IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 119

Suit 1131/1997

Between

Integrated Information Pte Ltd

… Plaintiff

And

CD-Biz Directories Pte Ltd

… Defendant

GROUNDS OF DECISION

Damages — Assessment; Tort — Malicious falsehood

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Integrated Information Pte Ltd v CD-Biz Directories Pte Ltd and Others

[1999] SGHC 119

Suit 1131/1997
Tay Yong Kwang JC
05 May 1999

1 : This is an appeal by the defendants against the decision of the learned assistant registrar assessing damages payable to the plaintiffs as follows:

2 (1) shift of gross sales of common advertisers from plaintiffs to first defendant - $654,320; and

3 (2) loss of goodwill of potential advertisers not captured in shift of gross sales from common advertisers to the first defendant - $30,000.

4 The learned assistant registrar also awarded interest at 6% per annum on the above amounts from the date of assessment and costs fixed at $5,000 to the plaintiffs.

5 I reduced the damages under the first head to $50,000, dismissed the appeal against the award under the second head and made no order as to costs for the appeal.

6 The plaintiffs are appealing against the said reduction in damages. [The appeal was withdrawn - Ed.]

7 ***The background***

8 The plaintiffs sued the defendants for malicious falsehood and succeeded in their action before Lai Siu Chiu J who granted an injunction and ordered that interlocutory judgment be entered with damages to be assessed by the Registrar. The following facts appear in the judgment of the learned trial judge.

9 The plaintiffs are the publishers of the ***Singapore Yellow Pages Commercial and Industrial Guide*** (`The Yellow Pages`). The first defendant is a company whose business is to compile, publish and market directories of telephone numbers and business addresses in a Compact Disc format (`The CD Rom`). The second defendant is a director of the first defendant while the third defendant is its managing director. Both are also shareholders of the first defendant incorporated on 10 November 1995.

10 The second and third defendants used to work for the plaintiffs in sales and marketing but left the plaintiffs` employ in 1991 and 1992 respectively. The plaintiffs` direct marketing manager (Giselle Chia) also left the plaintiffs in 1996 to join the first defendant.

11 On 27 May 1996, the plaintiffs received a copy of a fax dated 23 May 1996 sent by the first defendant`s Thomas Lim to Michael De Krester Consultants PR and Management. That document described the CD Rom and guaranteed its circulation `at a minimum of 200,000 copies for local distribution alone (as many as the Commercial Yellow Pages if not more), with additional

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copies for circulation in the Asean region. In addition to this, we would also have own web site on the Internet to ensure international readership`.

12 In December 1996, the plaintiffs received a letter of complaint dated 17 December 1996 apparently from one of their advertisers but without the author`s name or address. That letter enclosed a leaflet entitled `Reasons why you should advertise with CD-Biz` in which the following statement appeared:

> 1 Higher Circulation
>
> (Reach all potential customers)
>
> Highest circulation ever for a directory publication both locally and in the ASEAN region. (Local circulation of 200,000 copies - more than the commercial Yellow Pages).

13 In January 1997, the plaintiffs received another letter of complaint from one of their advertisers, Yew Aik Hung Pte Ltd, which was in the following terms:

> *We have been informed by your company that the circulation for the Commercial Yellow Pages is 350,000 copies. However, CD-Biz Directories Pte Ltd had claimed that their local circulation is `200,000 copies - more than the commercial Yellow Pages` which show a great discrepancy in the figure claimed. Please refer 2nd copy forwarded. Whose claim is correct?*
>
> *If CD-Biz Directories` Pte Ltd`s claim is true, we, as your advertiser will be very disappointed as this may account for one of the reason why we have not been receiving good response from your Yellow Pages` advertisement beside an error committed by your staff.*
>
> *We feel that the Commercial Yellow Pages, having been established for years, should do better than what CD-Biz Directories Pte Ltd had claimed.*
>
> *Advertising in your Commercial Yellow Pages is not cheap.*
>
> *We seek a clarification for the great difference in the claim and appreciate an early reply as several of our business associates are aware of this discrepancy too.*

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14 The plaintiffs also received from another of their advertisers a set of the first defendant`s promotional materials comprising the leaflet mentioned earlier together with a comparison chart which stated that the CD Rom`s circulation was 200,000 while that for the Yellow Pages was 180,000 and that while the first defendant charged $6,000 for first page full colour screen and $500 for each subsequent page, the plaintiffs charged $45,000 for full page size and $6,000 for name card size advertisements.

15 The plaintiffs claimed that the statements made by the first defendant in the fax dated 23 May 1996 and in the leaflet were false and/or were published maliciously. They claimed that the circulation of the Yellow Pages in 1996 was 390,000 and not 180,000 or 200,000. The falsehood was said to be malicious because the plaintiffs and the first defendant were competitors. Further, ex-employees of the plaintiffs worked for the first defendant and would know the estimated advertising rates and circulation tables and the first defendant therefore made the said statements knowing they were false or recklessly not caring whether they were true or false in order to induce members of the trade or the public to believe that advertising in the CD Rom was more attractive than in the Yellow Pages. The second and third defendants were said to be liable as joint tort feasors. Accordingly, the plaintiffs claimed injunctive relief as well as damages.

16 The first defendant contended that the yearly circulation of 180,000 for the Yellow Pages was computed or published without the authority of any of the defendants. The first defendant admitted, however, that it procured, ordered or approved the statement contained in the leaflet. The first defendant further averred that the circulation for the Yellow Pages was based on reasonable and/or honest inference and information from various sources, including the former

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employees of the plaintiffs, the plaintiffs` own projected circulation based on their rate sheets for 1996 and the first defendant`s own estimate based on the number of business telephone lines as listed in the Singapore Phone Book Business Listing of July 1996 (with a 30% to 40% discount for non-collection). The first defendant also denied that the words complained of were made maliciously or recklessly.

17 The second and third defendants denied that they had directorial control of the first defendant. They alleged that they were only employees and were responsible for the circulation figure of 200,000 for the Yellow Pages but denied that the words impugned were false or made maliciously or recklessly. For the same reasons canvassed by the first defendant, they believed that the figure of 200,000 was correct.

18 The learned trial judge disbelieved the defendants` witnesses who said that they were not aware of the circulation figures of the Yellow Pages or that they had arrived at the figure of 200,000 by analysis or logical deduction. Her Honour found that the circulation of the Yellow Pages for 1996 was above 300,000. She also decided that circulation meant the actual number of copies of the Yellow Pages collected or distributed. Her Honour found that in their zest to compete for advertisers, the defendants made the statement that the circulation of the Yellow Pages was 180,000 or 200,000 well knowing that it was not true or recklessly. She was prepared even to hold that the statement was actuated by improper motive on the part of the second defendant, the third defendant and Giselle to boost the circulation of the fledgling CD Rom at the expense of the more established Yellow Pages for pecuniary reasons.

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19 On the law, the learned trial judge held that although the plaintiffs did not need to prove special damage under s 6(1) of the Defamation Act (on which they relied), it appeared from the evidence adduced that they had suffered some loss of reputation if not revenue as a result of the malicious falsehood. This was evidenced, she opined, by the two letters of complaint, one of which was anonymous. The said s 6(1) reads:

> *In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage -*
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession or calling, trade or business held or carried on by him at the time of the publication.

20 ***The assessment before the assistant registrar***

21 Before the learned assistant registrar, the parties agreed that they would proceed on the basis of the affidavits filed for the assessment of damages as well as those filed for the trial proper, with no need for cross-examination of the deponents.

22 After hearing the parties` submissions, the learned assistant registrar awarded damages under the two heads mentioned earlier. For the shift of sales from the common advertisers to the first defendant, she adopted the plaintiffs` computation of the decline in their revenue of $1,308,640 and discounted 50% thereof.

23 ***The evidence and arguments***

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24 The first defendant started canvassing for advertisements in their CD Rom from May to November 1996. When the inaugural CD Rom was produced in early 1997, there were a total of 596 advertisers. 484 of these were also advertisers in the plaintiffs` 1996 Yellow Pages issued around July 1996.

25 According to Go Choon Huat, the plaintiffs` Marketing Support Executive, of the 484 `common advertisers`:

26 (1) 56 cancelled their advertisements for the 1997 Yellow Pages;

27 (2) 185 decreased their advertisements for the 1997 Yellow Pages;

28 (3) 245 increased their advertisements for the 1997 Yellow Pages; and

29 (4) 2 remained unchanged.

30 Twenty-six advertised for the first time in both the 1997 Yellow Pages as well as the CD Rom. The loss in annual gross revenue to the plaintiffs from the above cancellation and decrease amounted to $1,308,640.

31 Leong Fook Luen, a director of the plaintiffs, said in his affidavit that the advertising sales from the Yellow Pages came largely from renewals each year from existing advertisers. Each year, there would also be increases, decreases and cancellations from such advertisers. In addition, new advertisers might come on board.

32 According to Leong, apart from the said shift of gross sales of about $1.3m to the first defendant, the plaintiffs also suffered a sudden surge in the decrease and cancellation (`D and C`) rates for the 1997 Yellow Pages

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compared to the preceding three years. In percentage terms, the different D and C rates were as follows:

a	1994	
	1993 sales	100%
	decrease rate	8.29%
	cancellation rate	13.16%
b	1995	
	1994 sales	100%
	decrease rate	9.36%
	cancellation rate	10.68%
c	1996	
	1995 sales	100%
	decrease rate	8.72%
	cancellation rate	10.14%
d	1997	
	1996 sales	100%
	decrease rate	9.58%
	cancellation rate	14.77%

33 It was said that there was therefore a significant increase in the D and C rates for the 1997 Yellow Pages when compared to those for the preceding three years and particularly for the preceding two years.

34 Using the difference between the D and C rates for the 1996 and the 1997 Yellow Pages, there was an upsurge in D and C rates of 5.49%. In monetary terms, 5.49% of the 1996 quarterly sales of almost $15m translated into about $3.28m decrease and cancellation of annual sales.

35 Leong proposed an alternative method of computing the loss suffered by the plaintiffs by comparing the D and C rates for the 1997 Yellow Pages with the average of the D and C rates for the years 1994 to 1996. That would result

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in an increase in D and C rates for 1997 of 4.23%. This would amount to about $2.53m loss in annual sales through decrease and cancellation.

36 Three alternative methods of computation of damages were therefore placed before the court as follows:

37 (1) Shift of sales from the common advertisers to the first defendant - $1.3m.

38 (2) Increase in D and C for 1997 compared with 1996 - $3.28m.

39 (3) Increase in D and C for 1997 compared with the average of 1994, 1995 and 1996 - $2.53m.

40 The defendants` case was that in each year, there were always advertisers who either cancelled or decreased their advertisements with the plaintiffs from the previous year (as could be seen from the plaintiffs` own figures quoted earlier). This was so even before the first defendant entered the market in 1996 to publish their CD Rom in 1997. There was a whole spectrum of reasons why advertisers would cancel or decrease advertisements with the plaintiffs besides the actions of the defendants.

41 One possibility in respect of the common advertisers was that the defendants` CD Rom could offer more comprehensive coverage because the advertisements therein were not only in CD Rom format but were also available on the Internet so that they could be assessed by anyone anywhere in the world. Further, the CD Rom could offer comprehensive coverage because the advertisements could be represented under unlimited categories unlike the print medium (like the Yellow Pages) where a handphone vendor might have to list

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his advertisement under various categories (such as handphones, telephone equipment, telecommunications equipment) in order to ensure comprehensive coverage. The more categories he listed his product in, the more he would have to pay. The first defendants` directory could also be viewed in 256 colours and could be printed out as a brochure. Further, there was a powerful built-in search engine which allowed searches by products/services, by brands or by advertisers` names. The search engine could also link the search to other related products/services.

42 Returning to the computation of the plaintiffs` D and C rates, the defendants showed that the D and C rate for the common advertisers in 1997 as contrasted with that for 1996 was 19.15%. This was 0.97% lower than the average D and C rates for the preceding three years (1994 to 1996) which was 20.12%. It was also much lower than the D and C rate for 1997 in respect of all of the plaintiffs` advertisers (24.35%). As the total advertising revenue from the common advertisers represented more than 10% of the plaintiffs` total revenue for 1996 and 1997, the above computations were statistically significant.

43 The defendants also asserted that 1997 saw the beginning of the Asian economic crisis with businesses shrinking or folding up altogether. There were also other competitors producing directories for commercial and industrial products such as The Green Book and the CIDB Directory.

44 Taken together, all these factors could account for the upsurge in the D and C rates from an average of 20.12% for 1994 to 1996 to 24.35% for 1997. Accordingly, the defendants averred, there was no loss or damage suffered by the plaintiffs.

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45 ***The decision of the court***

46 ***McGregor on Damages*** (1997 Ed) states the following propositions at para 1943 under the heading `Injurious Falsehoods other than Passing Off`:

> *The damages will vary according to what interest of the plaintiff the defendant`s false statement attacks. ... Finally, the false statement may be in relation to the plaintiff`s business more generally: he will here be entitled to recover for any consequential loss of business. Thus in* ***Riding v Smith****, where the defendant falsely stated that the plaintiff`s wife, who assisted him in his business, had committed adultery with the parish incumbent, the plaintiff recovered for the falling off in his business which followed. And in* ***Ratcliffe v Evans****, where the defendant published in a newspaper the false statement that the plaintiff had closed down his business, damages were awarded for the general falling off of the plaintiff`s custom. Similarly, in* ***Worsley v Cooper*** *it was held that damages could be given for the falling off of the plaintiff`s business by reason of the defendant`s distribution of circulars to the plaintiff`s customers falsely implying that the plaintiff had parted with his business and that the defendant had succeeded to it. In such circumstances it would seem that the plaintiff could recover not only loss of profits but any proven loss of business reputation or goodwill.`*

47 At para 1944, the learned author states, with reference to s 3 of the English Defamation Act 1952 (the equivalent of our s 6 Defamation Act):

> *The present position is therefore this. With statements falling within s 3 the plaintiff need not allege and prove specific pecuniary loss as the court will infer the existence of pecuniary loss and the damages will be at large in a similar sense to that in inducement of breach of contract. With statements falling outside s 3 the plaintiff must still allege and prove specific pecuniary loss, although the court will be satisfied with general evidence of such loss where this is all that the circumstances of the case will allow.*

48 Where non-pecuniary loss is concerned, paras 1945 and 1946 of ***McGregor*** are illuminating:

> *There remains the question of non-pecuniary loss. Although s 3 of the Defamation Act 1952 continues to reflect the association of*

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injurious falsehood with defamation because the statements singled out as not requiring allegation and proof of special damage are very similar to those defamatory statements which are actionable per se, there is still an interesting difference between such injurious falsehoods and such defamatory statements in relation to non-pecuniary loss. Whereas with defamatory statements actionable ***per se*** *the principal head of damage is the injury to reputation which is non-pecuniary loss, with those similar injurious falsehoods which fall within s 3 of the Defamation Act 1952 the principal, and perhaps the only, head of damage is the pecuniary loss that the plaintiff has suffered. Section 3, by dispensing in these cases with the requirement of allegation and proof of specific pecuniary loss for success in the action, thus impliedly confirms the view that for all injurious falsehoods only pecuniary loss will ground the action, a view negatively supported by the absence of decisions awarding non-pecuniary loss, occasionally expressly hinted at in the cases, and generally prevalent in this area of tort.*

Whether, where pecuniary loss is satisfactorily shown, damages for non-pecuniary loss may be given in addition has long been uncharted, in relation both to those injurious falsehoods now falling within the provisions of s 3 of the Defamation Act 1952 and to those still controlled by the common law. Apart from Lord Denning MR in ***Fielding v Variety*** *Incorporated expressing his view that damages can only be recovered for `probable money loss and not for ... injured feelings`, the authorities have been silent, but now the Court of Appeal in* ***Joyce v Sengupta*** *has addressed, without there deciding, the question. The plaintiff, a lady`s maid to the Princess Royal, was suing the defendant, a newspaper`s crime correspondent, for falsely stating in a published article that she had stolen the Princess`s intimate letters. The defendant argued that as a matter of law damages were irrecoverable for the plaintiff`s anxiety, distress and injury to her feelings. The court did not find it necessary to decide the point but Sir Donald Nicholls VC in a valuable judgment gave cogent reasons for allowing a measure of recovery. `Take the example,` he said, `of a person who maliciously spreads rumours that his competitor`s business has closed down ... The owner of the business suffers severe financial loss. Further, because of the effect the rumours are having on his business he is worried beyond measure about his livelihood and his family`s future. He suffers acute anxiety and distress. Can it be right that the law is unable to give him any recompense for this suffering against the person whose malice caused it? Although injury to feelings alone will not found a cause of action in malicious falsehood, ought not the law to take such injury into account when it is connected with financial damage inflicted by the falsehood?`*

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> *To limit damages for injurious falsehood to pecuniary loss would, he added, mark out a clear boundary but `it would suffer from the drawback of failing to do justice in the type of case I have mentioned. I instinctively recoil from the notion that in no circumstances can an injured plaintiff obtain recompense from a defendant for understandable distress caused by a false statement made maliciously.`*
>
> *The Vice-Chancellor was, however, concerned that, if non-pecuniary loss were once allowed, it would be difficult to set coherent limits to potential recovery, both to the circumstances for recovery of non-pecuniary loss and to the types of non-pecuniary loss recoverable. He need not have been so concerned; the courts are perfectly capable of, and accustomed to, deciding when and how far to give damages for the omnibus injury to feelings. The matter is one of policy and it is thought that here policy should endorse recovery in general for injured feelings. What the Vice-Chancellor was particularly and rightly concerned to exclude, and indeed stated that it would be excluded as inappropriate in an injurious falsehood action, was the other and very different head of non-pecuniary loss, namely, injury to reputation. This is in line with the Court of Appeal`s decision very soon afterwards for its exclusion from the tort of conspiracy.`*

49 It was submitted by the defendants that loss of goodwill for businesses was equivalent to loss of reputation for individuals, that such non-pecuniary loss had never been awarded in an action for malicious falsehood and that the appropriate cause of action in which to seek damages for loss of reputation was defamation.

50 The plaintiffs contended that loss of goodwill was for the general loss of custom in respect of those who did not advertise in the Yellow Pages but who could have been affected by the falsehood perpetrated by the defendants. The plaintiffs submitted that they could recover not only loss of profits but also any proven loss of business reputation or goodwill, relying on **E Worsley & Co v Cooper** [1939] 1 All ER 290, a case concerning passing off and not malicious falsehood.

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51 In real terms, the loss of goodwill or business reputation pertains to the loss of profits resulting from a pool of potential advertisers who could have been dissuaded from signing up with the Yellow Pages after reading the false statements disseminated to them in the defendants` promotional materials. This head of damages is nothing more than a corollary of the other one dealing with advertisers who have already signed up with the Yellow Pages. In principle, I do not see why such loss should not be allowed. It is of course impossible to quantify as neither party would know how large the pool of potential advertisers so affected was. It is, however, reasonable to say, on a balance of probabilities, that some potential advertisers could have been affected thus. It is no different from the situation where one passes falsehood that a certain stall-holder`s prices are generally 10% above market prices or that his customers are not as numerous as he has claimed. Conceivably, some consumers who have never patronised that stall but have heard the falsehood could decide not to purchase anything from him at all. Where loss can be shown but cannot be quantified, it is justifiable to award nominal damages. The plaintiffs asked for $$50,000, the learned assistant registrar awarded $30,000. I do not find her award outrageously high or low and therefore confirmed her decision on this.

52 I now deal with the outstanding and more financially significant issue of loss of profits from the shift of business. Firstly, any award of loss of profits should not be on the basis of gross but of net profits, however small the expenses needed to generate those profits may be. Secondly, the mathematical formulae proposed by the plaintiffs appear attractive but the factual premises on which they depend have not been established. Out of two written complaints, only one bothered to identify itself. Obviously, we are not able to know what the reaction of that anonymous advertiser was - whether he decreased, cancelled, increased or maintained his advertisement with the Yellow Pages. As for the known

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advertiser (Yew Aik Hung Pte Ltd) who was peeved enough to write the strongly worded letter of complaint to the plaintiffs and whose reaction was apparently relied on as epitomising the general reaction of other advertisers in the Yellow Pages, it is highly significant to note that the same advertiser not only did not cancel or decrease its advertisement in the 1997 Yellow Pages, it in fact increased it. This can be seen in the documents exhibited in Go Choon Huat`s affidavit. This shows that this advertiser, who was the only known documented displeased customer, has somehow been reassured by the plaintiffs and that its misgivings have been assuaged to the extent that it was willing to renew and increase its commitment to the Yellow Pages. This is on top of the fact that Yew Aik Hung Pte Ltd also decided to advertise in the defendants` CD Rom. As for the alleged oral complaints made to the plaintiffs, for the same reason as that for the anonymous letter writer, we are not able to gauge what their response was.

53 What all this shows is that it is not a straightforward case of comparing yearly revenues to show how much business has been lost as a result of the falsehood. As Yew Aik Hung Pte Ltd`s case demonstrates, there might be no causal link at all in certain cases. If this is so for a disgruntled customer concerned enough to write a letter to the plaintiffs, it could surely apply with at least equal force to those who have kept silent or have resorted only to oral enquiries/complaints or anonymous letters. After all, the ubiquity of the plaintiffs` Yellow Pages in Singapore is obvious to all.

54 The sales figures of the plaintiffs for the various years do not show a consistent trend for the different components. While acknowledging that circulation is of crucial importance to advertisers, we should not underestimate the novelty value of the defendants` CD Rom. It is not in print form and is

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certainly less bulky than the Yellow Pages although it is not a stand-alone directory in that it requires computers to run it. It has the electronic wizardry to enable quick and comprehensive searches and, on the Internet, knows no geographical boundaries. 1996 and 1997 were within the era of the exponential growth of the Internet, which was and still is the focal point of forward-looking enterprises. It would be churlish to brush this novelty value aside and attribute the shift in business primarily to the false claims that the circulation of the Yellow Pages was only about 200,000.

55 One other factor proffered as a possible cause for the upsurge in the plaintiffs` D and C rates was the economic downturn in 1997. While general economic conditions could have affected businesses and consequently their advertising budgets, they were probably not significant in 1996 and in the first six months of 1997, during which time the plaintiffs would be canvassing for advertisements for their July 1997 Yellow Pages. It has been generally accepted that the Asian economic meltdown was precipitated by events that occurred in and after July 1997 and therefore after the publication of the 1997 Yellow Pages. However, the fact that the defendants` CD Rom made its debut in January/February 1997 while the plaintiffs` Yellow Pages appeared only in July 1997 may also have contributed to the D and C rates for 1997. It would not be surprising to find that a substantial number of common advertisers, having allocated their advertising budget or part thereof to the CD Rom, saw no need to advertise to the same extent or at all in the Yellow Pages that appeared some months later.

56 While I was willing to accept that loss in profits had probably been caused, I was not persuaded that the loss could be computed so neatly and methodically as suggested by the plaintiffs. As with the loss of goodwill, loss

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of profits was probable but was not capable of being quantified, certainly not on the state of evidence adduced by the plaintiffs. It would be highly illogical to extrapolate from Yew Aik Hung Pte Ltd`s case that the advertisers (or 50% of them) who decreased or cancelled their advertisements with the plaintiffs did so because of the false statements. One swallow does not a summer make and in this case the bird does not even seem alive. In the circumstances, as we are concerned with existing advertisers here, an award slightly higher than that given for the loss of goodwill should compensate the plaintiffs for their loss of profits. Accordingly, I awarded $50,000 for this head of claim.

57 As the defendants` appeal has succeeded on one count and failed on the other, I made no order as to costs in respect of the appeal before me.

58 **Outcome:**

59 Order accordingly.

Tay Yong Kwang JC

Chan Hock Keng (Wong Partnership) for the plaintiffs
Rey Foo (KS Chia Gurdeep & Param) for the defendants

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