SUPREME COURT OF QUEENSLAND

CITATION:	*Jones & Anor v Aussie Networks Pty Ltd & Anor* [2018] QSC 219
PARTIES:	**RHYS EDWARD JONES** (first plaintiff) **AUSTRALIAN SHAREHOLDER CENTRE PTY LTD** ABN 53 138 723 412 (second plaintiff) **v** **AUSSIE NETWORKS PTY LTD** ABN 44 124 401 734 (first defendant) **JOSEPH KEITH EIBY** (second defendant)
FILE NO/S:	BS No 12056 of 2013
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9-11, 19 October 2017
JUDGE:	Douglas J
ORDER:	**1. The plaintiffs' claims are dismissed.** **2. The parties will be heard as to the form of the order and as to costs.**
CATCHWORDS:	DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – IN GENERAL – where the first defendant operated an online investments and stock market discussion forum – where the first plaintiff was the director of the second plaintiff, which operated a stock trading business – where a user posted on the forum asking for 'thoughts, experiences and advice' regarding the second plaintiff – where the second defendant responded to the post – whether the second defendant's post was defamatory of the first plaintiff DEFAMATION – OTHER DEFENCES – HONEST OPINION – where the second defendant's post referred to, and was based upon, research that the second defendant had conducted – whether the defendants could rely on the defence of honest opinion

DEFAMATION – PRIVILEGE – QUALIFIED PRIVILEGE – IN GENERAL – where the second defendant's post was aimed at providing information in response to the user's question – whether the defendants could rely on the defence of qualified privilege

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – IN GENERAL – where only a small number of people identified the first plaintiff in the second defendant's post – where the post did not cause the people who identified the first plaintiff to think less of him – whether the first plaintiff was entitled to damages for any defamation

TORTS – MISCELLANEOUS TORTS – OTHER ECONOMIC TORTS – INJURIOUS FALSEHOOD – where the second defendant's post stated an incorrect fact about an entity related to the second plaintiff – whether the defendants had committed injurious falsehood – whether the plaintiffs were entitled to damages for any injurious falsehood

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – APPLICATION OF PROVISIONS TO PRESCRIBED INFORMATION PROVIDERS – where the first defendant operated an online forum – whether the post by the second defendant on that forum contravened s 18 of the *Australian Consumer Law* – whether s 19 of the *Australian Consumer Law* applied – whether the first defendant carried on the business of providing information – whether the second defendant's post had been in the course of carrying on a business of providing information

Australian Consumer Law (Cth), s 18, s 19
Defamation Act 2005 (Qld), s 30, s 31

AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd [2010] NSWSC 1395, cited
Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130, cited
Channel Seven Adelaide Pty Ltd v Manock (2007) 232 CLR 245; [2007] HCA 60, cited
David Syme & Co v Canavan (1918) 25 CLR 234; [1918] HCA 50, cited
Erglis v Buckley (No 2) [2006] 2 Qd R 407; [2005] QCA 404, cited
Fairfax Media Publications Pty Ltd v Pedavoli (2015) 91 NSWLR 485; [2015] NSWCA 237, cited
Favell v Queensland Newspapers Pty Ltd (2005) 79 ALJR 1716; [2005] HCA 52, applied
Harbour Radio Pty Ltd v Ahmed (2015) 90 NSWLR 695;

[2015] NSWCA 290, cited
Hockey v Fairfax Media Publication Pty Ltd (2015) 237 FCR 33; [2015] FCA 652, cited
Kruse v Linder (1978) 19 ALR 85, cited
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520; [1997] HCA 25, applied
Lloyd-Jones v Allen [2012] NSWCA 230, cited
Mann v The Medicine Group Pty Ltd (1992) 38 FCR 400, cited
Marshall v Megna [2013] NSWCA 30, cited
Meehan v Jones (1982) 149 CLR 571; [1982] HCA 52, cited
Middendorp Electric Co Pty Ltd v Sonneveld [2001] VSC 312, considered
Morgan v John Fairfax & Sons Ltd (No 2) (1991) 23 NSWLR 374, cited
Morgan v Odhams Press Ltd [1971] 1 WLR 1239, cited
Palmer Bruyn & Parker v Parsons (2001) 208 CLR 388; [2001] HCA 69, applied
Queensland Newspapers Pty Ltd v Palmer [2012] 2 Qd R 139; [2011] QCA 286, cited
Ratcliffe v Evans [1892] 2 QB 524, cited
Roberts v Prendergast [2014] 1 Qd R 357; [2013] QCA 47, cited
Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited (2015) 113 IPR 11; [2015] FCA 227, cited
Trkulja v Yahoo! Inc LLC [2012] VSC 88, cited
Trkulja v Google LLC (2018) 92 ALJR 619; [2018] HCA 25, cited

COUNSEL:	K Smark SC with C Wilson for the plaintiffs R J Anderson QC with P L Somers for the defendants
SOLICITORS:	Minter Ellison for the plaintiffs McBride Legal for the defendants

[1] Aussie Stock Forums was an internet forum used by individuals to post comments and information on topics related to the stock market and investments. The website was owned by Aussie Networks Pty Ltd, the first defendant, whose sole director and shareholder was Joseph Eiby, the second defendant. A comment by Mr Eiby on the forum has attracted claims for damages for defamation and for misleading and deceptive conduct on behalf of Mr Jones, the first plaintiff, against both defendants and damages for injurious falsehood and for misleading and deceptive conduct on behalf of Australian Shareholder Centre Pty Ltd ("ASC"), the second plaintiff, again against both defendants. I have concluded that all the claims fail.

The publication and background facts

[2] On 18 June 2013 at 2.17 pm, a user of the forum, "steve85" posted a note seeking information about ASC. Mr Jones, the first plaintiff, was its director.

[3] The note read:

> "**Australian Shareholder Centre**
>
> I was wondering whether anyone has used 'Australian Shareholder Centre' and their experiences and thoughts?
>
> Essentially I am currently using margin lending and my own investments. While this year has been good, overall I have not gone too well as I just dont [sic] have enough time looking at the market. I was looking around and came across Australian Shareholder Centre (I believe based out of gold coast).
>
> They trade in CFDz which I am aware are higher risk but they rely heavily on trailing stock losses to mitigate risks. I got the sales pitch which, if believed, would yield close to 50% (which obviously rang some alarm bells). They provided me access for a limited period to their members area and I went through all of their trade recommendations for the year so far. In essence, this year they have achieved losses on 56% of their trades (from my own calculations). However, on the plus side, after brokerage etc, it would have yielded approximately $2000 profit thus far. This isn't far off other years they claim. This is in their A and B categories (essentially trading CFDs on ASX, NYSE and London).
>
> My concerns:
> - obviously the extremely high return is of concern
> - I can not find any reviews of them on the net. Some further searching identified they are a legitimate business IAW ASIC and australian business register and used to trade as Trumarket a number of years ago which hasn't got a good wrap on this forum.
> - There is an extremely high set up cost of between $5000 and $7000
>
> Reasons I am contemplating it:
> - my own analysis of their trade recommendations year to date does demonstrate a high rate of return in line with what they are claiming.
> - I want to get out of self managed investments as I don't have time and look at a medium to high risk place to park some of my savings that is fully managed.
>
> Any thoughts, experiences and advice is greatly appreciated."

[4] Mr Eiby, using the handle "stockGURU" replied at 9.41 pm on the same day in this comment which gave rise to the claims by the plaintiffs:[1]

> "1
>
> 2 Re: Australian Shareholder Centre

[1] The line numbering is that used in Annexure "A" to the fourth amended statement of claim (the "FASOC"). It is convenient to reproduce the numbering as many of the submissions were relevant to particular lines of the comment.

> Hi Steve,
>
> The following is my assessment of Australian Shareholder Centre:
>
> Red flags
>
> - Domain privacy is enabled to hide ownership details on the domain name.
> - You cannot view the website without entering your name and mobile phone number. Well, you can, but I'll get to that in a minute.
> - Company registered and run out of the Gold Coast.
> - No upfront information about the cost of services. It looks like you register your interest and then get a phone call with the hard sell.
>
> But let's look a little deeper. Australian Shareholder Centre Pty Ltd was previously known as TruMarkets Pty Ltd, an advisory firm that closed its doors and sold its customers to another business by the name of Iron Claw Investments Pty Ltd, trading as Active Traders. You can read about Active Traders here and here. At the second link you will see a user named 'Chris Harris' offering a positive review of Active Traders, who then mysteriously disappears after promising more updates. More than likely this is someone associated with the company who is posting to try and make it seem that the company is generating good returns. Then the victims start showing up.
>
> Australian Shareholder Centre Pty Ltd and Iron Claw Investments Pty Ltd (Active Traders) have the same director and are both authorised representatives of AFSL holder Conquest Markets Pty Ltd. Conquest Markets has the same address as Australian Shareholder Centre Pty Ltd just different suite numbers. Can you see a pattern emerging?
>
> My opinion: Stay far away from Australian Shareholder Centre, Active Traders, and Conquest Markets. There is something very shady going on here. My guess is that Active Traders received a lot of complaints and they have set up a new company and website (Australian Shareholder Centre) to shift the business to. It looks like the exact same offering, just a new company name, website and phone number. My guess is that it's only a matter of time until the victims of Australian Shareholder Centre start showing up on forums telling their stories. Don't be one of them!
>
> P.S. To view the Australian Shareholder Centre website without surrendering your name and mobile phone number, just disable JavaScript in your browser. In Firefox you do this by going to Tools - > Options - > Content, then uncheck the 'Enable JavaScript' box.
>
> "

[5] Apart from the obviously critical comments or opinions expressed about ASC made in Mr Eiby's post the information in it about ASC, TruMarkets Pty Ltd ("TruMarkets") and Iron Claw Investments Pty Ltd ("Iron Claw") trading as Active Traders was not entirely accurate. Active Traders Pty Ltd ("Active Traders") was a company associated with a Mr Richard White which carried on the business of financial advisory services selling investment recommendations to customers online in 2012 and 2013. Mr Jones, the first plaintiff, was appointed as its director in December 2011 and that company changed its name to Iron Claw Investments Pty Ltd in April 2013. Mr Jones continued as its director.

[6] In late 2012, Mr White asked Mr Jones to become a director of TruMarkets which, about that time, changed its name to Australian Shareholder Centre Pty Ltd. It had previously been owned and run by a John Bryden and a Neville Robison. TruMarkets' customers and its business were taken over by Mr Jones and Mr White and, about the same time as the name change, Mr Jones assumed responsibility for servicing TruMarkets' clients. So TruMarkets did not sell its customers to Iron Claw trading as Active Traders. Rather,

TruMarkets underwent a change of name to ASC and its clients were then serviced by Mr Jones as the director of ASC.

[7] The evidence about the research done by Mr Eiby before he posted the comment was helpfully and accurately summarised in the defendants' written submissions. It is useful to set it out in detail as it is relevant both to the defence of honest opinion raised to the defamation action and to the issue of malice as an ingredient of the action for injurious falsehood. It also explains how he made the mistake of asserting that Trumarkets closed its doors and sold its customers to Active Traders. I have included the footnotes in parentheses:

> "27. Mr Eiby gave evidence of the research he undertook prior to posting the Comment. His process for researching various companies identified in threads on the Website developed from when he commenced operating the Website full time in 2005 (T 3-66 l 13), and in the course of researching approximately 80 to 90 other financial services companies (T 3-67 ll 23-29). Through this process, he had identified a number of factors which he considered to be red flags (T 3-68 l 15); being factors which he believed that people interested in a particular company should be concerned about (T 3-69 l 23).
>
> 28. Mr Eiby's evidence of those types of red flags he had identified in the past included:
>
> (a) a company being based on the Gold Coast (T 3-68 l 20). His evidence as to why this was a red flag was that (T 3-68 ll 22-29):
>
> 'The Gold Coast in my experience based on the research I've done has a very poor reputation with regard to financial services business. boiler room activity.
>
> What do you mean by boiler room activity?---Well, cold-calling sort of operations where people would cold-call people and, you know, offer them dubious products and services.'
>
> This opinion was consistent with the article Mr Eiby read in the Sydney Morning Herald in late 2012 (T 3-89 ll 27-34. See also exhibit 27).
>
> (b) the age of the company (T 3-68 ll 32-36);
>
> (c) the use of domain name privacy (T 3-41 l 41 - T 3-69 l 7);
>
> (d) the promise of high returns (T 3-69 ll 9-20);
>
> (e) the use of a virtual office (T 3-69 ll 32-37);
>
> (f) the requirement to register personal details at an initial stage, particularly phone numbers, email addresses and contact details that could be used to cold-call (T 3-69 l 42 - T 3-70 l 7 and T 3-70 ll 34-45);
>
> (g) whether appropriate licences were held (T 3-71 ll 5-17);

(h) the performance history of the business and if a business was linked to others that had previously failed (T 3-71 ll 9-22).

29. Mr Eiby gave evidence that when he identified a new thread concerning ASC, he did not know or identify that company. He took steps, therefore, to research that company (T 3-72 ll 39-45). That research led Mr Eiby to satisfy himself of the following matters set out in the Comment.

30. As to the issue of raising certain matters as 'red flags', these matters were identified as 'red flags' on the basis of Mr Eiby's past investigations.

Domain privacy is enabled to hide ownership details on the domain name

31. The first step Mr Eiby undertook in his research was to Google search ASC (T 3-73 ll 1-3). This led him to identify that:

(a) ASC was running a Google AdWords campaign, which placed it at the top of Google search results (T 3-73 l 5); and

(b) the URL was a '.com' domain name (T 3-73 l [sc 5-22]).

32. Mr Eiby also conducted a WHOIS domain name registration search on australianshareholdercentre.com (T 3-75 l 20). His evidence was that (T 3-75 ll 22-24):

> 'I did the search on australianshareholdercentre.com as that was the website that was used both in the Google AdWords campaign and in the Google search results.'

33. The WHOIS domain name registration search on australianshareholdercentre.com revealed that the domain name was first registered on 9 October 2012 (T 3-75 l 46), and that the company was utilising a domain name privacy service, which hid the domain name registration details from the public (T 3-75 l 43. See also exhibit 13).

34. Consistent with Mr Eiby's research is the fact that Mr Jones accepted that:

(a) while ASC had both a ".com.au" version of the website and a '.com' version of the website, all web traffic was redirected to, and ultimately landed at the '.com' version of ASC's website (T 1-93 l 4; T 1-87 l 1-6); in other words, no visitor to the website would ever see the '.com.au' domain;

(b) domain privacy service was used on ASC's '.com' version of the Website, and this hid the ownership details of the ASC website (T 1-93 ll 6-14);

You cannot view the website without entering your name and mobile phone number

35. In researching ASC, Mr Eiby went to the website www.australianshareholdercentre.com (T 3-73 l 21). A pop-up

requesting his personal details, including email address and mobile phone number, appeared on the screen (T 3-73 ll 24-26. See also exhibit 4).

36. To a user unfamiliar with the process of disabling pop-ups, there was no way to view the content of the ASC website.

37. This caused Mr Eiby to suspect that ASC used the information gathered from those visiting the website to contact potential clients. His evidence in this regard was (T 3-74 ll 6-15):

> 'Does the fact that the requirement to provide information in the popup; is that meaningful to you?---It was. The use of a mobile number as a password. I knew that the mobile phone number was going to be used for telemarketing purposes and I thought the use of it as a password wasn't sort of being honest with why you should answer your mobile phone number. There was no indication that there was going to be any contact and there was no, like – I guess usually if you wish contact there will be a little box that says, you know, I wish to be contacted about, you know, products and services. I noticed that wasn't on there. That was really the only observation I had made.'

38. Mr Jones accepted that:

    (a) a person viewing the web-site would initially be met with the pop-up screen, asking for their name, email address and phone number (T 1-40 ll 34-36. See also Exhibit 4);

    (b) if that information was provided, they would be 'allowed access to the website without the pop up box;' (T 1-44 l 26)

    (c) a telephone call was the preferred method of selling ASC's services to prospective clients- it was a more effective marketing tool (T 1-88 ll 3-16).

Company registered and run out of the Gold Coast

39. Mr Eiby's research included reviewing ASC's website (T 3-73 l 21). Extracts from that website recorded that ASC's address was Suite 204, 237 Scottsdale Drive, Robina (Exhibits 29 and 30).

40. Mr Eiby also reviewed ASC's Financial Services Guide (T 3-74 l 17). That guide also recorded ASC's address on the Gold Coast (Exhibit 10).

41. Mr Eiby also conducted an ASIC Current Company Extract search of ASC (T 3-76 ll 29-31). That company search also recorded ASC's registered office and principal place of business as Suite 204, 237 Scottsdale Drive, Robina (Exhibit 3).

No upfront information about the cost of services

42. Mr Eiby reviewed both the ASC website (Exhibit 29) and ASC's Financial Services Guide (Exhibit 10) as part of his research of ASC.

Both of those documents did not disclose to Mr Eiby the fees a customer was to be charged (T 3-75 ll 10-18).

43. The ASC website stated under the heading 'Remuneration & Fees' ([35], [90]):

> 'The Australian Shareholder Centre is remunerated through the fee and commissions that we charge you to become a Private Client.
>
> The Australian Shareholder Centre may also receive a financial benefit from referring you to a financial institution or broker thus allowing the Australian Shareholder Centre to be directly remunerated through ongoing commissions.'

44. The ASC Financial Services Guide (Exhibit 10), under the heading 'How Will I Be Charged for This Advice', stated that clients:

> 'will be required to pay a once off fixed fee'. There was no specific price mentioned.'

45. Exhibit 5, which the plaintiffs tendered, was a version of the Financial Services Guide that record [sic] information about the fees that ASC proposed to charge. Mr Eiby's evidence was that the version of the Financial Services Guide he viewed in undertaking his research was the version at exhibit 10 (T 3-75 l 2).

46. Mr Jones accepted that the version Mr Eiby saw was authentic and there was a Financial Services Guide in that form (T 1-72 ll 21-23). Moreover, the version at exhibit 5 was not disclosed prior to being tendered into evidence (T 1-71 ll 9-18) - it's probity is doubtful (UCPR r 225).

47. Mr Eiby's evidence was that the lack of information about the fees charged on both the ASC website and the Financial Services Guide (T 3-74 l 32):

> '.. made me think that it was large enough to not want to include it because then you could deal with it in the telemarketing sales process.'

Australian Shareholder Centre Pty Ltd was previously known as TruMarkets Pty Ltd

48. Mr Eiby performed an organisation and business name search on ASC at the ASIC Connect website. This search identified that ASC had been formerly known as TruMarkets Pty Ltd (T 3-85 l 17).

49. This is confirmed by the ASIC Current & Historical Organisation Extract for ASC (Exhibit 3).

50. Mr Jones accepted that this was correct (T 1-35 l 25).

TruMarkets Pty Ltd, an advisory firm that closed its doors and sold its customers to another business by the name of Iron Claw Investments Pty Ltd, trading as Active Traders

51. Mr Eiby's evidence that lead him to make this assertion in the Comment was as follows (T 3-85 l 25 - 3-86):

> 'What led you to that conclusion and is it correct?---I carried out – one I realised that the company had previously been known as Tru Markets, Steve mentioned it in his post, but I also confirmed that by the search I just mentioned. I did some searches on Tru Markets just to see if I could find out more information on Tru Markets and I came across a webpage, d-i-g-dot-d-o summary of trumarkets.com.au. It was - - -
>
> So is this the document behind tab 9, I think?---Yes.
>
> Yes. And what did it tell you?---It appeared to have crawled the trumarkets.com.au website.
>
> What does that mean?---That means that it scanned the information contained on the webpage and recorded it.
>
> So this is a form of what might be known as a bot exercise?---That's correct. Yes.
>
> So an exercise conducted by some computer somewhere that does these things for fund?---Yes.
>
> And what information did you glean from this page?---At the Tru Markets summary section I can see that the title – there was a title description keywords and URL and then below that there was a Tru Markets summary which just said:
>
> > *Tru Markets is delighted to announce that they are moving all clients over to Active Traders. Please call 1300 365 839 to receive your new log in details.*
>
> …
>
> Now, that phone number, did that correlate with - - -?---Yes, that was the Active Traders phone number.
>
> And then in the bottom right-hand corner, there's a reference to external links:
>
> > *Trumarkets.com.au is linking to those sites* –
>
> and then colon:
>
> > *www activetraders.com.au.*
>
> Did you rely on that information?---I did.

> I'll - - -?---And on the visit date at the bottom it said that it scanned the TruMarkets website on the 6th of February 2013.
>
> Yes?---And that's when I assumed it was present on the website.'

52. Mr Eiby's evidence recited above established that he genuinely believed that information was accurate.

53. A Current & Historical Company extract of Iron Claw Investments Pty Ltd recorded that its former name was Active Traders Pty Ltd (Exhibit 2). A business name search on Active Traders recorded it was a business carried on by Iron Claw Investments Pty Ltd (Exhibit 1).

54. Mr Jones accepted that Iron Claw Investments Pty Ltd was formerly Active Traders. (T 1-35 l 36)"

[8] Shortly after Mr Eiby's comment was posted, it came to Mr Jones' attention. He identified himself as the unnamed director of ASC as did three of its employees. Mr Jones gave evidence that, as a result of reading that post, he felt "extremely helpless and disheartened".[2] He also felt very annoyed and depressed, feeling a lot of emotions. He felt the allegations were unjust and unwarranted and was concerned that people would actually take the comments as being true.[3]

[9] The plaintiffs' case, on figures obtained from Google Analytics, was that there were 831 unique page views on the whole thread in which this comment appeared. They occurred from 18 June 2013 to 18 January 2014. Most of the page views occurred in the first three months. Their submissions were that the reasonable conclusion was that many hundreds or, possibly hundreds or many tens of individuals read the comment.

[10] The defendants point out, however, that the recorded number of unique page views should not be taken as an accurate record of the number of people to whom the comment was published. They submitted accurately that there is no evidence of the exact number of people who read the comment, and, in this case in particular, insofar as Mr Jones' claim for defamation is concerned, there was extremely limited evidence of the number of people who had sufficient information to enable them to identify it as being of and concerning him.

[11] The defendants also point to another comment critical of ASC posted on 23 August 2013 by "Drew64". They submit it must be brought in to account when assessing the effect of Mr Eiby's comment. Drew64's comment read:

> "**Re: Australian Shareholder Centre**
>
> …
>
> Unfortunately, I decided to throw the dice and give the Australian Share Centre a try.

---

2 T 1-57/23-26.
3 T 1-51/26-27 and T 1-57/45-46.

> BIG WARNING … the information they give you access to in 'The Sell' is fabricated. If you look underneath the Trade Performance there is the following disclaimer: 'All results although based on live trades are hypothetical and do not reflect an actual trading account.'
>
> Hypothetical is 100% correct. In my experience, their success rate is closer to 10% so, if you chose to invest, be prepared to watch your funds steadily dwindle away. They take their share of brokerage for all trades so they win whether the trades win or lose, and more often than not – THEY LOSE."

[12] Mr Eiby's comment was removed from the website on 18 January 2014. The second plaintiff's claim for damages is limited to the period ending on that date.

The proceedings

[13] These proceedings were instituted by Mr Jones and ASC seeking damages for defamation and for misleading and deceptive conduct on behalf of Mr Jones and damages for injurious falsehood and for misleading and deceptive conduct on behalf of ASC against both defendants. The claims for damages for misleading and deceptive conduct are made under s 18 of the *Australian Consumer Law*.

[14] The various causes of action plead five allegations in common whether expressed as imputations or representations. They are, essentially as expressed in paras 6(a) to 6(e) of the fourth amended statement of claim (the "FASOC"):

(a) In the course of carrying on the business of a stock broker and financial adviser, ASC had engaged in unscrupulous conduct with the intention of escaping the legitimate claims of aggrieved customers; (para 6(a))

(b) In the course of carrying on the said business, ASC had engaged in a dishonest scheme to hide the true identity of those behind it; (para 6(b))

(c) In the course of carrying on the said business, ASC deals dishonestly with its customers so as to give them cause to complain; (para 6(c))

(d) In the course of carrying on the said business, ASC had sought to entice prospective clients by posting a false testimonial of its services under the name of Chris Harris; (para 6(d))

(e) Alternatively to 6(d), in the course of carrying on the said business, there were reasonable grounds for suspecting that ASC had sought to entice prospective clients by posting a false testimonial of its services under the name of Chris Harris. (para 6(e)).

[15] Paragraph 7A of the FASOC alleged that Mr Jones "had a hand" in the conduct alleged against ASC and set out equivalent allegations to those in para 6.

[16] I shall deal with the claims for damages for defamation, injurious falsehood and for misleading and deceptive conduct in that order. I shall then consider the evidence in respect of Mr Jones' claim for damages and ASC's claim for economic loss in particular and finally consider whether any permanent injunctions should be ordered against the defendants.

Defamation

Was the publication of and concerning Mr Jones?

[17] Mr Jones' name does not appear in the publication. His case on this issue focussed on the reference to ASC and Iron Claw having the same director. A search of the records kept by the Australian Securities and Investments Commission (ASIC) identified Mr Jones as the only director of each of those companies. Only three witnesses gave evidence of the making of that connection, however. Only one of them made the connection because he knew that Mr Jones was a director of both companies. All were employees of ASC whose attention was directed to the comment by customers shortly after it was published.

[18] The defendants submitted that nothing in the comment, read objectively, meant that Mr Jones was involved in or "had a hand in" or was the person responsible for ASC's conduct. Mr Eiby's evidence in cross-examination about the issue was:[4]

> "You still say you weren't badmouthing Mr Jones, do you?---Well, I wasn't making any allegations against Mr Jones.
>
> He just happened to be in your assessment - he was - just happened to be a director of this company but nothing to do with the conduct alleged. Is that what you thought people would think?---Well - well, I wasn't sure whether he was the controlling mind of the corporation at the time.
>
> You say you didn't know one way or the other?---Well, I also knew that Richard White was involved in this company as well at that time.
>
> So you're saying - let's just understand this. You thought he might or might not be - that's Mr Jones -the controlling mind of the company, but you didn't know. Is that right?---That's right.
>
> And did you make any inquiry to find out before you wrote it?---Well, I knew that Torque Securities was the shareholders - Torque Securities Proprietary Limited. And I knew that Richard White was the owner of that domain name. And I had been aware that he had an association with previous companies that were connected to Australian Shareholder Centre. So my suspicion was that - or not suspicion, but I thought it was a possibility perhaps that Mr Jones, even though he was a director, was not the controlling mind of the corporation at that time. The reason I mentioned him as director was simply because that was one thing that connected this company to Active Traders."

[19] Mr Anderson QC for the defendants also criticised the evidence of the three employees called who said they had made the connection with Mr Jones. Two of them, Mr Davis and Mr Arndt, knew that Mr Jones was a director of ASC but not of Iron Claw. Each of them it was submitted, were "led" to give evidence of their understanding that the comment alleged that Mr Jones was responsible for the conduct or had a hand in it.[5]

---

4 See T 3-100/4-27.

5 See T 2-59/40 - T 2-60/9; T 2-66/33 - T 2-67/16.

[20] The third witness, Mr Rigby, knew Mr Jones was a director of both companies and understood the comment was saying negative things about his involvement in those companies. It was submitted, however, that his evidence fell short of establishing that the comment meant that Mr Jones "had a hand in" or was the person who caused the company to engage in the conduct that was criticised. Mr Anderson also pointed out that not even a family member was called to establish that he or she knew the critical facts needed to identify Mr Jones from the comment.

[21] The evidence seems sufficient, however, to establish that the words used were such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to.[6] Taking into account the criticisms levelled at the three witnesses to whom I have referred, they did, nonetheless, make a link to Mr Jones which was available on an objective analysis of the evidence. Here too the plaintiff's identity as a director of each of the companies can be established by ASIC's records so the plaintiff may have regard to the content of that source for the purpose of establishing identification with him.[7]

[22] Although I am satisfied that it has been established that the publication identifies Mr Jones as a director of both companies so that it can be viewed as being of and concerning him, he has not demonstrated that any significant number of people perceived that it was referring to him, including people close to him such as family members.

Was the publication simply by Mr Eiby or by him on behalf of the first defendant also?

[23] Mr Eiby published the information as "stockGURU", a title adopted by him separate from other titles he used on the thread which he used particularly as its administrator. He did so to allow himself to make comments that were not made obviously as an administrator of the forum. He was, however, the only member and director of the second defendant and, no doubt, saw some benefit to posting as "stockGURU" in enhancing the level of discussion on the forum. It seems to me, therefore, that his statements were made both for himself and for the second defendant.

Are the imputations made out?

[24] I have concluded that the publications were made of and concerning Mr Jones. They were also made explicitly of and concerning ASC.

[25] The first question is whether the words complained of are capable of conveying a defamatory meaning. The test itself is not controversial. It is set out conveniently in *Favell v Queensland Newspapers Pty Ltd*:[8]

> "[9] In *Jones v Skelton*,[9] the Privy Council said:
>
> > 'It is well settled that the question as to whether words which are complained of are capable of conveying a defamatory meaning is a question of law, and is therefore one calling for decision by the Court. If the words are so

---

6 See *David Syme & Co v Canavan* (1918) 25 CLR 234, 238, 240.
7 See *Fairfax Media Publications Pty Ltd v Pedavoli* (2015) 91 NSWLR 485, 518 at [154].
8 (2005) 79 ALJR 1716, 1719-20 at [9]-[11]. See also *Trkulja v Google LLC* (2018) 92 ALJR 619, 626-627.
9 [1964] NSWR 485 at 491; [1963] 1 WLR 1362, 1370-1371; [1963] 3 All ER 952, 958.

> capable then it is a question for the jury to decide as to whether the words do, in fact, convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the Court will reject those meanings which can only emerge as the product of some strained, or forced, or utterly unreasonable interpretation … The test of reasonableness guides and directs the Court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.'

[10] In determining what reasonable persons could understand the words complained of to mean, the Court must keep in mind the statement of Lord Reid in *Lewis v Daily Telegraph Ltd*:[10]

> 'The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.'

[11] Lord Devlin pointed out, in *Lewis v Daily Telegraph Ltd*,[11] that whereas, for a lawyer, an implication in a text must be necessary as well as reasonable, ordinary readers draw implications much more freely, especially when they are derogatory. That is an important reminder for judges. In words apposite to the present case, his Lordship said:[12]

> 'It is not … correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded.'

[26] When one reads the publication as having been made of and concerning Mr Jones, the only plaintiff suing for damages for defamation, there are many statements capable of conveying a defamatory meaning. The whole of the comment is relied on for each of the

---

[10] [1964] AC 234 at 258.
[11] [1964] AC 234 at 277.
[12] *Lewis* [1964] AC 234 at 285.

imputations with particular emphasis being placed, for the first two imputations, on these passages:

"But let's look a little deeper. Australian Shareholder Centre Pty Ltd was previously known as TruMarkets Pty Ltd, an advisory firm that closed its doors and sold its customers to another business by the name of Iron Claw Investments Pty Ltd, trading as Active Traders. You can read about Active Traders here and here.

…

Australian Shareholder Centre Pty Ltd and Iron Claw Investments Pty Ltd (Active Traders) have the same director and are both authorised representatives of AFSL holder Conquest Markets Pty Ltd. Conquest Markets has the same address as Australian Shareholder Centre Pty Ltd just different suite numbers. Can you see a pattern emerging?

…

… There is something very shady going on here. My guess is that Active Traders received a lot of complaints and they have set up a new company and website (Australian Shareholder Centre) to shift the business to. …"

[27] The third imputation relies in particular on ll 12-21 and ll 25-30 while the fourth and fifth imputations rely upon on ll 15-18.

[28] The first imputation, relating to unscrupulous conduct, is, in my view, supported particularly by the references to:

- Red flags;
- hiding of ownership details on the domain name;
- "No upfront information about the cost of services";
- the "hard sell";
- the inaccurate reference to TruMarkets closing its doors and selling its customers to Iron Claw trading as Active Traders when it had actually only changed its name to ASC;
- the reference to the mysterious disappearance of "Chris Harris";
- "then the victims start showing up";
- the links with Conquest Markets Pty Ltd ("Conquest Markets");
- the query: "Can you see a pattern emerging?".

[29] The final paragraph summarises the imputation to be drawn as follows:

"My opinion: Stay far away from Australian Shareholder Centre, Active Traders, and Conquest Markets. There is something very shady going on here. My guess is that Active Traders received a lot of complaints and they have set up a new company and website (Australian Shareholder Centre) to shift the business to. It looks like the exact same offering, just a new company name, website and phone number. My guess is that it's only a matter of time until the victims of Australian Shareholder Centre start showing up on forums telling their stories. Don't be one of them!"

[30] That information does, in my view, when one accepts that it was made of and concerning Mr Jones, support the imputations that Mr Jones had a hand in unscrupulous conduct in the first pleaded imputation, of participation in a dishonest scheme to hide the true identity

of those behind ASC in the second pleaded imputation and that he had a hand in ASC dealing dishonestly with customers so as to give them cause to complain in the third pleaded imputation. The passage referring to "Chris Harris" also supports the fourth and fifth pleaded imputations.

[31] When one reads the publication as a whole, as an ordinary reasonable reader, it seems inevitable to me that the defamatory meanings pleaded are made out, particularly if one bears in mind the publication in its context on a website which was devoted to the discussion of stocks and the provision of investment advice.[13]

[32] Mr Anderson QC for the defendants sought to persuade me that the alleged imputations were not made out on the basis that the pleading in the FASOC overlays the words used with terms such as "unscrupulous" or "dishonest", themselves not used in the text of the passage pleaded. He submitted that the reasonable reader would not engage in that process of describing the conduct in such terms because the first imputation relied primarily upon ASC taking over Active Traders' business and that would not lead the reasonable reader to conclude that ASC's business practices were unscrupulous.

[33] That submission fails, in my view, because of the explicit links drawn between ASC, Iron Claw, Active Traders and Conquest Markets at ll 20-23, coupled with the rhetorical question: "Can you see a pattern emerging?".

[34] Similarly, the second imputation pleaded, that there was a dishonest scheme to hide the identity of those behind ASC, was supported by the red flag identified as the enabling of domain privacy to hide ownership details on the domain name. As was also submitted for the plaintiff, three of the four red flags suggest lack of transparency or subterfuge as does the inaccurate reference to the shifting of the business to another company.

[35] The third imputation, that ASC dealt dishonestly with its customers so as to give them cause to complain, also is coloured by the links drawn between ASC and the other companies mentioned as well as the points made by the plaintiff's submissions that the "garbled suggestion that the company had 'closed its doors and sold its customers', starts this off and it emerges strongly from the references to 'victims' showing up". The submission went on to argue that the warning at ll 24 and 30 to avoid the company was fairly plainly because of allegations of dishonesty including the words "very shady", rather than something more innocuous such as inaccurate market predictions or high prices.

[36] The fourth and fifth imputations seem to me to flow directly from the links between ASC and Active Traders alleged in the comment and the language used about "Chris Harris". Even though his activities are described only in relation to Active Traders, the ordinary reasonable reader, having been told that ASC and Active Traders have the same director and having made the link to Mr Jones, would readily connect him to the assertion that the behaviour attributed to Mr Harris should be attributed to Active Traders and, through it, to ASC and Mr Jones. The argument that, merely because both ASC and Active Traders have the same director, the ordinary reader should not conclude that the behaviour of those entities was attributable to Mr Jones is not persuasive.

---

[13] *Queensland Newspapers Pty Ltd v Palmer* [2012] 2 Qd R 139, 144 at [19]-[22].

[37] Although the ordinary reader might not conclude that a director had a hand in all the conduct of a business, in this context, the link drawn between the directorships, the similar address of the two companies and the reference to "a pattern emerging" does suggest that the behaviour criticised is of the directing mind and will of the corporations rather than of people further down the management structure.

Defences to defamation

Honest opinion

[38] Section 31(1) of the *Defamation Act* 2005 provides a defence of honest opinion if the defendant proves that:

> "(a) the matter was an expression of opinion of the defendant rather than a statement of fact; and
>
> (b) the opinion related to a matter of public interest; and
>
> (c) the opinion is based on proper material."

[39] Section 31(6) is also relevant in providing:

> "(6) An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material."

[40] It is significant that the Act draws attention to the defamatory matter rather than the imputations sought to be drawn from the defamatory matter as the subject of the defence. Here it is the pleaded imputations which describe the behaviour referred to in the defamatory matter as unscrupulous, dishonest or a false testimonial.[14]

Opinion or fact?

[41] The defendants' submission is that the matter complained of distinguished internally between statements of fact and matters which were opinion. They submitted that the factual matters which Mr Eiby researched and were true included each of the "red flags" at ll 6-11, the former identity of ASC at ll 12-13, the reviews of Active Traders at l 14 and the relationship between ASC and Active Traders at ll 20-23. They submitted that a reasonable reader of that matter would have differentiated between the aspects of a comment that were fact and those that were opinion. In fact, that conclusion is made explicit by Mr Eiby's referring to his opinion at l 24 and his reference to his "guess" at ll 25 and 28.

[42] Mr Anderson also submitted that it should be borne in mind that the readers were likely to have read the initial post as well as this one where the initial post gave context to the understanding a reasonable reader would take from the matter. That initial post had sought comment, mentioned that author's own "alarm bells" and identified his concerns with ASC. In that context, it seems clear to me that what was expressed was an opinion or comment responding to the initial comment on the site and based on the factual material

---

[14] See *Harbour Radio Pty Ltd v Ahmed* (2015) 90 NSWLR 695, 704-705 at [43]-[44].

researched by Mr Eiby. It was certainly recognisable as a comment from the language used.[15]

Public interest

[43] It is also my view that the opinions expressed related to a matter of public interest. They concerned a company offering financial investment services to the public for a significant fee. As was submitted for the defendants, it maintained a website, advertised on the internet and maintained a database of interested persons. At its peak several hundred new clients were subscribing each month and its activities had the potential to involve a large number of people.

Proper material

[44] The next issue to consider under the Act is whether the opinion is based on proper material. It was in that context that counsel for the plaintiffs submitted that none of the relevant comments pleaded in para 7A of the FASOC were based on the facts and matters pleaded in the particulars to para 14(c) of the defence. That, in effect, points out the conclusory nature of the *imputations* alleged rather than focussing on the *defamatory matter* itself. It seems to me that the proper inquiry is to focus on the substantial truth of the "proper material" the defamatory matter was based upon rather than on the substantial truth of the imputations sought to be drawn by the plaintiffs from the publication.

[45] In that context, the plaintiffs submitted that it had not been shown that it was true that an individual had posted a comment under the name of "Chris Harris" on the Active Traders' website. Exhibit 26 was tendered, however, on the basis that it was the hyperlink indicating that a Chris Harris had posted on the "invested.com" website.[16] It was the second hyperlink identified with the word "here" in this passage of the comment at l 15: "You can read about Active Traders here and here. At the second link you will see a user named 'Chris Harris' offering a positive review of Active Traders, who then mysteriously disappears after promising more updates." No contrary evidence was led to suggest that it was not proper material on which to rely.

[46] There were some other minor issues raised by the plaintiffs in respect of the truth of the allegation that visitors were required to enter their name and mobile telephone number before reviewing investment recommendations or other information on the site. The argument was that they were able to view certain legal documents without first registering. That does not prevent the assertion that visitors could not view the website without entering a name and mobile phone number from being substantially true and therefore based on proper material.

[47] It was also the case that domain privacy was enabled on the default domain name, "australianshareholdercentre.com" but not on the alternative, "australianshareholdercentre.com.au". As someone searching for the ".com.au" website would be automatically redirected to the ".com" website the assertion that domain privacy was enabled was also substantially true and therefore based on proper material. The plaintiffs also conceded that in June 2013 the website did not have information about the cost of services.

---

[15] *Lloyd-Jones v Allen* [2012] NSWCA 230 at [43]; *Marshall v Megna* [2013] NSWCA 30 at [361] and *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 266-267 at [41]-[42].

[16] See T 3-87/11 to T 3-88/25.

[48] The truth of the allegation that TruMarkets sold its customers to Iron Claw was the main controversial issue in this context. It was conceded to be an inaccurate statement by the defendants but their argument was that the truth, that TruMarkets became ASC and continued to service TruMarkets' clients, was based on properly researched information and genuinely expressed Mr Eiby's opinion, even if the statements that TruMarkets sold its customers to Iron Claw were inaccurate.

[49] The submission, in respect of that matter, was that the comment did not cease to be based on proper material if only that part was incorrect. The balance of the facts set out were true or substantially true, on the defendants' submission, and the opinion offered could otherwise have been drawn from the balance of the true facts identified so that s 31(6) applied because the opinion might reasonably have been based on such of the material as was proper.

[50] Mr Jones' submissions were that there was no "cross-over" between Trumarkets/ASC on the one hand and Active Traders/Iron Claw on the other, they were different entities and that was a key element for the formation of any opinion. That was so particularly because of the reference to Trumarkets closing its doors and selling its customers to Active Traders. Mr Jones also submitted that it was not objectively reasonable to derive the opinion from that inaccurate material.

[51] In my view, that isolation of the inaccuracy from its context is not a correct way to characterise the operation of s 31(6) of the Act. The suspicious opinion expressed might reasonably have been based on the other material connecting ASC with Active Traders coupled with the reference to the change of name of TruMarkets to ASC. Mr Eiby had made the connection between Active Traders, Conquest Markets and ASC and the common directorship of ASC and Iron Claw when reviewing the Active Traders' website. He had also identified the fact that ASC and Conquest Markets share the same address with different suite numbers.[17] Nor was it challenged in cross-examination that Mr Eiby honestly held the opinions he set out in the comment at the time it was published.[18]

[52] Nonetheless, it was submitted for the plaintiffs that I should conclude that the expression of opinion by Mr Eiby was not honestly held by him because his research was carried out in a few hours, he should have been aware of the harm his attack could cause and he had not checked his allegations with the plaintiff. The research he conducted is detailed earlier in these reasons. It is fair to conclude that he did go to some pains to track down information about ASC and relied on what that research revealed. It may also have been appropriate for him to check the allegations with the plaintiffs but his failure to do that on this occasion does not mean that his opinion was not based on proper material.

[53] As will be seen it is my view that that failure is relevant to whether the publication was reasonable in the circumstances for the purposes of the defence of qualified privilege but I am not persuaded that it prevents the defence of honest opinion applying. Honesty and reasonableness are distinct concepts even if they often overlap.[19] Mr Eiby's opinion was based on material available from ASC's own website and financial services guide. He

---

[17] See T 3-88 - T 3-89.

[18] T 3-89 ll 24-25. See also s 31(4) of the Act.

[19] See, in a different, contractual context, the discussions in *Meehan v Jones* (1982) 149 CLR 571, 578-579, 581, 588-591, 597-598 and *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 145E-F per Hope JA in dissent. In the context of a defamation proceeding see *Erglis v Buckley (No 2)* [2006] 2 Qd R 407, 433 [70] (per Jerrard JA).

also searched ASIC's publicly available records to reveal, among other things, Trumarkets'change of name to ASC. Trumarkets' own historical website information revealed the apparent fact that it had moved all its clients over to Active Traders. It seems to me, therefore, that the correct conclusion is that these were expressions of opinion by him based on material that was proper so that the defence under s 31 of honest opinion does apply.

Qualified privilege

[54] This defence arises under s 30 of the Act which places the onus on the defendants to prove:

> "(a) the recipient has an interest or apparent interest in having information on some subject; and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances."

Interest of the recipients in information on the subject

[55] Here the plaintiffs sought to define the recipients as those whom they had proved had linked Mr Jones's name to the matter published. The submission for the plaintiffs was that those three individuals' status as employees of ASC did not give them any such interest. It seems to me, however, that the recipient of the publication can extend beyond those individuals to others likely to read the publication. As the defendants submitted, it was likely that only people interested in knowing about ASC would have come across the thread and the comment. It was not akin to publication in a newspaper or an online news service publishing an article that people would have stumbled across and read.

Publication in the course of giving the recipients information

[56] It was also published in the course of giving information about ASC to the inquirer "steve85" and to others who may have been interested in knowing more about ASC. Mr Eiby's evidence was that he researched financial services companies on a regular basis and had been researching them for about six years and wanted people to be informed about them.[20]

Reasonableness

[57] The real issue between the parties was, however, whether the publication was reasonable in the circumstances. The submission for the defendants was that, overwhelmingly, the comment was based on facts that were true. The submission for the plaintiffs was that, particularly having regard to the severity of the opinions published, it was incumbent on the defendants to give the plaintiffs a chance to respond to the allegations in reliance on the following passage from the decision of the High Court in *Lange v Australian Broadcasting Corporation*:[21]

---

[20] See T 3-66/5-15; T 3-71/ll 24-32 and T 3-72/34-39.
[21] (1997) 189 CLR 520, 574.

> "Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond."

[58] Here, in my view, there was good reason for Mr Eiby to refrain from publishing the comment before taking such a step. As was submitted for the plaintiffs, the only reason of substance he was able to suggest for not doing that was the following:[22]

> "So is this your position, that because you'd had some experience dealing with Mr Jones previously on a previous occasion you thought on this occasion you wouldn't give him the opportunity to respond to the allegations you were going to make in advance because you didn't want to know what he was going to say. You didn't feel you would rely on it and you didn't think that's a step you should take. Is that what you're saying?---Well, I felt that it - I felt that I put more trust in my research than I thought that I would in Mr Jones' view of the matter."

[59] In my view that was unreasonable in the circumstances, particularly having regard to the nature of the opinions expressed in the comment. There was no suggestion that there were time constraints affecting his ability to respond to the question on the forum. I see this inquiry as being rather different from the inquiry whether the opinions expressed by Mr Eiby were based on proper material. Accordingly, in my view, this defence is not made out.

Conclusion in respect of the claim for damages for defamation

[60] Because of my view that the defence of honest opinion has been made out the first plaintiff's claim will be dismissed. I shall assess damages, however, later in these reasons should the matter go on appeal.

Injurious falsehood

[61] The claim for damages for injurious falsehood is brought only by ASC. It is necessary for ASC to show, therefore, as Gleeson CJ said in *Palmer Bruyn & Parker v Parsons*, that the defendants maliciously published a false statement about it, its property or business and that actual damage resulted from such publication.[23] In the same decision Gummow J expressed the elements of the action in similar terms:[24]

> "(1) a false statement of or concerning the plaintiff's goods or business;

---

[22] See T 3-102/7-13.

[23] *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388, 393 at [1] per Gleeson CJ.

[24] See *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388, 404 at [52]; see also the similar views expressed at 437 at [154] per Hayne J and 447 at [192] per Callinan J.

(2) publication of that statement by the defendant to a third person;

(3) malice on the part of the defendant; and

(4) proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement."

[62] A more elaborate test was expressed by Kirby J involving seven different elements but it was not supported by the majority. One of his Honour's elements was that the false statement was calculated to induce others not to deal with the plaintiff or was otherwise likely to damage ASC. [25]

[63] Clearly the statement was published. Was it false?

False statement

[64] The plaintiffs' submissions focussed to a large extent on the truth or falsity of the imputations it sought to draw from the facts set out in the comment. One needs to focus, however, on the truth of the factual elements contained in that comment. The particular false fact that has been identified is that TruMarkets closed its doors and sold its customers to Iron Claw trading as Active Traders. In fact, TruMarkets changed its name to ASC. It did not sell its clients to Active Traders in spite of what had been said on its website at one stage.

Statement likely to damage

[65] It was submitted for the defendants that, if it were necessary to consider Kirby J's formulation of the appropriate elements of the cause of action, the publication was not calculated to induce others not to deal with ASC nor was it otherwise likely to damage ASC. Rather, Mr Eiby's motivation was to provide information about ASC to both steve85 and others interested in knowing more about it. Objectively speaking, however, it seems to me that the comment was likely to damage the plaintiff because of the opinions expressed including advising readers to stay far away from ASC and that there was something very shady going on. Assuming, therefore, if it is a necessary ingredient of the cause of action that the document was otherwise likely to damage the plaintiff,[26] one needs to consider whether it was actuated by malice.

Malice

[66] It is useful, in this context, the issue of malice, to remind oneself of the evidence about the research undertaken by Mr Eiby before he posted the comment. I have set out the defendants' counsel's detailed summary of that evidence earlier. It is apparent from that evidence that Mr Eiby, in making the mistake about TruMarkets selling its customers to Iron Claw was genuinely mistaken. He believed it to be accurate. In addressing that issue his evidence included:

> "What led you to that conclusion and is it correct?---I carried out – one I realised that the company had previously been known as Tru Markets, Steve mentioned it in his post, but I also confirmed that by the search I just

---

[25] *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388, 425 at [114].

[26] Compare Kirby J's formulation of the elements of the tort in *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388, 425 at [114] item (3) with the views expressed by the majority.

> mentioned. I did some searches on Tru Markets just to see if I could find out more information on Tru Markets and I came across a webpage, d-i-g-dot-d-o summary of trumarkets.com.au.[27]
>
> …
>
> And what information did you glean from this page?---At the Tru Markets summary section I can see that the title – there was a title description keywords and URL and then below that there was a Tru Markets summary which just said:[28]
>
> > *Tru Markets is delighted to announce that they are moving all clients over to Active Traders. Please call 1300 365 839 to receive your new log in details.*
>
> …
>
> Did you rely on that information?---I did."[29]

[67] That history of the research conducted by Mr Eiby, including his reasons for concluding that TruMarkets had sold its customers to Iron Claw, persuades me that he was not actuated by malice in making the publication but, rather, by his wish to provide information to steve85 and other readers of the blog. He had unearthed information that appeared to be accurate to him which he wished to share.

[68] It was argued for ASC that malice was shown because of a conversation that Mr Eiby had with Mr White in September 2015 that was recorded and made an exhibit in the proceedings. It is clear from that recording that, by then, Mr Eiby had very strong views about the people standing behind ASC, describing them as "absolutely vicious, amoral, horrible, Gold Coast, snake-oil salesmen … bottom feeders … parasites … people who victimise others … ratbags … complete and utter scumbags in every sense of the word".[30]

[69] By then, however, as was pointed out for the defendants, there had been almost two years of litigation, his opinions of the plaintiffs had been coloured by the previous two years during which he had spent in excess of $100,000 and become very frustrated with the litigation process because, from his point of view, the plaintiffs were not making proper disclosure on the issue of whether ASC was an excluded corporation under the *Australian Consumer Law*. That was an argument that ASC abandoned shortly after that conversation.

[70] For those reasons, I am reluctant to conclude that that evidence is a reliable basis from which to form a conclusive view about Mr Eiby's state of mind two years earlier when the comment was published.

[71] It was also submitted for ASC, however, that the publication of the comment without giving ASC a chance to respond was also evidence of malice. As counsel for ASC submitted, Mr Eiby's willingness to make these sweeping allegations contained in the comment, knowing that he had not checked the allegations with the plaintiffs first, was indicative of at least a reckless attitude and that he published wilfully blind to the truth of

---

[27] T 3-85 l 25.
[28] T 3-84 l 44.
[29] T 3-84 l 41.
[30] See Ex 21 and MFI "F".

the allegations he was making, in particular in respect of the allegation that there had been a "sale" of customers from TruMarkets to Iron Claw.[31] There is some strength in that submission but it does not seem to me that this publication was made with reckless indifference as to whether it was true or false having regard to the history of the research conducted by Mr Eiby referred to earlier.[32] Rather, in my view, Mr Eiby took some care to research the information and, on what he found, made the comment not with reckless indifference as to whether it was true or false but based on what he believed were reliable results from his research based on ASC's and TruMarkets' own historical information.

[72] Accordingly, the plaintiff has not made out the element of malice in respect of this cause of action.

Actual damage

[73] The remaining element of the cause of action of significance is whether it has established actual damage, including a general loss of business, suffered as a result of the statement.

[74] The main evidence of damage on which ASC relied was set out in ex 17, a report of a forensic accountant, Mr Firth, who concluded, on the information he was provided, that ASC's sales from January 2013 to May 2013 were increasing month on month, with the exception of membership sales during the month of March 2013. Using a mathematical linear regression technique, he expressed the opinion that ASC's membership income in the period January 2013 to May 2013 had an upward sloping trend. He said it was reasonable and conservative to assume that, based on the prior trading of ASC during the period January 2013 to May 2013, and in the absence of other information to indicate otherwise, the upward sloping trend would continue for an additional month, being June 2013, when the comment was published, and then would sustain the membership income at that level into the future.

[75] Based on that technique of analysis he assessed the loss to ASC in an amount of slightly in excess of $1 million on a pre-tax basis or slightly more than $700,000 on an after tax basis. He operated on the basis that the business had commenced in January 2013 with sales of $239,586 which increased through to May 2013 when they were $500,507. Sales in March 2013 were out of kilter with the overall rise in sales, being $317,697. Using the linear regression analysis he adopted, he concluded that ASC's membership income had an increase in trend in an amount of approximately $53,973 per month with a forecast membership income of $543,236 for the full month of June 2013 on the assumption that the claimed defamatory comment had not been published.

[76] He assumed that the comment sued on here was the first negative comment as to the service provided by ASC that he was able to find from a search for negative comments about it. The first negative comment he identified, apart from those on the first defendant's website, was posted on 25 January 2014, after the comment sued on was removed from the first defendant's website on about 18 January 2014.

[77] He also relied upon a Google Analytics report showing that the comment sued on here was downloaded for a total of 831 unique page views during the period 18 June 2013 to 18 January 2014. He assumed because of the header to the posts, "Australian Shareholder

---

[31] See the plaintiffs' written submissions at para 103.

[32] See *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2010] NSWSC 1395 at [31].

Centre", that most of those unique page views were by people searching Google for information on ASC. He also concluded that since the average viewing time for the first defendant's forum postings was one minute 59 seconds that viewers of the post were reading it in a substantial way, not just clicking on the post, skimming the material and clicking back to another search result.

[78] ASC's submission was that it was not necessary to identify particular transactions that had been lost or particular customers who failed to conduct business with the company but, rather, it was sufficient to produce evidence showing a downturn in expected business so that actual loss was established to the extent to which the court is persuaded that the downturn was caused by the impugned conduct.[33]

[79] It was submitted for ASC that its claim was for a closed period between 18 June 2013 and 18 January 2014 only. It did not assume continued growth in sales through that period even though the pre-publication sales would suggest such growth. Accordingly the approach was conservative even taking into account the adverse publication by Drew64 referred to earlier. ASC submitted that the latter publication was of a lesser order than the defendant's publication and not likely to have a similar effect on sales. It also occurred on 23 August 2013, more than two months after the comment sued on. There was also evidence that ASC's business was online and dependent on its online reputation so that I should conclude that a substantial volume of sales and therefore profit was lost to ASC as a result of the publication of the comment.

[80] The defendants' submissions focussed on the issue whether the downturn claimed for ASC in its business was caused by or was a direct result of the publication sued on. It seemed very relevant to me, in that context, that the plaintiffs had access to detailed computer records in Customer Relationship Management ("CRM") software which was used to record dealings with ASC's customers. It was notable that the contents of that database were not disclosed before the trial nor was any attempt made to rely upon records kept in it. It was apparent from the evidence that it was used for telemarketing but also recorded everybody with whom ASC had communications including those who rang to complain. Not everyone used that software within the company but there were many such records in existence and they recorded contact details for the company's customers and those to whom it marketed its products.[34]

[81] No evidence was led of any comments kept in that system relevant, for example, to any customer's decision to take their business from ASC. In those circumstances, it was submitted, that I should conclude that those records would not have assisted ASC to prove actual damage suffered as a result of the statement.[35] In particular, the defendants relied on the following passage from *Middendorp Electric Co Pty Ltd v Sonneveld*:[36]

> "236 As a general proposition, when seeking to prove special damages, the Court expects the best evidence available, and if it is said that a person's business has been affected or that he has lost contracts, it

---

33 *Ratcliffe v Evans* [1892] 2 QB 524, 527, 533; *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388, 404 at [52], 432 at [136].

34 T 2-52/5 - T 2-53/26.

35 See *Ratcliffe v Evans* [1892] 2 QB 524, 531-533; *Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited* (2015) 113 IPR 11, 64 at [305] and 65 [308] and *Middendorp Electric Co Pty Ltd v Sonneveld* [2001] VSC 312 at [232]-[237].

36 [2001] VSC 312 at [236]-[237].

> would be necessary for him to prove, by production of his financial records, that his business did suffer an economic downturn, and call witnesses at trial who would say that they ceased to employ him, or were not prepared to enter into a contract with him, because of the defamatory communication. If the special damage, which has been proven, has been caused by the conduct of others, then the plaintiff must fail.
>
> 237 It is clear that it is unnecessary to call as witnesses those who ceased to do business with a plaintiff if he is able to show, by reference to his financial statements, a general diminution in his business, as distinct from the loss of particular contracts or inability to employ others. But he must show a causal link to the defamatory communication."

[82] Other evidence was led from witnesses for the plaintiff regarding complaints ASC had received about the comment. It was led as relevant to the state of mind of those complainants but was not relied on as proof of the truth of the comments relayed to ASC's employees. In those circumstances, when direct evidence should have been available from customers whose contact details were kept in the CRM database, the defendants submitted that I should conclude that any such direct evidence fell short of establishing that the comment was a cause of ASC's loss in a sum in excess of $1 million.

[83] For example, Ms Walsh, an employee of ASC, gave evidence that a large number of customers said they had done a bit of research on the company and said that they did not want anything further to do with ASC having found something on the internet.[37] Mr Anderson submitted that there could be no loss in respect of those clients as their membership fees had already been paid. Another witness, Ms Paine, gave similar evidence about new clients who had just joined who would then not want to continue with the services because of the post on the internet.[38] There was no evidence that those people received a refund of the membership fee. It was submitted that her evidence also fell short of establishing that the comment was a cause of any loss to ASC.

[84] A Mr Davis gave evidence that there was a drop-off in calls following the comment but there was no evidence produced of the number of inquiries or calls the plaintiff had before and after its publication. Mr Davis also said that the drop-off continued through until December 2014. Other evidence from a Mr Arndt referenced complaints from customers reading "something online" or "something on Aussie Stock forums".[39]

[85] It was submitted by the defendants that a number of other factors could have affected ASC's business other than the comment given that, from August 2013, there was also the comment of Drew64 on the thread. Google had also removed reference to the thread in its searches from 17 September 2013 and the comment was removed from the internet in January 2014. From May 2014 there were also many other negative comments in the public forum. Accordingly, it was submitted that ASC had not established that the cause of its loss was the comment as opposed to some other factor.

---

[37] See T 2-39/6-10.
[38] T 2-48/43-45.
[39] See T 2-69/26-33.

[86] The failure to disclose or refer to the CRM records let alone to produce them into evidence leads to the direct inference that they would not have assisted the plaintiffs. I draw that inference as the issue was raised squarely during the hearing in those terms.

[87] It is also the case that, as was submitted for the defendants, the evidence of those complaining to ASC's employees that they did not want to engage ASC because of what they had read on the internet goes only to their state of mind and so of damage to the plaintiffs' reputation.[40] The defendants did not take issue with that proposition but argued that those authorities could not be used to admit that evidence to establish that an economic loss had been suffered as a direct consequence of the publication.[41] Accordingly, that evidence should not be used to make that causative link.

[88] In the absence of relevant evidence that should have been available from the CRM records, I am reluctant, therefore, to conclude that ASC has established to the appropriate standard that the comment caused the damage claimed.

[89] It might be said that the analysis by Mr Firth, the forensic accountant called by ASC, is sufficient to establish at least some loss caused by the publication. There were some legitimate criticisms of his approach, however. They were summarised in the defendants' written submissions as follows (footnotes omitted):

> "172. Perhaps however the submission with the greatest impact is that Mr Firth's conclusions were simply flawed. On his analysis, some $1.3M in losses were observable. To reach that position, he conducted the linear regression analysis to demonstrate a before scenario in which from June 2013 the company could maintain earnings of some $543,000 per month, and set that off against the actual earnings in the same period, however:
>
> (a) The exercise was solely focussed on what had occurred in the first few months of a start-up business; did not bring to account in any analytical way what occurred post-June 2013 (including to analyse the impact of other negative comments on the performance of the business); and did not bring to account aspects of the conduct of the business, which might also have an impact upon the revenue stream in the period following the Comment;
>
> (b) The linear equation upon which his evidence was solely based, produced a false outcome owing to his reliance on unrepresentative data such as that from January 2013 (the very first month of business for the company, in which no sales were recorded until the 8th day – a month notoriously slow for business owing to the intervention of holidays in any event – and in which there were almost as many sales in the last three days as there were in the first three weeks) and his exclusion of the otherwise representative first 18 days of June 2013. This had the effect of ensuring that the left hand end (or lower end) of the

---

[40] See *Hockey v Fairfax Media Publication Pty Ltd* (2015) 237 FCR 33, 118 at [477] and *Trkulja v Yahoo! Inc LLC* [2012] VSC 88 at [13].

[41] *Kruse v Linder* (1978) 19 ALR 85.

> trend line was lower than it should be, and the right hand end (or upper, terminating end) was higher than it should be – producing a gradient that is unrealistically steep. It had the effect of permitting, for example, an estimate for earnings for the month of June 2013 of some $543,000, a figure which, when account is given to actual sales for the first 18 days of that month of just $231,000, is highly improbable.
>
> (c) Mr Firth did not bring to account, because he was apparently not told about it, that revenue included amounts for trailling [sic] commission,[42] both from inherited and new clients, an amount which could not have been impacted by the posting of the Comment. This amount was never revealed – it might be assumed that it was an amount that would not have assisted the plaintiffs case;
>
> (d) Even the reliance on monthly data totals for earnings was irresponsible. As the exercises attached as appendices to these submissions demonstrate, not only do different (but still reasonable) analyses produce vastly lower results, they also demonstrate the fallacy in the exercise. It is simply too unreliable to take the place of the evidence that should have been called as to loss (direct evidence) but which was not."

[90] It was also submitted that alternative linear regression analyses produced significantly different results to those obtained from Mr Firth's analysis which demonstrated the inherent unreliability of the exercise. The alternative analyses did produce significantly different results from assumptions that were well within the bounds of the possible if one accepted the evidence related to ASC's income.

[91] Because of those legitimate criticisms, therefore, namely the absence of what should have been readily obtainable and highly relevant information from ASC's customers, coupled with the unreliability of the approach adopted in the analysis advanced for it, I am not persuaded that ASC has shown that any damage it suffered has been caused by the conduct of the defendants. If some loss was caused to ASC by the comment, those deficiencies in the evidence persuade me to be very conservative about any likely loss. Doing the best I can I would have assessed it at no more than $100,000.

Conclusion in respect of the injurious falsehood claim

[92] Because of my conclusions, that malice has not been proven and the cause of any actual damage has not been sheeted home reliably to the defendants, it is my view that ASC fails in its injurious falsehood claim.

***Australian Consumer Law* claim**

[93] Both plaintiffs claim damages under s 18 of the *Australian Consumer Law* for misleading and deceptive conduct.

---

[42] Starting at T 3-18.

[94] As I have concluded earlier, it is appropriate to treat Mr Eiby's conduct, even under the "stockGURU" label, as conduct of the company. The company was a money making exercise earning its income from display advertising as well as email advertising the success of which depended on traffic to the site. The comment was directed at a section of the general public interested in investment so I conclude that both his and the first defendant's conduct was in trade or commerce.

[95] The critical issue was, however, whether the publication was by an information provider as defined in s 19 of the *Australian Consumer Law*, namely "a person who carries on a business of providing information." Part 2-1 of that enactment, dealing with misleading and deceptive conduct, does not apply to a publication of matter by an information provider if the information provider made the publication in the course of carrying on a business of providing information; see s 19(1)(a).

[96] Mr Eiby described Aussie Stock Forums as an online community whose members came to discuss various topics mostly centred around the stock market, trading and investing.[43] That evidence and the evidence relied on by the plaintiffs to establish that his conduct was also conduct of the company in trade or commerce,[44] confirms me in the view that the publication was of matter by an information provider who made it in the course of carrying on the business of providing information. Therefore, that part of the *Australian Consumer Law* proscribing misleading and deceptive conduct does not apply to this conduct. Rather it is to be regulated under the law relating to defamation and injurious falsehood. An argument that one of the exceptions to s 19 was relevant was specifically abandoned during the hearing. Accordingly this claim also fails.

Damages

[97] For the reasons expressed earlier in respect of ASC's claim for injurious falsehood, if I am wrong in my conclusion that it had not established that claim, I would have found that it had established damages to the extent of $100,000.

[98] The damages for defamation sought by Mr Jones must, in my view, be minor because of the very limited group of people who identified him with the conduct commented on in the publication. None of the three witnesses who identified Mr Jones said that they thought any less of him by virtue of what they read in the comment. No member of his family was called to give evidence of the effect on his reputation with them. The extent to which the plaintiff was in fact identified is directly relevant to the amount of damages to be awarded.[45]

[99] I was referred to a number of relatively recent decisions in respect of possible awards of damages where there had been publication only to a very limited number of people for limited periods. Here there was no identifiable grapevine effect established by the evidence and no evidence of any significant impact on Mr Jones' feelings or damage to his reputation.

[100] The defendants submitted that a figure of $5,000 would be appropriate if damages were to be awarded. Mr Jones's submissions were that the damages should be sufficient to

---

[43] See T 3-52/35-40.

[44] See the plaintiffs' written submissions at paras 122-128.

[45] *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1247, 1255, 1271; *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374, 392; *Mann v The Medicine Group Pty Ltd* (1992) 38 FCR 400, 402-403.

convince a bystander of the baselessness of any charge contained in the defamatory matter.[46] Mr Jones also relied on evidence from a witness as to his reputation who had been a friend of his for some years and said that he was highly regarded in the community through which he knew him, a poker playing group. He described him as having a very good reputation, trusted by everyone and having a reputation for being very honest.[47] On his client's behalf, therefore, counsel for the plaintiff sought an award of substance to vindicate his reputation and for the hurt to his feelings.

[101] Again, doing the best I can, had I not dismissed the action for damages for defamation, I would have assessed those damages in the amount of $10,000.

Injunctions

[102] The plaintiffs sought final injunctions for fear that the defendants might make similar publications in future unless restrained. Because the plaintiffs' claims have been dismissed it is not appropriate to grant injunctions. As was submitted for the defendants, also, the comment has been removed from the forum and there was no evidence suggesting that Mr Eiby would say the same or a similar thing about Mr Jones in spite of the recorded telephone conversation in 2015. Those threats had not been acted on. It was also relevant that ASC was no longer trading so that there was no point in the grant of an injunction in my assessment even if the plaintiffs had succeeded in their claims.

Conclusion

[103] In the circumstances, therefore, the plaintiffs' claims are dismissed. I shall hear the parties as to the form of the order and as to costs.

---

[46] *Roberts v Prendergast* [2014] 1 Qd R 357, 362-363 at [32]-[33].
[47] T 2-46/1-26.