

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

LOLLYPOTZ PTY LTD ACN 135 723 885 v
PRODUCTREVIEW.COM.AU PTY LTD ACN 127 714 752 (Civil
Dispute) [2021] ACAT 45

XD 985/2020

Catchwords: **CIVIL DISPUTE** – intentional interference with economic relations – tort of injurious falsehood – claim that consumer opinion website attempted to injure applicant’s on-line business by removing 5-star and 4-star reviews – discussion of elements of the cause of action and evidentiary requirements – claim dismissed

Legislation cited: *ACT Civil and Administrative Act 2008* s 48
Australian Consumer Law s 18
Trade Practices Act 1975 (Cth) s 52

Cases cited: *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69

Texts cited: R. P. Balkin and J. R. Davis, *Law of Torts* (LexisNexis, 5th ed, 2013)

Tribunal: Senior Member M Orlov

Date of Orders: 9 June 2021

Date of Reasons for Decision: 9 June 2021

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) **XD 985/2020**

BETWEEN:

LOLLYPOTZ PTY LTD ACN 135 723 885
Applicant

AND:

PRODUCTREVIEW.COM.AU PTY LTD ACN 127 714 752
Respondent

TRIBUNAL: Senior Member M Orlov

DATE: 9 June 2021

ORDER

The Tribunal orders that:

1. The application is dismissed.
2. The transcript of the hearing on 27 April 2021 is not to be published or disclosed to the parties or any other person without the order of the Tribunal.

.....
Senior Member M Orlov

REASONS FOR DECISION

Introduction

1. The applicant (**Lollypotz**) carries on an on-line business as a supplier of chocolate gifts, bouquets and hampers to retail customers. The business has operated since 2001. Louise Curtis is the sole director of the applicant and represented the applicant at the hearing. Ms Curtis formerly operated a wedding and party supply business through a unit trust trading under the name 'Pink Frosting', which she bought in 2015 and sold in 2020. The relevance of this will appear later.
2. The respondent (**ProductReview**) operates one of the largest consumer opinion websites in Australia. According to its Managing Director, Elmar Sharafutdinov, who represented the respondent at the hearing, ProductReview commenced operation in 2003 and now has three million visitors monthly and over two million published reviews for 50,000 products and services.
3. Customer reviews of Lollypotz have appeared on the ProductReview website for some time. At the time of writing these reasons, Lollypotz has an overall 3.4-star rating based on 178 reviews. Of these, 95 reviewers rate the business 5 stars, nine rate it 4 stars, four rate it 3 stars, eight rate it 2 stars and 62 rate it 1 star. As of 14 September 2020, Lollypotz had an overall 3.1-star rating. On that date, ProductReview removed from the website 21 reviews that gave the business a 5-star rating and two reviews that gave it 4 stars. This reduced Lollypotz's overall star rating to 2.8 stars. The applicant claims that all the reviews that ProductReview removed were genuine.
4. Lollypotz filed this application in the tribunal on 17 September 2020, giving the following reasons for the claim:

I'm suing under the tort of Causing Intentional Damage to economic interests. ProductReview.com.au (PR) operates an online review site, which businesses are not able to opt in or opt out of. As Lollypotz P/L has not been able to opt out of this service, it has encouraged our customers to place reviews on this site. This comes at considerable time/cost and management. Lollypotz consistently encourages its customers to post reviews on the PR site – a site which PR makes ongoing income from by the sale of advertising. On 14 September 2020 PR removed 21 x 5 genuine 5 star and 2 x 4 star reviews from the Lollypotz review listing. This significantly impaired the overall rating of Lollypotz's listing and impacts consumer views. Lollypotz repeatedly requested Productreview.com.au [sic] for an explanation, explaining the Company holds strong evidence that

the reviews are factual for real customers, given the Company's process involved in contacting customers post sale. By unilaterally deleting factual positive reviews, PR are impacting and persuading the consumer's opinion of the business. PR maintain it is independent however this action contradicts that independence. This approach ensures businesses have no control over how customers perceive the business. PR have a history of determining whether reviews are false or not and have acted in a similar way to a business which I previously owned (Pink Frosting – see email chain attached).

5. The relief claimed was described as follows:

\$3000 for legal fees (paid to Eastwoods Legal for advice) and to cover staff time for contact customers/engaging customers for preparation of this document. Reinstatement of our deleted reviews. If the reviews have been deleted in full and cannot be reinstated, then an order that Productreview.com.au [sic] act in an equitable manner and remove 21 x 1 star and 2 x 2 star reviews. An Order that Productreview.com.au [sic] will not unilaterally decide to remove Lollypotz Pty Limited's reviews without first ascertaining evidence that there is an issue with the review.

6. The next day – i.e. on 18 September 2020 – ProductReview reinstated 21 of the removed product reviews. Two 5-star reviews were not reinstated.

Summary of the decision

7. For the reasons that follow, I am satisfied that the applicant has failed to establish any basis for the relief sought. The claim fails for lack of evidence on critical issues that were essential elements of the applicant's case. Whether all or some of the applicant's complaints about the respondent's conduct or suspicions about the respondent's motives in acting as it did are well founded is not answered by this decision. I have not made findings that ProductReview *did not* do any of the things that the applicant alleges that it did, partly because it was not necessary to do so having regard to how the applicant ran its case but, in any event, because there was no evidence which could support findings of that kind. The respondent ran what may be described as a 'passive' case, as it was entitled to do, in recognition of the fact that the applicant bore the legal and evidentiary onus to establish all the essential elements of its case.
8. The applicant ran the application in the way that it wished, as it was entitled to do, although I indicated at the start of the hearing that it appeared to me that there were difficulties in the formulation of the applicant's case and the evidence upon which the applicant intended to rely and that I was prepared to adjourn the hearing

to a later date to allow for the production of documents and the filing of further evidence. The applicant decided to proceed with the material already before the Tribunal. That was unfortunate. The applicant did not have the evidence it needed to prove its case. The outcome is that the application must be dismissed.

The evidence filed and served by the parties

9. In accordance with the tribunal's directions for the preparation of the application for hearing, the applicant filed and served two witness statements by Ms Curtis¹ and the respondent filed and served a brief witness statement by Mr Sharafutdinov.
10. Ms Curtis's first witness statement² was concerned largely with events relating to Pink Frosting, the thrust of which was that, from about October 2018, Pink Frosting started to receive large numbers of allegedly unverified and fake reviews. Ms Curtis requested ProductReview to ensure that in future all product reviews for both Pink Frosting and Lollypotz were verified – this involved ProductReview 'switching on' additional verification settings requiring a person wishing to post a review to provide proof of purchase at the time of lodgement. Ms Curtis claimed that despite this "fake reviews continued, and Product Review refused to do anything about it, stating that they have reviewed them, and they were verified".³ At the same time, according to Ms Curtis, Pink Frosting's 5-star reviews started to disappear from the website causing significant damage to Pink Frosting's business.⁴
11. She claimed in paragraph 7 of her statement that:

Knowing that fake reviews continued, and Product Review would not respond, I decided to give Pink Frosting a 1 star review and use a receipt from the Realm Hotel to prove that Product Review were never verifying anything. This review is marked "C". This review has remained live for 2 years. You will find the review at...and note from the screenshot was still live on the morning of 31 January 2021.
12. The statement then referred to several articles written by a journalist, John Rolfe, which were published by News Corp in the Daily Telegraph, ostensibly after a

¹ Exhibit A2 and A3

² Exhibit A2

³ Exhibit A2, paragraph 5

⁴ Exhibit A2, paragraph 6

‘tip-off’ from ProductReview, which were extremely critical of Pink Frosting, including suggestions that the business was a ‘scam’.⁵

13. Ms Curtis explained the relevance of the claims about the alleged treatment of Pink Frosting to the present application, which relates to Lollypotz only, as follows:

I submit to the Tribunal that Product Review and News Corp have colluded to bring harm to the Pink Frosting business and me generally. However this claim does not relate to Pink Frosting – that business has been sold, but the previous points go to the ongoing conduct of Product Review.

Knowing that Product Review were only protecting themselves and those customers who pay them a subscription, Lollypotz Pty Ltd set about protecting itself against this behaviour and sought to build up quality 5 star reviews and kept immaculate records so that Product Review could not do this to Lollypotz.

As provided in the Application, Lollypotz:-

- a. Wrote to each and every customer following delivery of its goods requesting a review;*
- b. Provided each and every customer a copy of their invoice, so they could upload it to the Product Review website;*
- c. Sent a thank you email to any customer who provided a 5 star review;*
- d. Maintained a photocopy of the review in a folder with each of the above pieces of correspondence, so that we could confirm each and every review.*

In addition, being aware of the conduct of Product Review, Lollypotz took a screenshot each and every day of Lollypotz’ listing showing it’s star rating, to ensure we had evidence that we had those reviews, if, in the unfortunate event Product Review would behave in the same manner as it did with Pink Frosting.

On 14 September 2020 Product Review removed 21 x 5 star reviews and 2 x 4 star reviews from the Lollypotz listing. See attachment marked “G” confirming this. Lollypotz immediately requested Product Review reinstate the reviews, however they refused. This removal of reviews coincided with one of the articles from Mr Rolfe, and I believe, given I was continually targeted by Mr Rolfe, the next article would have referred to Lollypotz and it’s lack of 5 star reviews.⁶

14. Ms Curtis also asserted:

In further support of this behaviour and showing that no verification process is used at all, attached and marked “D” is a listing for another business, that is fake. The business doesn’t operate in Warrnambool, it operates in Canada and it is put on Product Review by another party who

⁵ Exhibit A2, paragraph 10

⁶ Exhibit A2, paragraphs 12-16

has been building a case against Product Review for 3 years. That party has put on many fake reviews over a period, to prove that Product Review have dubious business practices.⁷

15. Ms Curtis explained what she was hoping to achieve by bringing the application in paragraph 24 of her statement:

I do not wish to bring ill-will to Product Review – I understand how they operate and that’s their choice. I was prepared to abide by their rules of engagement – that is why Lollypotz set up a system to ensure that what Product Review did to Pink Frosting could never be done to it. We operated our review system within the terms they provided, and yet they still sought to harm our business. These proceedings are brought against Product Review are [sic] a means to an end – I just want their conduct to stop and to protect my business from them doing this again.

16. In her second witness statement,⁸ Ms Curtis provided a copy of an invoice, email and 5-star review by two persons she claimed were customers of the business whose reviews were removed by ProductReview on 14 September 2020 and subsequently not reinstated.
17. As I mentioned earlier, ProductReview’s Managing Director, Mr Sharafutdinov,⁹ provided a brief witness statement.¹⁰ He did not engage with Ms Curtis’s allegations that ProductReview had allowed fake reviews to be posted for Pink Frosting, or the alleged collusion between ProductReview and News Corp to cause Pink Frosting harm. Instead, he claimed that the core focus of ProductReview is to publish genuine consumer reviews for products and services and that it follows all guidelines of the Australian Competition and Consumer Commission (ACCC) for Online Review Platforms.¹¹
18. The ACCC guidelines highlight the potential for consumers referencing online consumer review platforms to be misled where reviews are presented as impartial but in fact are written by the reviewed business, a business competing with a reviewed business, a third party on behalf of one of the former (e.g. a marketing

⁷ Exhibit A2, paragraph 8

⁸ Exhibit A3

⁹ In the Response – Civil Dispute (Exhibit R1) and his statement (Exhibit R2), the Managing Director refers to himself as Elmar Sharafutdinov. In his oral evidence he identified (and spelled) his surname as Sharafudgiaov (see page 12 of the transcript). For consistency I have referred to him in these reason as Mr Sharafutdinov.

¹⁰ Exhibit R2

¹¹ Exhibit R2

or public relations firm), third persons paid to write a review when they have not used the product, or someone who has used the goods or services but who writes an inflated review because they have been provided with a financial or non-financial benefit of some kind.¹²

19. In response to Lollypotz's demand that ProductReview give an undertaking that it will not remove any of Lollypotz's reviews without reference to the company, Mr Sharafutdinov advised that "We will not take [sic] any undertakings dictating what we publish on our site by a third-party. Once again I have confidence in our procedures on approving or rejecting reviews".¹³
20. An information sheet published on the ProductReview website claims that the company's moderation process is intended to "ensure that when you're reading opinions on a product or service on our platform, you can have trust & confidence in them".¹⁴ The moderation process appears to involve two steps. The first involves using a proprietary content algorithm to sift out 'questionable' reviews. According to the website:

We do this by analysing and monitoring hundreds of data points about reviews, products, brands, and members of ProductReview, where it is then attributed to whether this data point gravitates towards a review that is genuine and helpful, as opposed to a suspicious or fraudulent review.

Every single review we receive passes through this algorithm, where it is assigned a trust factor. We use this factor to either expedite your review approval, or whether to pass it to our Moderation Team to take a further look. This is why some reviews may be published in a short amount of time, while other reviews may take a couple of days to receive approval.

Since launching our platform in 2003, we have been constantly improving and refining our content algorithm to ensure that the reviews that you see are reviews that you can trust.

21. The second step involves using a Moderation Team. According to the website:

We have a dedicated Moderation Team, who work every single day to ensure that the reviews you depend on meet our Posting Guidelines. Our team not only personally check reviews that our algorithm flags as suspicious, but they also continually check & review existing reviews on our platform to ensure content is helpful, current, and constructive.

¹² See link in paragraph 4 of Exhibit R2

¹³ Exhibit R2, attachment (exhibit) B

¹⁴ Exhibit R2, attachment (exhibit) A

22. Obviously, errors can occur. The website makes the following claim about how these are dealt with:

Even with an industry-leading content algorithm & talented Moderation Team, a minority of reviews do slip through the cracks. But that doesn't mean they're not caught – thanks in part to you, the community. If you have a concern with any review, question, or comment on the platform, click the Report Review button. Every single report will be taken seriously to ensure that all reviews are genuine and meet our Posting Guidelines.

The evidence at the hearing

23. At the start of the hearing I outlined some difficulties I saw in the formulation of the applicant's case and the evidence on which the applicant intended to rely. I have reproduced what I said in full below, because it foreshadows why the applicant failed to prove its case:

So this is a claim for legal and other costs of preparing the civil dispute application and orders in the nature of injunctions requiring ProductReview to do certain things and refrain from doing other things. The tribunal's jurisdiction in relation to costs or applications is governed by section 48 of the ACT Civil and Administration Tribunal Act, and to put the matter shortly, the claim for costs is not maintainable.

The issue I have to decide, therefore, is whether there are grounds to make the other orders that Lollypotz seeks. The cause of action on which Lollypotz sues is, as the application describes it, causing intentional damage to economic interests which conventionally would be described as the tort of injurious falsehood. That tort is rarely employed these days and largely has been overtaken by what is now section 18 of the Australian Consumer Law, and prior to its enactment, section 52 of the Trade Practices Act which prohibits a person from engaging in conduct, in trade or commerce, that is misleading or deceptive or likely to mislead or deceive. A key difference between an action for or founded on injurious falsehood and an action founded on section 18 of the Australian Consumer Law is that proof of malice on the part of the defendant is not necessary.

Having reviewed the material the real issue as I see it is whether the conduct of ProductReview, in publishing certain negative reviews and in removing other positive reviews, amounts to misleading or deceptive conduct or conduct that is likely to mislead or deceive customers and potential customers of Lollypotz.

If the conduct is found to amount to a breach of section 18 – and I want to make it clear that I express no view about that, I have read the material but I haven't heard the parties – the issues that would arise are, firstly, what effect that conduct has had on the business of Lollypotz and what effect the conduct is likely to have in the future. Secondly, what orders should be made to prevent the conduct from reoccurring and to relieve any damage or the risk of any damage that may arise from the conduct that has occurred to date, and then, thirdly, whether, in addition to, or in substitution for any

orders of that kind, there should be an award of compensation to Lollypotz for any damage sustained.

The foundational factual issues, it seems to me, would require the tribunal to make findings about the genuineness or otherwise of the reviews in question. Now, that may involve, on the part of Lollypotz, providing evidence establishing the identity of each relevant customer, evidence of the sale and where available, direct evidence from the customer confirming authorship of the review. It may also involve obtaining production from ProductReview of documents relating to the negative reviews, including any proof of purchase supplied with the reviews, and establishing whether or not the proof of purchase and any other available evidence establishes that the customer purporting to be the author of the review is or is not a genuine customer of the business.

Now, it seems to me that we are at a fork in the road today. I am ready to proceed to hear this matter and I can, and if the parties want me to, will decide the application on the material before me, but having regard to the views that I have expressed about what I see as being the real issues and the nature of the factual inquiry that that would involve the tribunal in undertaking, the alternative is, if the applicant wishes to take that course, is that I can give leave for the applicant to amend the application and to make procedural directions for the production of documents and the filing and service of any other evidence and to bring the matter back before me for hearing in an appropriately short period of time on another date.¹⁵

24. The applicant elected to proceed based on the material already filed with the tribunal.¹⁶ However, I ordered that the amended Civil Dispute Application dated 7 September 2020 be amended to provide that the relief sought in the application based on the tort of injurious falsehood is sought also on the alternative basis that the conduct of the respondent about which the applicant complains amounts to a contravention of section 18 of the *Australian Consumer Law (ACL)*.¹⁷
25. The Civil Dispute Application and Ms Curtis's two witness statements were tendered without objection as Exhibit A1 to A3. Ms Curtis affirmed that the evidence in her witness statements was true. She was not cross-examined.
26. The Response and Mr Sharafutdinov's witness statement was tendered without objection as Exhibit R1 and R2. Mr Sharafutdinov affirmed that the evidence in his witness statement was true. Ms Curtis then cross-examined him for several hours.

¹⁵ Transcript of proceedings, page 3 line 45 to page 5 line 10

¹⁶ Transcript of proceedings, page 5 line 46 to page 6 line 26

¹⁷ Transcript of proceedings, page 58 lines, 33-39

27. The cross-examination established the following facts:
- (a) Reviews are initiated by consumers by clicking a ‘Write a review’ button on the website. If a business is not listed on the website the reviewer can submit details of the business and write a review. Otherwise the reviewer can use a search function to find an existing business listing.¹⁸
 - (b) The reviewer may be asked to submit a proof of purchase document. In most cases this is optional but for some business categories such as removalists and home builders where fake reviews has been detected previously, it is a requirement.¹⁹
 - (c) Once a review is submitted, ProductReview sends an email to verify the email address of the reviewer. The review is then moderated before being published on the website.²⁰
 - (d) A business has no say in whether it is listed on the website – i.e. there is no opt-in or opt-out process.²¹
 - (e) ProductReview displays Lollypotz’s trademark on the website but does not have approval to do so.²²
 - (f) ProductReview derives income by providing a subscription service to businesses at a cost of \$59 per month, which provides them with certain marketing tools. Essentially these boil down to ProductReview emailing customers on a list provided by the business, or who purchased a product from the business online, asking the customer to write a review for the business.²³ There is also a ‘premium’ subscription service available at a cost of \$119 per month.²⁴ ProductReview also derives income from advertising on its website.²⁵

¹⁸ Transcript of proceedings, page 13 lines 27-44

¹⁹ Transcript of proceedings, page 13 line 46 to page 14 line 15

²⁰ Transcript of proceedings, page 14 lines 10-15

²¹ Transcript of proceedings, page 14, lines 17-44

²² Transcript of proceedings, page 17 lines 9-25

²³ Transcript of proceedings, page 20 line 31 to page 21 line 13

²⁴ Transcript of proceedings, page 23 lines 16-30

²⁵ Transcript of proceedings, page 21 lines 27-44

- (g) Lollypotz does not subscribe to any of ProductReview’s services.²⁶
 - (h) Lollypotz asked for proof of purchase to be provided with any review, which ProductReview agreed to do. ProductReview claims that every review accompanied by a proof of purchase is verified by a member of the moderation team before it is published online.²⁷
 - (i) ProductReview claims to have zero tolerance for fake reviews. If ProductReview believes a business is generating many fake reviews, it usually will place a notice on top of the listing stating, ‘We believe that the reviews for this listing are generated’.²⁸
28. Mr Sharafutdinov said that ProductReview had an audience sharing arrangement with News Corp using Adobe Audience Manager for which ProductReview received payment.²⁹ The applicant sought, unsuccessfully, to build on this to establish that there was some kind of financial connection between ProductReview and News Corp by which ProductReview derived a financial benefit from providing News Corp with data and information that News Corp could use to publish negative news stories about businesses including, specifically, Pink Frosting and Ms Curtis personally. Mr Sharafutdinov denied the allegations and the applicant was in no position to challenge or contradict his denials.³⁰
29. Ms Curtis then turned to the issue of the ‘fake’ review for Pink Frosting she placed on the website.³¹ An immediate evidentiary problem for the applicant was that although Ms Curtis claimed to have attached an invoice from the Realm Hotel as ‘fake’ proof of purchase, the invoice was not in evidence and there was no evidence, other than her bare assertion, that she had done so. That lead to the following exchange:

SENIOR MEMBER ORLOV: The process of lodging these product reviews, including the process that you have described which you have referred to in paragraph 7 involves lodging something with ProductReview which

²⁶ Transcript of proceedings, page 24 lines 19-25

²⁷ Transcript of proceedings, page 25 lines 1-20; page 26 lines 21-29; page 27 lines 28-31

²⁸ Transcript of proceedings, page 27 lines 35-44

²⁹ Transcript of proceedings, page 29 lines 1-37

³⁰ Transcript of proceedings, page 28 line 1 to page 30 line 41 (Note, the answer attributed to Senior Member Orlov at page 30 line 41 actually was given by Mr Sharafutdinov).

³¹ See paragraph 11 above

includes presumably a PDF of a document. Now, you don't have copies of those documents but ProductReview presumably does.

MS CURTIS: Correct.

SENIOR MEMBER ORLOV: Now, I can make an order requiring ProductReview to produce certain documents to the hearing. So whilst I accept that you don't have that evidence available to you, that evidence, if it exists, can be made available to the tribunal in that way.

Now, I can't really be any clearer in saying that my present thinking is that in order for you to make out a case along the lines for which you contend I would need to be satisfied that as a matter of fact either all or some of the reviews which you describe as being fake, including your own, are in fact fake and if ProductReview was, in fact, carrying out the processes about which you have asked some questions already then that should have been identified. Now, what flows from that, you know, is another matter, but in terms of the basal facts that I have to find, that seems to me to be essential.

MS CURTIS: I agree

30. However, after the lunch adjournment it became apparent that the applicant sought production by ProductReview only of documents relating to the single occasion when Ms Curtis said she posted a 'fake' review for Pink Frosting, and that she did not seek production of any documents going to the allegations made in her first witness statement that, even after ProductReview ostensibly 'switched on' additional verification settings at her request,³² 'fake' reviews continued to appear and ProductReview "refused to do anything about them, stating that they had reviewed them and they were verified". That led to the following exchange in which Ms Curtis sought to explain the basis of the applicant's case and the relevance of the Pink Frosting evidence:

SENIOR MEMBER ORLOV: ...just so that I am completely clear, is your case founded on the proposition that there is a single negative review of which you are the author but which was not picked up by - - -

MS CURTIS: No.

SENIOR MEMBER ORLOV: - - - the respondent's processes?

MS CURTIS: That is not, that is not the entirety of my case. It is one factor that goes to the conduct of ProductReview. There's many factors that go to the conduct. My issue in relation to this is that Mr Shar has already confirmed by his evidence today, as well as multiple statements to the press, also by his terms on his website, that there is a verification process in place. Now, when I get to the end of my questioning of Mr Shar we will see that there is no verification process in place and - - -

³² See paragraph 10 above

SENIOR MEMBER ORLOV: All right.

MS CURTIS: - - - this was just one. This was just one example of all of the evidence that I have got.

SENIOR MEMBER ORLOV: All right. Well, look - - -

MS CURTIS: It's not that I rely on the one-star review. I'm just saying that if their system is what it is, what he claims it is, then these things would be picked up and in relation to - - -

SENIOR MEMBER ORLOV: All right. Well, just hang on, Ms Curtis. We're not in submissions yet. I just want to be, I want to understand – and I think what you have just said is helpful – that at least insofar as negative reviews are concerned there is one negative review and that is a review which you are the author. That's the only one - - -

MS CURTIS: Correct.

SENIOR MEMBER ORLOV: - - - you're relying on?

MS CURTIS: Correct.

SENIOR MEMBER ORLOV: Okay.

MS CURTIS: So I guess by the time I get to the end of my questioning what I would like to get to a point of is that ProductReview only removed five-star reviews. They don't remove the negative stuff.

SENIOR MEMBER ORLOV: Okay. No, that's - - -

MS CURTIS: So that's sort of what I'm referring to and just with that particular one you point to, it's just an example of that.

SENIOR MEMBER ORLOV: Yes. Well, okay, I understand. So in relation to the – you have put on a whole lot of evidence about the issues relating to Pink Frosting and am I right to understand that you don't seek any documents in relation to the negative reviews relating to that?

MS CURTIS: Look, I don't see any point in relation to that.

SENIOR MEMBER ORLOV: That's fine.

MS CURTIS: But this one, this one review does relate to Pink Frosting. It does and the reason I put it on there was because I was trying to prove a point.

SENIOR MEMBER ORLOV: Yes.

MS CURTIS: I'm not requiring - - -

SENIOR MEMBER ORLOV: All right.

MS CURTIS: I'm not requiring the tribunal to obtain evidence at all of Pink Frosting. That's done and dusted. It's just the information I have given about Pink Frosting is just going to the conduct but this one particularly will prove that there is no verification process.

31. However, as Mr Sharafutdinov observed in his closing submissions it does nothing of the sort. The evidence that the review was, in fact, a fake review and

that the proof of purchase supplied with it (i.e. the Realm invoice, which Mr Sharafutdinov confirmed, after checking ProductReview's business records on his computer)³³ was self-evidently unrelated to any services or goods supplied by Lollypotz proves that a mistake was made and that ProductReview's moderation process, including the inspection by a member of the moderating team that ostensibly checked every proof of purchase to verify its authenticity, failed to pick up a fake review on that occasion. Whilst undoubtedly relevant to the reliability of ProductReview's moderation processes, the evidence that an error was made on one occasion, or even that the moderation process was not followed at all on one occasion, is not enough to establish that ProductReview has *no* verification processes in place as Lollypotz contends or that ProductReview's moderation processes are not as robust as some of the statements published on its website would suggest.

32. The applicant then sought an explanation from Mr Sharafutdinov for the removal of 23 mostly 5-star reviews and subsequent reinstatement of all but two reviews. Mr Sharafutdinov explained in some detail the features of the proprietary content algorithm³⁴ which led to the initial decision to treat the reviews as suspicious. The information disclosed to the Tribunal about ProductReview's moderation processes constitutes a trade secret and is entitled to the full protection of the law applicable to confidential information. Accordingly I have made an order prohibiting the publication or disclosure of the transcript of the hearing to the parties or other persons without the order of the tribunal.
33. As a matter of course, ProductReview refuses to disclose such information to businesses seeking to question the authenticity of reviews published on the website on the grounds that disclosure would harm its business interests. ProductReview's stock answer appears to be that its moderation system has identified the review as suspicious, without explaining the basis for the suspicion or how it arrived at that conclusion. ProductReview undoubtedly has a legitimate interest to protect confidential information about its proprietary content algorithm. It is clearly of considerable commercial value and presumably would be of interest to ProductReview's competitors. However, it is understandable also

³³ Transcript of proceedings, page 44 line 8 to page 45 line 13

³⁴ See statements from the website extracted at paragraph 20 above

that the secrecy surrounding ProductReview's moderation processes can cause frustration and is capable of fuelling suspicions that ProductReview has something to hide.

34. Nevertheless, when a case comes to court or, as in this case, to the tribunal, the fact that information about ProductReview's moderation processes and how it operates in specific cases is confidential information, or may involve the disclosure of trade secrets, is not a bar to a litigant obtaining access to the information and using it as evidence in an appropriate case. Procedures that are familiar to litigation lawyers are available to compel a party to produce documents and electronic records containing information of that kind and to ensure that confidentiality is maintained.
35. In this case Ms Curtis undertook to keep confidential all such information disclosed by Mr Sharafutdinov in his oral evidence³⁵ and I indicated that it would not be disclosed in my reasons for decision. It is enough to say for the purposes of these reasons that, according to Mr Sharafutdinov's evidence, the system identified the reviews as suspicious and there appeared to be a legitimate basis for doing so.³⁶ There was no real challenge to Mr Sharafutdinov's evidence on this issue, nor could there be in the absence of documentary evidence (which could have been obtained from ProductReview on subpoena) and, quite likely, evidence from a computer expert subject to an appropriate regime to maintain the confidentiality of the primary information. At the end of the day, all that the applicant succeeded in establishing is that ProductReview's systems are not perfect, and that the system does make mistakes despite human intervention in the process.³⁷
36. A further difficulty for the applicant was the lack of evidence establishing that the two reviews Ms Curtis claimed were genuine, but which ProductReview refused to reinstate, were in fact genuine reviews authored by customers of Lollypotz. There are ways that could have been done but, perhaps understandably, Ms Curtis said she did not want to drag her customers into the dispute.³⁸

³⁵ Transcript of proceedings, page 41 line 42 to page 43 line 14; page 48 lines 42-46

³⁶ Transcript of proceedings, page 48 line 25 to line 40; page 51 line to page 35 line 9

³⁷ Transcript of proceedings, page 52 line 11 to page 55 line 1

³⁸ Transcript of proceedings, page 49 line 42 to page 51 line 18

Consideration

37. The applicant framed its application, apparently on legal advice, as a claim “under the tort of causing intentional damage to economic interests”. The common law does not recognise a tort of that kind. Rather, a common feature of the class of torts generally termed ‘economic torts’ is that they involve intentional interference with a person’s economic interests as an element of the cause of action. That is, economic torts in general are concerned with deliberate, rather than negligent, infliction of economic loss by various means. The means by which deliberate economic loss is inflicted will determine which tort applies to the circumstances of the case, although there may be an overlap. The class of economic torts generally is recognised to include the tort of inducing breach of contract, unlawful interference with trade, intimidation, conspiracy, the action for loss of services, injurious falsehood, passing off and deceit. The elements of the cause of action for each tort are different.
38. The essential facts that Lollypotz must prove depend on which of the economic torts applies to the circumstances of this case.
39. In her closing submissions, Ms Curtis summarised the applicant’s case as follows:

So I submit to the tribunal that ProductReview has intentionally tried to or attempted to damage the Lollypotz Pty Ltd business. Over a period of two years, I, myself, and businesses I have owned have been the subject of numerous articles that have been printed by News Corp. News Corp alone. No other, no other journalists that Mr Shar has suggested, and in each of those articles it refers to ProductReview and that ProductReview have given statements in those articles.

My concern is that knowing that ProductReview have acted in this manner in relation to my previous business, Pink Frosting, I set about to ensure that Lollypotz would not suffer the same consequences.

Now, what we did was unusual and unheard of. What we did was we basically put ProductReview under surveillance and what I mean by that is my assistant took every morning before he did anything else, was to take a screenshot of the reviews to show every day of ProductReview, to show how many reviews we had and how many stars we had. The reason we did this was because we knew that ProductReview at any time would take these away from us and they do that to promote their own message and their message is they want people to buy businesses out. Nobody wants businesses unless you have five-star reviews.

On 14 September, the same day that an article came out from Jon Ralph about me, again referencing ProductReview, on that day ProductReview removed one-third of Lollypotz’s reviews, none of which were the one-star

reviews. Only five-star reviews and four-star reviews. We got to the point where we asked ProductReview to reinstate those reviews – and I have provided that in my evidence – and ProductReview refused. I then wrote to ProductReview and gave them a copy of the ACAT application. The next day ProductReview reinstated the majority of those reviews.

I'm not concerned about the two reviews that haven't been reinstated. I know who they are but I understand they're not going to reinstate them. I'm not arguing about that.

...

...My concern is that only the five-star reviews are removed and then, of course, once I commenced proceedings they reinstated them.

Now, just to go back – and I'm sorry to rehash – but if we go back to the end of 2018 and the email chain that I have submitted between myself and Pink Frosting. I'm sorry, between Pink Frosting and ProductReview. This is exactly what ProductReview did to Pink Frosting at the end of 2018. They removed all of our five-star reviews.

Now, you will see in the email statement that I have attached to my witness statement that I asked for them to be reinstated repeatedly. I gave them evidence of the reviews and they refused. I subsequently threatened legal action. They responded by not engaging with me but going to News Corp and naming and shaming me to News Corp. They gave statements to News Corp saying I was the worst business that they had on their books.

Now, that is how they reacted in 2018 when I threatened legal action. They then did this again to Lollypotz in September of 2020 and I could not allow them to do this to Lollypotz.³⁹

40. The general thrust of the allegations most closely fits a claim based on the tort of injurious falsehood, although some of the allegations involving the alleged conduct of News Corp and ProductReview border on a claim based on the tort of conspiracy, the elements of which involve the following:

The civil tort of conspiracy is committed when two or more persons combine together either (1) to commit an unlawful act with the intention (actual or constructive) of harming the plaintiff's trade, business or other economic interests, or (2) to perform an act which, if carried out by a single person, would not be unlawful, with the predominant object of so harming the plaintiff, and, in either case, the acts cause damage to the plaintiff.⁴⁰

41. However, if the applicant wished to bring a claim based on the tort of conspiracy it would have been necessary for News Corp to be joined as a respondent. As that did not happen, I disregard that possibility.

³⁹ Transcript of proceedings, page 58 line 47 to page 60 line 41

⁴⁰ R. P. Balkin and J. R. Davis, *Law of Torts* (LexisNexis, 5th ed, 2013) [21.43] at page 631

42. That leaves injurious falsehood. The High Court considered the requirements for a claim based on injurious falsehood in *Palmer Bruyn & Parker Pty Ltd v Parsons*.⁴¹ In that case, Gummow J said:

The elements of the action for injurious falsehood usually are expressed in terms which derive from Bowen LJ's judgment in Ratcliffe v Evans,⁴² to which further reference will be made. Thus generally, it is said that an action for injurious falsehood has four elements: (1) a false statement of or concerning the plaintiff's goods or business; (2) publication of that statement by the defendant to a third person; (3) malice on the part of the defendant; and (4) proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement.⁴³

43. To a large extent the action for injurious falsehood has been displaced by the statutory cause of action for breach of section 18 of the ACL and its statutory predecessor, section 52 of the *Trade Practices Act 1975* (Cth). There are limited circumstances where that may not be the case, such as where the false statement concerning the plaintiff's goods or services is not made in trade or commerce – i.e. not in a business context – which is a necessary precondition for the statutory cause of action to be available. However, that is not relevant here because the conduct about which the applicant complains clearly was conduct that occurred in trade or commerce. The other circumstance in which an action for injurious falsehood may remain relevant is that because proof of malice is an essential requirement, the plaintiff may be entitled to recover aggravated or exemplary damages, whereas only compensatory damages are available for breach of section 18 of the ACL.
44. The starting point is that the applicant must identify a false statement made by ProductReview about Lollypotz's goods or services and that ProductReview published the statement to a third party. The applicant failed to do so. Although the applicant claims that the removal of the 5-star and 4-star reviews coincided with the publication on 14 September 2020 of an article in the Telegraph newspaper, which Ms Curtis claimed 'referenced' ProductReview, the article was not in evidence and there was no evidence that the article was based on any statement made by ProductReview to the journalist, much less that any such

⁴¹ [2001] HCA 69

⁴² [1892] 2 QB 524 at 527-528

⁴³ [2001] HCA 69 at [52]

statement was false. Even if, as the applicant claims, ProductReview responded to Ms Curtis's threats of legal action relating to the removal of Pink Frosting's 5-star reviews in 2018 by "going to News Corp and naming and shaming me to News Corp" – which in any event, was not established by the evidence before the Tribunal – that fact would have no relevance to a claim founded on the alleged publication of an unspecified false statement to News Corp about Lollypotz in September 2020.

45. In essence, the applicant's complaint boiled down to the undisputed fact that on 14 September 2020, ProductReview removed twenty-one 5-star and two 4-star reviews from the website and, on 18 September 2020, the day after the applicant filed this application, ProductReview reinstated 21 reviews but did not reinstate two 5-star reviews, citing continuing concerns as to their authenticity.
46. The consequence was that on 14 September 2020, Lollypotz's overall star rating on the ProductReview website dropped from 3.1 to 2.8 stars. Presumably, the overall star rating recovered when most of the reviews were reinstated several days later although there was no evidence going to that issue. The applicant did not allege that she suffered economic loss as a result and led no evidence to establish that such loss occurred. As proof of economic loss is an essential element of the tort of injurious falsehood – i.e. the cause of action does not arise *unless* economic loss has been suffered – the applicant's claim must fail even if it had succeeded in establishing the other elements of the cause of action.
47. The reinstatement of 21 of the 23 reviews may be taken to be an admission by ProductReview that, on further verification, they were found to be genuine reviews. However, the applicant failed to prove that ProductReview was not justified in treating the reviews initially as suspicious, notwithstanding their later reinstatement. Further, the applicant failed to prove that the remaining two reviews, that ProductReview refused to reinstate, were genuine reviews posted by actual customers of the business.
48. Fundamentally, there was a complete lack of evidence capable of proving malice – i.e. that ProductReview removed the 23 reviews deliberately with the intention to cause economic harm to Lollypotz. The applicant's attempt to establish that ProductReview had a financial motive to do so because it received a financial

benefit from News Corp from ‘feeding’ journalists information to ground negative stories about businesses, lacked any real evidentiary foundation. While the evidence established that ProductReview derives income from supplying marketing services to businesses, there was no evidence linking the removal of the Lollypotz reviews on 14 September 2020 to any offer to sell such services to Lollypotz, much less any attempt to coerce Lollypotz into subscribing to ProductReview’s services.

49. Finally, as I have explained earlier,⁴⁴ the applicant’s attempt to establish that, contrary to ProductReview’s claims that it verified all reviews submitted with a proof of purchase, there was in fact no such review process, failed for lack of evidence. It was essential to proof of that case that the applicant establish that allegations Ms Curtis made in her first witness statement about the posting of fake reviews and the removal of genuine reviews of Pink Frosting on the ProductReview website were substantially true. Evidence of that kind would have been relevant to the alternative ground that the conduct about which the applicant complains amounted to a breach of section 18 of the ACL. As the evidence to support such a claim was lacking and the applicant gave no attention to it in its closing submissions, I will say nothing more on the subject.

Concluding remarks

50. I have explained why the applicant’s case must be dismissed in perhaps greater detail than was strictly necessary. I have done so in deference to Ms Curtis’s understandable sense of grievance. It appears Ms Curtis is not alone in the belief that ProductReview may be abusing its market power in its treatment of businesses. There were references in the evidence to other businesses voicing similar concerns and to the possibility of a class action being brought on behalf of such persons. As I mentioned earlier, the ACCC guidelines highlight the potential for customers to be misled by consumer opinion websites.⁴⁵ ProductReview claims that it operates within the ACCC guidelines. That may be so and nothing I have said in these reasons should be taken to suggest otherwise. However, as these reasons show, a litigant wishing to challenge that position faces substantial factual, technical legal and forensic obstacles. Although litigants have

⁴⁴ See paragraph 31 above

⁴⁵ See paragraph 18 above

the right to be self-represented both in the tribunal and in courts of competent jurisdiction, it is not always wise for them to do so. This is such a case.

.....
Senior Member M Orlov

Date(s) of hearing	27 April 2021
Applicant:	In person
Respondent:	In person