

Supreme Court

New South Wales

Case Name: Pan v Cheng; Zhou v Cheng

Medium Neutral Citation: [2021] NSWSC 30

Hearing Date(s): 16 – 18 October, 1 November 2019

Decision Date: 1 February 2021

Jurisdiction: Common Law

Before: Rothman J

Decision: In proceedings 2018/218713; Henry Pan & Chinese Australian Services Society Ltd v Jie Cheng:

- (1) Judgment for the plaintiffs;
- (2) The defendant shall pay the first plaintiff, Henry Pan, damages, including aggravated damages, in the amount of \$285,000;
- (3) The defendant shall pay the second plaintiff, the Chinese Australian Services Society Ltd, damages, including aggravated damages, of \$150,000;
- (4) The defendant shall pay interest on the foregoing damages, calculated at 2%, from 1 January 2017 until the date of judgment;
- (5) The defendant shall pay interest on the aforesaid damages, being post-judgment interest, at the prescribed rate, pursuant to s 101 of the Civil Procedure Act 2005 (NSW);
- (6) Pursuant to s 40 of the Defamation Act 2005 (NSW), the defendant shall pay the first and second plaintiffs their costs of and incidental to the proceedings, assessed on an indemnity basis.

In proceedings 2018/340360 Bo Zhou v Jie Cheng:

- (7) Judgment for the plaintiff;
- (8) The defendant shall pay the plaintiff damages, including aggravated damages, in the amount of \$200,000;

(9) The defendant shall pay interest on the foregoing damages, calculated at 2%, from 1 January 2017 until the date of judgment;

(10) The defendant shall pay interest on the aforesaid damages, being post-judgment interest, at the prescribed rate, pursuant to s 101 of the Civil Procedure Act 2005 (NSW);

(11) Pursuant to s 40 of the Defamation Act 2005 (NSW), the defendant shall pay the plaintiff his costs of and incidental to the proceedings, assessed on an indemnity basis.

In both matters:

(12) The defendant shall be enjoined and restrained from distributing or publishing (or repeating publication or continuing to publish), in hard copy or in soft copy, any document, including a letter, or publication or posting on the internet or on social media any article, advertisement, document, description, audio or video recording, photograph, depiction, image or picture referring to Henry Pan, Bo Zhou and/or the Chinese Australian Services Society Ltd and imputing or implying any imputation pleaded in either or both proceedings 2018/218713 or 2018/340360 about or concerning Henry Pan, the Chinese Australian Services Society Ltd and/or Bo Zhou;

(13) The parties in each matter have liberty to deal with the form of any orders proposed, the question of interest and the question of costs by the making of any different, special or other order as to any and all of the foregoing. Such application shall be made by email, directly to the Associate to Rothman J, with a copy to each other party accompanied by a submission and/or evidence not exceeding five pages. Such application may be made within 14 days of the date of this judgment. Any other party affected by any such application may respond by submission of no more than five pages within a further 14 days.

Catchwords:

DEFAMATION – determination of identity of publisher of material – material defamatory – damages awarded – need for injunctive relief – permanent injunction issued.

Legislation Cited: Australian Charities and Not-for-profits Commission Act 2012 (Cth)
Civil Procedure Act 2005 (NSW), s 101
Defamation Act 2005 (NSW), ss 9, 34, 35, 37, 40
Supreme Court Act 1970 (NSW), ss 23, 66

Cases Cited: Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158; [1998] NSWSC 4
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34
Carson v John Fairfax & Sons Ltd (1978) 178 CLR 44; [1993] HCA 31
Fabre v Arenales (1992) 27 NSWLR 437
Greek Herald Pty Ltd v Nikolopoulos (2001) 54 NSWLR 165; [2002] NSWCA 41
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632; [1979] HCA 3
Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327; [2003] HCA 52

Category: Principal judgment

Parties: 2018/218713:
Henry Pan (First Plaintiff)
Chinese Australian Services Society Limited (Second Plaintiff)
Jie Cheng (Defendant)

2018/340360:
Bo Zhou (Plaintiff)
Jie Cheng (Defendant)

Representation: Counsel:
S Chrysanthou/N Olson (Plaintiffs)
R Rasmussen (Defendant)

Solicitors:
Austra Legal (Plaintiffs)
Kalantzis Lawyers (Defendant)

File Number(s): 2018/218713; 2018/340360

JUDGMENT

- 1 **HIS HONOUR:** The Court is required to deal with two proceedings against Jie Cheng, the defendant, each of which seeks damages for allegedly defamatory material published by the defendant. In the first set of proceedings, Mr Henry Pan (hereinafter “the first plaintiff”) and Chinese Australian Services Society Limited (hereinafter “CASS”) sue for a series of publications said to have been published by the defendant about the first plaintiff and CASS. In the second set of proceedings, Mr Bo Zhou (hereinafter “the second plaintiff”) also sues the defendant for a series of publications. The publications overlap.
- 2 CASS is an excluded corporation within the meaning of s 9 of the *Defamation Act 2005* (NSW). On the evidence before the Court, it was not formed for the purposes of profit and is not a public body.
- 3 It may be, although there is little evidence on the issue, that it also employs fewer than 10 persons. Although that is unlikely.
- 4 Nevertheless, CASS is an excluded corporation, on the evidence before the Court.¹ The parties in the proceedings agree that CASS is an excluded corporation.
- 5 CASS is a registered charity and the first plaintiff is the Honorary Executive Director of CASS. The second plaintiff is, and was at all relevant times, the Chairman of the Board of Directors of CASS.
- 6 As a charity, CASS is registered under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (hereinafter “ACNC Act”) and is otherwise a company limited by guarantee. It provides aged care, disability, settlement and child care services and provides them, predominantly, if not solely, to the East Asian community in Sydney’s inner west, south, southwest and northern suburbs. It also operates in Wollongong. Its services seem to be delivered by subsidiaries. CASS has net assets of approximately \$14 million and annual revenue of almost \$23 million.²

¹ Defamation Act 2005 (NSW), s 9(2).

² Affidavit, Henry Pan, 14 October 2019, at [14]-[15], [24].

- 7 The first plaintiff was one of the persons who established CASS under its original name, the Sydney Chinese Childcare and Community Co-Operative Society Ltd. It was established in 1981 and the first plaintiff was the Chairman from its establishment until 1 July 2006, at which time he became its Honorary Executive Director, which he has remained. As the name implies, the position is an unpaid office and, according to his evidence,³ he does not claim reimbursement for expenses incurred.
- 8 The second plaintiff became involved in CASS in 1996 and became a Director shortly thereafter. He became Vice-Chairman in 2014 and in 2016 was elected as Chairman of the Board.
- 9 In 2013, CASS Care Ltd, a wholly owned subsidiary of CASS, commenced the development of a 63-bed residential aged care facility in Campsie, which was opened in February 2015. On the material before the Court, it has consistently operated with an occupancy rate of 99% up to the date of trial.
- 10 The defendant was, between 1 July 2014 and 23 August 2016, the Director of Nursing at the aforementioned residential aged care facility. Her function was the day-to-day management and operation of the aged care facility, which included the planning, developing and coordinating of the residential aged care services and activities of CASS Care and the supervision of staff. The defendant reported directly to the first plaintiff and was, as the title and reporting line makes clear, a senior employee and considered so amongst the officers and employees of CASS.

Issues in the proceedings

- 11 There is little doubt that the publications about which complaints are made are defamatory. No defence is filed relating to any denial that the publications carry defamatory meaning or relying on other defences such as opinion, contextual truth or the like.
- 12 The only issue raised in the defences is the identity of the person that published the impugned publications. As a consequence of the claim that the defendant had no involvement in the publication of the statements, the Court is,

³ Affidavit, Henry Pan, 14 October 2019, at [16]-[17].

independently, required to deal with whether they carry a defamatory meaning. All of the plaintiffs also seek injunctive relief as well as damages.

- 13 As may be obvious from the immediately foregoing comments, CASS and the first and second plaintiffs were the targets of a letter writing campaign by a person or persons who was not identified in the publications. All of the letters were written in Chinese characters and were said to be written on behalf of or by various groups, including “People in the Chinese community”, “People in the community who care about CASS”, “Representatives of family members from the CASS”, and other similar identifying comments.
- 14 The letters and publications were sent to the Ambassador of the People’s Republic of China in Australia; the Consul-General and Deputy Consul-General of the People’s Republic of China in Sydney; the Overseas Chinese Affairs Office of the People’s Republic of China’s State Council; the first plaintiff’s wife; and a company in China with which CASS was attempting to establish a business relationship, being Silian Youshi Scientific Ageing Industry Co (hereinafter “Silian”).
- 15 As stated, the major issue in the proceedings is whether the defendant sent these anonymous letters. There are other issues, with which the Court will deal at the outset, more briefly than might otherwise have been the case. By orders of the Court, issued otherwise than by the Court as presently constituted and prior to the commencement of the hearing of the substantive matter, the evidence in each proceeding is evidence in the other proceeding.

Reputation of plaintiffs and other evidence

- 16 The plaintiffs rely upon the Affidavits of the first plaintiff of 15 October 2019; the second plaintiff of 15 October 2019; Kitty Leong of 15 October 2019; Maria Cheng of 15 October 2019; and Kit Chung of 15 October 2019. Other evidence was adduced, overwhelmingly related to reputational evidence, about which there was little or no contest.
- 17 An Affidavit of Andrew Petrie OAM was filed in Court and relied upon in relation to the reputation of the second plaintiff, whom he described as having the highest integrity; being very intelligent; and hard-working. He was also well regarded for his generosity and community service. That was the view of

Mr Petrie and his understanding of the view generally held of the second plaintiff in the community.

- 18 The second plaintiff was also known to Mr Petrie as a result of a joint venture of which the second plaintiff was Managing Director and Mr Petrie OAM was a Non-Executive Director. They keep in regular contact.
- 19 The Affidavit of Yi Yun Chen also attested to the reputation of the second plaintiff. Mr Chen, also known as Michael Chen, is the manager of MC International Investment Group; has known the second plaintiff for about 10 years; met the second plaintiff through business, in particular property acquisitions, and knows him socially; and testified both as to Mr Chen's view of the second plaintiff and his reputation within the Chinese Australian community as being: honest; respectable; trustworthy; and hard-working. According to Mr Chen, the second plaintiff has always been admired for his community work and generosity.
- 20 Ms Christina Jinying Wu testified as to the reputation of the first plaintiff. She is a Councillor on Georges River Council and has known the first plaintiff for about six years. They met through CASS, as CASS performs community work in the Georges River area. She attested to the reputation of the first plaintiff and as to his reputation within the Chinese community as being: a person who did a lot of community work; had a good reputation; also known in the Korean community as doing a lot of good work in that community as well.
- 21 Mr Agapitos Passaris, also known as Jack Passaris, is a Foundation Member of the Ethnic Communities Council of New South Wales and was, at one stage, Deputy Mayor of Marrickville Council. He had been a Councillor for about 20 years. He testified as to the reputation of the first plaintiff, whom he had known for about 30 years and initially met because of the first plaintiff's involvement in various bodies and committees.
- 22 The first plaintiff worked, at one stage, for the Community Relations Commission and was a delegate for the Ethnic Communities Council. Mr Passaris testified that he, and the persons with whom he had contact within the multicultural community, considered that the first plaintiff had an "excellent reputation".

- 23 The Affidavit of Hoi Kit Chung was read. It dealt with certain background facts as well as the reputation of the first plaintiff and the second plaintiff. The Affidavit attests to the reputation of the first plaintiff amongst staff and attests to the fact that most staff “have a high opinion” of the first plaintiff. Similarly, people outside CASS held the first plaintiff and CASS in high repute and esteem.
- 24 The reputation of the second plaintiff was also described as one in which he has been “highly regarded by the Australian Chinese Community”. As to the publication of the impugned statements, the following evidence was provided:
- “I am aware that the anonymous letter ‘campaign’ has taken an enormous toll on both [the first and second plaintiffs]. Neither of them have been their true selves since it started, being aware of gossip and talking going on in the Australian Chinese Community. They have each been anxious and saddened by the campaign, especially as it has continued on for such a long period of time.”
- 25 An Affidavit was read from Ka Po Maria Cheng, who has been the Chief Operations Manager for CASS and, in that role, the next most senior executive officer to the first plaintiff. She attested to the fact that she had known the first and second plaintiffs since 2011. During the time that she had known them, they each had been “highly regarded within the Chinese-Australian community for their charitable work in running CASS”.
- 26 Ms Cheng was aware of the letters denigrating the first plaintiff and CASS and received some of those letters. She passed the letters onto the first plaintiff. The letters were received commencing November 2016.
- 27 In November 2017, Ms Cheng went to Chongqing in China, accompanying Zou Xiao Qing to conduct a training session for the Silian Technology Company. At the time, Ms Zou was the Care Manager of the residential aged care facility. During that visit, Ms Cheng exchanged messages on WeChat with Mr Luo Mingliang, the Director of Silian.
- 28 On 12 January 2018, Ms Cheng had a meeting with the first plaintiff and Ms Kitty, during which meeting she received photos of some letters and envelopes received by Mr Luo, or said to be received by him, and, at the request of the first plaintiff and Ms Leong, asked him to send the document by post. The request to send the documents by post was sent by WeChat.

- 29 The next day, the first plaintiff asked Ms Cheng to request of Mr Luo that he send the documents to the second plaintiff, who, coincidentally, was in China at the time. That message was passed on. Mr Luo did not reply to the message, but on 20 January 2018, the second plaintiff informed Ms Cheng that he had received a package from Mr Luo.
- 30 Sometime in 2017, Ms Cheng met an officer or employee of the Australian Nursing Home Foundation, a Ms Ada Cheng, who informed the deponent, Ms Cheng, that she had received anonymous letters making allegations against CASS and the first plaintiff. Ms Ada Cheng made comments as to the harm it was doing for the corporate image and suggesting that something be done to stop the letters. The same issue was raised later at another function.
- 31 In December 2018, the newly appointed Deputy Consul-General of the People's Republic of China visited CASS and, at that time, in a conversation with the first and second plaintiffs and other Board members, complained that he had received anonymous letters denigrating CASS and the first and second plaintiffs. According to Ms Cheng, the Deputy Consul-General was or seemed "unimpressed" by the circumstance.
- 32 The plaintiffs also relied upon Affidavits of Dr Leng Tan; and the two plaintiffs. The Court will deal with those Affidavits separately.
- 33 The only witness evidence, upon which the defendant relied, was the testimony of the defendant herself. A number of documents were relied upon by the defendant with which the Court will deal later in these Reasons.

Matters complained of

- 34 Each of the impugned statements, said to be defamatory of one or other of the first or second plaintiff or CASS, or all of them, is written in Chinese characters. A certified translation has been provided. Each is in the form of a letter. Each is lengthy and defies repetition. Each of the matters complained of is contained in Exhibit A in the proceedings, being the plaintiff's Courtbook, Vol 1.
- 35 There are 21 matters complained of in relation to the first plaintiff and seven matters complained of in relation to the second plaintiff. Some of the matters

complained of, in relation to the first plaintiff, also relate to CASS and are said to be defamatory of each.

- 36 It is sufficient for present purposes for the Court to summarise, in very general terms, the effect of each of the publications. Dealing first with the first plaintiff and CASS, the matters about which complaint has been made can be summarised briefly in the following manner.
- 37 A letter of 17 July 2017 referring to the first defendant and the CASS residential aged care facility, alleges a lack of leadership; frequent medical accidents at the residential aged care facility; abuse of power by both the first plaintiff and CASS; and preferential treatment provided to friends and relatives of the first plaintiff by CASS in the running of the residential aged care facility. The letter is addressed to the Ambassador of the People's Republic of China to Australia; the Consul-General for the People's Republic of China in Sydney; unnamed friends and relevant media friends; Dr Tony Goh and Dr Leng Tan; the Chairperson, Mr Benze Leung, and Deputy Chairperson, Mr Dominic Sin, of CASS; the second plaintiff; Ms Maria Cheng; Mr Ivan Wang; Ms Kit Chung; and department heads of CASS and staff friends. It was sent over the descriptor, "Enthusiastic people in the Chinese community". It is plainly defamatory of both CASS and of the first plaintiff.
- 38 The second letter, also dated 17 July 2017, and translated on 14 August 2017, is addressed to the second plaintiff, Dr Leng Tan and Dr Tony Goh. It accuses the first plaintiff of "evil doings"; using his position to make profits for his children; embezzle properties from CASS; have CASS pay for his daughter's business; taking bribes and abusing the rules; mistreating employees; issuing handfuls of warning letters; and calling for his dismissal from his positions. It is said to have been written by "Relevant people in the Chinese community". The Court finds it is defamatory of both the first plaintiff and CASS.
- 39 The third matter complained of is defamatory of CASS and the first plaintiff. It is addressed to the Ambassador; the Consul General in Sydney; community leaders; "community people from all walks of life"; Dr Tony Goh and Chairperson Dr Leng Tan; Chairperson Mr Benze Leung and Deputy

Chairperson Mr Dominic Sin of CASS; the second plaintiff; and the supervisors of every department of CASS and staff friends.

- 40 The publication accuses the first plaintiff of being an incompetent manager and appointing people based on favouritism. It accuses CASS of being a bad employer and issuing inappropriate and unsupportable warning letters. It accuses the first plaintiff of being “authoritarian” and of “suppressing staff”. It accuses the first plaintiff of being “reviled” in the community for his professional ignorance and managerial incompetence. It accuses the first plaintiff of being “unscrupulous”, or, more accurately, of engaging in “cruel and unscrupulous actions”.
- 41 The fourth letter is addressed to the first plaintiff’s wife. It is over the descriptor of “People who care about you in the community” and accuses the first plaintiff of engaging in an extramarital affair; speaking badly of the recipient; being a hypocrite; possessing the nature of an animal; being devoid of gratitude; being uncaring; and urging Ms Pan to leave her husband. The letter was apparently sent on or about 11 September 2017.
- 42 The fifth matter about which complaint is made is a letter purportedly sent to Ms Qiu Yuanping, Director of Overseas Chinese Affairs Office of the People’s Republic of China State Council; Mr Tong Xuejun, Deputy Consul General of the People’s Republic of China Consulate in Sydney; the second plaintiff; Dr Leng Tan and respected community leaders. It accuses the first plaintiff of practising nepotism; engaging in factional activities in pursuit of personal gains; and oppressing dissidents.
- 43 It also accuses the first plaintiff and CASS of covering up the administration of incorrect medicine to an elderly resident; ignoring sexual abuse and beatings occurring at the residential aged care facility; serious breaches of laws protecting the elderly; mismanagement that led to the repeated loss of patients’ consciousness; abuse of power and preferential treatment to certain patients; and deceptive conduct towards the community regarding financial donations. Again, like the other matters complained of, it is plainly defamatory of the first plaintiff and of CASS. It was apparently sent on or about 13 September 2017.

- 44 On 2 October 2017, a further letter was sent to Ms Pan, the wife of the first plaintiff. That letter asserts that the marriage between the recipient of the letter and the first plaintiff is a marriage in name only, that the first plaintiff has been unfaithful to his wife and that there is no affection felt by the first plaintiff towards his wife.
- 45 Further, it asserts that the first plaintiff is engaged in an extramarital affair; that the first plaintiff is engaged, with his wife, in a fraud, involving them continuing to be married in order for the wife to receive a carers' allowance; that the first plaintiff is casting aspersions on his wife, the recipient of the letter; and that he attributes guilt to the recipient of the letter, Ms Pan and her daughters, associated with the relationship the first plaintiff has with his mistress. It is said to be written by "People in the community who care about you".
- 46 The seventh matter about which complaint is made is a letter addressed to Mr Tong Xuejun, Vice-Consul of the People's Republic of China in Sydney; the second plaintiff; and Dr Leng Tan. It was apparently sent on or about 8 October 2017 and alleges that the first plaintiff has abused matters of public trust; personally used resources of CASS for his own benefit; is a poor manager; and that he and CASS had failed to investigate serious accidents. It is purportedly sent by "People from different walks of life in the Chinese community and representatives of overseas Chinese leaders".
- 47 The eighth matter about which complaint is made is a letter addressed to the "Comrade in Charge at Chongqing Silian Youshi Scientific Ageing Industry Co", seemingly on 9 October 2017, over the signature of "Representative of family members from the CASS" and "representatives of various walks of life in the Chinese community". It bears a date of 25 September 2017, notwithstanding the date on which it is most likely to have been sent.
- 48 The letter accuses the first plaintiff and CASS of covering up medical accidents at the residential aged care facility; deceitful management by the first plaintiff of CASS; that both CASS and the first plaintiff covered up sexual harassment allegations relating to residents with dementia at the residential aged care facility; deceived Silian; and employed unqualified nurses.

- 49 The ninth matter about which complaint is made is a letter addressed to the respected Director Ms Qiu Yuanping, Office for Overseas Chinese Affairs, State Council, People's Republic of China; respected Mr Tong Xuejun, Deputy Consul-General of the People's Republic of China in Sydney; the second plaintiff; and Dr Leng Tan. It was sent on 26 October 2017 and is said to have been sent by "People from different walks of life in the community". It accuses the first plaintiff of abuse of power; being an incompetent manager at CASS; that CASS and the first plaintiff forced staff to modify archived files in the interests of the first plaintiff; that the first plaintiff is an "atrocious person"; and deceitful, in that he claims to volunteer but is rewarded financially. It further accuses CASS of mistreating staff and engaging in deceit and/or fraud.
- 50 The tenth matter complained of seems to have been sent on 15 November 2017 and was addressed to the "Respected Director Qiu Yuanping, Overseas Chinese Affairs Office, of the People's Republic of China State Council"; Mr Tong Xuejun, Deputy Consul-General of the People's Republic of China in Sydney; the second plaintiff; Dr Leng Tan; and various respected community leaders. It accuses the first plaintiff of using his blindness as an excuse to avoid responsibilities; deceit; utilising the resources of CASS to corrupt others; and of being a despicable man. The tenth matter accuses CASS of operating as the enemy of the vast majority of overseas Chinese people; destroying the trust of the government of the People's Republic of China; and discrediting the reputation of the Overseas Chinese Services Centre. It also accuses CASS of operating an authoritarian dictatorship within the residential aged care facility.
- 51 The eleventh matter about which complaint is made is addressed to the "Respected Chairman", Mr Luo Mingliang. It is said to have been published on 17 November 2017 and accuses the first plaintiff of: a lack of leadership; causing frequent medical accidents; abuse of power; corruption in giving preferential admission to relatives of his friends and "cronies" to the residential aged care facility; abuse of power in giving preferential admission to two relatives of Kit Chueng to the residential aged care facility. It also defames CASS in that it accuses CASS of corrupt activity and nepotism.

- 52 Further, the letter of 17 November 2017, being the eleventh matter complained of, also refers to the second plaintiff and says that he: neglects his duty; neglects his responsibilities as chairperson of CASS; and does not devote sufficient time to CASS. It makes a number of comments about the expertise or otherwise of nursing staff at CASS.
- 53 The twelfth matter about which there is complaint is said to have been sent from “People from different walks of life in the community” to Respected Chairman Mr Luo Mingliang, Chair of Silian and refers to the first plaintiff. It was apparently sent on 22 November 2017. It, once more, accuses the first plaintiff of using his blindness as an excuse to avoid legal responsibility; avoiding legal responsibilities; corruption of others using the resources of CASS; and ruining CASS’s reputation with lies and falsehood. There are consequential defamatory comments made of CASS.
- 54 The thirteenth matter about which complaint has been made is a letter addressed to “Community People and former staff at CASS” and is said to be written by “People who care about you in the Chinese community”. It refers to the infidelity of the first plaintiff towards his wife; and the nepotism shown by both CASS and the first plaintiff towards people by promoting persons, based upon favouritism rather than on a rational basis.
- 55 The fourteenth matter complained of was sent on 19 December 2017 and is another letter addressed to Ms Pan, the wife of the first plaintiff. Once more, the letter accuses the first plaintiff of being unfaithful towards his wife; and nepotism, being the promotion of people based upon favouritism. It is said to be written by “People who care about you and the Chinese community”.
- 56 The fifteenth matter complained of is a letter addressed to respected officials of the Consul General of the People’s Republic of China in Sydney; respected people from all walks of life in the community (which I assume to mean the Chinese community); and the second plaintiff.
- 57 It alleges that the first plaintiff engaged in disgraceful conduct; and cheated people. Further, it alleges that the second plaintiff is a “running dog” for the first plaintiff; covers up disgraceful conduct of the first plaintiff; allows the first

plaintiff's evil acts to lie and cheat; and covets fame and loves to be flattered, being, it seems on the document, a narcissist, with no sense of justice.

- 58 The sixteenth matter about which complaint has been made is, again, a letter, addressed, on its face, to "People from different walks of life in the community and Mrs Pan" and is over the descriptor "People who care about you in the community". It refers to the first plaintiff as a "despicable man". It accuses CASS of acting corruptly and hiding the lies and cheating of the first plaintiff and his scandalous behaviour. It refers, once more, to alleged infidelity.
- 59 The seventeenth matter about which complaint has been made is a letter addressed to "People from different walks of life in the community and leaders of relevant organisations"; Dr Leng Tan; the second plaintiff; and Mrs Pan. It accuses the first plaintiff of nepotism and favouritism when appointing staff; of being unfaithful to his wife; of abuse of power; of immorality and being lacking in moral standards; of embezzling or defrauding CASS; and many other issues. It involves consequential criticism of CASS as behaving corruptly and inconsistently with its objects.
- 60 The eighteenth matter about which complaint has been made is said to have been sent on 13 March 2018 and was addressed to the Consul-General of the People's Republic of China in Sydney and to Ms Maria Cheng. It refers to the first plaintiff as incompetent in management; it refers to the first plaintiff and CASS as covering up sexual harassment of staff and senior residents; of covering up staff members beating senior residents; of administering wrong medicines, which were injected into residents; and behaving abominably in the exercise of power.
- 61 It also alleges that the second plaintiff: neglects his duties and responsibilities as Board Chair of CASS; is vain; seeks inappropriately to ingratiate himself with Australian politicians; fails to lead CASS; is abusing his position at CASS to gain political power; is a puppet of the first plaintiff; and ignores serious accidents and incidents at CASS. Again, this letter was sent over the "signature" of "People from different walks of life in the community".
- 62 On 9 April 2018, a letter was sent, which is the nineteenth matter complained of. It was addressed to the Consulate General of the People's Republic of

China in Sydney; leaders of relevant departments and community organisations; people from all walks of life in the community; and the second plaintiff. It accuses the first plaintiff of using every effort to harm people, particularly those that have helped him for more than a decade; of being mercilessly cruel; and other misdeeds.

63 Further, it accuses the second plaintiff of being aware of the first plaintiff's evil, ungrateful and treacherous behaviour and covering it up and praising the first plaintiff, notwithstanding that knowledge. It accuses the second plaintiff of exonerating the first plaintiff's bad management; describes him as a "laughingstock" of the community; describes him as fawning on rich and powerful people; and suggests that he has no talent. There are consequential allegations made about the conduct of CASS.

64 On 10 April 2018, the 20th matter complained of was sent over the title "People in the community who support justice" and was addressed to Mrs Pan, the second plaintiff, Dr Leng Tan, and "People from all walks of life in the community and respective leaders of relevant organisations". It accuses the first plaintiff of abuse of power; of promoting people preferentially on the basis of narcissism and nepotism; of cheating; of misleading the Board of Directors of CASS; and of being unfaithful to his wife.

65 The twenty-first matter complained of is said to have been published on 11 May 2018. It is addressed to officials from the Consul-General of the People's Republic of China in Sydney; respected community leaders; respected people for all walks of life in the community; and Mrs Pan. There is no group or entity or identity that is said to have "authorised" the letter.

66 It accuses the first plaintiff of: being a sham; pretending to know and be an expert in matters of which he has no idea; being a poor manager; being a poor businessperson; being quarrelsome; being vengeful and hunting down those with different opinions to him; misusing CASS resources to pay for his own personal expenditures and social entertainment; using CASS resources to supplement his daughter's private ballet classes; nepotism towards relatives of his mistress, and of assigning to such persons promotional positions for which they have no competence. He is also alleged to have "elbowed out"

conscientious persons who had tried to work for and donate money to CASS. It accuses the first plaintiff of being “rubbish” and a “scumbag”.

- 67 In the proceedings taken by the second plaintiff there are seven matters complained of, some of which have already been the subject of comment in relation to the matters about which the first plaintiff complains. That includes the first matter complained of; the second matter complained of; the third matter complained of; and the sixth matter complained of.
- 68 Without detailing each of the matters complained of and the allegations or overall summary of them, it is fair to say that they accuse the second plaintiff of knowing that the first plaintiff abused his power and acquiescing in it; colluding with the first plaintiff to destroy the reputation of CASS; acquiescing in and allowing the first plaintiff to lie to and cheat the Board of CASS; paying insufficient time to his duties as Chair of CASS; undertaking the role as Chair of CASS only for the purpose of maintaining face for a “glorious title”; “rubberstamping” the first plaintiff’s decisions and desires; being a controlled puppet without independent thought or action; being engaged in a secret deal with the first plaintiff; a breach of duties as Chair of CASS; causing unprecedented harm to CASS; covering up the first plaintiff’s evil behaviour; utilising despicable means to destroy anyone whose opinions differ from him and allowing the first plaintiff to do likewise; and otherwise acquiescing in, agreeing to and/or allowing the inappropriate, unlawful or illegal work of the first plaintiff.
- 69 I have not sought to summarise accurately all of the issues in each of the publications. Each is lengthy and, in ordinary circumstances, would warrant a separate proceeding. It is sufficient for present purposes to make clear that the publications defame the first plaintiff; they defame, to the extent noted above, the second plaintiff; and they defame CASS.
- 70 Without setting out the detailed imputations that were said to arise from each publication, the Court accepts the imputations pleaded in each of the proceedings in relation to the plaintiff there specified. Even though other allegations may be included in the foregoing summary, the Court confines its assessment to the imputations pleaded.

- 71 No issue is taken in the proceedings by the defendant that the alleged imputations arise from the publications to which the pleadings refer. Those imputations are not admitted, but they plainly arise from the publications.
- 72 The Court, as presently constituted, confirms that the imputations alleged arise from the documents which are said to be the letters published by the defendant. Further, those imputations are defamatory of the first plaintiff, CASS and the second plaintiff respectively.
- 73 As earlier stated, those formalities are not substantially in issue in these proceedings. That which is in issue is whether it was the defendant that published the letters.
- 74 The evidence against the defendant on the issue of whether it was the defendant that published the documents is almost entirely circumstantial. It depends upon motive; opportunity; and the circumstance that one or more of the publications was sent at a time and from a place at which the defendant was sending a document. While the foregoing may be a little cryptic, it will be explained in the course of the following reasons. It is necessary to deal with those aspects.

Motive

- 75 The defendant, as already stated, was the director of nursing at the residential aged care facility. She commenced at the facility on or about 20 May 2014 and commenced work on 1 July 2014.
- 76 As earlier stated, her task was the day-to-day management and operation of the facility and the defendant was responsible for planning, developing and coordinating the residential aged care services and activities of CASS Care; and for supervising staff.
- 77 Part of the functions of the defendant was to provide regular reports to the first plaintiff of the operation of the facility. It is alleged, by the plaintiffs, including CASS, that the defendant did not provide regular updates, as she was required, to the Board of Directors and ran the facility without regard to the views of the Board. The Board acquiesced in that approach, for a significant

period, until, it is alleged, two incidents occurred that, according to the first plaintiff, led him to remind the defendant of her obligations.

- 78 The structure of the CASS Care organisation, at least as at 7 August 2018, is before the Court.⁴
- 79 Apparently, the two incidents that the first plaintiff considered required him to inform the defendant that she was obliged to report incidents to him occurred in January and February 2016. According to the evidence of the first plaintiff, the defendant continued to be uncooperative as to the provision of information about the operations of the facility and, it seems, instructed staff to “over-report” on minor issues that were occurring at the facility.
- 80 On 7 April 2016, the defendant resigned from her position within the disability services division, although she continued working at the aged care facility in another role. Her letter of resignation, dated 23 August 2016, resigned her position as director of nursing at the facility effective from 20 September 2016.
- 81 Prior to the resignation, the defendant wrote to the chairperson of CASS, Mr Benze Leung, complaining formally of bullying by the first plaintiff and, in particular, in relation to the defendant’s role in disability services. The defendant also complained about abusive phone calls relating to an incident where one resident at the facility went missing and the continual interference with the day-to-day running of the facility. The defendant raised six areas that needed attention and about which complaint was made relating to the continuing conduct of services. The foregoing complaint was made on 11 April 2016. On 31 May 2016, the defendant withdrew the complaint.
- 82 On 16 August 2016, the defendant was provided with a warning letter (hereinafter “the first warning letter”). The letter is on the letterhead of CASS Care and over the signature of the first plaintiff.
- 83 The letter is a warning letter in relation to the defendant’s employment. It alleges misuse of company resources by the defendant and, in particular, the use of a tablet. It also accuses the defendant of not behaving with utmost

⁴ Exhibit E, plaintiffs’ Courtbook, Vol 2 at tab 42, second last page.

integrity; and, in relation to the same issue of misuse of corporate resources, breach of the CASS Fraud Corruption Prevention Policy.

- 84 On 23 August 2016, the defendant wrote to the first plaintiff and CASS Care Ltd seeking to refute the allegations made and conclusions drawn in the first warning letter. In doing so, the defendant admitted that the tablet “has rarely been used for work purposes as yet”, but denied it had been used for private enjoyment.
- 85 On 18 August 2016, i.e. prior to the defendant’s response to the first warning letter, a further letter (hereinafter “the second warning letter”), on the letterhead of CASS Care and over the signature of the first plaintiff, was sent to the defendant, relating to the defendant’s conduct during her employment, including: her leave and attendance record and correspondence relating to same commencing 1 July 2016; the issue associated with the tablet; the provision of false information as to attendance; the forging or mis-recording of days attended; and the recording of annual leave as rostered days off.
- 86 The second warning letter accused the defendant of breaching the CASS Personnel Code of Conduct; the CASS Fraud and Corruption Prevention Policy; and the CASS Conditions of Employment. It required a response, if that was desired, within three working days of the date of the letter.
- 87 By letter dated 23 August 2016, the same date as the letter responding to the first warning letter, the defendant responded to the second warning letter. In that response, the defendant, while agreeing that there had been opportunity to provide explanation, suggested that the explanation had been ignored or downplayed; that she had misapprehended the “RDO policy”, and previously informed the first plaintiff of that misapprehension; and regretted that the issue with rostered days off had occurred.
- 88 Further, the response to the second warning letter suggested that the swipe card record was not absolute proof of attendance as entry and exit of the building may be in the company of others, who may utilise their card to open and close the doors.

- 89 Moreover, the defendant suggested that her practice was to exit the building via the basement stairs and drive out, which required no swipe card. Further again, the defendant suggests that she did not realise that there was a protocol to provide a statutory declaration, where there was no medical certificate in relation to sick leave.
- 90 As stated, the defendant resigned from CASS on 23 August 2016. The letters with defamatory material relating to the plaintiffs commenced in about November 2016. I have dealt with the nature of the letters already and, later in these reasons, I will set out the plaintiffs' chronology, supplied to the Court in order to put all of the events in a chronological context and without, unless otherwise stated, accepting the accuracy of the commentary.
- 91 Apart from the letters about which complaint is made, on 10 February 2017, an anonymous letter was sent to Dr Leng Tan and Dr Tony Goh. That letter, reveals information relating to the conduct of the residential aged care facility and its staff from which the Court draws the inference that it was written by somebody with a good knowledge of the internal workings of the facility at a senior level.
- 92 That letter refers to a meeting of residents' family members attended by the first plaintiff; the expression of opinions at that meeting; a sexual harassment incident; an incident involving staff assaulting the elderly; service quality; catering; and the lack of a complaints process. It compliments the defendant as a person who would listen to residents and investigate complaints. Further, it refers to particular staff, including the defendant, who left the facility. It complains about the first plaintiff's "ignorance and obstinacy".
- 93 The anonymous letter refers to care issues, for example, elderly residents sleeping in a wetted bed for the whole night; not being given pants; and not being given nappies. It refers to the call bell being kept under the mattress and staff throwing a hot pack to elderly residents, rather than passing it to them, which has caused injury and which issue has not been addressed. One of the persons capable of compiling the letter and publishing it is the defendant. Others may include the first and/or second plaintiff and possibly the addressees of the letter. There may be others, but the Court is unaware of any.

- 94 Prior to the warning letters, the first plaintiff commissioned an enquiry by Ms Kit Chung, who was senior executive officer in relation to Aged Care Planning & Development at CASS, and who undertook an internal audit of the aged care facility. A verbal report was given to the first plaintiff, the findings of which were that the defendant authorised the purchase of five tablets in about March 2016 and, without documentation or explanation; the defendant had assigned one of the purchased tablets to herself; the defendant explained that the tablets were purchased for staff to use at work and the tablet assigned to her was for administrative work; the defendant was asked to hand over the tablet for checking, but it was not at work; the defendant claimed that another employee, a registered nurse, had the tablet assigned to the defendant; that employee, when contacted, denied that she had borrowed the defendant's tablet; the defendant handed over the tablet on the next day; the tablet was analysed by technical personnel and found to contain no work-related files, but it did contain downloaded music, personal photos of the defendant or relating to the defendant, and applications for music and card games. No satisfactory explanation was provided by the defendant in relation to the tablet.
- 95 The purpose of the foregoing is not to resolve the merits of the allegations made relating to the defendant. Nor is it to resolve the matters raised by the defendant in relation to the operations of CASS or the conduct of the first or second plaintiff. Rather, the merits of the allegations in the warning letters and the complaints of the defendant are mostly irrelevant to the issues before the Court. That which is relevant is not the truth or otherwise of the allegations, but the fact that they were made and the reaction and/or perception of the defendant.
- 96 In the course of her oral evidence, the defendant maintained that, after she resigned from CASS, she "moved on" and did not give CASS, or the first or second plaintiffs, a second thought. The evidence of the defendant will be dealt with in more detail later in these reasons. For present purposes, it is sufficient to note that the Court does not accept that statement of the attitude of the defendant. The defendant's evidence and demeanour were starkly and obviously to the contrary.

- 97 It is obvious from the evidence before the Court, and the demeanour of the defendant, that she is and was extremely angry at her treatment by CASS, by the first plaintiff and by the second plaintiff and that she held, and continues to hold, significant resentment and anger towards the plaintiffs. I have no hesitation in coming to the conclusion that the defendant was the only person, that was the subject of evidence in these proceedings, who possessed a motive to write the anonymous letters.
- 98 Of course, motive, of itself, does not prove that the defendant published the letters. It may make more rational the publication of the letters; and it may give the Court greater comfort in drawing the inference that the defendant wrote the letters. But the inference must be drawn as a result of the application of common sense and not, solely, on the basis that the defendant had a motive to write the letters.

Drawing of inferences

- 99 The foregoing statement of the manner in which motive should be treated as part of a circumstantial case requires the Court to deal with the principles in relation to the drawing of inferences, on a more general basis. The drawing of an inference has been described as a matter of “common sense”. If facts A, B and C are held to exist, then fact Z may be inferred, if common sense would be denied if fact Z did not exist.⁵
- 100 It is for the plaintiff to prove, on the balance of probabilities, that the defendant published the defamatory material. That may be proved by direct means, that is, by adducing evidence that directly proves the existence of that fact or renders it more probable than not. This can be achieved by a single piece of evidence to that effect, or a combination of pieces of evidence, the effect of which is that the fact, being a fact in issue in the proceedings, is more probable than not.
- 101 Ultimately, the Court must be satisfied, on the balance of probabilities, of the existence of the fact in issue, namely, that the defendant published the material. That satisfaction may be based upon the direct evidence, to which the

⁵ *Fabre v Arenales* (1992) 27 NSWLR 437 at 445, per Mahoney JA.

Court has just referred, or it may be based upon inferences that arise from direct evidence.

- 102 As the authorities make clear, there is nothing peculiar or esoteric about the drawing of inferences. It is a process that has been described as a matter of common sense, if not “plain common sense”.⁶ In *Fabre v Arenales*, Mahoney JA said:

“A factual inference (if A, B, C exists, Z exists), is open if, to quote the words of Knox CJ and Dixon J, ‘human experience would be contradicted if Z did not exist: see the cases referred to in *Jones v Sutherland Shire Council* (at 222 et seq). It follows that the inference will or may be drawn if general human experience (plain commonsense) will not become contradicted if the inference be drawn.”

- 103 It is, as Windeyer J noted, easy to confuse mere conjecture with reasoned conclusion.⁷

- 104 The classic description of the manner in which a rational inference may be drawn was given by Sir Frederick Jordan CJ in *Bell v Thomson*⁸ and in *Carr v Baker*⁹. In *Carr v Baker*, Sir Frederick Jordan CJ said:

“In a Court of justice, the question whether a particular fact has been proved must be determined by considering evidence and seeing whether the existence of the fact is probable in the light of that evidence. In a civil matter, it is necessary, in order that a fact may be regarded as established, that the evidence should be such that it is more probable that it exists than that it does not. The position is the same whether the evidence is direct or circumstantial: In a criminal matter, it is necessary, if the fact is to be proved by the prosecution, that the evidence should be such that not only is it more probable than not that the fact exists, but that there is no reasonable probability that it does not: it must be proved that it is so probable that no reasonable doubt exists that it is the fact:

It has been clearly and emphatically laid down ... that in no case can a fact be regarded as established unless its existence is at least a reasonable inference from some matter proved in evidence. It is not sufficient that there should be some ground for conjecturing that the fact exists. There must be evidence affording ground for treating it as existing as a matter of inference and not of conjecture: The existence of a fact may be inferred from other facts when those facts make it reasonably probable that it exists; if they go no further than to show that it is possible that it may exist, then its existence does not go beyond mere conjecture. Conjecture may range from the barely possible to the quite possible. Inferences of probability may range from a faint probability - a mere scintilla of probability such as would not warrant a finding in a civil action:

⁶ *Fabre v Arenales*, supra; *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, per Windeyer J.

⁷ *Jones v Dunkel*, supra, at 319-320.

⁸ (1934) 34 SR (NSW) 431.

⁹ (1936) 36 SR (NSW) 301.

... to such practical certainty as would justify a conviction in a criminal prosecution. ...

It is well established that if there is no piece of evidence which, taken at its highest, is more than equally consistent with the existence and with the non-existence of a fact, it cannot be treated as established: This situation may arise in two different ways. First, there may be no piece of evidence which suggests that the existence of the fact is more than possible. In such a case, since there is nothing to show whether the existence of the fact is probable or not, it is just as likely that it does not exist as that it does. There is no probability either way; and nothing equals nothing. ... There may, however, be a case in which the evidence is such that in some aspects it raises a probability that the fact exists, and in other aspects it raises a probability that it does not. If, in such cases, the two countervailing probabilities are in perfect equipoise, the fact cannot be treated as established.”¹⁰ (Citations omitted.)

- 105 Notwithstanding the seriousness of the allegations made by the plaintiffs against the defendant, each fact upon which the plaintiffs rely to prove their circumstantial case need not be proved with any regard being had to the seriousness of the allegation. The ultimate conclusion that is sought to be drawn, namely that the defendant published the anonymous letters, must be proved on the balance of probabilities, but also the seriousness of the allegation being made against the defendant must be borne in mind.¹¹
- 106 Nevertheless, the primary facts that make up the circumstantial case from which an inference is drawn on the balance of probabilities, and bearing in mind the seriousness of the allegation, may together satisfy the burden of proof, even though each primary fact may not. As is often described, like the strands of a cable, each strand may not bear the weight of the burden of proof, but the cable, once the strands are bound together, will.
- 107 Ultimately, however, the drawing of an inference to the requisite standard, even on a matter of seriousness, is to be done on the balance of probabilities and remains a matter of common sense.

Chronology

- 108 As earlier stated, so that the events can be understood in the context of the alleged timeline, I recite the plaintiffs’ chronology; which is in the following terms:

¹⁰ Ibid, Carr v Baker, at 306-307.

¹¹ Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34.

Date	Document
01.07.2014	Defendant commences employment at CASS
January 2016	Defendant appointed Senior Executive Officer for Disability Services
April 2016	Defendant resigns as Senior Executive Officer for Disability Services
11.04.2016	Defendant lodges bullying complaint against Henry Pan
31.05.2016	Defendant withdraws bullying complaint against Henry Pan
16.08.2016	Henry Pan sends defendant first warning letter
18.08.2016	Henry Pan sends defendant second warning letter
23.08.2016	Defendant resigns from CASS
November 2016	Anonymous letters are first received
10.02.2017	Anonymous letter to Leng Tan and Tony Goh
28.02.2017	Anonymous letter to the Chinese Ambassador and the Chinese Consulate in Sydney and others
08.03.2017	Anonymous letter to Mrs Pan
21.03.2017- 10.04.2017	Defendant travels to China
03.05.2017	Anonymous letter to Aged Care Complaints Commission

	and others
04.06.2017- 08.06.2017	Defendant travels to China
17.07.2017	Pan and CASS First Matter Complained Of
17.07.2017	Pan and CASS Second Matter Complained Of
09.08.2017	Pan and CASS Third Matter Complained Of
07.09.2017- 26.09.2017	Defendant travels to China
11.09.2017	Pan and CASS Fourth Matter Complained Of
13.09.2017	Pan and CASS Fifth Matter Complained Of
02.10.2017	Pan and CASS Sixth Matter Complained Of
08.10.2017	Pan and CASS Seventh Matter Complained Of
09.10.2017	Defendant attends Hornsby post office and sends two letters (including 8th MCO) - forges Len Tang's signature and lists her as sender
09.10.2017	Pan and CASS Eighth Matter Complained Of
09.10.2017	Leng Tan receives call from Hornsby Post Office and receives one of the letters and envelopes attempted to be sent by defendant
26.10.2017	Pan and CASS Ninth Matter Complained Of
05.11.2017-	Defendant travels to China

14.11.2017	
15.11.2017	Pan and CASS Tenth Matter Complained Of
17.11.2017	Defendant attends Hornsby post office and sends 11th MCO -forges Len Tang's signature and lists her as sender
17.11.2017	Pan and CASS Eleventh Matter Complained Of
17.11.2017	Zhou First Matter Complained Of
22.11.2017	Pan and CASS Twelfth Matter Complained Of
13.12.2017	Pan and CASS Thirteenth Matter Complained Of
19.12.2017	Pan and CASS Fourteenth Matter Complained Of
20.12.2017- 22.12.2017	Defendant travels to China
16.01.2018	Pan and CASS Fifteenth Matter Complained Of
16.01.2018	Zhou Second Matter Complained Of
07.02.2018	Pan and CASS Sixteenth Matter Complained Of
28.02.2018	Pan and CASS Seventeenth Matter Complained Of
13.03.2018	Pan and CASS Eighteenth Matter Complained Of
13.03.2018	Zhou Third Matter Complained Of
08.04.2018- 14.04.2018	Defendant travels to China

08.04.2018	Anonymous letter sent to Wendy Zhang from China
09.04.2018	Pan and CASS Nineteenth Matter Complained Of - sent from China
09.04.2018	Zhou Fourth Matter Complained Of - sent from China
10.04.2018	Pan and CASS Twentieth Matter Complained Of
10.05.2018- 15.05.2018	Defendant travels to China
11.05.2018	Pan and CASS Twenty-First Matter Complained Of
17.05.2018	Zhou Fifth Matter Complained Of
07.08.2018- 15.08.2018	Defendant travels to China
16.09.2018- 17.09.2018	Defendant travels to China
17.09.2018	Anonymous letter sent from China
19.09.2018	Zhou Sixth Matter Complained Of
25.09.2018- 28.09.2018	Defendant travels to China
19.10.2018	Zhou Seventh Matter Complained Of
19.12.2018	Anonymous letter to Qiu Yuanping and others

The evidence of Dr Leng Tan and the defendant

- 109 Dr Leng Tan was born in China and educated in Singapore. She graduated with her medical degrees from the University of New South Wales in 1973 and has been working in general practice in Sydney ever since.
- 110 For some years, Dr Tan was a part-time member of the Immigration Review Tribunal of Australia and has held a number of other community positions: Artistic Director of Chinatown Carnival; member of the Chinatown Cultural Advisory Committee of the City of Sydney; Honorary Medical Consultant for China Week; member of the Executive Council of the Australian Council of Chinese Organisations Inc; and Vice President of the Chinese Youth League.
- 111 Dr Tan has also received a number of awards: “Outstanding Women Service Award” from the NSW Minister of Women; “the Quang Tart Community Lifetime Achievement Award in Community Services” from the Premier of New South Wales; NSW Woman of the Year; and she is currently a Director and Emeritus Chair of the Chinese Australian Services Society (in this judgment referred to as CASS).
- 112 Dr Tan received a large number of anonymous letters from approximately November 2016. Those letters were passed by her to the first plaintiff.
- 113 Particularly relevant are the events that occurred on 9 October 2017. Dr Tan was working at her surgery and received a call from Hornsby Post Office, informing her that she needed to fill out more information on the envelope that she wanted to send to China. This surprised her, because she had not sent anything to China.
- 114 She informed the postal employee that she had not sent any material to China and asked if he could send the envelope to her and gave him her surgery address. The envelope arrived by Australia Post Courier on that day or on the next day.
- 115 When the envelope was opened by Dr Tan, she found that it contained a letter to Silian, referred to above in these Reasons. The letter was written in Chinese.

- 116 The letter is the document which is the eighth matter complained of and can be found in Exhibit A in these proceedings. As a result of her contact with CASS and the first plaintiff, Dr Tan was aware of the developing business relationship, or intent to develop a business relationship, with Silian, in which she had no direct involvement. As a consequence of the receipt of the letter and her knowledge, Dr Tan contacted the first plaintiff and informed him of those events.
- 117 As a consequence of the contact by Australia Post of Dr Tan, the plaintiffs made enquiries of the Hornsby Office of Australia Post. Those enquiries resulted in the following: Australia Post produced CCTV footage of the time in and around the time at which the letter was said to have been posted or attempted to be posted. That CCTV footage is Exhibit B in the proceedings.
- 118 The CCTV footage clearly shows the defendant posting a letter at about the time that the letter to China was posted. The evidence of the defendant in this regard is most unsatisfactory.
- 119 The defendant accepts that it is footage of her in the CCTV at Hornsby Australia Post office. Further, she had been interviewed by Police in May 2017. In that interview she informed the Police that she didn't have time to do things like post letters of that kind and that she had "moved on in her life", no longer wanting involvement.
- 120 Later, and on the view the Court takes, at the last moment, when faced with irrefragable evidence, the defendant suggested or testified, on oath, that different letters were posted to China at the time that she was depicted in the CCTV footage. Those letters were not initially able to be produced. Some time later again, the defendant produced a photocopy of letters that she said she posted, coincidentally, at the Hornsby Australia Post office, at the same time as the letters were posted that found their way to Dr Tan.
- 121 Moreover, the letters that the defendant admits to sending were posted in circumstances that she had denied having the time or the inclination to be involved and having moved on. The defendant failed, until her re-examination, to produce the original letters said to be sent or a copy thereof. The defendant failed, initially, to produce copies of the electronic files.

- 122 At the last moment, when in the witness box, and in re-examination, the defendant produced files that she says were photocopies of the documents sent in the post to China.
- 123 The file that was produced consisted of a number of documents.¹² The only documents that were “fresh”, by which the Court means not aged, were the documents that, for the first time, were produced as a consequence of the re-examination of the defendant.
- 124 No attempt was made to produce computer records which would show how and when those letters were printed or typed or created. The Court considers the documents produced in re-examination, being those documents at Tabs 8 and 10 of Exhibit 2 and Exhibit 3 in the proceedings, are forgeries in that they are a last-minute creation by the defendant of letters that did not previously exist and were never sent to China.

The defendant’s demeanour and evidence

- 125 The defendant’s evidence otherwise was wholly unsatisfactory. The defendant insisted upon the use of an interpreter in circumstances where it was patently obvious that the defendant could understand and speak English extremely well.
- 126 Apart from the fact that the defendant studied and obtained qualifications in English, the defendant disclosed during the course of her examination in Court that she was fluent in English. She continued to protest that she did not hate anyone because of her religious beliefs. At one stage, during an answer of that kind, she answered angrily, banging the table and answered in English.
- 127 Notwithstanding her obvious anger at the events that occurred at CASS, the defendant consistently maintained a position that she was forgiving, forgetting and moving on. The defendant distinguished, in English, between the use of the word “incompetent” and “inappropriate”. The defendant maintained that her English had been degraded since she had been in China, where she had been on a number of occasions in the intervening period, but then continued to answer the question in English and, in the view of the Court, extremely eloquent English.

¹² Exhibit 3.

- 128 The defendant continued, to the point of irrationality, to deny that things said by her in correspondence to which she did adhere, were comments about the first plaintiff or other persons.
- 129 The transcript reporters, while seeking to differentiate between answers given by the witness and answers given by the interpreter, did an extremely good job in difficult circumstances. However, the transcript does not reflect, fully, the level of eloquence and understanding of English that was displayed by a witness who insisted upon an interpreter because her English had been “degraded”. I consider that her use of an interpreter was deliberately intended to give the witness more time in which to answer the questions that she had been asked.
- 130 The passage in transcript at page 167, commencing line 5 and concluding at line 24, was said in great anger, extremely eloquently, extremely quickly and refuted any suggestion that the defendant did not understand English sufficiently to be able to give evidence directly.
- 131 Further, it refuted any suggestion that was consistent with her later comment, almost immediately thereafter, repeating the suggestion that her philosophy was, and she acted in order, to “forgive, forget, [and] move on”.
- 132 Her suggestion that letters other than the ones that arrived in China were sent by her at the same time and in the same Australia Post Office is, frankly, fanciful. The defendant showed herself to be mendacious and dissembling, and did so for the purposes of avoiding responsibility for her own conduct.
- 133 Further, the defendant provided answers to questions concerning the understanding of a document that, on her initial evidence, the defendant said was not her document. When doing so, the defendant had no difficulty; answering without looking at the document, which, on the defendant’s evidence the defendant had not read in English or Chinese recently.
- 134 The whole tenor of the evidence of the defendant was that the evidence was given on the basis of that which the defendant considered best assisted her case and bore no connection with the truth nor any obligation to tell it. The Court does not believe any testimony of the defendant on any issue unless its

effect was contrary to her interests. If, by sheer coincidence, there is other evidence to the effect to which the defendant has testified, so be it, but it is not the evidence of the defendant that is accepted.

- 135 Returning to the issue of the letter sent from Hornsby, the plaintiff called Mr Liu Ziao Lu, who is the representative of Silian in Australia. There are other witnesses dealing with the same issue. It is sufficient to summarise the evidence.
- 136 Silian received a letter sent from Australia in an envelope that, on the Court's determination, was sent by the defendant. That letter and the envelope was the subject of communication. The officer of Silian sent a photograph of the envelope and the letter to Mr Liu, who showed the first plaintiff and others the photographs as they were contained on his mobile phone. He was asked to send the photograph to the plaintiffs. He sent the photograph of the envelope.
- 137 Only the photograph of the envelope was sent; and not the photographs of the letter itself. There was cross-examination and submissions based upon the proposition that, if the photographs originally consisted of the letter themselves, the photographs of the letters would have been sent. I do not consider that a criticism of the evidence.
- 138 The letter was, on the evidence that the Court accepts, in the same terms as a letter already received and in the possession of the plaintiffs. It was unnecessary to send photographs of a letter that was already in the possession of the plaintiffs. That which was not in the possession of the plaintiffs was the envelope. A photograph of the envelope was sent.
- 139 I have reached the irrefragable conclusion that the defendant sent the letter from Hornsby Post Office to Silian that was defamatory and which is the eighth matter complained. That is in the same or similar terms to most, if not all, of the other matters of which complaint is made.
- 140 It has often been said that an author signs her or his name every time a pen is put to paper. One does not need to be an expert to realise the similarity in the content of each of the matters complained of. I draw the inference that the

defendant has sent each and every one of the letters about which complaint has been made.

- 141 I reiterate that the fact that just because the Court does not believe the defendant in her denials, that is insufficient to prove the existence of the opposite. In other words, the fact that the Court does not believe the defendant's denial that she sent the letters does not prove that she did send the letters. It merely means, if that were the only evidence, that there is no evidence that she did not send the letters.
- 142 Nevertheless, all of the other evidence in the proceedings leads, as a matter of common sense and as a matter of logic, to the inescapable conclusion that the defendant published the matters complained of and sent them to the various recipients. I reach that conclusion on the balance of probabilities, bearing in mind the seriousness of the allegation made against the defendant, and taking that into account in determining whether the Court is satisfied on the balance of probabilities.
- 143 Having reached the conclusion that the defendant published the documents to the people to whom they were addressed, it is necessary to determine the appropriate orders that should be made as a consequence.
- 144 Before doing so, there are other matters, it is evident, that have led the Court to the conclusion that the defendant published the material and sent it to the addressees. The defendant did admit that the envelopes in October and November 2017 were sent by her. She did admit to posting a further envelope to Silian in November 2017.
- 145 Further, the defendant admitted that, when she posted the envelopes, she represented that she was Dr Leng Tan and signed a false declaration to that effect. It should be remarked that the defendant, in so doing, forged Dr Tan's signature.
- 146 There was cross-examination, as already noted, on the photograph of the envelope. In relation to one of the envelopes that was photographed and which was adduced in evidence, it is clear, from the comparison of the material on top of which the envelope is placed, that the material was part of the letter

that was the matter complained of and which the defendant alleged was not contained in the envelope.

- 147 The contents of the letter, I infer, were that which were behind the envelope, which is Exhibit 1. The contents of that letter are the eighth matter complained of.
- 148 The evidence of Mr Liu, a person independent of any of the plaintiffs, was consistent with the independent evidence otherwise available as to the length and nature of the letter and its contents. I reject any suggestion that Mr Liu was unreliable or untruthful. In the absence of a proven conspiracy between him and the plaintiffs to mislead the Court and the parties, that evidence corroborates the findings otherwise made by the Court as to the authorship of the material.
- 149 The deliberate forging of the signature of Dr Tan and the lies told on a statutory declaration corroborate the view the Court otherwise takes as to the truthfulness of the defendant.
- 150 Further, the defendant's counsel did not put to Mr Liu that a different letter was contained in the envelope that he identified. Nor did counsel put to either Mr Kitty Leong or the first plaintiff that the letter they read on the telephone, being the eleventh matter complained of was not the eleventh matter complained of.
- 151 The foregoing is not a criticism of counsel. It points to the recent invention, between cross-examination and re-examination, of the forged letters said to be sent by the defendant and the recent invention of the whole story. That story is inconsistent with the explanation given to Police in May 2017 and is inconsistent with the earlier statements provided by the defendant.
- 152 There can be no doubt that the direct evidence proves that the defendant published the eighth and eleventh matters complained of. As a matter of common sense and an analysis of the publications, it is clear that all of the publications were published by a single individual and the Court concludes in addition to the earlier comments, that the defendant published and sent all of the matters complained of in each set of proceedings.

153 Comfort for that conclusion is obtained from the information contained in a number of the matters of which complaint is made, which are matters that, in total, could only have been known to the defendant and the plaintiffs, because they deal with details of the operation of the plaintiffs and the defendant and other senior staff of CASS to which there would be a very confined group with knowledge.

The reputations of the plaintiffs

154 There is no doubt that the publications about which CASS complains are defamatory of CASS. They plainly damage the reputation of CASS, as a business entity. In my view, they have been deliberately designed for that purpose. There is no other available inference.

155 In relation to the first plaintiff, those publications are even more damaging and defame the first plaintiff in a number of ways. In reaching that conclusion in relation to CASS and the first plaintiff, and in reaching it in relation to the second plaintiff, I take into account that the letters tend to lower each of the plaintiffs' reputations in the minds of right-thinking ordinary members of the community.¹³

156 I have already commented that the defamatory meaning pleaded by the plaintiffs in each of the proceedings is carried by the publications to which they refer. I come to that conclusion on the basis of the balance of probabilities, as is required. I do so from the position of the ordinary reasonable reader: a hypothetical individual of fair, average intelligence; not avid for scandal; but prone to a degree of loose thinking and capable of reading between the lines.¹⁴

157 The ordinary and natural meaning of the material is defamatory, bearing in mind that each publication must be read as a whole and construed within the context of the entire matter published.¹⁵

158 Each of the imputations about which the plaintiffs complain has been derived from the words used in the publication and a cross-reference has been

¹³ *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 638; [1979] HCA 3, per Mason and Jacobs JJ.

¹⁴ *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164-165; [1998] NSWSC 4.

¹⁵ *Greek Herald Pty Ltd v Nikolopoulos* (2001) 54 NSWLR 165; [2002] NSWCA 41.

provided. Those imputations reflect the ordinary and grammatical meaning of the words used in the publications.

Damages

- 159 An award of damages for defamation is based upon compensation for and consolation of the hurt feelings suffered by an individual and compensation for the damage to the reputation of the person and/or company defamed. While vindication of the plaintiffs' reputation is not a head of damage, the damages awarded to console and/or to compensate for hurt feelings and/or damage to reputation must be such that they serve the purpose of vindicating the plaintiffs' reputation.¹⁶
- 160 Unlike other torts, damage need not be proved. In defamation, once the defamation has been proved, damage is presumed. The level of damage must ensure an appropriate and rational relationship between the harm sustained and the amount of the damages.¹⁷
- 161 Further, damages are capped and the maximum damages for non-economic loss that may be awarded in defamation proceedings is, on and from 26 June 2020, \$421,000.¹⁸
- 162 The foregoing maximum damages cap does not apply if the Court is satisfied that the circumstances of the publication of the defamatory material to which the proceedings relate warrants an award of aggravated damages. Aggravated damages are compensatory damages and are different in principle and form to exemplary damages, which are prohibited.¹⁹
- 163 The state of mind of the defendant is not relevant to the awarding of damages, except to the extent that the state of mind amounts to malice or some other state of mind that affects the harm sustained by the plaintiff. In these proceedings, the Court takes the view that the publication of this material involves malice and a deliberate attempt to harm the plaintiffs.

¹⁶ Carson v John Fairfax & Sons Ltd (1978) 178 CLR 44 at 60-61; [1993] HCA 31; Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327; [2003] HCA 52 at [60].

¹⁷ Defamation Act 2005 (NSW), s 34.

¹⁸ Defamation Act 2005 (NSW), s 35; New South Wales Government Gazette, No 132, 26 June 2020, at 3045.

¹⁹ Defamation Act 2005 (NSW), s 37.

- 164 Further, the manner in which the defendant has conducted the proceedings, in denying the publication, and in the manner in which she has dishonestly conducted the proceedings, has aggravated the damage suffered by each of the plaintiffs. The defendant has fabricated evidence; lied about material facts; and, at least to some extent, reiterated the defamatory material in Court. In that respect, the defendant has, on the face of the manner in which this proceeding has been conducted, misled her own legal representatives and deliberately sought to mislead the Court.
- 165 I have referred already to the reputation of the first and second plaintiffs. The first plaintiff was awarded a medal in the Order of Australia (OAM). His reputation was, prior to publication of these documents, of an extremely high standing. At the outset of these reasons for judgment, I referred to the evidence as to reputation of both the first plaintiff and the second plaintiff and of CASS.
- 166 The first plaintiff's reputation, demonstrated by the appointments to which he testifies in his Affidavit, is best exemplified by his OAM, his appointment to the Equal Opportunity Division of the Administrative Decisions Tribunal and the awarding of the Centenary Medal.
- 167 Moreover, the defamatory material was aimed deliberately at the Chinese community, whom he had represented. Coming, as it does, from a member of that community, and written, as it was, in Chinese, the material becomes even more damaging.
- 168 Each of the first and second plaintiffs testified to their embarrassment and the degree to which they were offended and angered by the false allegations. They were humiliated. They were no longer invited to events that they had previously enjoyed as important persons in the Chinese Australian community.
- 169 While the addressees and the persons to whom the publications were sent were not a large number of people, the fact that it was deliberately sent to influential members of the Chinese community, including the Ambassador of the People's Republic of China and the Consul General and staff, necessarily involves the proposition that the grapevine effect would have been even larger than would ordinarily be the case. It is not conjecture to posit that, within a

minority group in Australia, scandalous accusations of this kind will circulate to an even greater level than might be the case within the general Australian community.

- 170 In relation to CASS, while it has no feelings, or, in the words of Lord Atkin, no soul to be damned or body to be kicked, the allegations were extremely damaging. CASS was shunned by Chinese ambassadorial and consular staff; Chinese community radio stations; and influential people within the Chinese Australian community.
- 171 The Court will award damages on the basis that each of the plaintiffs is entitled to aggravated damages. As a consequence, the Court is not bound by the cap prescribed by s 35 of the *Defamation Act*. Nevertheless, the Court is still required to fix the damages on the basis that those damages will bear a rational relationship to the harm, including the aggravated damage, suffered by each of the plaintiffs.
- 172 The damage to the first plaintiff is greater than the damage to the second plaintiff, which, in turn, is greater than the damage to CASS.
- 173 Given the attitude of the defendant in denying any wrongdoing and the lengths to which the defendant has gone, and, I infer, would go, to lie, to dissemble and to mislead the Court and the parties, the Court takes the view that there are significant risks associated with the defendant repeating this conduct.
- 174 The principles that apply to interlocutory injunctions that tend to be against the awarding of injunctions do not apply to permanent injunctions. Fundamentally, the principle, as it applies to interlocutory injunctions, balances the public interest in favour of freedom of expression against the risk of the commission of a tort for which damages may be an appropriate and complete remedy.
- 175 That balance does not apply to permanent injunctions issued after a Court has determined that the tort has been committed and there is a risk of further tortious conduct. There is no public interest in favour of the capacity to express defamatory material.
- 176 Once it is determined that a defendant has published material that is defamatory and there is a risk that further defamatory material may be

published, whether the Court issues an injunction, enjoining the defendant from such conduct, is to be determined on the basis of the balance of convenience and the exercise of the discretion reposed in the Court. That discretion arises from the inherent jurisdiction of the Court as a superior court of record, of general jurisdiction, and pursuant to ss 23 and 66 of the *Supreme Court Act 1970* (NSW).

- 177 In my view, there is a risk of further publication. The anger of the defendant, displayed in the course of her evidence in Court, was palpable and remains a motivating factor for the conduct of the defendant. Coupled with the defendant's attitude to the publication of this material and her disregard for the norms of behaviour associated with truthfulness and integrity, there is a serious risk that material of the same kind or similar kind will be published in the future.
- 178 On the other hand, given the defamatory nature of the material in question, there is no detriment to the defendant from an order restricting publication of the material or material carrying the same imputations, unless it is the detriment associated with the restriction on the defendant of her "free speech". As already stated, the public interest in allowing free speech does not extend to the right to publish, or republish, material that has been determined to be defamatory.
- 179 The determination of an appropriate level of damages needs some explanation. The plaintiffs do not allege special damage. There is no claimed or proven economic loss arising from the defamatory publication.
- 180 This has particular relevance to the damages for the defamatory material in relation to CASS. Nevertheless, CASS, as stated, is a registered charity. There is no evidence of DGR (Deductible Gift Recipient) status, enabling the receipt of tax deductible donations.
- 181 Nevertheless, CASS is a company that seeks to serve the Australian-Chinese community and its reputation within that section is essential to its operation. Notwithstanding the deliberate targeting of Silian, there is no suggestion that the publications adversely affected the intended relationship between CASS and Silian.

- 182 Yet the damage to the reputation of CASS is significant. Depending as it does on its standing within the Australian-Chinese Community, CASS will suffer more significantly in the longer term. But, in the absence of special damage and given the status of CASS as a corporation, the damage to CASS should be less than the damage to be awarded to the first or second plaintiff. It must however reflect the damage to its reputation and vindicate its reputation. That damage is significant.
- 183 The foregoing comment concerning the absence of special damage applies to the first and second plaintiffs. Each individual, or non-corporate, plaintiff has suffered significant damage to his reputation and, on the evidence before the Court, extremely severe hurt to his feelings.
- 184 The award of damages to each will be assessed taking into account the significant damage to each and the hurt feelings of each. It will also need to be sufficient to vindicate the reputation of each. In relation to each plaintiff, I take account of aggravated damages and note, again, that in the circumstances the cap on non-economic damage has no effect.
- 185 Some further comments, beyond that which I have already made, are required in relation to the ambassadorial and consular staff of the People's Republic of China. It is important to understand why the shunning of the plaintiffs by the representations of the People's Republic of China has significance, beyond shunning by others.
- 186 Historically, there is evidence of Chinese presence in Australia well before European presence. After 1788, there has been a Han community in Australia since the early 1800s. They suffered formal and informal racism, which was the motive for the introduction of the White Australia policy.
- 187 This discrimination, in turn, caused the Han community to organise internal support mechanisms and has made the Chinese community, in the current era, a strong, cohesive community that has strengthened Australian society so profoundly. It is in that context that the People's Republic of China's position must be understood.

- 188 Apart from the very recent trade relations, the Australia-China relationship has been mutually beneficially and robust. Australia and China were trading from the earliest times. We joined in combating a common enemy in the Second World War and the first ever “Western” delegation to China after 1948 was a trade union delegation from Australia in 1952.
- 189 Further, it is often suggested that Australia’s formal recognition of the People’s Republic of China paved the way for the People’s Republic of China’s acceptance by other “Western” countries. Nevertheless, that history, particularly of early discrimination, points to the importance of support for the local community by the government of China.
- 190 Regardless of the political views of the local leadership of the Han community, recognition by the representatives of the government of China in Australia of a person as one of the leaders of the local Chinese community is an important aspect of that person’s status and stature within that community. It is in that context that the shunning of the first and second plaintiffs by the ambassadorial and consular staff, including their exclusion from semi-public functions, adds to both the damage to the reputation and to the hurt feelings of each of the non-corporate plaintiffs. Moreover this damage was an intended effect of the defamation and an obvious and expected consequence of it.
- 191 Lastly, I have had regard to the comparable awards made in defamation proceedings. Each defamation is different. This defamation, as conceded by the plaintiffs, was not published to a large number of people.
- 192 The definitive ruling that has been made, relating to the deceitful conduct of the defendant and making clear that the material is defamatory, should vindicate the plaintiffs and, one hopes, restore their reputation. Nevertheless, the damages will be sufficient to evidence the defamatory nature of the material that has, on the view the Court takes, spread to a large degree amongst the Chinese community. I have regard to what I assume is some relative lack of means in the defendant.
- 193 For the foregoing reasons, the Court makes the following orders:

In proceedings 2018/218713; Henry Pan & Chinese Australian Services Society Ltd v Jie Cheng:

- (1) Judgment for the plaintiffs;
- (2) The defendant shall pay the first plaintiff, Henry Pan, damages, including aggravated damages, in the amount of \$285,000;
- (3) The defendant shall pay the second plaintiff, the Chinese Australian Services Society Ltd, damages, including aggravated damages, of \$150,000;
- (4) The defendant shall pay interest on the foregoing damages, calculated at 2%, from 1 January 2017 until the date of judgment;
- (5) The defendant shall pay interest on the aforesaid damages, being post-judgment interest, at the prescribed rate, pursuant to s 101 of the *Civil Procedure Act 2005* (NSW);
- (6) Pursuant to s 40 of the *Defamation Act 2005* (NSW), the defendant shall pay the first and second plaintiffs their costs of and incidental to the proceedings, assessed on an indemnity basis.

In proceedings 2018/340360 Bo Zhou v Jie Cheng:

- (1) Judgment for the plaintiff;
- (2) The defendant shall pay the plaintiff damages, including aggravated damages, in the amount of \$200,000;
- (3) The defendant shall pay interest on the foregoing damages, calculated at 2%, from 1 January 2017 until the date of judgment;
- (4) The defendant shall pay interest on the aforesaid damages, being post-judgment interest, at the prescribed rate, pursuant to s 101 of the *Civil Procedure Act 2005* (NSW);
- (5) Pursuant to s 40 of the *Defamation Act 2005* (NSW), the defendant shall pay the plaintiff his costs of and incidental to the proceedings, assessed on an indemnity basis.

In both matters:

- (1) The defendant shall be enjoined and restrained from distributing or publishing (or repeating publication or continuing to publish), in hard copy or in soft copy, any document, including a letter, or publication or posting on the internet or on social media any article, advertisement, document, description, audio or video recording, photograph, depiction, image or picture referring to Henry Pan, Bo Zhou and/or the Chinese Australian Services Society Ltd and imputing or implying any imputation pleaded in either or both proceedings 2018/218713 or 2018/340360 about or concerning Henry Pan, the Chinese Australian Services Society Ltd and/or Bo Zhou;
- (2) The parties in each matter have liberty to deal with the form of any orders proposed, the question of interest and the question of costs by the making of any different, special or other order as to any and all of

the foregoing. Such application shall be made by email, directly to the Associate to Rothman J, with a copy to each other party accompanied by a submission and/or evidence not exceeding five pages. Such application may be made within 14 days of the date of this judgment. Any other party affected by any such application may respond by submission of no more than five pages within a further 14 days.
