

SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

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CHENG v LOK

[2020] SASC 14

Judgment of Judge Bochner a Master of the Supreme Court

6 February 2020

DEFAMATION - DAMAGES - GENERAL DAMAGES - ASSESSMENT

Default judgment entered against defendant - assessment of damages.

Defamation Act 2005 (SA) s 38, referred to.

Duffy v Google Inc (No 2) [2015] SASC 206; *Duffy v Google Inc (No 3)* [2016] SASC 1, considered.

Plaintiff: GORDON YUK KWAI CHENG Counsel: MR P HEYWOOD-SMITH QC - Solicitor:
GORDON CHENG

Defendant: WAI MAN ISABELLA LOK No Attendance

Hearing Date/s: 20/09/2019

File No/s: SCCIV-19-491

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CHENG v LOK
[2020] SASC 14

1 The plaintiff has issued proceedings against the defendant alleging that she
defamed him on a website by the name *Google My Business* on about
18 October 2018. This judgment deals with the assessment of damages following
the entry of default judgment against the defendant.

Background

2 The plaintiff is a lawyer practising in Adelaide. He is Chinese by birth, and
most of his clients come from the Chinese community in South Australia and
overseas, in particular from Hong Kong and mainland China. He receives most
of his referrals by word of mouth.

3 The plaintiff was originally admitted to legal practice in Hong Kong in
1982. He was first admitted to practice in Australia in the Australian Capital
Territory in 1988, and in South Australia in 1992. He has also been admitted to
practice in a number of other jurisdictions.

4 The plaintiff is a fellow of the Australian and New Zealand College of
Notaries, a member of the Law Society of South Australia, a member of the
Notaries Society of South Australia and a member of the Chartered Institute of
Arbitrators. He has been the legal advisor of the Australian Chinese Medical
Association since its inception in 1994. He has provided pro bono legal advice to
members of the Chinese speaking community through the website,
www.AdelaideBBS.com.au since 2012.

5 The plaintiff is a well respected member of the legal profession.

6 In late 2018 and early 2019, the plaintiff became aware that a large number
of his clients had left his practice to instruct other lawyers. On 28 February 2019,
he received a telephone call from a former client, Mr Fung, who advised him that
the following review had been posted on *Google My Business*:

Re Gordon Cheng Barristers & Solicitors

of level 1/186 Pultney Street, Adelaide SA

Isabel Lok

Stay clear of this place! Gordon brings shame to all lawyers and is infamous for his lack
of professionalism amongst the law society in Adelaide. He is only concerned about how
to get most of your money by giving you false and misleading advices, and convincing
you to go to court when it is clear that he doesn't have a case to win.¹

7 The review was also published in Chinese.

¹ FDN2 at [4].

8 Mr Fung had come across the review while surfing the internet.

9 The plaintiff says that, by February 2019, about 80% of his clients had left his practice.

10 After investigating the review, the plaintiff ascertained that it had been published by the defendant. I am satisfied that this is the case.

11 On 12 March 2019, the plaintiff issued a concerns notice, and lodged a complaint with Google. The defendant's response, on 14 March 2019, was to change her name on the review from "Isabel Lok" to "Bel". The plaintiff then served the summons and statement of claim in this matter on the defendant on 24 April 2019, following which she changed her name on the review from "Bel" to "Cindy".

12 The review remained posted on *Google My Business*. To control the damage to his practice, the plaintiff posted the concerns notice and the summons and statement of claim on the website. He also lodged a further complaint with Google on 24 April 2019. The review was finally deleted on 30 April 2019.

13 On 20 April 2019, the defendant posted a further review of the plaintiff's legal practice on *Google My Business*, this time using her father's name, Peter. The review reads:

Peter

Bad Lawyer! Not at all reliable.²

14 On 22 April 2019, the plaintiff met with the defendant's father, Peter Lok. The plaintiff has known Mr Lok for about ten years, although he has never acted for him. The plaintiff asked Mr Lok if he could persuade the defendant to delete the review. Mr Lok confirmed that he had not written the review that had been published under his name. He then telephoned his daughter in the plaintiff's presence. The plaintiff says that they had a heated argument and the defendant asked Mr Lok not to interfere in the matter.

15 The defendant posted a further review of the plaintiff's practice on 20 May 2019. This review reads:

JYL

Poor service.³

16 The following exchange then occurred between the plaintiff and defendant on *Google My Business*:

² FDN15 at [21].

³ FDN15 at [26].

To JYL

Our database shows that you are not and have never been our client nor have you ever attended our office for consultation of any nature whatsoever.

You posted a negative rating with defamatory review against our business willfully and deliberately with malice and with intention to harm our reputation and business.

We reserve our rights to pursue you for defamation and loss of business.

Gordon Cheng, Barristers, Solicitors & Notaries

Date: 23 May 2019⁴

JYL

Poor Service. Your database is incomplete. I did consult with you.⁵

If you were my client, please give me your full name and the subject matter.

Gordon Cheng, Barristers, Solicitors & Notaries

Date: 4 June 2019⁶

17 The plaintiff did not receive a response to his final message.

18 *Google My Business* provides data on the number of people who have read a page. It has advised the plaintiff that during the month of April 2019, 887 people read the page and in May 2019, 727 people viewed the defendant's post. There is no reason to suppose that a similar number of people did not read the defendant's posts each month from October 2018.

19 The plaintiff has never met the defendant. He has never been retained as her lawyer. He has never had any contact with her save through the *Google My Business* website.

The progress of this proceeding

20 After the proceedings was issued, the plaintiff went to extraordinary lengths to serve the defendant. These are described in P2. An order for substituted service was made on 20 June 2019. The defendant did not respond to service of the summons and statement of claim. She has never appeared in this matter, either personally or by a solicitor. On 31 July 2019, an order for default judgment was made in favour of the plaintiff.

21 I am satisfied that the default judgment was served on the defendant. I am further satisfied that the defendant was given appropriate notice that this matter was listed to proceed to an assessment of damage. She did not appear at the hearing for the assessment of damage on 20 September 2019. The hearing took place in her absence.

The plaintiff's submissions

22 The plaintiff says that as a result of the defamatory reviews posted by the defendant, he has suffered significant loss.

⁴ FDN15 at [28].

⁵ FDN15 at [29].

⁶ FDN15 at [30].

23 The plaintiff says that he has suffered significant economic loss. He lost about 80% of his clients. He was forced to retrench a law clerk and an associate as he could no longer afford to pay them.

24 The plaintiff relies on a report from his accountant, Karen Phu & Associates, dated 9 August 2019. Ms Phu assessed the total loss of income from 1 November 2018 to 31 January 2020 to be \$631,229. Ms Phu reached this figure by analysing the financial performance of the business for the eight month period immediately before the publication of the review, and the performance of the business for the eight month period immediately after its publication. This analysis revealed loss of past income to be \$396,000. The business's actual trading loss for the period 1 November 2018 to 31 July 2019 was \$136,000. She assessed the loss of income from 1 July 2019 to 31 December 2019 to be \$190,00.

25 Ms Phu provided a further report, dated 20 August 2019, which deals with the loss of goodwill to the plaintiff's business. Ms Phu formed the view that the goodwill of the practice has been damaged by 86.28%. Ms Phu reached this figure by comparing the average gross monthly income for the eight months before the publication with the eight months after publication. She then took the net pre-tax profit for the eight months before the publication as the normalised annual earnings for the year 2018. This figure is \$342,239. The damage to goodwill ratio was then applied, giving a figure of \$296,146 as the damage of the practice's goodwill.

26 The plaintiff seeks the sum of \$400,000 for past economic loss and \$200,000 for future economic loss including good will.

27 The plaintiff says that he suffered significant damage to his reputation as a result of the defendant's posts. Many hundreds of people read the reviews. The plaintiff's client base was dependent on referrals from other clients and word of mouth. The defendant's actions have had a serious effect on this. He lost 80% of his clients within a few months after the defendant first posted her defamatory review.

28 The plaintiff says that he has suffered significant distress as a result of the defendant's actions. He suffers anxiety every time he turns on his computer to check if there are any new posts from the defendant. The financial losses caused by the publication have caused him significant distress, anxiety and financial hardship. In April 2019, the plaintiff was diagnosed with depression and started taking anti-depressant medication.

29 The plaintiff says that he is entitled to aggravated damages. He has never met the plaintiff or acted for her. As a result, there can be no question that the defendant was not acting in good faith. The only conclusion that can be drawn is that her intention was to destroy the plaintiff's livelihood, and cause him distress, anxiety and financial hardship.

30 The defendant has made no offer of amends. She has made no apology. She refused to withdraw the review. She has not responded to service of the summons and statement of claim or of the default judgment. Her conduct in evading service has added to the cost and delay in this matter.

31 The defendant seeks the sum of \$200,000 for general damages, including aggravated damages.

Consideration

Economic Loss

32 The evidence of Ms Phu was unchallenged. Ms Phu graduated from the University of South Australia in 1990 with a Bachelor of Accounting. She worked as an employed accountant for a number of years and started her own practice on 1 July 1995. She has been the accountant for the plaintiff's legal practice since 1999. For the purpose of her report, Ms Phu reviewed the financial records of the business for the financial years 1 July 2016 to 30 June 2017, 1 July 2017 to 30 June 2018 and 1 July 2018 to 30 June 2019.

33 I note that the business has no overdraft banking facilities, does not keep a trust account and at the time of the report was debt free. For analysing the effect of the publication on the business, Ms Phu used 1 November 2018 as the demarcation date, on the basis that it would have taken about two weeks after the publication for it to affect the business.

34 Ms Phu adopted the Australian Tax Office guidelines for tax audit, by taking the immediate past two financial years as representative figures for comparison. She based her assessment on cashflow valuation rather than asset valuation. In taking this approach, she references a number of reputable sources as evidence of its appropriateness. I accept that Ms Phu has used an appropriate method of valuation for determining both the economic loss to the business and the loss of good will.

35 Using this method, Ms Phu determined that the average gross monthly income for the business, for the eight month period immediately before the publication of the review was \$57,684.02. She used the figure of \$57,000 as the benchmark for comparison.

36 For the first four months immediately after the publication, the gross average monthly income of the practice fell to \$7,286.50. For the second period of four months after publication, the gross average monthly income was \$9,388.31. During this period, the practice suffered a net trading loss of -\$71,687.96.

37 In the four month period immediately preceding publication, the business made a net pre-tax profit of \$193,801. In the four month period immediately after

publication, the business made a net trading loss of -\$60,618. This equates to a loss of average monthly gross income of -\$51,000 as a result of the publication.

38 Ms Phu noted that after the plaintiff posted the concerns notice, and the summons and statement of claim on *Google My Business*, the monthly turnover of the business improved.

39 For the period 1 November 2018 to 31 July 2019, the business made a net trading loss of -\$136,000, the first time in Ms Phu's experience that the business has made a loss.

40 Ms Phu has calculated the loss to the practice for the next six month period to be \$190,000. This is based on the assumption that the income of the practice would improve as the period of time since the publication increased. She used the actual revenue generated in July 2019 to project the increased profitability of the business over the next six months. On this basis, she has determined that the loss for the six month period to January 2020 would be \$190,000.

41 Ms Phu has calculated the plaintiff's loss of income as follows:

Loss of income for period 1/11/2018 to 28/2/19 at \$51,000 per month	\$204,000
Loss of income for period 1/3/19 to 30/6/19 at \$48,000 per month	\$192,000
Loss of income for July 2019	\$45,229
Loss of future income	\$190,000
Total loss of income	\$631,229

42 I note that these calculations do not include the damage to the goodwill of the business.

43 In a separate report dated 20 August 2019, Ms Phu provided her opinion on the value of the loss of good will to the plaintiff's business. In reaching her opinion, Ms Phu followed the guidelines set out in *Valuation of a Law Firm and a Law Practice*,⁷ which she says is widely used by legal practices in Australia when assessing the value of goodwill. She used the conclusions that she reached in her previous report as to the loss of income as the basis for her valuation of good will. I have no reason to doubt that this is an appropriate method, or that Ms Phu is qualified to undertake the task.

44 Ms Phu concluded that the good will of the practice was damaged by 86.28%, based on a comparison of the revenue of the practice in the eight months immediately before and after publication. She used the Traditional Look Back Method described by Cotterman, using the net pre-tax profit for the eight month period immediately before the publication as the normalised annual earnings for 2018 as an estimation of the value of the goodwill. On this basis, she concluded that the damage to the goodwill of the business amounted to \$296,146.

⁷ Valuation of a Law Firm and a Law Practice, James D. Cotterman, Altman Weil Inc 2014.

45 In reaching this conclusion, Ms Phu took into account the following factors:

- The plaintiff has built up substantial connections in Hong Kong and China. The grapevine effect as a result of publication on the internet would have a profound adverse effect on his practice.
- The plaintiff's bilingual skills gives him an advantage when dealing with the Chinese community in Australia.
- His pro bono service has increased his popularity and network within the Chinese community in Australia.
- He is 66 years old and approaching retirement. It would be very difficult to restore the goodwill of his practice before he wishes to do so, thus decreasing the likelihood of a profitable sale of the business.
- He would have to work until about the age of 70 to rebuild the goodwill of the business.

46 Ms Phu concluded that her assessment of the damage to the goodwill of the practice is a fair assessment of the value of a lifetime of hard work. She considers that it is a conservative assessment.

47 In total, Ms Phu has assessed the plaintiff's economic loss, including the loss of goodwill at \$927,375.

48 As I have already noted, Ms Phu's evidence was unchallenged, and I have no reason to doubt the opinions that she has expressed. Nonetheless, I am of the view that a number of contingencies need to be taken into account, including the business recovering faster than she has predicted, and other unforeseen circumstances occurring which may affect the profitability of the business into the future.

49 I assess damages for past economic loss in the sum of \$300,000.

50 I assess damages for future economic loss in the sum of \$100,000.

51 I assess damages for loss of goodwill in the sum of \$150,000.

General Damages

52 The plaintiff's evidence is that, as well as harming the reputation of his business, the publication has also harmed his personal reputation. I accept that the publication of the review, and the consequent loss of business and need to retrench staff has caused the plaintiff great anxiety and distress. He has described feelings of "distress, anxiety, frustration and indignation" which are

“unbearable”.⁸ He says that he was diagnosed with depression in April 2019 and prescribed anti-depressant medication.

53 While the plaintiff has provided a copy of the prescription for his medication, he has not provided a report from a medical practitioner in relation to his diagnosis, or its cause. It is difficult, therefore, for me to find conclusively that the diagnosis of depression is directly and predominantly caused by the publication. There may have been other factors in the plaintiff’s life which contributed to his condition; further, I have no evidence as to the severity of the diagnosis, or the prognosis.

54 Nonetheless, I am prepared to accept that the plaintiff suffered great distress as a result of the publication. In this regard, I take into account the ease with which reviews on the internet are republished and the fact that in a period of two months alone the review was viewed more than 1500 times. I note too, that these figures are some six months after the review was first published; it is not inconceivable that it was viewed more times in the first weeks or months after publication.

55 I further accept that the plaintiff would have suffered great anxiety as a result of the downturn in his business, and the need to retrench staff. I have no doubt that the fact that his business suffered a loss for the first time in twenty years was a matter of great hurt and distress to him.

56 In assessing the damages to which the plaintiff is entitled, I have relied on the principles set out by Blue J in *Duffy v Google Inc (No 2)*⁹ (“Duffy”):

Section 32 of the *Defamation Act 2005* (SA) provides:

32—Damages to bear rational relationship to harm

In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

Section 33 imposes a limit on damages for non-economic loss which is currently \$376,500.

Damages are otherwise to be assessed under common law principles (subject to mitigation).

General damages in defamation address three overlapping aspects of compensation for harm: compensation for hurt to the plaintiff’s feelings and damage to the plaintiff’s reputation and compensation to vindicate the plaintiff’s reputation.

In *Uren v. John Fairfax and Sons Pty Ltd*, Windeyer J said:

⁸ P6 at [34].

⁹ [2015] SASC 206.

When it is said that in an action for defamation damages are given for an injury to the plaintiff's reputation, what is meant? A man's reputation, his good name, the estimation in which he is held in the opinion of others, is not a possession of his as a chattel is. Damage to it cannot be measured as harm to a tangible thing is measured. Apart from special damages strictly so called and damages for a loss of clients or customers, money and reputation are not commensurables. It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways- as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money. The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is the product of a mixture of inextricable considerations.

In *Broome v Cassell & Co*, Lord Hailsham said:

In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge...

and Lord Diplock divided heads of damage into (1) ordinary, (2) aggravated and (3) exemplary and said:

The harm caused to the plaintiff by the publication of a libel 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. A solatium for injured feelings, however innocent the publication by the defendant may have been, forms a large element in the damages under head (1) itself even in cases in which there are no grounds for 'aggravated damages' under head (2)...

In *Carson v John Fairfax and Sons Limited* Carson, Mason CJ, Deane, Dawson and Gaudron JJ said:

Specific economic loss and exemplary or punitive damages aside, there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that "the amount of a verdict is the product of a mixture of inextricable considerations". The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation. "The gravity of the libel, the social standing of the parties and the availability of alternative remedies" are all relevant to assessing the quantum of damages necessary to vindicate the appellant.

and Brennan J said:

Although damages are awarded to vindicate the plaintiff's reputation, damages are not awarded as compensation for the loss in value of a plaintiff's reputation as though that reputation were itself a tangible asset or a physical attribute which, once damaged, is worth less than it was before. In order to achieve the purpose of vindicating reputation, damages for defamation are quantified by reference, *inter alia*, to what is needed to achieve that purpose: those damages are not quantified by reference to a depreciation in the value of a plaintiff's reputation. Other heads of damage are compensation for the external consequences produced by the publication of the defamation and "a solatium" for the plaintiff's internal hurt, that is, for the complex of reactions that the plaintiff has experienced as the result of the publication and its external consequences.

...

The *consequences* of publication include not only the insult publicly inflicted on the plaintiff but also the effect of the defamation on those to whom it is published, any diminution in the regard in which the plaintiff is held by others, any isolation produced (causing the plaintiff to be "shunned or avoided" is the traditional formula) and any conduct adverse to the plaintiff engaged in by others because of the publication of the defamatory matter. Damages are awarded also for the plaintiff's injured feelings, including the hurt, anxiety, loss of self-esteem, the sense of indignity and the sense of outrage felt by the plaintiff. Indeed, all those objective consequences and those subjective reactions which flow naturally from the publication of the defamatory matter are relevant factors. Of course, the subjective reactions are often produced by the objective consequences of the publication. The two categories are not cumulative heads of damage but descriptions of kinds of intangible factors which must be taken into account in assessing damages.

...

Damages by way of vindication of reputation are not added to the damages assessed under other heads. Although an award of damages operates "as a vindication of the plaintiff to the public and as consolation to him for a wrong done", as Windeyer J said [in *Uren v. John Fairfax and Sons Pty. Ltd.*], the dual operation of an award does not require cumulative components of damages. The same sum can operate as vindication, compensation and solatium, for "the amount of a verdict is the product of a mixture of inextricable considerations". The amount assessed under other heads may itself be sufficient in aggregate to provide the vindication required. The extent of the overlap depends on the circumstances. But the award in total must be sufficient to satisfy the purposes for which damages for defamation are awarded: vindication of reputation, compensation for injury to reputation and solatium for injured feelings.

In *Ali v Nationwide News Pty Ltd*, Tobias and McColl JJA said:

The harm caused to the plaintiff by the publication of the defamation 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. Thus '[a] solatium for injured feelings, *however innocent the publication by the defendant may have been, forms a large part in the [general compensatory] damages*'.

The harm caused by the defamatory publication does not end at the time of publication but encompasses continuing harm including ongoing hurt feelings during and up to the conclusion of the litigation by the plaintiff seeking vindication.¹⁰

(citations omitted)

57 The defamatory publications hit at the heart of the plaintiff's business and reputation. The imputations are grave; publication occurred over a period of at least six months and the only mitigation was that undertaken by the plaintiff himself. Separate to the damage to the goodwill of the plaintiff's business is the damage to his own reputation. I have no doubt that significant damage was caused by the publication, and any award of damages must, in the words of Blue J, "be sufficient to signal the public vindication of [his] reputation".¹¹

58 I assess general damages in the sum of \$100,000.

Aggravated damages

59 In my view, this is a case where aggravated damages are warranted. The plaintiff has never met or had any dealings, personal or business, with the defendant. Her response to the concerns notice was to change the name on the review. After the review was deleted, she posted a further defamatory review. She evaded service which increased the cost and time required to bring this matter to a hearing. She has never apologised or made any offer of compensation. I have no doubt that as a result of her actions (or inaction) she increased the harm to the plaintiff.

60 In determining that the plaintiff is entitled to aggravated damages, I have taken into consideration the judgment of Blue J in *Duffy*, where he said:

Aggravated damages in defamation are compensatory and not punitive and are awarded "to reflect conduct by the defendant which aggravates the injury and increases the harm done to the [plaintiff]".

Aggravated damages may be awarded for defamation when the defendant's conduct of the defence (or other conduct at or after the publication) is lacking in bona fides, improper or unjustifiable.

Such conduct may include a failure to apologise or persistence in a plea of justification, but only if the defendant's conduct in failing to apologise or persisting in the plea of justification is lacking in bona fides, improper or unjustifiable.

Failure to apologise

Merely not to apologise is not positive or active conduct and cannot in itself be in bad faith, improper or unjustifiable. Something more is required. For example, if the original

¹⁰ [2015] SASC 206 at [90]-[98].

¹¹ [2015] SASC 206 at [131]

publication was made maliciously, a failure to apologise might be regarded as a continuation of the malice and hence lacking in bona fides, improper or unjustifiable.¹²

(citation omitted)

61 I have no doubt that the defendant was acting in the absence of bona fides. No other finding is open to me in circumstances where the plaintiff and defendant have never met each other or had any dealings with each other.

62 I assess aggravated damages in the sum of \$100,000.

Costs

63 The plaintiff seeks the costs of the action on an indemnity basis.

64 Section 38 of the *Defamation Act 2005* (SA) (“the Act”) provides:

38—Costs in defamation proceedings

- (1) In awarding costs in defamation proceedings, the court may have regard to—
 - (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party’s superior financial position to hinder the early resolution of the proceedings); and
 - (b) any other matters that the court considers relevant.
- (2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise)—
 - (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff; or
 - (b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

- (3) In this section—

settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made.

65 Its application was discussed by Blue J in *Duffy v Google Inc (No 3)*.¹³ In this matter, I have no hesitation in finding that the defendant unreasonably failed

¹² [2015] SASC 206 at [81]-[84].

¹³ [2016] SASC 1.

to make a settlement offer or agree to a settlement offer proposed by the plaintiff. Indeed, the defendant's only response to this matter was to change the name of the person posting the review and to post a further review.

66 The plaintiff is entitled to costs on an indemnity basis.

Conclusion

- 1 The plaintiff is entitled to damages in the sum of \$750,000.
- 2 The defendant is to pay the plaintiff's costs of the action on an indemnity basis, such costs to be agreed or taxed.