DISTRICT COURT OF QUEENSLAND

CITATION:	*Lee & Ors v Sheen & Anor* [2021] QDC 18
PARTIES:	**CARRIE KA YEE LEE** (first plaintiff) **and** **ANNETTE LEUNG** (second plaintiff) **and** **CHUNZI ZHANG** (third plaintiff) **and** **ZIXI LI** (fifth plaintiff) **and** **RIVER CITY LEGAL PTY LTD (ACN 164 303 093)** (sixth plaintiff) **and** **CHANG LONG AUSTRALIA PTY LTD** **(ACN 614 186 480)** (seventh plaintiff) **and** **WATER LEGAL PTY LTD (ACN 164 122 749)** (eighth plaintiff) **v** **JAMES DANIEL SHEEN** (first defendant) **and** **NSW LEGAL PTY LTD (ACN 607 586 416)** (second defendant)
FILE NO:	4886/17
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	12 February 2021.
DELIVERED AT:	Brisbane
HEARING DATES:	23, 24 and 25 June 2020. Written submissions received 1, 10 and 15 July 2020.
JUDGE:	Byrne QC DCJ

ORDERS:

1. **It is ordered that the first defendant pay to the first plaintiff damages for defamation, including aggravated damages, in the sum of $60,000 plus interest in the amount of $6,494.79 for the publication pleaded at paragraphs 28, 29 and 30 of the amended statement of claim filed 15 May 2018.**

2. **The first plaintiff's claim against the second defendant is dismissed.**

3. **The second plaintiff's claim against each of the first and second defendants is dismissed.**

4. **The third plaintiff's claim against each of the first and second defendants is dismissed.**

5. **The fifth plaintiff's claim against each of the first and second defendants is dismissed.**

6. **The sixth plaintiff's claim against each of the first and second defendants is dismissed.**

7. **The seventh plaintiff's claim against each of the first and second defendants is dismissed.**

8. **The eighth plaintiff's claim against each of the first and second defendants is dismissed.**

9. **In the absence of an agreement being reached within two weeks of delivery of this judgment, the parties are to submit by email to my associate an agreed timetable for the delivery of written submissions as to costs no later than 4.00pm on 1 March 2021. Those submissions are to be limited to five pages, unless otherwise ordered.**

10. **Liberty to apply in respect of the costs order.**

CATCHWORDS: DEFAMATION – PUBLICATION – GENERALLY – INTERNET PUBLICATIONS – SOCIAL MEDIA – where the plaintiffs sued in relation to an article published on "WeChat" - whether either defendant can be proven to be a publisher of the article – whether the article was published by another in the course of acting under an agency agreement - whether the first defendant was a passive publisher of the article.

DEFAMATION – PUBLICATION – GENERALLY – INTERNET PUBLICATIONS – SOCIAL MEDIA – where the plaintiffs sued in relation to an article published on "WeChat" - whether any or all of the plaintiffs are identified in the article.

DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – IMPUTATIONS – where the article is predominantly written in a language other than English – where there is issue as to the precise meaning of the words used - where plaintiffs allege that the publications gives rise to defamatory imputations – whether the alleged imputations are conveyed.

DEFAMATION – DEFENCES – HONEST OPINION – where in respect of the publication defendants seeks to establish a defence of honest opinion pursuant to s 31(2) of the *Defamation Act 2005* (Qld) – whether words of the publication were opinions rather than statements of fact – whether the opinion expressed was that of an employee or agent of the first defendant - whether the opinions related to matters of public interest – whether the opinions were based on proper material

DEFAMATION – HEADS OF DAMAGES – where personal hurt was not expressly pleaded by the plaintiffs – whether the pleadings should be taken as referring to allegations of personal hurt - whether evidence of the personal hurt suffered by the plaintiffs is admissible.

DEFAMATION – ASSESMENT OF DAMAGES – GENERAL DAMAGES – where plaintiffs suffered harm to reputation – whether the "grapevine effect" resulted from the publication – whether a public apology mitigates damages - whether an award of general damages should be made

DEFAMATION – ASSESMENT FOR DAMAGES – AGGRAVATED DAMAGES – whether the defendants unjustifiable persistence in making untrue allegations or pursuing of a defence in a manner which is unjustifiable, improper or lacking bona fides aggravates damages – whether an award of aggravated damages should be made

LEGISLATION: *Defamation Act 2005* (Qld)

Uniform Civil Procedure Rules 1999 (Qld)

CASES:

Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158.
Asbog Veterinary Services Pty Ltd v Barlow [2020] QDC 112.
Bellino v Australian Broadcasting Corporation (1996) 185 CLR 183.
Bertwhistle v Conquest [2015] QDC 133.
Bjelke-Petersen v Warburton [1987] 2 Qd R 465.
Briginshaw v Briginshaw (1938) 60 CLR 336.
Byrne v Deane [1937] 1 KB 818.
Cassell & Co Ltd v Broome [1972] AC 1027.
Cerutti v Crestside Pty Ltd [2016] 1 Qd R 89.
Channel Seven Adelaide Pty Ltd v Manock (2007) 232 CLR 245.
Church of Scientology of California Inc v Reader's Digest Services Pty Ltd [1980] 1 NSWLR 344.
Clarke v Norton [1910] VLR 494.
Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd (1931) 46 CLR 41.
Consolidated Trust Company Limited v Browne (1948) 49 SR (NSW) 86.
Costello v Random House Australia Pty Ltd (1999) 137 ACTR 1.
Crampton v Nugawela (1996) 41 NSWLR 176.
Dods v McDonald (No 2) [2016] VSC 201.
Douglas v McLernon (No. 3) [2016] WASC 319.
Favell v Queensland Newspapers Pty Ltd (2005) 221 ALR 186
Forestview Nominees Pty Ltd v Perron Investments Pty Ltd (1999) 162 ALR 482.
Garnac Grain Co Ltd v HMF Faure & Fairclough Ltd [1968] AC 1130.
Grattan v Porter [2016] QDC 202.
Hollis v Vabu Pty Ltd (2001) 207 CLR 21.
John Fairfax Publications Pty Ltd v Rivkin (2003) 201 ALR 77.
Knupfer v London Express Newspaper Limited [1944] AC 16.
Kooragang Investments Pty Ltd v Richardson & Wrench Ltd [1982] AC 462.
Lewis v Daily Telegraph Ltd [1964] AC 234.
Lighthouse Forward Planning Pty Ltd v Queensland

Newspapers Pty Ltd [2014] QSC 217.
Lion Laboratories Ltd v Evans [1985] QB 526.
MacDonald v Australian Broadcasting Corporation [2014] NSWSC 206.
Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632.
Morosi v Broadcasting Station 2GB Pty Ltd [1980] 2 NSWLR 418.
O'Brien v The Marquis of Salisbury (1889) 6 TLR 133.
Parmiter v Coupland (1840) 6 M&W 105.
Pervan v North Queensland Newspaper Company Ltd (1993) 178 CLR 309.
Plymouth Brethren Christian Church v The Age Company Limited (2018) 97 NSWLR 739.
Rana v Google Australia Pty Ltd [2013] FCA 60.
Reid v Dukic [2016] ACTSC 344.
Robertson v Dogz Online Pty Ltd & Anor [2010] QCA 295.
Sim v Stretch [1936] 2 All ER 1237.
Stoltenberg v Bolton [2020] NSWCA 45.
Sungravure Pty Ltd v Middle East Airlines Airliban SAL (1975) 134 CLR 1.
Sweeney v Boylan Nominees Pty Limited (2006) 226 CLR 161.
Todd v Swann Television and Radio Pty Ltd [2001] 25 WAR 284.
Urbanchich v Drummoyne Municipal Council (1991) Aust Torts Reporter 81-129, 69, 193.
Wagner & Ors v Harbour Radio Pty Ltd & Ors [2018] QSC 201.
Wilson v Bauer Media Pty Ltd [2017] VSC 521.
Zoef v Nationwide News Pty Ltd (2016) 92 NSWLR 570.

COUNSEL: Mr. A.J.H. Morris QC for the plaintiffs.
Mr. R. Anderson QC for the defendants.

SOLICITORS: Londy Lawyers for the plaintiffs.
Nyst Legal for the defendants.

TABLE OF CONTENTS

Introduction

[1] On 6 July 2017 an article was published on the social media platform "WeChat", which is popular amongst the Chinese community in Australia and China, and no doubt in other countries across the world. Eight plaintiffs commenced an action for damages alleging that the article was defamatory of each of them. The fourth named plaintiff settled proceedings prior to the commencement of the trial.

[2] The article was written predominantly in simplified Chinese script, but there are some words in it that appear in the English language. The article also contains some pictures, some drawings or caricatures, a GIF image, copies of some certificates, a

copy of a letter and two screenshots from a mobile phone of two different Google pages, each predominantly in the Chinese language.

[3] The primary issues raised in the hearing are:

1. proof of the identity of the publisher or publishers;
2. proof that any or all of the plaintiffs are identified in the publication;
3. proof of the meanings conveyed by the publication;
4. the applicability of a defence of honest opinion; and
5. assessment of damages, if any.

General factual findings and background

[4] The first defendant is a solicitor who has been entitled to practise in Australia since 1998. He has operated a number of law firms since that time. The most recent being Austin Haworth & Lexon, also known as AHL Legal, since 2003.

[5] He operates predominantly in New South Wales but with offices in other locations. His principal office is based in Liverpool Street in the Sydney CBD.

[6] He is the director of the second defendant which is a company duly incorporated in Australia and is the registered owner of the business name, AHL Legal (Burwood). As such it is concerned with the provision of legal services at the Burwood office of AHL Legal.[1] It employed Laura Qiao in the capacity of a marketing assistant.[2]

[7] Each of the first, second, third and fifth plaintiffs had been employed at AHL Legal for respectively differing periods prior to 2016.

[8] In 2010 the first defendant decided to expand his Sydney practice and operate in a number of other cities in Australia and China. Broadly speaking, the structure was that each office would be legally separate from the others, but each could operate under the AHL Legal banner.[3]

[9] Each of those plaintiffs became financially interested in an AHL Legal office that opened in Melbourne in 2010.[4] Then, in 2011, the first plaintiff became financially interested in an AHL Legal office that opened in Brisbane.[5] The first defendant also held a financial interest in both of these offices.

[10] Each of those plaintiffs described the first defendant's conduct of his business in terms that suggests he was domineering and difficult to deal with. In 2016 they decided to collectively move away from AHL Legal and form their own legal

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1 Amended statement of claim ("ASOC") at para 21; Further amended defence ("FAD") at para 7.
2 FAD at para 13(b).
3 TS1-19, ll 12-17.
4 TS1-19, l 19 to 1-20, l 34.
5 TS1-20, l 41 to 1-21, l 20.

practice, Accuro Legal.[6] Two written Chinese characters, "An Run", were selected to represent the name Accuro, but they were not a direct translation of the word, which in itself is not a word known to the English language.[7]

[11] The legal practice business of each of the AHL Legal practices in Brisbane and Melbourne were "bought out" by the plaintiffs, but in each instance that required resort to the enforcement of the respective shareholder agreements.[8]

[12] AHL Legal bought the plaintiffs' proprietary interest in the premises in both Melbourne and Brisbane, but only after the plaintiffs commenced proceedings in both instances, in 2017 and 2019 respectively.[9] In respect of the Brisbane property, the first defendant alleges that the first plaintiff removed fittings that were part of the premises without justification.

[13] Further, there have over time been complaints by various parties about other parties to disciplinary and regulatory bodies.

[14] For example, on 6 March 2018 a solicitor from AHL Legal, expressly said to be acting "*on behalf of AHL Legal*", wrote to the Victorian Legal Services Commission making complaints about the fourth plaintiff which alleged damage to the AHL Legal property in Melbourne, about false, misleading and deceptive advertising and about misleading and deceptive conduct.[10] Although complaining about the fourth plaintiff, whose action has been settled, the evidence has some relevance as to the first defendant's attitude towards Accuro Legal generally. The last two mentioned complaints formed the basis of defences pleaded under sections 25 and 26 of the *Defamation Act 2005* ("DA"). The complaint had not been withdrawn by the time of trial.

[15] On the same date the same solicitor wrote to the Queensland Legal Services Commissioner, expressed as being on behalf of AHL Legal and the first defendant, making the same last two complaints as referred to above but this time against the first plaintiff.[11] The matters of complaint were denied.[12] The complaint had not been withdrawn by the time of trial.

[16] On 30 July 2019 the first plaintiff complained to the Queensland Legal Services Commissioner that a firm known as AHL Legal (Brisbane), and operated by the first defendant, was using that name when it was not owned by him.[13] That complaint was dismissed on or about 10 October 2019.[14]

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6 There is a discrepancy between the plaintiffs as to when in 2016 the decision was made, but nothing turns on this.
7 TS1-23, ll 31-37.
8 TS1-24, ll 18-35.
9 TS1-24, l 37 to 1-25, l 47; 1-47, l 45; 1-48, l 34.
10 Exhibit 9.
11 Exhibit 10.
12 Exhibit 17.
13 Exhibit 12.
14 Exhibit 13.

[17] On 28 July 2017 and 3 October 2017 the third plaintiff wrote to the New South Wales Legal Services Commissioner, who in turn referred the complaints to the New South Wales Law Society Professional Standards, complaining that the first defendant had offered monetary incentives to support a claim, had engaged in misleading or deceptive advertising and had falsely circulated letters purporting to originate from the eighth plaintiff.[15]

[18] In summary, it is clear that there was two way animosity between the plaintiffs and the first defendant. From the conduct of the proceedings and the demeanour of the witnesses, it seems clear that animosity extends to the present time.[16]

[19] At all relevant times the Accuro Legal practice was conducted from five offices, namely in Brisbane, Sydney, Melbourne, Beijing and Shanghai.[17]

[20] The sixth plaintiff conducts the practice of Accuro Legal in Brisbane and is the registered owner of the business name Accuro Legal (Brisbane). The first plaintiff both managed and is the legal practitioner director of that business.[18]

[21] The seventh plaintiff conducts the practice of Accuro Legal in Sydney and is the registered owner of the business name Accuro Legal (Sydney). The second and third plaintiffs both manage and are the legal practitioner directors of that business.[19]

[22] The eighth plaintiff conducts the practice of Accuro Legal in Melbourne and is the registered owner of the business name Accuro Legal (Melbourne).[20]

[23] The fifth plaintiff managed the Beijing office of Accuro Legal at the relevant time.[21] The identity of the owner of this practice, and the ownership structure, is not revealed in the evidence.

[24] Although clear on the evidence, it seems that at least one and possibly all plaintiff's supplied equity which was applied to the creation of the entity Accuro Legal. Regardless of that equity input, the sixth, seventh and eighth plaintiffs were utilised as the owners of the respective businesses in Australia. The appointment of the first, second and third plaintiffs as legal practitioner directors imposes obligations and duties under the respective legislation regulating the legal profession in the different States, but does not bring with it the entitlements and obligations of ownership.

[25] Each of the corporate plaintiffs was an excluded corporation for the purposes of s 9(2) of the DA.[22]

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15 Exhibit 15.
16 TS1-46, ll 25-29; 1-50, ll 7-14.
17 ASOC at para 9; FAD at para 2.
18 ASOC at paras 11 and 16; FAD at paras 2 and 4.
19 Amended statement of claim, paras 12, 13 and 17; further amended defence, paras 2 and 4.
20 ASOC at para 18; FAD at para 4.
21 ASOC at para 15; FAD at para 2.
22 TS1-74, ll 40-47; 2-54, ll 34-39; 2-55, ll 5-9; defence reply to written submissions, para 1.

[26] As noted earlier, Laura Qiao was employed by the second defendant.[23] Her role was primarily in marketing but also involved general office management, human resources duties and administrative duties.[24] Her marketing role included managing social media, implementing digital marketing (including search engine optimisation) and arranging paid online advertising.[25] Although Ms Qiao is employed by the second defendant, which is the registered owner only of AHL Legal (Burwood) and conducts the legal practice for that entity,[26] the clear tenor of the evidence is that she performs her role in respect of all AHL Legal entities and answers to the first defendant.[27] Consistent with that, in testimony she provided the same work address as that by the first defendant in Liverpool Street, Sydney.[28]

[27] At relevant times, AHL Legal's marketing was directly handled by a Chinese company based in Shanghai, named Aoh An Li Investment Management and Consulting Limited ("Aoh An Li"). The first defendant was the sole director of that company, which closed down in 2018 or 2019. It was the official controller of the AHL Legal WeChat page.[29] Another corporate entity now performs that role of which the first defendant holds a share. It is convenient to refer to the later entity by the shortened name "Aidi".

[28] According to the third defendant, this structure was created to operate out of the AHL Legal Shanghai office because of cheaper labour costs in China. She perceives that it was effectively controlled by the first defendant and Ms Qiao.[30] Her perception is supported to some extent by the first defendant's testimony that Ms Qiao "*is in charge of digital marketing*"[31] and by Ms Qiao's testimony that the first defendant would let her make decisions about digital marketing.[32]

[29] One of the employees of Aoh An Li was a Ms Qi who was directly involved in drafting the publication the subject of this action. She was not called as a witness as it was said she could not be located. The first defendant testified that she had resigned.[33] Ms Qiao testified that she was "*fired*" or "*sacked*" over the mistake she made with the subject publication.[34]

[30] I accept that Ms Qi's employment was terminated. The first defendant had a tendency to answer glibly during his testimony. On the other hand, while some aspects of Ms Qiao's testimony require that some care be taken in its assessment, she appeared to give considerable thought to this answer. The whole of her

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23 TS2-9, ll 31-39; 3-22, ll 19-21.
24 TS2-9, ll 40-41; 2-64, ll 19-31.
25 TS2-64, ll 19-22.
26 ASOC at paras 20 and 21; FAD at paras 6 and 7.
27 See for exampleTS1-83, ll 1-7; 2-9, l 31 to 2-10, l 4; 2-64, ll 19-31.
28 TS2-7, l 40; 2-63, l 33.
29 TS2-13, ll 7-26.
30 TS1-78, ll 4-8.
31 TS2-11, l 20.
32 TS3-16, l 21.
33 TS2-59, ll 9-14.
34 TS3-20, ll 1-26.

testimony on this topic shows she clearly understood what she was saying, which was not in the interests of the first defendant, to whom she answered.

[31] On Ms Qiao's account, in about March 2017 she entered the first defendant's name, in Chinese characters, into a Google search engine. She also did the same thing with the name AHL Legal, again in Chinese characters. On both occasions, she testified, the first result was for Accuro Legal. Due to an annotation on each of those results, she believed that the results were returned as a result of the Google AdWords service.[35] Her understanding, which is essentially uncontested, is that Google offers a service called AdWords by which clients can obtain preferential results on searches through the Google search engine, in return for a fee. The highest bidder obtains the highest or first result when particular searches are conducted.[36]

[32] The first, second and third plaintiffs each expressly denied having ever bid for a Google AdWords preferential listing containing these search terms.[37] The fifth plaintiff was not questioned on the topic, but the plaintiffs' case is that they were not responsible for purchasing any such AdWords, and a forensic examination of their Google AdWords account on 19 November 2019 failed to find any support for the proposition that they had placed any such bid through Google AdWords for the search result.[38]

[33] Ms Qiao testified in chief that she brought the results to the first defendant's attention, and he agreed that something had to be done, but because of his lack of familiarity with Google, "*he let me do that*".[39] He agreed they should bid on AdWords for preferential results. In cross-examination, she testified that she told him she was "*going to do something to clear up the confusion*" and that his response was "*you handle it*".[40]

[34] Ms Qiao testified that AHL Legal commenced paying for AdWords, and in April or May 2017 Accuro Legal's Google ads stopped appearing when the same search terms were used.[41]

[35] The first defendant recalled being told by Ms Qiao about the results of the Google searches on a day he could not recall in 2017. He engaged a legal firm, Pigott Stinson, to write to Accuro Legal telling them to stop purchasing his name. Once he received a copy of that letter, he made it available to a WeChat group that he, Ms Qiao and others were members of. He testified that his instructions to Ms Qiao

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35 TS2-64, l 36; 2-65, l 19.
36 TS2-65, ll 21; 2-66, l 2; 3-12, ll 33-39.
37 TS1-36, ll 35-39; 1-68, ll 21-32; 1-81, ll 27-32.
38 Exhibit 11; TS2-28, ll 21-27; 2-30, ll 19-23.
39 TS2-66, l 38.
40 TS3-19, ll 30-33.
41 TS2-66, ll 10-29.

about the matter were "*I just tell Laura can you handle that. … I wanted her to deal with it*."[42]

[36] A copy of the Pigott Stinson letter is contained within Exhibit 10, and is dated 6 April 2017. That date is consistent with Ms Qiao's timeline. I accept that at about, or shortly before, 6 April 2017 she was told by the first defendant to "*handle it*" or "*deal with it"*, or words to that effect.

[37] AHL Legal had a dedicated page on WeChat. People could subscribe or follow the AHL Legal page and would receive a notification when an article was posted to the page.[43] Subscribers could send the post to other WeChat users who were not themselves subscribers but were contacts of subscribers.[44] When a new article was posted to the page, the original article would be pushed down the page.[45] A maximum of two posts could be seen on the page at any one time.[46] The viewing of WeChat articles can occur on computers, but is mostly performed on mobile devices.[47] I assume that the use of the term "mobile devices" includes tablets and is not limited to mobile telephones.

[38] As at July 2017 the AHL Legal WeChat page likely had "*less than 800*" subscribers.[48] The terminology used is suggestive of a figure less than but approaching 800.

[39] The page itself records the number of times the page is "read". A "read" is recorded each time someone accesses the page, regardless of how much of the page is in fact read. Further, if the same person accesses the page multiple times, each access will be recorded as a separate "read".

[40] On 6 July 2017, the subject article was posted on the AHL Legal WeChat page. A printed copy of the published article is Exhibit 1. I have earlier broadly summarised what that article contains. For the purposes of clarity the two screenshots of the Google search results are partly pixelated but each show the words "Carrie Lee"; the name of the first plaintiff. The Pigott Stinson letter is also partly pixelated so as to obliterate any reference to people from Accuro Legal and of Accuro Legal itself in the letter. The rest of the article contains sundry other brandings and other matters apparently intended to promote AHL Legal as a competent legal practice worthy of engagement for legal services. Part of the Chinese script and the two screenshots are very much the focus of contest in this matter and will be returned to in more detail.

[41] It is common ground that the pixelation of the Pigott Stinson letter removes the identification of any of the plaintiffs. The pixelation in the screenshots is of the

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42 TS2-11, ll 23-32.
43 TS2-12, ll 40-43; 2-13, l 42 to 2-14, l6.
44 TS1-92, l 32 to 1-93, l4.
45 TS1-93, ll 14-37.
46 TS2-68, ll 19-35.
47 TS1-39, ll 6-8.
48 TS2-68, ll 1-2.

word "accurolegal" where it appears twice in each screenshot, and the Chinese script "An Run", where it appears once in each screenshot. There is an issue as to whether one of these instances of pixelation of "An Run" was effective or not.

[42] Exhibit 1 shows there had been 113 "reads" at the time it was downloaded on 6 July 2017. Exhibit 3 is a partially complete copy of Exhibit 1 said to have been downloaded on 10 July 2017, and which records 430 "reads".[49]

[43] The evidence of how the article was created predominantly comes from Ms Qiao. By way of summary, she said she wanted to do something to clear up any "*confusion out there*" and spoke to Ms Qi at Aoh Ln Li "*to come up with something to clear up the confusion out there and promote and protect our own brand*".[50] She instructed Ms Qi to blur out any reference to any law firms or individuals.[51]

[44] Ms Qiao received a draft of the publication and which included both Google screenshots. She read the whole of the document including both screenshots.[52] She didn't notice anything wrong with the draft.[53] As far as she was aware, the article was published in the same form as the draft she was provided.[54] She did not notice that the first plaintiff's name was visible in the Google screenshots.[55]

[45] She testified that she did not converse with the first defendant about the contents of the publication, nor show him a copy before it was uploaded on the WeChat page.[56] That evidence is consistent with the first defendant's testimony.[57]

[46] Ms Qiao testified that once the article was published she noticed that Accuro's Chinese characters had been "*blurred out*", but even then she did not notice the first plaintiff's name had not been "*blurred out*". She was reading the article on the screen of an iPhone 6 or 7.[58]

[47] The first plaintiff was informed of the publication by the third plaintiff who in turn was shown it by the second plaintiff, all on 6 July 2017. The second plaintiff had been informed of the article by a link to it received by way of message to her from a friend, Ms Jiang. A printout of the message and the ensuing text based discussion between them became Exhibit 14, but was not admitted for proof of the facts asserted therein.[59]

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49 TS1-31, ll 21-40.
50 TS2-69, ll 16-17; 2-78, ll 6-7.
51 TS2-70, ll 30-33; 2-75, ll 1-2; 3-21, ll 3-6.
52 TS2-78, l 34 to 2-79, l 1.
53 TS3-21, l 14.
54 TS2-70, ll 13-14.
55 TS3-20, ll 31-38; 3-21, ll 8-14.
56 TS2-70, ll 24-28; 3-21, l 30.
57 TS2-12, l 22; 2-13, ll 1-5.
58 TS2-70, ll 35-40; Exhibit 18.
59 See the translation of the discussion at TS1-69, l 36 to 1-73, l 46.

[48] On the same date a letter was sent by the third plaintiff on behalf of all plaintiffs to Pigott Stinson, as solicitor for the first defendant. ("the concerns letter")[60]

[49] It complained that the article suggested Accuro Legal was an imposter (or a conman or a cheater) and that Accuro Legal had impersonated the brand name AHL Legal. It requested, amongst other things, that the article be removed. It did not expressly suggest that the article imputed "fraud" or "dishonesty". The first plaintiff accepted that those words were not used, but considered the substance of the complaint reflected those allegations.[61] The other plaintiffs were not questioned on this topic.

[50] On receipt of the concerns letter, the first defendant said he read the article closely for the first time. His evidence was as follows:

> "*How did it come to your attention and what did you do in relation to it? --- After I received that email, a letter of demand, from the plaintiffs, then I clicked that article, have a close look at it again. All of a sudden at that time I just say, 'Shit'. I realised there's a problem.*
>
> *What problem did you realise? --- I closely looked at it, Carrie's name ---*
>
> *I'm sorry. Sorry. I just didn't – I just didn't hear clearly what you said in response? --- Okay. I had second close – I had – it's the first time I had a close look at it. I realised Carrie's name, only one name, rest of them blurred out, but only one place, Carrie's name, has not been blurred out*."[62]

[51] He immediately had the article translated and sought advice from a Senior Counsel on the issue, and on receipt of that advice the article was removed.[63] The first defendant testified that the first article remained on the page for "… *maybe 10 days. Less than 10 days*."[64] Ms Qiao could not recall precisely but she thought it remained up for one or two weeks.[65] The first defendant was "*involved heavily*"[66] in the drafting of the replacement article, a copy of which became Exhibit 2. That document bears a date 25 July 2017 which I accept is the date of publication.

[52] The replacement article, broadly speaking, suggested that "*some mischievous friends sought to be associated with our brand image*" and offered $1,000 or $10,000 to persons who respectively provided information or testified, and $100,000 if the testimony resulted in successful litigation.

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60 Exhibit 6.
61 TS1-41, l 26 to 1-43, l 22; 1-63, ll 25-35.
62 TS2-14, ll 11-21.
63 TS2-14, ll 31-42; 3-11, ll 8-38.
64 TS2-14, l 38.
65 TS3-11, ll 37-38.
66 TS2-14, ll 44-45.

[53] The pixelation in Exhibit 2 was enhanced from that which occurred in Exhibit 1, and there is no suggestion that any relevant person or entity is identified therein. This document does not form the basis of the action.

Broad credit findings

[54] Cross-examination made substantial inroads into the first defendant's credit. In addition to personally offering rewards for information and/or testimony, it was established that he had previously falsely claimed to have held a PhD from Sydney University,[67] and that in 2003 he was found guilty of professional misconduct and fined $2,000.[68]

[55] Further, in my view he did not favourably impress when he testifying. I have earlier referred to his answers being at times glib. His repeated apologies[69] - in terms not accepting responsibility for the action before the court[70] - sounded hollow and rehearsed, and his explanation[71] for the delay in abandoning the defences pleaded under sections 25 and 26 of the DA[72] respectively in April 2021 and then on the eve of the trial was also unconvincing and appeared to be an excuse of convenience. In making that last observation I am mindful that in the course of litigation the defendants have had to change Counsel on a number of occasions, not always through their own choice, but this decision does not appear to have been complicated given the results of the forensic examination of the plaintiff's Google AdWords account in November 2019. In my view the evidence of the first defendant requires careful scrutiny before acceptance.

[56] As a general proposition, it appeared to me that Ms Qiao was trying her best to provide an accurate account. It was noticeable however that her evidence was clearest when testifying that the first defendant had no direct input into the creation of the subject article. That raises the possibility of collusion or coaching, but may also reflect a recognition of what, even to a lay person, was obviously a central issue and the desire to be clear on that central point. She was not directly questioned as to the reason for particular clarity on the topic, but did deny covering for the first defendant.[73]

[57] The issues of credit raised with the plaintiffs broadly related to allegations of animosity towards the first defendant, some of which were accepted and some not. I have earlier noted my finding that there was animosity both ways, and that must be taken into account when assessing the veracity of each of their testimonies, as well as that of the first defendant. Otherwise there was nothing that caused particular concern about the plaintiffs' respective credibility.

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67 TS2-16, ll 26 to 2-17, l 1.
68 TS2-49, ll 1-5; 2-49, ll 38-46.
69 TS2-14, ll 26-30; 2-27, l 43 to 2-28, l 11; 2-20, l 10; 2-31, ll 23-35; 2-32, ll 13-17.
70 TS2-27, ll 35-37.
71 TS2-28, ll 13-30; 2-29, l 38 to 2-31, l 28; 2-50, l 37 to 2-51, l 23.
72 See FAD at paras 19 and 20.
73 TS3-19, l 16.

[58] There were no credit issues raised in respect of either of the expert translator witnesses called by the parties.

The identity of the publisher or publishers

The first defendant.

[59] The plaintiffs' sole pleading concerning publication is that the first defendant "*caused a message… to be published*."[74]

[60] In the Reply to the Further Amended Defence ("RFAD"), the plaintiffs allege that the first defendant instructed his servants or agents, including Ms Qiao and Aidi, to post the article, or alternatively authorised his servants or agents, including Ms Qiao and Aidi, to post the article.[75] On the evidence at trial, Aidi only came into existence in 2018 or 2019. The reference to it appears comes from the FAD at paragraph 12 and should, given the evidence, be taken to be a reference to Aoh An Li.

[61] The plaintiffs' written submissions assert that the first defendant "*is liable for publication as the person in control of the facility by which publication was effected*", and also on the basis of "*passive publication*" in deciding to not remove the publication.[76]

[62] Notwithstanding the circumspection with which I view the first defendant's evidence, I accept that he had no direct involvement in the creation of and publication of the article. Ms Qiao, who in effect says that once told to "*handle it*", testified that it was her actions and not the first defendant's that resulted in publication. There is no other evidence to cast doubt on that assertion. Even if the plaintiffs' evidence to the effect that the defendant conducted his business in a domineering manner is accepted, it does not necessarily follow that he must have been directly involved prior to publication. It makes sense that it would be left to Ms Qiao to deal with it as part of her role in charge of digital marketing.

[63] Insofar as the submitted primary case encompasses liability on the basis of the actions of a servant, I do not accept that to be established in this case. Ms Qiao is the employee of the second defendant, not the first defendant. Certainly the first defendant is the director of the second defendant, but the pleadings do not allege a claim against the first defendant based in vicarious liability for the conduct of Ms Qiao, and so nice questions of whether she is, or should effectively be treated as the

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74 ASOC at para 28.
75 RFAD at para 4.
76 Plaintiffs' written submissions at para 17.

first defendant's employee[77] do not arise even though the evidence establishes that she often performed many tasks for and at the direction of the first defendant.

[64] The first defendant was the director of Aoh An Li. That does not make it his servant.

[65] Neither entity can be considered to be the servant of the first defendant.

[66] Insofar as the plaintiffs' primary case encompasses liability on the basis of the actions of an agent, I also do not accept that to be established in this case. Assuming, without deciding, that the instruction to "*handle it*" and the apparent acceptance of that instruction is sufficient to amount to a form of agency agreement, it cannot in my view amount to the totality of any agreement in the circumstances of this matter. The balance of any agreement must be inferred from what was said and done at that time, earlier words and conduct in order to gain an historical understanding of what was meant, and later words and conduct to understand the extent of the agreement.[78]

[67] In the present circumstances, the bland direction to "*handle it*", or a like instruction cannot be taken to have meant to handle it by any or all means. In particular, Ms Qiao's instruction to Ms Qi to pixelate the respective names and identities indicates that was the basis on what she was handling it, and the first defendant's reaction when he read the published article and saw the first plaintiff's name therein is, to my mind, strongly suggestive that "handling" the issue without resort to illegal or defamatory means was the implicitly understood basis of the agency agreement.

[68] In my opinion, Ms Qiao was not acting within the scope of the agency agreement, and hence was not the first defendant's agent in publishing the article.

[69] That, however, is not the end of the consideration. In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[79] ("**Colonial Mutual Life**") an agent (i.e. not an employee) had been engaged to sell life insurance policies. The terms of his engagement specifically prohibited him from making statements that were defamatory of competitors in the course of providing his services, but he did just that while attempting to induce others to make proposals for life insurance by his principal. Even though he was not the servant of the appellant company, it was held that the appellant was vicariously liable for his statement because he made them while acting as the company's agent. At face value this would seem to hold that the first defendant is liable for the defamatory article caused to be published by Ms Qiao.

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77 Compare for example the consideration in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 and *Sweeney v Boylan Nominees Pty Limited* (2006) 226 CLR 161.

78 *Garnac Grain Co Ltd v HMF Faure & Fairclough Ltd* [1968] AC 1130, 1137.

79 (1931) 46 CLR 41.

[70] However, in *Sweeney v Boylan Nominees Pty Ltd*[80] a majority of the High Court made this observation about the limits of that decision:

> *"Colonial Mutual Life establishes that if an independent contractor is engaged to solicit the bringing about of legal relations between the principal who engages the contractor and third parties, the principal will be held liable for slanders uttered to persuade the third party to make an agreement with the principal. It is a conclusion that depends directly upon the identification of the independent contractor as the principal's agent (properly so called) and the recognition that the conduct of which complaint is made was conduct undertaken in the course of, and for the purpose of, executing that agency*." (underlining added)

[71] Accordingly, in my view, *Colonial Mutual Life* does not apply in the present situation to hold the first defendant liable for the publication of the defamatory article. Ms Qiao was not "*engaged to solicit the bringing about of legal relations"* between either of the defendants and anyone else. Nor was the article, in the defamatory terms in which it was written, published for the purpose of executing the agency agreement, namely that of "handling it" in a non-defamatory manner. It is those two critical features of the nature of the relationship that justifies bringing a principal's liability within concepts of vicarious liability[81] and their absence in the present matter confirms my view that the first defendant is not liable for Ms Qiao's actions in causing the publication of the article.

[72] Further, in *Colonial Mutual Life*, Dixon J observed:

> "*But there is, I believe, no case which distinctly decides that a principal is liable generally for wrongful acts which he did not directly authorise, committed in the course of carrying out his agency by an agent who is not the principal servant or partner, except, perhaps, in some special relations, such as solicitor and client, and then within limitations*."[82]

[73] Consistent with the approach that a principal will not be held liable for all tortious conduct of an agent, it has been held that a principal is not liable for contumelious conduct by a solicitor in the course of completing his engagement by the principal.[83] This, in my view, support my present conclusion.

[74] Further, even though concepts of vicarious liability are usually more strictly applied in a master servant relationship than a principal agent relationship,[84] the Privy Council in deciding a case from New South Wales held that the employer was not

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80 (2006) 226 CLR 161, [22].

81 *Sweeney v Boylan Nominees Pty Ltd, supra* at [24].

82 *Colonial Mutual Life, supra* at 49.

83 *Forestview Nominees Pty Ltd v Perron Investments Pty Ltd* (1999) 162 ALR 482 and cases applying it.

84 See for example the commentary in Bowstead and Reynolds on Agency, 21st Ed, Thomson Reuters at 8-177.

liable for the negligent completion of tasks of the employee which were of the nature he was employed to undertake but which he had been forbidden from undertaking for a particular client.[85] The Court noted that the tasks of the employee may so clearly depart from the scope of the employment that the master will not be liable for the wrongful acts.[86] That observation is apposite here.

[75] For all those reasons I conclude that Ms Qiao was not the agent of the first defendant when she published the defamatory material.

[76] Further again, the plaintiffs' primary case rests upon the proposition that "*as the person in control*" of the facility by which publication was effected the first defendant is liable for that publication. The difficulty with the submission is that it was the corporate entity Aoh An Li which controlled the WeChat page, not the first defendant. He was the sole director, but there is no evidence of his direct dealings with Aoh An Li causing the publication of the article.[87] To the contrary, it was Ms Qiao's dealings that caused the publication of the article but, for reasons expressed above, she was not acting within the scope of any agency agreement between them in authorising that particular publication.

[77] I am however satisfied that the first defendant is a "passive publisher" of that article.

[78] Although there was at an earlier time some doubt about the extent of liability for publication on this basis, it is now clear[88] that liability can attach where, rather than merely having knowledge of the publication, the defendant consents to, approves of, adopts, promotes or in some way ratifies the continued presence of the article so that persons other than the plaintiffs may continue to read it.[89] It has been said that additional features required to establish liability on this basis are that the defendant has been requested to remove the material, had the ability to remove it and failed to remove it, thereby properly allowing an inference that the defendant has accepted responsibility for the continued publication of the material.[90]

[79] The first defendant was aware of the published material on 6 July 2017. The concerns letter requested that it be removed. His reaction at the time was such that he believed there was a problem with the material being defamatory. Accepting that he did not specialise in defamation law,[91] it did not in my view require specialisation to confirm the view that he had reached. Regardless, a conscious decision was made to leave the article on the WeChat page, until it was replaced 19 days later, on 25 July 2017. I accept that in that time he had the material translated,

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85 *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462.
86 *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd, supra* at 473F.
87 *Douglas v McLernon (No. 3)* [2016] WASC 319, [44]-[46].
88 *Robertson v Dogz Online Pty Ltd & Anor* [2010] QCA 295, [35].
89 *Byrne v Deane* [1937] 1 KB 818; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reporter 81-129, 69, 193 at 69, 194.
90 *Urbanchich, ibid*; *Stoltenberg v Bolton* [2020] NSWCA 45, [228]; *Rana v Google Australia Pty Ltd* [2013] FCA 60, [51].
91 TS2-31, l 25.

sought advice of Senior Counsel and had a replacement article prepared, but in my view none of that changes the fact that he made a deliberate decision to leave material he considered was likely to be defamatory accessible on the WeChat page. The swift removal of the article would have distanced him from it, while still seeking the advice he did. He decided against doing that.

[80] In the context of the animosity between the parties that I earlier referred to, I am reasonably satisfied on the balance of probabilities[92] that in so doing he accepted responsibility for the continued publication of the article. He had the ability to have the article removed; that is what ultimately occurred at his direction. Further I consider that in circumstances where he immediately realised the risk, it would have been reasonable to have had the article removed within a few days, not 19.

[81] Accordingly, I accept to the relevant standard that, in the sense just considered, the first defendant published the article.

The second defendant

[82] The plaintiffs also contend that the second defendant is a publisher of the article, but there is no pleaded allegation of publication in the amended statement of claim, nor in the reply to the further amended defence.[93] Undeterred, the plaintiffs submit that the second defendant is the entity by which publication was effected, albeit that relevant acts were carried out on its behalf by one of its employees. However, they deny reliance on principles of vicarious liability for the actions of the employee.[94] They argue that Ms Qiao was doing the job she was employed to do "*in accordance with the instructions of the individual… responsible for the ultimate direction of advertising and marketing on behalf of her employer*". They argue that it was unnecessary to plead this case, just as it would be unnecessary to plead primary liability for a journalist who wrote an article and secondary liability for the publisher of a newspaper.[95]

[83] Without accepting the last mentioned proposition, the analogy is in my view inapt as the second defendant is not the publisher of the website, and not responsible for the website page; that is Aoh An Li which has not been joined as a defendant.

[84] In my view the failure to plead the basis on which the plaintiffs assert the second defendant is liable for publication of the article is fatal. The case for publication against the first defendant may have been very broadly alleged, but it was at least pleaded in broad terms. The case against the second defendant is not pleaded at all, and there has been no application to amend the pleadings. The case against the second defendant must fail on that basis.

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92 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-363.
93 Rules 149(1)(b) and (c) and 157 UCPR.
94 Plaintiffs' written submissions at paras 19 and 20.
95 Plaintiffs' written submissions at para 21.

[85] In any event, I consider there is no case against the second defendant. The second defendant is not a publisher; the publishers are Aoh An Li and Ms Qiao.[96] Their case is not that the second defendant directed that the article be published, it is that the first defendant did that. The case against the second defendant fails for these reasons. As the second defendant is not a primary publisher, liability might possibly attach if vicarious liability is established, but the plaintiffs have disavowed reliance on any such case.

Identification of the plaintiffs

[86] The subject article included two reproductions of what are obviously Google search result pages side by side. The one on the left depicts the results of a search using the first defendant's name in Chinese characters. The one on the right depicts the results of a search using the term "AHL Legal", using Chinese characters for the word "Legal".[97]

[87] It is common ground that the name "Carrie Lee" appears in each screenshot without any effort being made to pixelate or otherwise obscure the name. On the left-hand screenshot the words "AHL Legal (Sydney)" appears unobstructed. On each screenshot the word "accurolegal" is pixelated where it twice appears in a URL address, and there is no suggestion that each pixelation has not been effective.

The second, third and fifth to eighth plaintiffs inclusive

[88] The Chinese characters "An Run", representing the word "Accuro" in the phrase "Accuro Legal",[98] have been pixelated in each screenshot. Apart from the first plaintiff asserting that she could make out the characters under the left-hand pixelation, but accepting that she was influenced by knowing what was under that pixelation[99] there is no suggestion that the characters "An Run" can be made out in the left-hand screenshot.

[89] There is however dispute as to whether the characters "An Run" can be made out in the right-hand screenshot, notwithstanding the pixelation. Both the first and third plaintiffs assert that they can see the characters "An Run" notwithstanding the pixelation.[100] The second and fifth plaintiffs were not questioned on the topic. The first defendant contended that only one name, "*Carrie's name*", had not been blurred out,[101] as did Ms Qiao.[102]

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96 In this sense I am referring to primary publishers and not passive publishers as I have found the first defendant to be.
97 TS2-65, ll 14-16.
98 TS1-23, l-37.
99 TS1-27, ll 41-44.
100 TS1-27, ll 41-46; 1-81, ll 34-47.
101 TS2-14, ll 19-21.
102 TS2-7, ll 35-38.

[90] Ms Zhao, an interpreter engaged by the plaintiffs, considered the two Chinese characters the subject of pixelation on the right-hand screenshot. She could not make out the first character but, after zooming the page on the computer screen so that the characters were bigger than an A4 sheet of paper,[103] she thought she could make out the second character. She zoomed on the characters because at normal size she could not tell what it was. Even when zoomed, there were multiple possibilities, and "An Run" was a best guess.[104]

[91] Ms Zhang, an interpreter engaged by the defendants, also considered these characters and could not recognise them. She said she could probably guess dozens of words that they represented. Once she learnt there was a law firm called Accuro Legal represented by two particular Chinese characters, she thought it possible it was those characters that were blurred, but it was not obviously so.[105]

[92] On my observation, the pixelation of the Chinese characters appears to preclude recognition of the characters, even allowing for the fact that the reproduction in Exhibit 1 is likely to be of less quality than as it appeared on the screen to a user. However I accept the plaintiffs' submission that I should be cautious in basing any finding on my own observations given my lack of familiarity with the written form of the Chinese language.

[93] Each of the third and fifth plaintiffs were informed of the WeChat article by other persons. The text conversation between the third plaintiff and Ms Jiang, contained in Exhibit 14, was admitted as proof of the notification to the third plaintiff, but the contents of the text conversation is inadmissible as proof of the matters asserted therein. It is unknown what, if anything, was said by the informant to the fifth plaintiff.

[94] Neither of those informants testified in the trial, and so it is unknown whether or not they could see "An Run" through the pixelation of the right-hand screenshot. Does the fact that two persons alerted two of the plaintiffs to the existence of the article allow an inference that they did see the characters "An Run"?

[95] That is a possible inference, but it is not the only available inference. In my view it is at least equally open to infer that each informant brought the article to the attention of the respective plaintiff because one of those plaintiffs' partners, Carrie Lee, was openly named in the article. Further, in that context, it must be borne in mind the article was critical of one of AHL's competitors, hence raising the possibility of it being communicated to the partners of Accuro Legal, a firm in competition with AHL Legal, for reasons other than "An Run" being discernible.

[96] While I accept that each of the first and third plaintiffs were honestly testifying as to their belief, I take into account the possibility of subconscious bias informing their

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103 TS2-89, ll 44-47.
104 Exhibit 20; TS2-89, l 25 to 2-90, l 47.
105 TS3-7, l 4 to 3-8, l 3.

belief. This is borne out by the evidence of the independent interpreters. Whilst their expertise does not lie in unravelling pixelated characters, they are familiar with the Chinese written language. Their independent views as to the ability to see the characters bears on the possibility of an ordinary reasonable reader being able to make out the characters, which in themselves are not a literal translation of "Accuro".[106] When all that is added to my own observations about the extent of pixelation and the lack of an available inference that "An Run" is discernible from the fact of communication to the plaintiff's in the first instance, I am not satisfied the plaintiffs have made out their allegation that "Accuro" is able to be read, in Chinese characters, by the ordinary reasonable reader of the article.

[97] Given the natural human reaction to attempt to read behind pixelation when presented with it, I have taken into account that the ordinary reasonable reader may have zoomed in on the pixelation to some degree in an effort to read through it, but they would be unlikely to have zoomed in to the extent that Ms Zhao did. In any event, they did not have the background information that the pixelation may have hidden the characters "An Run".

[98] The plaintiffs' pleadings do not suggest that any of them, other than the first plaintiff, is identified other than by reference to recognition of the "An Run" characters. In my view, it follows that the second, third and fifth to eighth plaintiffs inclusive have failed to establish they have been identified in the subject article.

[99] Had I considered that the "An Run" characters were discernible, I still would not have found that any of those plaintiffs had been identified in the article.

[100] Broadly speaking, nothing further is required in terms of identification when the defamatory material names the plaintiff. Where not directly named the circumstances must be such to allow persons acquainted with the plaintiff to believe that he or she was the person referred to before identification will be proven. This will often require evidence from people who have special knowledge linking the plaintiff with what has been published.[107]

[101] The plaintiffs have not pleaded innuendo, nor proven that special knowledge. However that is not always fatal. Where there is "*something in the defamatory matter or in the circumstances in which it is published, which indicates, and enables a jury to find, that particular individuals are defamed, although they are not named*", identification can be proven.[108] A statement against members of a clearly defined group may be capable of identifying every member of the group.[109] A statement which imputes misconduct against some of the members of a clearly defined group may be capable of referring to all members of the group.[110]

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106 TS1-23, l 37.

107 *Plymouth Brethren Christian Church v The Age Company Limited* (2018) 97 NSWLR 739, [58]; *Consolidated Trust Company Limited v Browne* (1948) 49 SR (NSW) 86, 89, 91, 92.

108 *Knupfer v London Express Newspaper Limited* [1944] AC 16, 124.

109 *Knupfer v London Express Newspaper Limited, ibid*.

110 *Bjelke-Petersen v Warburton* [1987] 2 Qd R 465, 467, 471, 475.

Importantly for present purposes, when a report defames the owner of a business without expressly naming the owner, and the imputation from the report is likely to injure the business, the owner has available an action in defamation without having to prove that the persons who read the report knew that he or she was the owner of the business.[111]

[102] If the Chinese characters the subject of pixelation were a direct or close translation of the actual word "Accuro", and if they were discernible, I would have accepted that the sixth, seventh and eighth plaintiffs had been identified, because of the principle explained immediately above in *Mirror Newspapers Ltd v World Hosts Pty Ltd*.[112]

[103] However, even if the pixelated characters were a direct translation of the firm name and if they were discernible, the second, third and fifth plaintiffs were not identified by the article. Each of them have a managing role in the Brisbane, Sydney and Beijing offices. The identity of the owner of the Beijing practice is not revealed in the evidence and the sixth, seventh and eighth plaintiffs are the "owners" of the Brisbane, Sydney and Melbourne practices respectively, not the non-corporate plaintiffs. The principle from *Mirror Newspapers Ltd v World Hosts Pty Ltd* cannot apply to them.

[104] In any event, "Accuro" is not a word recognised in the English language and "An Run" therefore cannot be a direct translation of any identifiable word in the English language.[113] It is a term of art employed in a marketing sense. It does not inform the readers of the details of the law firm to which it is said to relate or, in other words it does not identify the group of persons whom it is said to have defamed. Accordingly, special knowledge of the reader is required to precisely identify those who are affected by the publication. It has not been pleaded nor proven by evidence and so I would not have found for the second, third and fifth to eighth plaintiffs inclusive on this basis.

The first plaintiff

[105] The first plaintiff is differently positioned as she is the only one of the plaintiffs who is directly named. While some of the authorities at face value suggest that the mere naming of a person is sufficient for the purposes of identification, more precisely the test to be applied is whether the publication identifies the plaintiff as the person defamed. The defendant must be proven to have published the defamatory matter "*about the plaintiff*" or "*of and concerning*" the plaintiff.[114]

[106] The defendants in effect argue that because the name of the first plaintiff appears only in each of the screenshots of the Google results search, which are about the

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111 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632, 635, 640, 644.
112 *ibid*.
113 TS1-23, l 37.
114 *Knupfer v London Express Newspaper Ltd*, *supra* at 121; *Zoef v Nationwide News Pty Ltd* (2016) 92 NSWLR 570, [126].

first defendant and AHL Legal, and not in the text of the article, the ordinary reasonable reader would not associate the first plaintiff with the wrongdoer the subject of the article. Further, it is submitted, the first plaintiff is unlikely to be identified because the words bearing her name are in very small type, as shown in Exhibit 18.

[107] Dealing with the second submission first, Exhibit 18 demonstrates that the name indeed appears to be small on the screen of an iPhone 6, one of the two possible models of phone used by Ms Qiao to view the published article. That may explain why Ms Qiao did not notice the first plaintiff's name, but I cannot assume that the ordinary reasonable reader used an iPhone 6 to read the article. Nor can I assume that a mobile phone of any make and style was used given that WeChat is accessible on tablets and computers.

[108] In any event, it is well established that in order to understand the effect of the published material the ordinary reasonable reader is taken, in the case of written material, to have read the whole of the published material. This is not a case where it can be said that a listener did not direct the same attention to all parts of the publication because of an inability to review the publication.[115]

[109] For those reasons I accept to the required standard that the first plaintiff was expressly named in the published article for the purposes of proving her identification for the purposes of the action.

[110] Turning to the first submission, in understanding the meaning of the article, and hence in this case if the article is of or about the first plaintiff, the ordinary reasonable reader does not approach the issue as a lawyer might approach a question of construction. As a result the ordinary reasonable reader may imply meanings quite freely and may be prone to do so when the publication is derogatory.[116] That reader is entitled to form a general impression of the meaning of the words used.

[111] Broadly, the article complains of a competitor pretending to be AHL Legal and thereby luring away clients or potential clients, or attempting to do so. I accept that the Google screenshots were included to provide "evidence" of that conduct, in an effort to substantiate the claims made. For that reason the ordinary reasonable reader's attention is drawn to those screenshots, where the first plaintiff's name is displayed. That then associates the first plaintiff with the claims being made in the article. The placement of the first plaintiff's name does not leave the ordinary reasonable reader to assume that Carrie Lee works for AHL Legal, nor does it associate her with the first defendant or AHL Legal.

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115 *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 165-166; *Morosi v Broadcasting Station 2GB Pty Ltd* [1980] 2 NSWLR 418, 420.

116 *Lewis v Daily Telegraph Ltd* [1964] AC 234, 277, 285; *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186, [11].

Has the allegation of publication to another been proven?

[112] The defendants submit that it has not been proven the article was published, in the sense that it was read and understood by persons who could do so in the language it was predominantly written, namely Chinese. They submit that there is no direct evidence of publication in this sense, and the drawing of an inference of publication is unsafe.

[113] I do not accept that to be the case.

[114] In *Lighthouse Forward Planning Pty Ltd v Queensland Newspapers Pty Ltd*[117] Flanagan J cited Beech-Jones J in *MacDonald v Australian Broadcasting Corporation*[118] when he observed:

> "*In a case such as this, identifying persons to whom the publication is alleged to have been made is merely one way of providing particulars of publication. As Mr Dawson conceded in argument, it may be in a particular case involving the internet that a plaintiff cannot name such a person but would instead rely upon an inference from, say, the number of hits and the period of time over which a matter was placed on the internet that at least one person downloaded and viewed the article in question*."

[115] Flanagan J ordered the plaintiffs in that case to provide particulars of publication, as did Beech-Jones J in the case before him. But in each instance that must be seen in light of the nature of the respective applications and the relief sought. It does not deny the legitimacy of the drawing of an inference, if one is properly available, to prove publication to at least one person.

[116] Here the evidence establishes that there was a notification sent to less than 800 subscribers when the article was published, although the phraseology used suggests a figure close to but not reaching 800 subscribers. Given it was published on a Chinese based social media platform widely used in the Chinese community and on a page relating to a law firm which markets to Chinese clients, in my view it can be safely inferred that nearly all, and possibly all, readers who received the notification of the publication were conversant in the Chinese language.

[117] The article remained posted for 19 days. At some point on the day it was posted, namely 6 July 2017, 113 "reads" were recorded. At some time four days later on 10 July 2017, 410 "reads" were recorded. Common sense dictates that there were repeat visitors, but common sense also requires a conclusion that persons other than the parties and Ms Qiao "read" the article. That two separate people approached two of the plaintiffs and informed them of the article supports that conclusion.

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117 [2014] QSC 217, [23].
118 [2014] NSWSC 206, [28].

[118] In those circumstances I accept that at least one person and, given the nature of the allegations made and the likelihood of that in itself generating interest in the article, it is likely more than one person read the whole of the article published.

The meanings conveyed by the publication

[119] The plaintiffs allege that the functional part of the article, in Chinese script, contains, amongst other comments, the following four assertions:

1. "*There is a fraudster who imitates our law firm!*";
2. "*I have to roll my sharp eyes and fight with these fraudsters to the end.*";
3. "*Come on, To those fraudsters, please use your rusty brains, our customers are smart and they cannot be cheated so easily"*;
4. "*Indeed, someone has used our brand name to advertise*". [119]

What then immediately follows are the Google screenshots.

[120] Using the same numbering as above, the defendants contend that what is actually said, as translated into English, is:

1. "*Some faker pretended to be our law firm!*";
2. "*So, I have to roll my 24K eyes and continue to fight against the faker.*";
3. "*Come on… fakers, wake up your rusty brains! Our clients are smart! It is not easy to fool them.*";
4. "*Well it turns out that someone has falsely used our brand to advertise*".[120]

[121] The defendants accept that the article read as a whole was capable of being understood to mean that someone had pretended to be, or be associated with, AHL Legal and similarly that an attempt had been made by someone to pass off a law practice as being associated with AHL Legal.[121] It is common ground that the article is defamatory. What is not common ground are the interpretations arising from the article. That in turn devolves to a determination of whether the article complains of a fraudster or fraudsters, or a faker or fakers. The former is submitted to be more derogatory than the latter.

[122] Each side called an accredited translator/interpreter as an expert witness. The literal translation of the two Chinese characters is neither of the contended for options; it is in fact "*cheat paper*".[122] Each interpreter sought to understand the meaning of the characters by reference to the context of the article, given this was a "nonsense word".

[123] That each expert witness honestly came to a contrary view underlines the subjectivity involved in the particular translation and tends to suggest that reasonable minds can easily differ in the task. This is further underlined by two of

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119 ASOC at para 29.
120 FAD at para 15; Exhibit 21, Annexure 2.
121 FAD at para 16; Exhibit 21, Annexure 2.
122 TS 2-87, l 44.

the plaintiffs who expressed themselves in terms that the characters were capable of different meanings,[123] and the fact that the concerns letter on 6 July 2017 did not expressly refer to the articles asserting they were fraudsters (although the first plaintiff considered the terms used were analogous).[124] Each of the expert witnesses expressly agreed that the Chinese characters the focus of attention could bear various meanings, including "faker" and "fraud",[125] or derivations thereof.

[124] Both experts agree that the means of publication is important to understand the context in which the Chinese characters are used, and that WeChat is an informal means of communication, thereby tending to the use of informal language.[126] I accept the English word "fraud" is a more formal allegation than that of "faker", but while a tendency to informality is suggestive of the adoption of the English word "faker", it is not in itself determinative.

[125] Bearing in mind that the ordinary reasonable reader will try to strike a balance between the most extreme meaning that the words could have and the most innocent meaning,[127] the subjectivity necessarily applied in the translation of the Chinese characters and the use of them in an informal style of communication means that I am unable to be satisfied to the required standard that the meaning of the disputed Chinese characters would be understood as "fraud", or a variation of that word, by the ordinary reasonable reader.

[126] However, I consider that in the context of the allegations here there is little if any difference in the meanings behind the two words. In that respect I note Ms Zhao's opinion evidence that whether "fraudster" has a stronger meaning than "faker" depends on the context.[128] Here, regardless of which word is attributed to the article, the allegation is one of impersonation to clients and potential clients. As the plaintiffs submitted,[129] the sting of the defamation is an allegation that the plaintiffs consciously and deliberately impersonated the defendants' legal practice with the object of drawing potential clients. It is not said that the imposter has gained anything from the impersonation. Had that been the case, an allegation of "fraud" may have been more apt, but in my view, in the present circumstances the terms are effectively synonymous. Both encompass dishonesty, which is the essence of the allegation.

The defence of honest opinion

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123 TS1-43, ll 27-30; 1-44, ll 24-28; 1-45, ll 30-34; 1-96, l 46.
124 TS1-42, l 9 to 1-43, l 22.
125 TS2-84, l 33 to 2-85, l 19; 3-4, ll 22-27.
126 Exhibit 19 at para 11; Exhibit 21 at paras 5.4, 7.2, 7.4, 7.7, 7.10.
127 *Lewis v Daily Telegraph*, *supra*, at 259-260; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77, [26].
128 TS2-85, l 27. The transcript records the word "content" but my own notes and recollection are that the word used was "context".
129 Plaintiffs' written submissions at para 1(b).

[127] The defendants rely on the statutory defence of honest opinion.[130] In order to succeed they must respectively prove on the balance of probabilities that:

1. the defamatory matter was an expression of opinion rather than a statement of fact; and
2. it was the opinion of an employee or agent of the respective defendant; and
3. the opinion related to a matter of public interest; and
4. the opinion was based on proper material.

[128] The parameters of the last mentioned matter are defined by ss 4, 31(5), 31(6) and the definition of "proper material" at Schedule 5 of the DA.

[129] If the defence is established, it can be defeated only if the plaintiff proves that the defendant did not believe the opinion was honestly held by the employee or agent at the time the matter was published.[131] In this case the plaintiffs do not rely on this provision. They contend that the defence is not established.

An expression of opinion or a statement of fact?

[130] Comment, or statements of opinion, fall within this statutory defence. Statements of fact do not. It is not always easy to differentiate between the two. It has been said that a comment (or opinion) is "*something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark, etc*".[132] The form of the words used is not determinative.

[131] Messages conveyed as an apparent statement of fact may still be capable of being comment or opinion.[133] A communication will be more likely to be considered to be a statement of fact where it does not refer to the facts from which it can be deduced that the comment is being made, or where the facts are not contained within the publication itself, or are not in the common knowledge of both the communicator and the recipient of the communication.[134] The test has been stated to be in the following terms:

> "*The question of construction or characterisation turns on whether the ordinary reasonable "recipient of a communication would understand that a statement of fact was being made, or that an opinion was being offered" – not "an exceptionally subtle" recipient, or one bringing to the task of "interpretation a subtlety and perspicacity well beyond that reasonably to*

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130 Section 31(2) of the DA.
131 Section 31(4) of the DA.
132 *Clarke v Norton* [1910] VLR 494, 499 cited in *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, [35].
133 See for example, *Pervan v North Queensland Newspaper Company Ltd* (1993) 178 CLR 309.
134 *O'Brien v The Marquis of Salisbury* (1889) 6 TLR 133, 137; *Channel Seven Adelaide Pty Ltd v Manock*, *supra* at [5], [35], [47]; *Pervan v North Queensland Newspaper Company Ltd*, *supra* at 327.

> *be expected of the ordinary reader whom the defendant was obviously aiming at"*."[135] (citations omitted)

[132] I am reasonably satisfied on the balance of probabilities that the defamatory matter is a statement of opinion and not fact.

[133] The most convenient source in considering the overall effect of the publication is the defendants' expert's translation at Exhibit 21, Appendix 2. While I accept there are comments therein which are in the form of statements of concluded fact,[136] the overall tenor of the article is that it is the woman in the GIF image (who in the online version rolls her eyes) speaking of an opinion she holds. That is supported by the provision of the so-called "evidence" on which the opinion is based in the article itself. The allegation would be understood by the ordinary reasonable reader as being a conclusion based on the material provided. True it is that it would more obviously be a statement of opinion if phrased in softer terms, such as "I believe that…" or "it seems that…", but as noted earlier the form of word used does not necessarily preclude the material from being understood as an opinion, or comment.

Was the opinion expressed that of an employee or agent of the defendant?

[134] The published opinion was Ms Qiao's. For reasons earlier expressed, I am not satisfied she was the agent of the first defendant. Accordingly, the defence is not available to the first defendant, in my view.

[135] Ms Qiao was an employee of the second defendant. I have already found the second defendant is not liable for publication of the article, but if wrong about that, this defence would remain open to the second defendant on this element of the defence.

[136] I do not accept that in order to qualify for the defence the agent or employee must be identified so that the reader can ascertain the weight to be given to the opinion.[137] There is no such requirement in the express terms of the legislative provision, and the plaintiffs cite no authority for the proposition. The safeguards for the operation of the defence relate to the concepts of "*public interest*" and "*proper material*", not the status of the person whose opinion is published. I cannot discern a legitimate reason to read into the provision a further limiting requirement.

Did the opinion relate to a matter of public interest?

[137] The article had a scandalous aspect to it, conveying as it did an opinion that someone was attempting to impersonate AHL Legal for the purposes of deceiving

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135 *Channel Seven Adelaide Pty Ltd v Manock, supra* at [36].
136 For example, "Some faker pretended to be our law firm" and "Well it turns out …".
137 Plaintiffs' written submissions at para 93.

clients and potential clients. It was therefore likely to arouse interest in members of the public, but not everything that interests the public is in the public interest.[138]

[138] At common law, a subject of public interest for the purposes of the analogous defence of fair comment refers to the conduct of a person engaged in activities that either inherently, expressly or inferentially invite public criticism or discussion.[139] That is the appropriate test in this matter given the statutory defence is based on that common law defence.

[139] Contrary to the plaintiffs' submission,[140] I accept the opinion related to a matter of public interest.

[140] The legal profession is publically regulated and disciplinary proceedings are conducted in public forums. Given the vital role legal practitioners play in the compliance with at times complicated laws and the administration of justice generally, which is in itself a matter of public interest and concern, the proper and honest conduct of legal practices is a matter which invites public criticism or discussion. In my view, the fact that the opinion related to one legal practice or practitioner only does not deprive it of the status of being related to a matter of public interest. That is not to say that every publication about any or all aspects of a legal practice or practitioner's conduct will be in the public interest, but in my view the true identity of legal service providers, each of whom advertise to the public, falls within that concept.

Was the opinion based on proper material?

[141] The defendants submit that the opinion was based on proper material as it was based on material that was substantially true.[141] That in turn means that the underlying material was true in substance or not materially different from the truth.[142]

[142] The article expressed Ms Qiao's belief or opinion that Accuro Legal was bidding for preferential search results and thereby seeking to impersonate the first defendant and AHL Legal. Her opinion was based on the Google search results which evidenced that when using those particular search terms the first result was for Accuro Legal, as well as the information marked thereon that the result was generated via Google AdWords involvement and her belief that entities can purchase preferential results through Google AdWords.

[143] The unobscured Google search results in Exhibit 10 evidences that her belief in that respect was based on true underlying material. Although the defendants now accept that the plaintiffs did not pay for Google AdWords priority, there is no suggestion that the printouts were falsified. Her opinion was based on something that was

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138 *Lion Laboratories Ltd v Evans* [1985] QB 526, 553.
139 *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, 215, 220 to 221.
140 Plaintiffs' written submissions at para 95(a).
141 Section 31(5)(a) of the DA.
142 Section 4 and Schedule 5 of the DA.

substantially true, as defined. That priority can be paid for through the Google AdWords facility is common ground between the parties and hence that is also a true fact.

[144] I do not accept the plaintiffs' submission that Ms Qiao's opinion was not based on proper material because, in effect, more research could or should have been undertaken before forming the opinion, or publicly expressing it.[143] That submission fails to have regard to the statutory prescription of when an opinion is based on proper material at s 31(5) of the DA, and the definition of "substantially true" at s 4 and Schedule 5 of the DA.

[145] Therefore I am satisfied that this limb of the defence is established.

Conclusion

[146] In my view, the evidence does not raise the defence at s 31 of the DA for the benefit of the first defendant. If I am wrong in concluding earlier that the second defendant did not publish the article, the defence would be made out in its favour.

Damages

[147] I follows that, in my view, only the first plaintiff is entitled to damages, and only from the first defendant. I will however also indicate what damages I consider each of the other plaintiffs to be entitled to in the event my conclusions are found to be erroneous and that they too are entitled to an award of damages.

Is the evidence of personal hurt admissible on the issue of damages?

[148] Each plaintiff testified as to having suffered personal hurt both upon becoming aware of the publication and due to the subsequent conduct of the first defendant.

[149] The first plaintiff said she was appalled and angry and thought the article was "*absolutely uncalled for*".[144] In relation to pleading the defences and a counterclaim which in effect asserted that the Accuro Legal practice had been conducted dishonestly and attempted to be part of the first defendant's practice, the first plaintiff said she felt that was belittling because they conducted Accuro Legal honestly and she couldn't comprehend the assertion made.[145] As to the fact that that assertion was not fully abandoned until the commencement of trial, she said that the impact did not change much.[146] Having seen and heard that testimony, my

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143 Plaintiffs' written submissions at para 95(b).
144 TS-16, l 17.
145 TS1-16, ll 22-31.
146 TS1-16, l 37.

impression of it is that she meant that there were no new emotions involved, but that she continued to be appalled and angry and that this conduct provided a further source of those emotions.

[150] The second plaintiff said she felt embarrassed and angry by the publication. She said she felt surprised because it was not something she expected a fellow legal practitioner to do.[147] In relation to the pleaded defences and counterclaim, she said that allegation made her feel angry and embarrassed and the fact that it was not completely abandoned until the commencement of the trial made her feel angry.[148] The complaints made to legal disciplinary authorities in various States made her feel as though the first defendant would continue to harass them.[149]

[151] The third plaintiff said that, in relation to the publication itself, she felt angry and also frustrated in the sense that she felt that they could not get away from the first defendant and he would not leave them alone.[150] She was not asked anything concerning the counterclaim or subsequent conduct of the first defendant relevant to an assessment of aggravated damages.

[152] In relation to the fact of publication, the fifth plaintiff said she felt astonished, angry and distressed. She found the allegations made against them quite unacceptable and distressing.[151] She too, was not questioned as to any feelings arising from the pleading of the counterclaim, nor the subsequent conduct of the first defendant insofar as that could affect aggravated damages.

[153] It might be thought that the reaction of each plaintiff is unremarkable given the nature of the allegation which the defendants now accept were false. I accept that each has suffered as they have testified. Having said that it does not appear to me that their feelings fall into an exceptional range of hurt or distress.

[154] The defendants contend that the evidence of personal hurt is inadmissible because personal hurt had not been specifically pleaded as a head of damages. The plaintiffs contend that a pleading to the effect of the publication was to bring each plaintiff "*into hatred, ridicule and contempt*"[152] together with a pleaded claim for aggravated damages (which it should be noted is found only in the prayer for relief), and particulars provided in relation to that claim, was sufficient to raise the issue of personal hurt in the pleadings. The plaintiffs further submit that the provision of particulars and the exchange of correspondence prior to trial was such that the defendants were put on notice of the claim.[153]

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147 TS1-74, ll 13-17.
148 TS1-74, ll 19-30.
149 TS1-74, ll 32-38.
150 TS1-81, ll 19-22.
151 TS1-96, l 38 to 1-97, l 9.
152 Amended Statement of Claim at para 30(a).
153 TS1-10, l 20 to 1-15, l 46; Defendants' written submissions at paras 58, 59, 65(j); Plaintiffs' written submissions at paras 144-145.

[155] The UCPRs, particularly at rr 150(1)(b) and 155(2)(a), require a degree of specificity as to the head of damages being claimed. It has not been expressly pleaded, and so the issue is whether it has been effectively pleaded in the other aspects of the pleadings in this case.

[156] The pleading of being brought into hatred, ridicule and contempt was adopted as a test to determine whether the complained of material is in fact defamatory,[154] although over time other tests have been developed.[155] The test says nothing about a specific head of damage claimed. For example, the pleading can apply equally to reputational damage (which is specifically pleaded in this case under the same formula) as it does to personal hurt. To further emphasise this point, it can be pleaded (and again has been in this case) in respect of corporate plaintiffs which of course cannot suffer personal hurt. Accordingly, the pleading of "*hatred, ridicule and contempt*" might allege personal hurt, but not necessarily so without more, and in my view not to the degree of specificity required by the UCPRs.

[157] Similarly, a claim for aggravated damages may relate to a claim for personal hurt, but is not necessarily so limited.

[158] Aggravated damages are not a separate head of damages. They are included in the general damages, whether separately calculated or not. They focus "*on the circumstances of the wrongdoing which has made the impact of it worse for the plaintiff. It is not to go beyond compensation for aggravation of the harm to repute or feelings*."[156] That aggravated damages may be relevant to reputation or feeling has been expressly recognised in this State.[157]

[159] In this case the plaintiffs provided particulars as to the claim for aggravated damages.[158] The plaintiffs therein particularised an aspect of the material facts giving rise to the claim for aggravated damages as:

> "*The plaintiffs' perception, arising from the contents of the defamatory message, that the defendants held them to be dishonest.*"

That is, plainly enough, a reference to personal hurt even though it is not expressed in those clear terms. The pleadings must be read in light of the particulars.

The plaintiffs' case for aggravated damages can only rest on the pleading of hatred, ridicule and contempt being referrable to personal hurt. Otherwise, the claim for aggravated damages is meaningless in so far as the particulars illuminate it.

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154 *Parmiter v Coupland* (1840) 6 M&W 105, 108.

155 *Sim v Stretch* [1936] 2 All ER 1237, 1240; *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 13, 23-24.

156 *Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, [411] cited in *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89, [37] ("***Cerutti***").

157 *Cerutti, supra* at [38]-[39].

158 Court document 68; Plaintiffs' Response to Defendants' Further Request for Particulars at para 4.

[160] In my view the combined reading of the pleadings and the particulars is sufficient, although only barely sufficient, to accept that a head of damage of personal hurt is raised. For that reason the evidence of personal hurt, including the evidence going to aggravated damages for personal hurt, is admissible.

General principles

[161] An award of general damages for defamation serves three overlapping purposes. They are to compensate for damage to both the personal and, if applicable, business reputation, to give consolation for the personal hurt and distress caused by the publication and to vindicate the person's reputation.[159] Damage to reputation is assumed at law upon proof of publication. Therefore a plaintiff is not required to prove actual damage to reputation, nor to call evidence that others thought less of the plaintiff as a result of the publication,[160] and there was no such evidence adduced in the case.

[162] The amount of damages awarded must be the minimum necessary to signal to the public the vindication of the plaintiff's reputation.[161] The amount awarded must be sufficient to convince a bystander of the baselessness of the subject of the publication.[162]

[163] In this case there is no clear evidence of actual economic loss, although there is an ill-defined claim for future economic loss.[163] It is said in such a case that damages are "at large". However the assessment will depend upon what is fair and reasonable having regard to all the circumstances of the case. The extent of the publication and the seriousness of the "sting" of the defamatory material are pertinent considerations.[164]

[164] Injury to an individual plaintiff's feelings, which includes personal hurt as well as phenomena such as anxiety, loss of self-esteem and a sense of indignity, are relevant also to the assessment of damages. This head of damages may represent a significant part of the harm sustained by a plaintiff. Lord Diplock stated in *Cassell & Co Ltd v Broome*:

> "*The harm caused to the plaintiff by the publication of a liable upon him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him*."[165]

Whether it does depends of course on the evidence in the particular case.

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159 *Cerutti*, *supra* at [25].
160 *Cerutti*, *supra* at [59].
161 *Cerutti*, *supra* at [25], [34].
162 *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071.
163 ASOC at para 38(b).
164 *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [59](e).
165 *Cassell & Co Ltd v Broome*, *supra* at 1125 cited in *Cerutti*, *supra* at [32].

[165] A corporate plaintiff cannot be awarded damages for personal hurt, simply because a corporation cannot be injured in its feelings. It can be injured economically[166] and also suffer injury to its reputation.[167]

[166] In assessing the award of damages the Court should also consider the "grapevine effect", which was described by Flanagan J in *Wagner & Ors v Harbour Radio Pty Ltd & Ors* as:

> "*…no more than the realistic recognition by the law that, by the ordinary function of human nature, the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published*."[168]

[167] The use of social media enhances the ability for the grapevine effect to in fact occur. It however must also be recognised that the publication on social media is usually in a more transient form than might otherwise be the case, and in this case there was evidence that when new articles were posted to the AHL Legal page the existing posts all dropped down from the top of the list.

[168] I have earlier noted that there is two way animosity between the first, second third and fifth plaintiffs and the first defendant. In assessing damages, the Court cannot have regard to malice or other state of mind of the defendant at the time of publication except to the extent that the state of mind affects the harm sustained by the plaintiff.[169]

Aggravated damages

[169] Some principles relating to aggravated damages have earlier been noted.

[170] Additionally, aggravated damages may be granted if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable. The unjustifiable conduct may have occurred when making the publication or at any time up to the assessment of damages.[170] Damages may be increased by an unjustifiable failure to apologise for or retract the publication, by an unjustifiable persistence in making untrue allegations or by pursuing a defence in a manner which is unjustifiable, improper or lacking in bona fides.[171] The conduct giving rise to an award of aggravated damages may relate to both personal hurt and reputational damage.

Mitigation

[171] Some of the means by which damages may be mitigated are listed at s 38 of the DA.

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166 *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344, 357.
167 *Todd v Swann Television and Radio Pty Ltd* [2001] 25 WAR 284, 298.
168 [2018] QSC 201, [736].
169 Section 36 of the DA.
170 *Cerutti*, *supra* at [37].
171 *Cerutti*, *supra* at [38].

[172] Notably for present purposes, an apology, as referred to there, is meant to undo the harm caused. An apology should amount to "*a full and frank withdrawal of the charges or the suggestions conveyed*" and expressly regret they were ever made.[172]

[173] Here the defendant expressed sorrow for the fact the article was published, which apology fell short of an acceptance of blame. Leaving aside any without prejudice discussions prior to trial, the first time he apologised, and therefore the first time any public apology was made, was on the second day of the trial.[173] As earlier observed, I consider the manner in which the apology was delivered was hollow and rehearsed. Nonetheless there has been a public apology of sorts, albeit a late one and only offered under cross-examination, and so it affords some, but only a small, degree of mitigation.

Comparable damages awards

[174] While it is legitimate to consider damages awards in other cases, it must be approached with caution.[174] Care must be taken to remember that these cases provide some guidance only. They do not prescribe upper or lower limits on the quantum of damages to be awarded in any one case and they do not absolve the court from ensuring that the damages awarded actually represent an appropriate and rational response to the harm sustained in the individual case.[175]

[175] The plaintiffs have submitted that assistance will be gained by reference to *Bertwhistle v Conquest*[176] and cases cited therein, *Grattan v Porter*,[177] *Reid v Dukic*[178] and *Dods v McDonald (No 2)*.[179] The defendants submit that assistance will be gained from a consideration of *Asbog Veterinary Services Pty Ltd v Barlow*. ("*Asbog Veterinary*")[180] To that list of cases I would also add *Cerutti v Crestside Pty Ltd*.[181]

Consideration

[176] In the present matter, the offending article was a single publication,[182] but primarily aimed at a readership of a defined market of clients in which the first defendant and the plaintiffs were in competition with each other. The initial readership group comprised less than, but probably close to, 800 people, the vast majority, if not all, of whom, were capable of reading the Chinese language. I accept it is likely that the article was "read" on the AHL Legal WeChat page by many individual readers within the first 4 days of publication, and then more before it was removed after a

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172 *Cerutti*, *supra* at [44] citing Gatley on Libel and Slander (11th Ed) 2008, 31.2.
173 TS2-27, l 35 – 2-28, l 11.
174 Some of the difficulties in relying on comparable cases are outlined in *Cerutti*, *supra* at [46]-]49].
175 Section 34 of the *DA*.
176 [2015] QDC 133.
177 [2016] QDC 202.
178 [2016] ACTSC 344.
179 [2016] VSC 201.
180 [2020] QDC 112.
181 *supra.*
182 *cf Reid v Dukic, ibid.*

further 15 days. I also accept that the "grapevine effect" is likely to have had an effect and that many of those persons on the grapevine will not be reflected in those identifiable reader numbers.

[177] However, I accept that the article moved down the list of posts on the AHL Legal WeChat page as other posts were added, and thereby gained less prominence as time passed. I also accept that in general the effect of social media posts tends to be more transitory than some other forms of publication. Nonetheless, the defamatory material had considerable reach into a defined and identifiable section of the community which had an interest in the provision of legal services in Australia.

[178] A publication which clearly imputes dishonesty on the part of a legal service provider is seriously defamatory. A reputation for honesty and integrity of legal practitioners is essential if practitioners are to have the trust and respect of others dealing with them on behalf of their clients.

> "*In some cases, a person's reputation is, in a relevant sense, his whole life. The reputation of a clerk for financial honesty and of a solicitor for integrity are illustrations of this*."[183]

Consideration of personal hurt should be undertaken in that context in this case.

[179] However, the imputation does not carry the same opprobrium and broad public condemnation attaching to an allegation of paedophilia,[184] or other sex offending[185] or of a murder committed by a police officer in the course of his duties.[186] Further, it was not combined with any allegation that the plaintiffs were incompetent, negligent or otherwise did not provide good service to their clients.

[180] The defendants have correctly observed that the plaintiffs did not call any witness to speak of the state of any plaintiff's reputation and nor did they adduce any substantial evidence of hurt. They submit that whilst the law presumes there has been damage, in the absence of specific evidence the damage should be considered nominal.[187] I do not accept that submission. It is not unusual that specific evidence of that nature is not led. It therefore falls to the Court to assess the degree of impact based on many features including the sting of the defamation, the likely effect of it on a person in the plaintiff's position and the extent of the publication.

[181] In my view, the damage to each non-corporate plaintiff's personal and business reputation, and the business reputation of each of the corporate plaintiffs, is significant. Personal reputation is in itself an important feature and is not merely a business asset.[188] As was the case in *Cerutti*, in my view the nature of the present

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183 *Crampton v Nugawela* (1996) 41 NSWLR 176, 193 cited in *Cerutti, supra* at [60].
184 *cf Grattan v Porter, ibid.*
185 *cf Bertwhistle v Conquest, ibid.*
186 *cf Dods v McDonald (No 2), ibid.*
187 Defendants' written submissions at para 56.
188 *Cerutti, supra* at [60].

defamation is such as to make vindication of the plaintiffs' respective reputations a matter of particular importance.

[182] Although the plaintiffs have pleaded a broad claim for future economic loss, there is no direct evidence of any such loss. There is some evidence, particularly from the fifth plaintiff, as to the likely effect that the defamatory material would have had on clients and potential clients. It tends to suggest that at least some future business may have been lost.

[183] On the basis of the evidence adduced and as matter of common sense, I accept that the publication of the defamatory material is likely to lead to some, unquantifiable, loss of business. Further, there was no evidence led as to the profit margin expected for types of work undertaken, nor the rates at which the work is charged for the different employees and plaintiffs. Given the inability to quantify this amount in any way at all and the fact it is closely related to damage to the business reputation of the plaintiff, I consider that this aspect is sufficiently reflected in the component of the damages award which reflects reparation to the business reputation.[189]

[184] If, contrary to my conclusions, it is found that any of the corporate plaintiffs are entitled to damages, care would need to be taken to ensure that there is no "doubling up" on this aspect of the damages award.

[185] I accept that the plaintiffs are entitled to aggravated damages. In order to understand the reasoning behind this conclusion it is necessary to understand a little more about the course of the pleadings.

[186] The defendants initially relied upon a counterclaim, the broad effect of which was to allege damage caused by the conduct of the plaintiffs in impersonating and otherwise passing themselves off as AHL Legal and the first defendant.[190] It was based on the allegation that the plaintiffs had paid for the preferential Google AdWords search results. It was therefore related to the defences pleaded under sections 25 and 26 of the DA.[191]

[187] By consent, on 3 December 2019 the counterclaim was dismissed upon the provision of certain undertakings.[192] By the filing of the FAD on 21 April 2020, the defendants abandoned the defence pleaded under section 26 of the DA. The defendants then abandoned the defence pleaded under section 25 of the DA on the eve of the trial.

[188] There is no direct evidence that the forensic examination of the plaintiffs' Google AdWords account in November 2019 had any impact on the decision to consent to the dismissal of the counterclaim, but it is difficult to believe it did not at least operate in the background of that decision making, no doubt along with other

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189 *Cerutti, supra* at [81]-[84].
190 Amended Defence and Counterclaim, Court Doc 28.
191 FAD at paras 19 and 20.
192 Consent Order of Reid DCJ dated 3 December 2019, Court Doc 43.

considerations. Similarly, it is difficult to believe that it had no role to play in the abandonment of the pleaded defences in April 2020 and on the eve of trial. I have earlier noted my impression as to the explanations for the delay in the abandonment of the defences as being unconvincing and having the appearance of convenience.

[189] The harm caused by the pleading of those defences was further aggravated by the complaints to the respective Legal Services Commissioners and, particularly, the failure to notify those bodies of the first defendant's later acceptance that the complaints cannot be made out. This has improperly and unjustifiably affected the standing of the first plaintiff, and Accuro Legal more generally, in the eyes of those regulatory bodies.

[190] In my view, the combination of those factors amounts to unjustifiable persistence in making untrue allegations or by pursuing a defence in a manner which is unjustifiable, improper or lacking in bona fides and justifies the awarding of aggravated damages. In so concluding I do not consider that the initial pleading of the counterclaim was unjustifiable prior to the forensic examination of the plaintiffs' Google AdWords account and it was abandoned within a short time thereafter. Further, the reliance on the honest opinion defence was in my view justified, even though I have held it to be unsuccessful.

[191] I consider that the appropriate award of damages would fall at a point for each of the plaintiffs less than that awarded in *Bertwhistle v Conquest, Porter v Grattan, Reid v Dukic and Dods v McDonald (No. 2),* also bearing in mind the issues attaching to consideration of interstate damages awards in the last two mentioned cases. In each of those cases, other than *Reid v Dukic*, the seriousness of the defamation was significantly higher than the present. *Reid v Dukic* and *Dods v McDonald* (No. 2) involved more than the single publication involved here. There are other points of distinction but it is unnecessary to undertake a refined analysis of the differences to conclude that the appropriate award of damages would be less than in those cases.

[192] The appropriate award would also be higher than that imposed in *Cerutti* and in *Asbog Veterinary*. While there are similarities in the style of defamatory material published in *Cerutti,* it had a very limited readership and there was no real opportunity for the effects of the grapevine effect to adhere. In my view the defamation in the present matter is much more serious than that in *Asbog Veterinary* where the material was not targeted in the first instance to an identifiable group of people who were likely to have a particular interest in the matters published. Again, there are other points of distinction to be drawn between the cases but it is unnecessary that every one of them be drawn out.

[193] In my view the first plaintiff is entitled to a higher award than would have been granted to the other non-corporate plaintiffs to reflect the fact that she was directly named, and hence she was more readily identified to a wider audience, and to reflect

the aggravation of the complaint to the Legal Services Commissioner made directly about her conduct.

[194] Taking all that into account, I consider that an overall appropriate award of damages to the first plaintiff by the first defendant, including aggravated damages, is $60,000.

[195] If the second, third and fifth plaintiffs were entitled to damages, I would have awarded each of them $50,000, including aggravated damages.

[196] If the sixth to eighth plaintiffs inclusive were entitled to damages, I would have awarded each of them $20,000, including aggravated damages.

Interest

[197] The plaintiffs have pleaded a claim for interest, although it is not specifically pleaded as to the details sought.[193] Neither party have addressed the issue in their written submissions. It seems to me to be appropriate to order that interest be paid from the date of publication to the date of judgment at the rate of 3% per annum.[194]

Costs

[198] In the absence of an agreement being reached within two weeks of delivery of this judgment, the parties are to submit by email to my associate an agreed timetable for the delivery of written submissions as to costs no later than 4.00pm on 1 March 2021. Those submissions are to be limited to five pages, unless otherwise ordered.

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193 *Cf* r. 159(3) of the UCPR.

194 *Cerutti, supra* at [89]-[91].