckless indifference as to their truth and for an improper purpose, namely to punish the plaintiffs for not refunding the amount of $750 which the defendant thought he was entitled to and/or to deliberately damage the reputations of the plaintiffs following the rejection by the OFT in July 2015 of his complaint about the plaintiffs; and
(iv) the defendant's conduct throughout the course of the proceedings.[121]

---

[115] Transcript 2-33, ln 1-2.
[116] *Allen v Lloyd-Jones (No 6)* [2014] NSWDC 40.
[117] *Cerutti* at [41] per Applegarth J.
[118] *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.
[119] *Clark v Ainsworth* (1996) 40 NSWLR 463 at 466 per Sheller JA.
[120] *Cerutti* at [37] per Applegarth J.
[121] Paragraph 28.

[169] The reviews were not removed upon the defendant being served with the Concerns Notice in late August 2015. I do not consider this fact supports an award for aggravated damages. Two of the reviews were removed within two months, one within four months and the other review within 10 months. The last of the reviews had been removed 17 months prior to the commencement of the trial. I do not consider that a failure to request their earlier removal was improper, lacking in bona fides or unjustified in the sense required to establish an entitlement to aggravated damages. The defendant's evidence is that he did not seek to have the reviews removed earlier as he considered their contents to be true and that it was an '*attack on free speech*' to require a review to be removed simply on the basis that it contained information which reflected negatively on the plaintiffs.[122] Further, the defendant's then solicitors responded to the Concerns Notice in an email dated 9 October 2015 and clearly articulated the defendant's position. This included that it was not accepted that the reviews had been read by unnamed individuals in the world, that the alleged imputations were not be made out and that even if they were, there were a number of defences on which the defendant could rely. At least some of these matters have been upheld in these reasons.

[170] The defendant has not apologised. The second plaintiff's evidence was that this has caused him further bewilderment. However, the fact of this is not sufficient to give rise to an award for aggravated damages. While a failure to apologise may support such an award if the failure has been unjustified, improper of lacking in bona fides, I am not persuaded that any of these circumstances exist here. Rather, I accept the defendant's evidence that the reason he has not apologised is because he strongly believes that the reviews simply express his honest opinion as to his experiences with the plaintiffs, including the customer service he received from them and in those circumstances he has nothing to apologise for. It seems to me that such damages are not warranted on this basis.

[171] For the reasons detailed above, I have rejected the plaintiffs' submission that the reviews were authored with reckless indifference as to the truth of them and for an improper purpose. Rather, the defendant was driven to write and upload the reviews to the websites because he was unhappy with the service that had been provided and that his $750 had not been refunded. Therefore, this cannot found a basis for aggravated damages.

[172] The conduct of the litigation by a defendant may also support a claim for aggravated damage, and the plaintiffs claim it is applicable in this case.[123] The plaintiffs contend that the defendant engaged in obstructive and delaying conduct which resulted in interlocutory applications on 15 March 2016, 2 June 2016 and 17 August 2017, which were resolved in the plaintiffs' favour.

---

[122] Transcript, p.3-55, ln 3-21.
[123] *Steel v Mirror Newspapers Ltd* [1974] 2 NSWLR 348 at 379 per Sammuels JA.

[173] Two applications were heard by Andrews SC DCJ on 15 March 2016, one by each party. The plaintiffs were successful with their application in relation to three subparagraphs of the Amended Defence. The defendant's application also related to pleading issues and it was dismissed. The defendant was ordered to pay the plaintiffs' costs with respect to both applications on a standard basis. The application on 2 June 2016 was heard by Martin SC DCJ. It related to two of the particulars which were the subject of the earlier interlocutory application. The order was made striking out the particulars, with the defendant to file an amended pleading within 14 days. The costs of the application were ordered to be costs in the cause. The defence was amended as ordered and it was this pleading that the defendant relied on at the hearing. There was a further application dispensing with the defendant's signature on the request for trial date. The parties agreed to consent orders on 17 August 2017, granting the application with an order for the defendant to pay the plaintiffs' costs of the application on a standard basis. The fact that a party has been unsuccessful in respect of one or more interlocutory applications may justify a costs order, but does not provide a sufficient foundation for awarding aggravated damages. There is no evidence before the court that the defendant's conduct with respect to any of these applications was improper, unjustified or lacking in bona fides.

[174] In their written submissions, the plaintiffs further contend an entitlement to aggravated damages on the basis that the defendant published the reviews to deliberately damage the reputation of the plaintiffs as an act of revenge. These submissions do not accord with my findings and I reject them.

[175] For these reasons, even if the plaintiffs had been successful in establishing an entitlement to damages, I would not have allowed any amount for aggravated damages.

[176] In determining an appropriate award for damages, the variety of factors relevant to an assessment makes a direct comparison with other cases difficult, and of course, each case depends on its own facts. Nevertheless, the awards of damages in other cases may provide useful guidance.

[177] Counsel for the plaintiffs referred me to one case only, being *Zaia v Eshow,*[124] in which damages were assessed at $150,000. In that case the plaintiff was the Archbishop of the Assyrian Church of the East. He brought proceedings alleging defamation arising out of online Facebook posts against a former parishioner who had held many roles within the Church community. The publications giving rise to the claim concerned the appointment of two priests to the Church. The defendant asserted that the priests had previously been defrocked from other churches. There were seven relevant publications and the plaintiff was successful in establishing an entitlement to damages in respect of six of them. These were

[124] [2017] NSWSC 1540.

not the only posts the defendant had made about the plaintiff. He had maintained a campaign of criticism against the plaintiff, the seriousness of which escalated over time.

[178] The first relevant post was published on the defendant's Facebook page on 2 April 2015. Approximately one week later, he was suspended from the Church for two years. In the following weeks, he made two further Facebook posts. The remaining three posts were made in December 2015. As at March 2015, the defendant had approximately 264 Facebook 'friends' and this had grown steadily over the period of the posts, reaching 332 at the time of the final post on 15 December 2015. Further, the defendant's Facebook profile was 'open' and therefore publicly available during this period.

[179] The imputations were broadly that the plaintiff had failed the Church, was a hypocrite, was unfit to hold the position he held, that he deserved to be punished for expelling the defendant from the Church, that he was evil and worse than ISIS, that he was violent, a drunk, dishonest and incompetent and that he had made false accusations against the defendant. The plaintiff did not give evidence and therefore was not entitled to damages for hurt to feelings. Vindication to his reputation was the primary consideration. The position held by the plaintiff and the importance of his reputation to his role and the Church was relevant to the assessment of an amount adequate to vindicate a strong reputation.

[180] The court was satisfied that the overwhelming likelihood was that many readers would have rejected the extravagant claims made by the defendant in the Facebook posts. Further, it was relevant that the plaintiff also had available as a remedy, injunctive relief.

[181] There was evidence that the posts had generated discussion in the Assyrian community and beyond. Four of the matters complained of were still online at the time of the trial in 2017. There was also evidence that there was a high level of interest in the plaintiff on social media. It was ultimately a matter of speculation as to how widely the posts were read. There was a finding that the defamation was serious and persistent. The plaintiff was awarded $150,000 in damages and a permanent injunction restraining the repetition of the publications.

[182] I consider the facts and relevant circumstances of this case are vastly different to the present case. The defamatory imputations there were far more serious. There were six relevant publications which were made over an eight month period. The defamatory material was posted on Facebook where there was an 'open' profile. The plaintiff was a significant public figure in the Assyrian community and attracted a high level of interest on social media. There was a campaign of criticism by the defendant against the plaintiff, with escalating seriousness. Four of the matters complained of remained online at the time of the trial.

[183] There are a few other cases that perhaps provide some guidance as to damages. *Graham v Powell (No 4),*[125] involved nine publications, eight of which were made available for downloading on two websites on the internet. The ninth publication complained of consisted of an email sent by the defendant to the email address of the Mayor of Goulburn and a number of other email addresses, including councillors and media bodies. The imputations were serious and included that in his role as a councillor, the plaintiff had lied, been a party to transparent fraud, had stolen public money and was guilty of incompetence, corruption and fraud. Further imputations related to bribery, ripping off residents, misappropriation and corruptly receiving fees. An allegation was also made that the plaintiff was a disgusting parasite who dishonestly presented himself as ethically motivated to the Palerang Council, when all he cared about was enriching himself. It was accepted by the court that the plaintiff was absolutely devastated by the persistence, viciousness and irrationality of the defamatory publications against him by the defendant. Damages including aggravated damages were awarded in the sum of $80,000. Once again, the defamatory imputations were far more serious in that case. The plaintiff was a councillor and therefore a public figure and there were more than double the publications when compared to the present case.

[184] In *Hallam v Ross,* [126] the plaintiff was an arborist who was defamed by two emails. The first email was published to 33 email addresses and contained imputations that the plaintiff colluded in a criminal way with two other arborists, had falsified a government certificate, was a liar and was an example of the world's worst practice as an arborist. The second email was published to 37 email addresses and contained imputations that the plaintiff was a criminal, dishonest, a liar and that he was an example of the world's worst practice as an arborist. It was found that the imputations that the plaintiff was dishonest and a liar were substantially true but that the remaining imputations were defamatory. While the plaintiff only sued upon the two emails, over a five or so year period the defendant had sent hundreds of emails about the plaintiff to multiple recipients and published messages about him on Twitter and public online forums. The court was unable to isolate the harm caused by the publication of these two emails from the stream of emails and other publications. Wilson J found that the damages would have been assessed at $20,000 were it not for the mitigating effect of the two imputations being substantially true. Damages were reduced to $12,000. She considered that aggravated damages were warranted on account of the defendant's persistent assertion that they were true, the plaintiff's knowledge that the imputations were false and the fact that the emails were part of a relentless, unreasonable campaign of fallacious abuse by the defendant. Aggravated damages were assessed at $6,250 but her Honour observed that she would have assessed them at $10,000 in the absence of the mitigating factors.

---

[125] [2014] NSWSC 1319.
[126] [2012] QSC 407.

[185] I consider *McEloney v Massey*[127] to be of most value as a comparative as to an appropriate award for damages. The plaintiff, an accountant, brought proceedings alleging defamation arising out of online posts on a Facebook page called 'Poms in Perth-Australia (WA)' by a former client who was critical of the services provided by the plaintiff. The defendant's statements about the plaintiff were made as part of a string of posts on 29 August 2014. These gave rise to imputations that the plaintiff was unprofessional, that he was rude to his clients, that he did not provide good service to his clients, that he overcharged for his services and that he had breached his professional obligations to return papers to the defendant when he properly should have done so. Her Honour Schoombee DCJ found that it could be concluded from these imputations that the defendant conducted his practice in a way which meant that he should not be engaged and that he was to be avoided in his professional capacity. Her Honour found that the defendant had established the defence of justification and the defence of honest opinion with respect to each of the statements made by her. Her Honour then went on to assess damages in the event that she was wrong with these findings.

[186] There were some 9,595 members of 'Poms in Perth-Australia (WA)' as at September 2014 and of those, 18 people made comments about the defendant's posts. Her Honour considered that while more people may have read the posts, and it is possible that some of the people who read the posts would have discussed them with other people, it is unlikely to have been widespread. The posts were only on the Facebook site for between some seven and 13 hours. Her Honour also considered it relevant that the ordinary reader of these types of reviews would understand that it involved one person stating their personal opinion about a particular service and that it may be one-sided or exaggerated. The ordinary, reasonable reader would also realise the need to treat the posts with appropriate caution and scepticism given that different people can have different opinions about an identical experience. The plaintiff gave evidence of the hurt, anxiety and depression experienced by him as a result of the posts. Damages were assessed at $10,000.

[187] Turning to the present case, in all of the circumstances, I am satisfied that an award of damages in the sum of $10,000 ought be made in favour of the first plaintiff and $15,000 in relation to the second plaintiff. The larger sum awarded to the second plaintiff is to reflect the personal hurt and distress caused by the defamatory imputations, which is of course not applicable to the first plaintiff.

Injunctive relief

[188] The plaintiffs seek a permanent injunction restraining the defendant from publishing material defamatory of them. Given my findings, the plaintiffs are not

[127] [2015] WADC 126.

entitled to injunctive relief. However, like damages, I have addressed the issue of injunctive relief, in the event that my findings are wrong.

[189] I am not satisfied the defendant has evidenced an intention to continue to publish defamatory matter concerning the plaintiffs. His evidence was that this was the only occasion he had posted such reviews and given his experience with this litigation, he would not do it again.[128] I am not persuaded the defendant may be likely to publish similar allegations against the plaintiffs unless restrained. Accordingly, I would not have been minded to grant the injunctive relief sought had the plaintiffs established their claims.

Costs

[190] Given my conclusions above, my preliminary view is that costs follow the event. If an alternate order as to costs is sought, then I will allow the parties until 4.00pm on 8 June 2018, to provide no more than a four page written outline to me through my associate. If necessary, I will relist the matter for hearing at a date to be fixed.

[128] Transcript, p.4-36, ln 27-32.