SUPREME COURT OF QUEENSLAND

CITATION:	*Lee v Abedian & Ors* [2016] QSC 92
PARTIES:	**MARCUS RAMON LEE** (plaintiff) **v** **SOHEIL ABEDIAN** (first defendant) **DAVID SCOTT BROWN** (second defendant) **RONALD JOHN EAMES** (third defendant) **PAUL EDWARD BAXTER, RODNEY GRAEME BESLEY, ANTHONY JAMES BUTLER, PHILIP JOHN BYRNES, DREW ANTHONY CASTLEY, ANTHONY JAMES CONAGHAN, BENTLEY SEAN COOGAN, JAMES BUCHANAN DANIEL, PHILIP BRIAN DOWLING, JAMES PATRICK FEEHELY, ANDREW ROBERTSON FORBES, EUGENE YUK-KWAN FUNG, ALISON BERESFORD HALY, ANDREW JAMES KELLY, MICHAEL FINDLAY MARSHALL, MARTIN DENNIS McENIERY, SAMANTHA JANE O'BRIEN, CHRISTOPHER JOHN O'SHEA, ROGER WILLIAM QUICK, SEAN ANTHONY SULLIVAN, LAWRENCE NEIL WARD** (fourth defendants) **SUNLAND GROUP LIMITED** (fifth defendant)
FILE NO/S:	SC No 982 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application of the fourth defendants filed 26 October 2015 Application of the first, second, third and fifth defendants filed 28 October 2015
DELIVERED ON:	28 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2015
JUDGE:	Bond J
ORDER:	**In relation to the fourth defendants' application filed 26 October 2015, I order that:** **1. The claim against the fourth defendants is struck out.**

2. The plaintiff pay the fourth defendants' costs of the proceeding.

In relation to the first, second, third and fifth defendants' application filed 28 October 2015, I order that:

1. The claim in negligence against the third defendant and paragraphs 86 to 93 of the statement of claim are struck out.

2. The following paragraphs of the statement of claim are struck out, with leave to re-plead:

(a) paragraphs 80 to 85;

(b) paragraphs 94 to 105;

(c) paragraph 8(d); and

(d) paragraphs 29 and 49.

3. Paragraphs 61 and 62 of the statement of claim are struck out.

4. The plaintiff pay the first, second, third and fifth defendants' costs of the third amended application filed 28 October 2015.

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – where third and fourth defendants were engaged to act as solicitors for fifth defendant – where, in performance of retainer, third and fourth defendants drafted a report to be provided to prosecution authorities in Dubai – where plaintiff alleged third and fourth defendants owed duty "to take reasonable care to avoid causing [the plaintiff] to suffer loss resulting from the careless expression of an opinion" – whether actual or potential conflict with duties owed to fifth defendant – whether duty would supplement or subvert the existence of other principles of law – whether arguable that third and fourth defendants owed alleged duty

TORTS – MISCELLANEOUS TORTS – CONSPIRING TO INJURE – GENERAL PRINCIPLES – where plaintiff alleged unlawful conspiracy to injure against first, second and third defendants – where pleadings do not clearly distinguish between unlawful means conspiracy and lawful means conspiracy – whether pleadings fail to specify the unlawful means agreed to be employed and the facts or circumstances which made them unlawful – whether pleadings do not establish necessary causal relationship between unlawful conduct and loss and damage – whether reference to "improper" in pleadings superfluous or wrong at law

TORTS – MISCELLANEOUS TORTS – CONSPIRING TO INJURE – GENERAL PRINCIPLES – where plaintiff alleged lawful means conspiracy in the alternative to unlawful means conspiracy – adequacy of the plea of purpose in respect of the

lawful means conspiracy – whether pleadings are embarrassing – whether pleadings do not establish necessary causal relationship between lawful conduct and loss and damage

TORTS – MISCELLANEOUS TORTS – CONSPIRING TO INJURE – PARTICULAR CASES – where alleged implementation of conspiracy relied on information provided to prosecution authorities – whether witness immunity from suit applied – whether appropriate to determine applicability of immunity on strike out application

TORTS – MALICIOUS PROCEDURE AND FALSE IMPRISONMENT – MALICIOUS CRIMINAL AND CIVIL PROCEEDINGS – ESSENTIALS OF CAUSE OF ACTION GENERALLY – INSTITUTION OR CONTINUANCE OF PROCEEDINGS BY DEFENDANT – whether first, second, third and fifth defendants liable for having instigated prosecution proceedings – nature of the legal test appropriate for that issue considered – whether pleaded facts established arguable case satisfying that test – whether particulars will remedy failure to plead material facts

TORTS – MISCELLANEOUS TORTS – CONSPIRING TO INJURE – GENERAL PRINCIPLES – whether general damages for loss of reputation recoverable –whether appropriate to determine arguable question of law on strike out application

A v Ipec Australia Ltd [1973] VR 39, cited
A v New South Wales (2007) 230 CLR 500, cited
AED Oil Ltd v Back [2009] VSC 158, cited
Agar v Hyde (2000) 201 CLR 552, cited
Al-Kandari v J R Brown & Co [1988] QB 665, considered
Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2) ("*Airline Pilots*" case) [1991] 2 VR 636, considered
Australian Wool Innovation Ltd v Newkirk [2005] FCA 290, cited
Ballard v Multiplex Ltd (2008) 68 ACSR 208; [2008] NSWSC 1019, considered
Beach Petroleum NL v Kennedy (1999) 48 NSWLR 1; [1999] NSWCA 408, cited
Beckett v New South Wales (2013) 248 CLR 432, cited
Blackwell v Barroile Pty Ltd (1994) 51 FCR 347, cited
Bond Corp Pty Ltd v Thiess Contractors Pty Ltd (1987) 14 FCR 215, cited
Bruce v Oldhams Press Ltd [1936] 1 KB 697, cited
Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd [2014] QSC 205, cited
Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649; [2009] NSWCA 258, considered
Carey v Freehills (2013) 303 ALR 445; [2013] FCA 954, cited

Chahoud v Koleda (2008) 72 NSWLR 740; [2008] NSWSC 1060, considered
Chapman v Luminis Pty Ltd (No 5) (2001) 123 FCR 62; [2001] FCA 1106, cited
Coles Myer Limited v Webster; Coles Myer Limited v Thompson [2009] NSWCA 299, cited
Commonwealth Life Assurance Society Ltd v Brain (1935) 53 CLR 343, considered
Cosentino v Kent [2009] QCA 355, cited
Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd (1998) 157 ALR 135, cited
Curry v Commonwealth of Australia [2009] NSWSC 1354, cited
David v David [2007] NSWSC 855, cited
Dey v Victorian Railways Commissioners (1949) 78 CLR 62, cited
Digicel (St Lucia) Ltd v Cable & Wireless Plc [2010] EWHC 774 (Ch), cited
D'Orta-Ekenaike v Victorian Legal Aid (2005) 223 CLR 1, considered
Downsview Nominees Ltd v First City Corporation Ltd [1993] AC 295, cited
Dresna Pty Ltd v Misu Nominees Pty Ltd [2004] FCAFC 169, cited
Elguzouli-Daf v Commissioner of Police of the Metropolis; McBrearty v Ministry of Defence [1995] QB 335, cited
Elliott v Seymour [1999] FCA 976, considered
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (1997) 188 CLR 241, cited
Farrington v Rowe McBride & Partners [1985] 1 NZLR 83, cited
General Steel Industries Inc v Commissioner for Railways (1964) 112 CLR 125, cited
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72, cited
H 1976 Nominees Pty Ltd v Galli (1979) FLR 242, cited
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403, cited
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, cited
Hill v Van Erp (1997) 188 CLR 159, considered
Johnston v Australia & New Zealand Banking Group Ltd & Ors [2006] NSWCA 218, cited
Kinsella v Gold Coast City Council (No 3) [2016] QSC 14, cited
Larkin v Long [1915] AC 814, considered
Ligon Sixty-Three Pty Ltd v ClarkeKann [2015] QSC 153, cited
Maguire v Makaronis (1997) 188 CLR 449, cited
Mann v O'Neill (1997) 191 CLR 204, cited

Maritime Union of Australia v Geraldton Port Authority (1999) 93 FCR 34; [1999] FCA 899, cited
Martin v Watson [1996] AC 74, considered
McKellar v Container Terminal Management Services Ltd (1999) 165 ALR 409; [1999] FCA 1101, cited
New South Wales v Spearpoint [2009] NSWCA 233, cited
Ollis v New South Wales Crime Commission (2007) 177 A Crim R 306; [2007] NSWCA 311, cited
Radisich v McDonald (2010) 198 IR 244; [2010] FCA 762, cited
Robert Bax & Associates v Cavenham Pty Ltd [2011] QCA 53, cited
Sahade v Bischoff [2015] NSWCA 418, cited
Seabrook v Asher [2006] QCA 238, considered
State of New South Wales v Abed [2014] NSWCA 419, cited
Sullivan v Moody (2001) 207 CLR 562, considered
Szanto v Bainton [2011] NSWSC 985, cited
Taylor v Director of the Serious Fraud Office [1999] 2 AC 177, cited
The Council of the Shire of Sutherland v Heyman (1985) 157 CLR 424, cited
The Hancock Family Memorial Foundation Ltd v Fieldhouse [No 5] [2013] WASC 121, cited
Vickery v Taylor (1910) 11 SR (NSW) 119, cited
Weston v Publishing and Broadcasting Ltd [2011] NSWSC 433, cited
Williams v Hursey (1959) 103 CLR 30, cited
Woodham v Roberts Ltd [2010] TASSC 31, cited

COUNSEL: W Sofronoff QC, with M A Hoch, for the plaintiff
S L Doyle QC, with S J Webster, for the first, second, third and fifth defendants
D G Clothier QC, with A R Nicholas, for the fourth defendants

SOLICITORS: Shand Taylor Lawyers for the plaintiff
Holding Redlich for the first, second, third and fifth defendants
Bartley Cohen for the fourth defendants

Table of contents

Introduction

[1] The plaintiff had been an employee of a government body in the United Arab Emirates which developed land for sale in Dubai, including the "Dubai Waterfront Project". The fifth defendant ("Sunland"), had, by a subsidiary, purchased land from an entity controlled by that government body for a considerable sum.

[2] The plaintiff alleges that on 25 January 2009 he was arrested and interrogated by prosecution authorities in the UAE in connection with an alleged bribe said to have been paid by Sunland to a third party in relation to that transaction.

[3] The plaintiff was incarcerated without charge, held in solitary confinement for two months, and remained incarcerated until his release on bail on 26 October 2009. From 15 September 2009 to 29 April 2013 he was subject to a criminal prosecution which proceeded over the course of 46 hearings. He was ultimately acquitted of all charges and that acquittal was affirmed on appeal.

[4] The first defendant was the chair of the board of directors of Sunland and the Managing Director of its Dubai branch. The second defendant was a senior employee of Sunland in Dubai. The third defendant was a director and shareholder of Sunland and also its solicitor. He was a partner in the law firm DLA Phillips Fox.

[5] The plaintiff says that his arrest, incarceration and prosecution occurred because of the wrongful conduct of the first, second and third defendants, all of whom, in various ways, acted falsely to implicate him in conduct contrary to the laws of the UAE and of Australia. He says their motivation was to protect Sunland and the second defendant from prosecution, by portraying Sunland as the victim of a fraud perpetrated by the plaintiff and others.

[6] The plaintiff says that his arrest, incarceration and prosecution has caused him considerable financial loss in the form of legal expenses, lost income, and damage to his reputation and livelihood. He says that it caused him physical, mental and emotional harm.

[7] He claims damages against the first, second and third defendants for the separate torts of conspiracy to injure by unlawful means and conspiracy to injure by lawful means. He claims damages against the first, second and third defendants and Sunland ("the Sunland defendants") for the tort of malicious prosecution, for instigating or maintaining his prosecution in the UAE. He further claims damages for the tort of negligence against the third defendant and the fourth defendants (who were the remaining partners in DLA Phillips Fox). The fourth defendants are said to be vicariously liable for the third defendant's negligence.

[8] There are two strike out applications before me.

[9] The fourth defendants seek to strike out the plaintiff's claim and statement of claim insofar as it relates to them on the grounds that the duty of care which lies at the base of the alleged negligence case is not one known to law.

[10] The Sunland defendants seek to strike out the plaintiff's third statement of claim. They support the fourth defendants' application, but also raise a number of attacks on the adequacy of the manner by which the plaintiff has expressed his causes of action.

[11] It is necessary first to record in a little more detail the facts alleged by the plaintiff. For the purposes of the determination of the defendants' strike out applications, it is appropriate to assume that the plaintiff could prove the truth of the allegations at trial. The defendants do not concede their truth.

The alleged factual background

[12] From about August 2006, the plaintiff was employed in Dubai by a state-owned entity, Nakheel, which developed and sold land owned by the Dubai government. He variously held the positions of "Commercial Manager", "Director Project Control – Dubai Waterfront", "Director Commercial Operations – Dubai Waterfront" and "Director Commercial Operations and Building Projects – Dubai Waterfront".

[13] During 2007, a subsidiary of Sunland entered into a negotiation with Nakheel and separately with Angus Reed to purchase a block of land on the Dubai waterfront ("plot D17") which was owned by DWF (a company Nakheel controlled). The formal role in the negotiations of Reed and certain Australian companies he controlled is unclear.

[14] Ultimately Sunland's subsidiary purchased plot D17 from DWF for approximately $63 million[1]. As part of the transaction Sunland made a collateral payment of approximately $14 million to a subsidiary of an Australian company controlled by Reed. The purpose of the $14 million collateral payment was to remove Reed's company from the transaction so as to secure the site for Sunland alone.

[15] In about December 2008, the Financial Audit Department for the Ruler's Court in Dubai started investigating the transaction. The director of that department told the second defendant that the people involved in the transaction, including the second defendant and Sunland, were being investigated in relation to a possible bribery offence arising out of the $14 million collateral payment.

[16] On 21 January 2009, the second defendant was questioned by Dubai prosecution authorities about the transaction. He was not arrested but was required to surrender his passport. During the interview, the second defendant falsely told the authorities that –

(a) Reed had first approached him with a view to Sunland purchasing plot D17 and had tricked him into thinking that Reed owned or controlled plot D17;

(b) DWF's Australian managing director had told the second defendant that Sunland could only buy plot D17 if it reached an agreement with Reed;

(c) the plaintiff was helping DWF's managing director and Reed to push the deal onto Sunland;

(d) he had an old relationship with the plaintiff deriving from a previous purchase of a block of land known as "D5B".

[17] The true position, known to the second defendant, was that the plaintiff had no involvement in the purchase of D5B, had met the second defendant for the first time in 2007, had no involvement in Sunland's negotiations or agreements with Reed or his companies and had done nothing to push the deal onto Sunland or to help others do this.

[18] On 25 January 2009, the plaintiff, together with DWF's managing director, was arrested in Dubai and, on 26 January 2009, the plaintiff was imprisoned without charge.

[19] On 16 February 2009, the second defendant had a further interview with Dubai prosecution authorities during which he knowingly made further false statements about the plaintiff's intimate involvement in Sunland's purchase of plot D17 and during which he also suggested that the plaintiff had given false information to the authorities.

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[1] The amount paid was actually an amount in Emirati Dirhams. In this judgment and because precise amounts do not matter at present I will adopt the device of referring to approximate Australian dollar equivalents of the Emirati Dirham amounts.

[20] On 17 May 2009, the second defendant had a conversation with the Dubai Assistant Prosecutor General in which –

(a) the Assistant Prosecutor General told the second defendant that he (the Assistant Prosecutor General) must obtain a conviction in relation to the transactions concerning plot D17;

(b) the second defendant said that he was there to assist in any way possible; and

(c) the Assistant Prosecutor General told the second defendant the commencement of proceedings in Australia by Sunland would assist in the prosecution of the plaintiff in Dubai.

[21] On the following day, 18 May 2009, the second defendant emailed the first defendant and the third defendant informing them that –

(a) it was clear that the Assistant Prosecutor General was convinced that he must obtain a conviction;

(b) the Assistant Prosecutor General supported the commencement of legal action by Sunland in Australia against, relevantly, the plaintiff in relation to the $14 million collateral payment, had recommended that such legal action be commenced as soon as possible, and had said that doing so would assist the prosecution in Dubai of the plaintiff and DWF's managing director;

(c) the Assistant Prosecutor General wanted Sunland to send him any documents evidencing that action had commenced in Australia because that would assist him in the prosecution in Dubai; and

(d) he and the first defendant suggested that the third defendant should "prepare a brief report covering our strategy for starting proceedings, key player[s], timeline, and the basis for legal action" which could then be given to the Assistant Prosecutor General in Dubai.

[22] On the same day or shortly thereafter Sunland retained DLA Phillips Fox to prepare that report. The third defendant with the assistance of the second defendant prepared a memorandum dated 29 May 2009 on the letterhead of DLA Phillips Fox ("the legal report"). The third defendant prepared the legal report for the purposes of it being provided to the Dubai Assistant Prosecutor General to assist and encourage him in the prosecution of the plaintiff and others.

[23] The legal report relevantly conveyed the following:

(a) Sunland had a potential claim against the two Reed companies involved in the receipt of the $14 million collateral payment for misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth);

(b) Reed also appeared to be liable;

(c) information provided by the second defendant made it appear that the prospects of success of such an action were good;

(d) it appeared from the statement of the second defendant that the plaintiff was a person who was "knowingly concerned" in the conduct of the Reed companies and possibly the plaintiff would be liable on the same basis as Reed and his companies; and

(e) ss 82 and 87 of the *Trade Practices Act* allowed Sunland to claim a remedy from the plaintiff.

[24] The contents of the legal report were to the knowledge of the first, second and third defendants false. In particular:

(a) the second defendant knew the contents were false because he knew the true state of affairs and had been directly engaged in the dealings;

(b) the third defendant knew the contents were false because –

(i) the second defendant had not provided any statement to him to justify any of its contents;

(ii) he possessed no information that could serve as a basis for the allegation that the plaintiff could be liable to Sunland in the manner alleged or any manner;

(iii) the contemporaneous records of Sunland in relation to the transaction to purchase plot D17 did not provide any basis for the allegations contained in the legal report; and

(iv) that is an inference to be drawn from the fact that in relation to Federal Court proceedings subsequently issued in Australia, Sunland neither issued a letter of demand to the plaintiff nor made any claim against him; and

(c) the first defendant knew the contents were false for the same reasons as (b)(ii) to (iv) above and also because that is an inference to be drawn from the fact that in 2013 he had admitted during a media interview that Sunland did not have any claim against the plaintiff and that the plaintiff had nothing to do with the case as far as Sunland knew.

[25] On 31 May 2009, the first and second defendants informed the Assistant Prosecutor General in Dubai that they would support the prosecution of the plaintiff and others where necessary, gave him a copy of the legal report, and, when he asked for an Arabic translation of the legal report, offered to cause one to be made. On the following day the second defendant delivered the Arabic translation of the legal report to the offices of Dubai Public Prosecution and also sent a copy and the Arabic translation to the director of the Financial Audit Department for the Ruler's Court.

[26] The legal report was placed on the file relating to the criminal investigation and read by the prosecuting authorities, including the Assistant Prosecutor General. It was relied on by the prosecuting authorities, including the Assistant Prosecutor General –

(a) in rejecting the plaintiff's application for bail on 10 June 2009, (notwithstanding the fact that before receipt of the legal report the Assistant Prosecutor General and the relevant officeholders within the Ruler's Court had already approved bail and only formal approval by the Attorney General had remained); and

(b) in charging the plaintiff, on 16 July 2009, with criminal offences involving fraud said to arise from Sunland's dealings concerning the purchase of plot D17, Sunland's agreements with Reed's companies, and the $14 million collateral payment.

[27] On 26 October 2009, the plaintiff was released from imprisonment on bail, but was required to remain in Dubai pending trial.

[28] The plaintiff's criminal trial in Dubai proceeded over the course of 46 hearings from 15 September 2009 to 29 April 2013. On 20 May 2013, the plaintiff was acquitted of the charges against him. His acquittal was subsequently affirmed on appeal, his passport was then returned and, on 20 January 2014, he returned to Australia.

[29] The criminal proceeding in Dubai was not the only relevant legal proceeding. Sunland commenced two civil proceedings: one in Australia and one in Dubai.

[30] On 10 August 2009, the first, second and third defendants (or one or more of them) caused Sunland to commence a proceeding in the Federal Court of Australia against Reed, his two companies and DWF's Australian managing director, seeking damages pursuant to s 82 of the *Trade Practices Act* and for deceit, which was later transferred to the Supreme Court of Victoria. The plaintiff was not a defendant to the Australian proceeding and no claim was made against him in the proceeding. The Australian civil proceedings were unsuccessful.

[31] On about 14 October 2009, the first, second and third defendants (or one or more of them) caused Sunland to commence in Dubai a civil proceeding against the plaintiff as a proceeding related to the prosecution of the plaintiff in which:

(a) Sunland alleged that the second defendant was shown plot D17 by the plaintiff; and

(b) in relation to the plaintiff, Reed, DWF's Australian managing director and another person –

(i) Sunland alleged they had convinced the second defendant to pay the $14 million collateral payment;

(ii) Sunland alleged that the second defendant realised that he had been the subject of a fraud by the four of them and that they had "seized" the $14 million collateral payment;

(iii) Sunland alleged that Sunland was certain that the four of them had committed the fraud; and

(iv) Sunland sought an order that they pay Sunland compensation.

[32] The allegations concerning the plaintiff in the Dubai civil proceedings were, to the knowledge of the first, second and third defendants, false and the Dubai civil proceeding against the plaintiff baseless. Nevertheless, they caused Sunland to continue with the proceeding and even relied on its existence to obtain standing for Sunland to instruct an advocate to make submissions to the Court during the Dubai criminal proceedings that the plaintiff should be convicted quickly and the highest penalties imposed. The Dubai civil proceeding was eventually withdrawn because of an anti-suit injunction issued by the Australian Court handling the Australian civil proceeding. But despite many requests so to do from the plaintiff's solicitors, the first, second and third defendants refused to cause the Dubai prosecution authorities to be informed that Sunland had never advanced a claim against the plaintiff in Australia or of the falsity of statements made about the plaintiff in the legal report and the Dubai civil proceeding.

[33] It is necessary also to mention that the pleading makes a number of references to media releases made by Sunland to the Australian Stock Exchange. The essence of what is alleged is that Sunland released three media releases to the Australian Stock Exchange which concealed the extent to which the second defendant and Sunland were under investigation in Dubai and which falsely implicated the plaintiff in relation to activities in Dubai. The plaintiff alleges that the first defendant approved those media releases knowing them to be false, and that the first and third defendants took no steps to correct those false statements. That falsehoods were advanced publicly in the manner alleged is said to be a matter which supports an inference as to the existence of a conspiracy and intention to harm the plaintiff.

[34] The plaintiff says the pecuniary losses he suffered in consequence of what happened to him in Dubai were as follows:

(a) He had to incur legal fees and other losses of not less than $750,000 associated with his imprisonment, the need to secure bail and the need to conduct the defence of the Dubai criminal and civil proceedings.

(b) He had to sell personal assets at an under value (and to incur associated costs) in order to obtain cash to meet those legal fees and other expenses, which loss was not less than $268,000.

(c) He has suffered past loss of earnings of not less than $3.4 million because –

(i) he lost his well-paid job in Dubai and was unable to work for the period from his first imprisonment on 26 January 2009 to 20 January 2014 when he returned to Australia; and

(ii) the combination of being out of work for so long and the damage to his reputation caused by the notoriety of what happened has meant that he has been unable to obtain employment since his return.

(d) He has suffered a loss of future earning capacity of not less than $6.2 million.

[35] The plaintiff also seeks to claim general damages for loss of liberty; physical, mental and emotional harm resulting from his imprisonment; mental distress; loss of reputation and livelihood and the loss or interruption of relationships with family and friends.

Introductory observations as to the strike out applications

[36] If the plaintiff made good at trial the allegations summarised in the previous paragraphs of these reasons, he would have established that he had been the victim of thoroughly discreditable conduct by the natural persons who are the first, second and third defendants.

[37] The present questions are whether the plaintiff has, in his attempts to obtain redress for what he contends was the harm caused by that conduct, pleaded causes of action in the manner which the law requires and, in relation to the negligence case advanced against the third defendant and the fourth defendants, whether he has pleaded a cause of action known to the law.

[38] All of the applicant defendants accept, as they must, that the power to strike out is to be used sparingly and only in clear cases: *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 129 to 130. The power cannot be exercised "once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it": *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J.

[39] However, they submit, and I agree, that the Court will not shrink from striking out a pleading which is defective because it does not disclose a reasonable cause of action, has a tendency to prejudice or delay a fair trial, contains allegations which are unnecessary[2], scandalous, vexatious or embarrassing[3], or which is otherwise an abuse of the processes of the Court[4].

[40] In dealing with the application by the fourth defendants, I am also conscious of the fact that in *Agar v Hyde* (2000) 201 CLR 552 at [64], Gaudron, McHugh, Gummow and Hayne JJ stated (footnotes omitted):

> It may be difficult for a court to say from the pleadings that a claim by a plaintiff that the defendant is liable in negligence is bound to fail because it is not arguable that the defendant owed the plaintiff a duty of care. Such cases do arise. In *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*, this Court held that the statement of claim did not disclose a cause of action in negligence against the defendant auditors. In

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2 *A v Ipec Australia Ltd* [1973] VR 39 at 43 per Menhennitt J; *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd* [2014] QSC 205 at [27] to [30] per Jackson J.

3 *Robert Bax & Associates v Cavenham Pty Ltd* [2011] QCA 53 at [16] per White JA (with whom McMurdo P and Fraser JA agreed).

4 See, generally, *Radisich v McDonald* (2010) 198 IR 244 at 251; [2010] FCA 762 at [20] and *AED Oil Ltd v Back* [2009] VSC 158 at [7] to [9] per Judd J.

> M*utual Life & Citizens' Assurance Co Ltd v Evatt*, the Privy Council held that the declaration in that case was demurrable because it did not describe a relationship which imposed upon the defendants a duty of care in giving advice to the plaintiff. However, as Barwick CJ observed in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*:
>
> > "[In] fact pleading as it was introduced in the judicature system, there is no necessity to assert or identify a legal category of action or suit which the facts asserted may illustrate, involve or demonstrate and on which the particular relief claimed is based or to which it is relevant."
>
> The result is that frequently the conventional form of pleading in an action of negligence will not reveal the alleged duty with sufficient clarity for a court considering an application for summary termination of the proceeding to be sure that all of the possible nuances of the plaintiff's case are revealed by the pleading. Further, and no less importantly, any finding about duty of care will often depend upon the evidence which is given at trial. Questions of reliance or knowledge of risk are two obvious examples of the kinds of question in which the evidence given at trial may take on considerable importance in determining whether a defendant owed the plaintiff a duty of care.

[41] I note also that in *New South Wales v Spearpoint* [2009] NSWCA 233, Allsop ACJ (with whom Beazley JA agreed) observed (at [26]) that:

> It is often, though not always, inappropriate to dismiss summarily a claim [alleging a novel duty of care] on the pleadings, at least [where the parties] stand at an early stage in litigation.

[42] I will proceed to consider the applications against the background of these statements of legal principle.

The application of the fourth defendants

Introduction

[43] The plaintiff's sole claim against the fourth defendants is for damages for negligence. They seek an order that the proceeding against them should be struck out on the basis that the alleged duty of care is not one known to law. Alternatively, they seek the same relief on the basis of what they contend are the many manifest inadequacies in the plaintiff's statement of claim. The arguments advanced by the fourth defendants are just as applicable to the negligence case advanced against the third defendant and were relied upon by the Sunland defendants.

The pleaded duty of care

[44] The plaintiff's case about the solicitors' retainer is that on or shortly after 18 May 2009, Sunland engaged DLA Phillips Fox to prepare a brief report covering its strategy for starting proceedings, key players, timeline, and the basis for legal action in Australia which could then be given to the Assistant Prosecutor General in Dubai.

[45] The relevant parts of the statement of claim which articulated the duty of care were then as follows (emphasis added, particulars omitted):

> 86. In the alternative, during the period when [the legal report] was being drafted, from on or after 18 May 2009 to on or before 31 May 2009, [the third defendant] knew, or ought to have known, that:
>
> (a) the plaintiff had been imprisoned in Dubai without charge and remanded in prison;
>
> (b) the plaintiff had been arrested and was under investigation for his alleged participation in a fraud committed against Sunland in connection with Sunland's purchase of Plot D17 and [the $14 million collateral payment] made by Sunland;
>
> (c) the Assistant Prosecutor General was under, or felt under, pressure to obtain a conviction in relation to the transactions concerning Plot D17;
>
> (d) the Assistant Prosecutor General believed that the institution of proceedings in Australia by Sunland would assist the prosecution of the plaintiff … in Dubai;

(e) the Assistant Prosecutor General wanted Sunland to send him any documents evidencing that action had commenced in Australia because that would, or he believed that would, assist him in the prosecution of the plaintiff … in Dubai;

(f) Sunland had instructed [the third defendant] to prepare a brief report covering its strategy for starting proceedings in Australia, the key players, timeline and the basis for legal action that could be given to the Assistant Prosecutor General in Dubai;

(g) Sunland intended to provide the document to the Assistant Prosecutor General in Dubai;

(h) Sunland intended that the Assistant Prosecutor General in Dubai would rely upon the document as being an accurate report of proceedings that Sunland intended to commence in Australia and a considered legal opinion by a reputable Australian law firm as to the liability of persons identified therein;

(i) the prosecution authorities in Dubai, including the Assistant Prosecutor General, were likely to rely upon a document drafted by [the third defendant], as a lawyer and partner of a reputable Australian law firm, which contained his legal opinion concerning the liability of the plaintiff in connection with the dealings of Sunland concerning Plot D17;

(j) if such a document implicated the plaintiff, it would be likely that the prosecution authorities, including the Assistant Prosecutor General, would rely upon it in determining to charge the plaintiff with criminal offences or, alternatively, to rely upon it in determining to continue criminal proceedings against him.

87. By reason of:

(a) the matters pleaded in subparagraphs (a) to (k) of paragraph 86 above;

(b) the plaintiff's lack of knowledge of the matters pleaded in subparagraphs (c) to (i) of paragraph 86 above,

the plaintiff was:

(c) unable to take steps to prevent the document from being given to prosecution authorities in Dubai or to dissuade them from relying upon it;

(d) accordingly, unable to protect himself from economic loss arising out of a failure on the part of [the fourth defendants] and [the third defendant] to take reasonable care in drafting the document insofar as it contained an opinion as to the liability, or possible liability, of the plaintiff to Sunland in respect of [the $14 million collateral payment].

88. In the premises of paragraphs 86 and 87 above, **in drafting [the legal report], [the fourth defendants] and [the third defendant] owed the plaintiff a duty to take reasonable care to avoid causing the plaintiff to suffer loss resulting from the careless expression of an opinion, to be conveyed to the prosecution authorities in Dubai, as to his liability, or possible liability, to Sunland** under the *Trade Practices Act 1974* (Cth) and in deceit in respect of [the $14 million collateral payment].

[46] The loss in respect of which the solicitors ought to have taken reasonable care to avoid was not articulated with any precision but was evidently loss arising from the criminal prosecution which might eventuate from a careless expression of opinion in the legal report.

[47] The duty so articulated was said to have been breached by the third defendant and the fourth defendants when –

(a) "in the absence of any facts set out in [the legal report] to support such statements", the third defendant drafted the legal report so that it contained the statements he is said to have known to be false; and

(b) "in the absence of any facts or law to justify it", the third defendant expressed an opinion in the legal report that the plaintiff may be liable in damages to Sunland by reason of his involvement in the purchase of plot D17.

Analysis

[48] The alleged retainer was that the solicitors would prepare for their client a report about potential legal proceedings by the client against a third party, so that the client could use that report in what the client conceived were its own interests.

[49] The alleged duty of care was effectively a duty to take reasonable care in one of the key tasks to be undertaken in the performance of that retainer, namely in the manner of expression of the report. Undoubtedly the solicitors owed their client a duty of care in both contract and tort. But in this case it is suggested that the solicitors also owed a duty to the third party who was the client's potential adversary in the legal proceedings which would be the subject of the contemplated report.

[50] In my view, the suggested duty runs up against the stumbling block of the following statement by Brennan CJ in *Hill v Van Erp* (1997) 188 CLR 159 at 167[5] (footnote omitted):

> Generally speaking, however, a solicitor's duty is owed solely to the client subject to the rules and standards of the profession. That is because the solicitor's duty is to exercise professional knowledge and skill in the lawful protection and advancement of the client's interests in the transaction in which the solicitor is retained and that duty cannot be tempered by the existence of a duty to any third person whose interests in the transaction are not coincident with the interests of the client.

[51] It may be acknowledged that there are exceptions to the general rule to which his Honour referred. Thus:

(a) There are cases where although there is no formal solicitor/client relationship, a solicitor's conduct demonstrates an assumption of responsibility, with known reliance by the plaintiff, such that a duty of care may arise by reason of an implied professional retainer agreement: see the cases cited in *Carey v Freehills* (2013) 303 ALR 445 at 525; [2013] FCA 954 at [311] per Kenny J.

(b) There are cases in which a duty of care owed by a professional to someone other than their client has been held to exist on the basis of normal principles relating to negligent misstatement, which include the requirements of assumption of responsibility and reasonable reliance: see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

(c) There are also cases in which a duty of care has also been recognised as being owed by a solicitor to someone other than their client (e.g. beneficiaries in a will or the client's trustee in bankruptcy), but in those cases there is a coincidence of interest between the client and third party: see *Hill v Van Erp* and *Blackwell v Barroile Pty Ltd* (1994) 51 FCR 347.

[52] However, this case does not fit into any of those exceptions. The plaintiff concedes that he cannot point to any case which directly supports the existence of a duty of care in analogous circumstances.

[53] In assessing whether a duty of care arises in a novel circumstance or category, authority suggests I should undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by reference to the salient features or factors affecting

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[5] To similar effect, see also Dawson J at 187 and Gaudron J at 196 to 197. The passage quoted from the judgment of Brennan CJ has been quoted with approval many times: see, for example, *The Hancock Family Memorial Foundation Ltd v Fieldhouse [No 5]* [2013] WASC 121 at [98] per Le Miere J; *Carey v Freehills* (2013) 303 ALR 445 at 525; [2013] FCA 954 at [310] per Kenny J; *Hardie Finance Corporation Pty Ltd v Ahern [No 3]* [2010] WASC 403 at [448] per Pritchard J; *David v David* [2007] NSWSC 855 at [164] per Patten AJ; *Chapman v Luminis Pty Ltd (No 5)* (2001) 123 FCR 62 at 148; [2001] FCA 1106 at [284] per von Doussa J.

the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury: see *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at 675 to 676; [2009] NSWCA 258 at [100] to [102] per Allsop P, recently cited with approval in *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72 at [98] to [100] per Beazley P (with whom Barrett and Gleeson JJA agreed) and *Kinsella v Gold Coast City Council (No 3)* [2016] QSC 14 at [31] to [32] per Burns J.

[54] In *Caltex Refineries (Qld) Pty Ltd v Stavar*, Allsop P set out (at 676 [103]) a non-exhaustive list of 17 considerations relevant to the evaluative task of imputation of a duty of care and the identification of its scope and content. His Honour acknowledged (at 676 [104]) that there was no suggestion in the cases that it was compulsory in any given case to examine all of those features. Amongst the considerations listed were:

(a) the foreseeability of harm;

(b) the nature of the harm alleged;

(c) the degree and nature of control able to be exercised by the defendant to avoid harm;

(d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;

(e) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;

(f) the nature of the activity undertaken by the defendant;

(g) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;

(h) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;

(i) the existence of conflicting duties arising from other principles of law or statute; and

(j) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

[55] The plaintiff's argument focused on the considerations identified in (a) and (d) and it may be accepted that his pleading adequately deals with those matters and that they tend to point towards the existence of a duty. It is arguable that the same may be said for the considerations identified in (c), (d), (e) and (g). But, as the High Court observed in *Sullivan v Moody* "[d]ifferent classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care"[6]. In this case it seems to me that the relevant problem is an evaluation of the significance of the considerations in (i) and (j) as informed by (b), (f) and (h) and that it is those matters which should become the focus of my attention to arrive at a conclusion as a matter of principle.

[56] The impugned activities were activities allegedly undertaken by solicitors for a client. They were the activities which the solicitors were retained by their client to do, namely to prepare a report about potential legal proceedings by the client against a third party, so that the client could use that report in what the client conceived were its own interests (by giving the legal report to someone else). The action which, *ex hypothesi*, could have been taken to avoid the harm was to perform the retainer bearing in mind not just the interests of the client but also the interests of the third party. And the nature of the harm alleged is harm alleged to be

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6 *Sullivan v Moody* (2001) 207 CLR 562 at 578 [50].

directly consequential upon the performance of the very thing which the solicitors were retained to do.

[57] To contend that the solicitors owed the third party a duty of care is to seek to do the very thing which Brennan CJ said could not be done, namely to temper the duty undoubtedly owed to the client by the existence of a duty to a third person whose interests in the transaction are not coincident with the interests of the client. I would apply his Honour's observations to conclude that a duty of care owed to the client in connection with the production of a report concerning potential legal proceedings against a third party cannot be tempered by the existence of a duty owed to the client's potential adversary in those legal proceedings.

[58] The plaintiff contended that there was no inconsistency issue because the content of the duty of care owed to him by the solicitors could be formulated in such a way as to be not inconsistent with the duty of care which they owed their client. The plaintiff contended that the duty in each case was to take care to be accurate in stating facts and opinions. I do not think that that proposition is an adequate answer to the problems I have identified. As Brennan J noted in *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 (at 487) "… a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered and in reference to the plaintiff or a class of which the plaintiff is a member". In this case the inconsistency issue was created by who the plaintiff was and the interests the plaintiff had in comparison with those of the solicitors' client rather than solely by the content of the duty.

[59] My conclusion is consistent with the reasoning in *Al-Kandari v J R Brown & Co* [1988] QB 665 (a case cited with approval by Dawson J in *Hill v Van Erp* at 187) that a solicitor acting for a party who is engaged in hostile litigation owes a duty to the client and to the Court, but the solicitor does not normally owe any duty to the client's opponent. I do not see that any relevant distinction is to be drawn between the position of an actual opponent, litigation having commenced, and that of a potential opponent, litigation being only contemplated.

[60] I also think that recognition of the alleged duty would be inconsistent with the desirability of coherence with the law governing the duty of undivided loyalty which solicitors owe to their clients. I observe:

(a) In *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, Richardson J observed (in a passage oft-cited with approval[7]) as follows (at 90):

> A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting. …
>
> And there will be some circumstances in which it is impossible, notwithstanding such disclosure for any solicitor to act fairly and adequately for both.
>
> But the acceptance of multiple engagements is not necessarily fatal. There may be an identity of interests or the separate clients may have unrelated interests. Such cases seem straightforward so long as it is apparent that there is no actual conflict between duties owed in each relationship.

(b) It would be to introduce an undesirable incoherence to the law to conclude that a solicitor owed a duty of undivided loyalty to the client, but at the same time was required to discharge a duty of care to a third party whose interests[8] were opposed to

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[7] See, for example, *Maguire v Makaronis* (1997) 188 CLR 449 at 465; *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at 47; [1999] NSWCA 408 at [203].

[8] in not being said to be liable to potential legal proceedings at the instance of the client.

the client's interests[9] because the question of the liability of the third party to the client is the subject matter of the solicitors retainer (and because it was foreseeable that the way in which the client intended to use the report might harm the third party). I do not accept the plaintiff's contention that his interests and those of Sunland are relevantly to be regarded as the same, namely that the prosecutor be told the truth. That seems to me to be too limited and unrealistic a consideration of what were the interests of the plaintiff and of Sunland.

(c) This consideration also supports the observations by Brennan CJ in *Hill v Van Erp* which I have followed.

[61] I note also that the proposition for which the plaintiff contends would also bring about a significant expansion of the tort of negligence into spheres of conduct that are otherwise regulated, particularly by professional ethical standards and, as the fourth defendants put it, the intentional torts which are specifically directed towards providing redress for abuse of legal processes (such as the torts of collateral abuse of process and of malicious prosecution). That a proposed duty of care might supplement or subvert the existence of other principles of law which have already struck a particular balance between rights and obligations, duties and freedoms has long been recognised as a consideration which sounds adversely to the recognition of the duty: see *Elguzouli-Daf v Commissioner of Police of the Metropolis; McBrearty v Ministry of Defence* [1995] QB 335 at 352, where Morritt LJ cited the speech of Lord Templeman in *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295 at 316; *Hill v Van Erp* at 180 to 181 per Dawson J and *Sullivan v Moody* at [42] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

[62] It does not follow from the foregoing that there can be no remedy for a client's adversary or potential adversary if a solicitor has engaged in misconduct in carrying out a retainer. It is just that the safeguards against impropriety may have to be found in the rules and remedies relevant to the regulation of the professional conduct of solicitors, or, in appropriate cases (and no such case is advanced against the fourth defendants), the intentional torts. In *Al-Kandari v J R Brown & Co* [1988] QB 665, Lord Donaldson of Lymington MR (with whom Dillon LJ agreed) observed (at 672):

> A solicitor acting for a party who is engaged in 'hostile' litigation owes a duty to his client and to the court, but he does not normally owe any duty to his client's opponent: *Business Computers International Ltd v Registrar of Companies* [1987] 3 WLR 1134. This is not to say that, if the solicitor is guilty of professional misconduct and someone other than his client is damnified thereby, that person is without a remedy, for the court exercises a supervisory jurisdiction over solicitors as officers of the court and, in an appropriate case, will order the solicitor to pay compensation: *Myers v Elman* [1940] AC 282. …

[63] Because the plaintiff's claim against the fourth defendants is explicitly only a claim for damages for negligence, it is unnecessary to consider (and I have heard no argument concerning) whether there is any scope for the plaintiff to contend that the Court's inherent jurisdiction to order legal practitioners who have misconducted themselves to pay compensation to a third party "damnified thereby" –

(a) is enlivened on the facts pleaded in the present case because of the nature of the impugned conduct of the third defendant;

(b) is conduct for which the fourth defendants could be regarded as vicariously liable (in the same way as the solicitor was for the conduct of the managing clerk in *Myers v Elman*); and

(c) might extend (or be extended) beyond the circumstances in which it is usually exercised (namely in the making of costs orders against legal practitioners personally),

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9 in obtaining a report about potential legal proceedings against the third party.

to encompass an order for payment of compensation for loss of the nature which the plaintiff says he incurred because of the third defendant's conduct,

and I express no view on those matters. The plaintiff does advance a case based in the intentional torts against the Sunland defendants and I will consider aspects of that case later in this judgment.

[64] In the circumstances of this case, I am persuaded that it is not arguable that the fourth defendants owed the plaintiff the alleged duty of care in tort. I do not think that the matters which I have found to be insurmountable obstacles to the existence of the alleged duty of care in tort are matters which could be overcome by evidence or amendment.

Conclusion

[65] As the only claim against the fourth defendants is based on the alleged duty of care in tort, and I have concluded the law cannot recognise such a duty, the proceeding against the fourth defendants should be struck out. It is unnecessary to consider the alleged pleading inadequacies on which the fourth defendants rely in support of the strike out application.

The application of the Sunland defendants

Introduction

[66] The claim for damages for the tort of negligence against the third defendant must be disposed of in the same way as was the claim against the fourth defendants. It is unnecessary to consider the alleged pleading inadequacies in relation to that case on which the Sunland defendants rely.

[67] It then remains to consider the various complaints made in relation to the manner by which the plaintiff has pleaded his damages claims –

(a) against the first, second and third defendants for the separate torts of conspiracy to injure by unlawful means and conspiracy to injure by lawful means; and

(b) against the Sunland defendants for the tort of malicious prosecution, for "instigating" or "maintaining" his prosecution in the UAE.

The conspiracy to injure causes of action

The elements of the causes of action

[68] There are two torts of conspiracy to injure – the first is a conspiracy to injure by lawful means and the second is a conspiracy to injure by unlawful means.

[69] The elements of the tort of conspiracy to injure by lawful means are[10]:

(a) there was a combination or agreement between two or more persons;

(b) the sole or dominant purpose of the combination or agreement was to injure the plaintiff;

(c) the combination or agreement was carried into effect by the defendants' conduct;

(d) the defendants' conduct in carrying the combination or agreement into effect caused damage to the plaintiff.

[70] The elements of the tort of conspiracy to injure by unlawful means are[11]:

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10 *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290 at [60] to [61].

11 *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 at 102; [1999] FCA 899 at [421] per R D Nicholson J; *Weston v Publishing and Broadcasting Ltd* [2011] NSWSC 433 at [612] per Ward J.

(a) there was a combination or agreement between two or more persons to engage in conduct amounting to unlawful means;

(b) a purpose of that combination or agreement was to injure the plaintiff;

(c) the combination or agreement was carried into effect by the commission of the agreed unlawful acts; and

(d) those unlawful acts caused damage to the plaintiff.

[71] It can be seen that the two torts have in common[12] the need to prove the conspiracy; that the conspiracy involved an intention to injure; that the conspiracy was carried into effect; and that so doing caused damage to the plaintiff. And it may also be observed in relation to both torts, that in a case based on a clandestine arrangement or arrangements between conspirators, a plaintiff, who can be expected to be unable to plead the terms of an express agreement in the usual way, must at the least be able to plead and particularise the overt acts it intends to rely on to justify the inference that the agreement on which it relies was in fact made as it alleges[13].

[72] There are three key distinctions between the two torts.

[73] The first lies in the prominence of the required purpose of injuring the plaintiff. Both torts require the plaintiff to prove that a purpose of the conspiracy was to injure the plaintiff. For a lawful means conspiracy, however, the plaintiff must prove that the purpose of injuring the plaintiff was the sole or predominant purpose of the conspiracy. That is not required for an unlawful means conspiracy where it will suffice for a plaintiff to prove that causing injury to the plaintiff was a purpose of the conspiracy.

[74] The second lies in the nature of the means agreed to be used to injure the plaintiff. For an unlawful means conspiracy, the plaintiff must prove that the combination or agreement was to engage in conduct which amounted to unlawful means[14]. In other words the unlawful means aspect must exist at the time the combination or agreement was made. That is not required for a lawful means conspiracy.

[75] The third lies in the nature of the means in fact used to carry the conspiracy into effect and cause injury to the plaintiff. For an unlawful means conspiracy, the plaintiff must prove that the conspiracy was carried into effect by commission of the agreed unlawful acts and those agreed unlawful acts caused damage to the plaintiff[15]. That is not required for a lawful means conspiracy where the plaintiff does not have to show that it was the unlawful part of the conspiracy that caused loss to the plaintiff.

Complaints concerning the form of the pleading

[76] The structure of the pleading is to plead first the factual background which alleges the identity and function of the various actors, what they did, what happened to the plaintiff, and what loss the plaintiff suffered. Then at [80] to [85] the plaintiff pleads the material facts on which he relies to contend that he has advanced an arguable case in relation to the tort of conspiracy to injure. In many respects the pleadings cross-referred back to facts earlier pleaded as the basis from which particular matters ought to be inferred.

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12 *Weston v Publishing and Broadcasting Ltd* [2011] NSWSC 433 at [634]

13 Cf *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* (1998) 157 ALR 135 at 140 per Drummond J. See also *Weston v Publishing and Broadcasting Ltd* [2011] NSWSC 433 at [639] to [640].

14 *Williams v Hursey* (1959) 103 CLR 30 at 78; *Szanto v Bainton* [2011] NSWSC 985 at [180].

15 *Vickery v Taylor* (1910) 11 SR (NSW) 119 at 130 to 131; *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169 at [7]; *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) at [186] and annex I at [3].

[77] It will suffice to quote the following:

> 80. In about early February 2009, or alternatively in or about mid to late May 2009, for the purpose of protecting the reputation of Sunland and protecting Sunland and [the second defendant] from being charged with criminal offences in Dubai, [the first, second and third defendants] conspired to allege and maintain, to the Dubai prosecution authorities and publicly, that Sunland was the victim of a fraud in respect of [the $14 million collateral payment] and that the plaintiff (with others) was a participant in the fraud.
>
> Particulars
>
> The conspiracy is to be inferred from the acts pleaded in paragraphs …, or, alternatively, paragraphs … above.
>
> 81. In furtherance of the conspiracy -
>
> (a) [the first defendant] undertook the acts pleaded in paragraph … and, or alternatively, paragraphs … above;
>
> (b) [the second defendant] undertook the acts pleaded in paragraph … and, or alternatively, paragraphs … above;
>
> (c) [the third defendant] undertook the acts pleaded in paragraph … and, or alternatively, paragraphs … above;
>
> 82. [The first, second and third defendants] so conspired with the dominant intention or, alternatively, with an intention, to cause the plaintiff harm by securing, encouraging and, or alternatively, supporting the criminal prosecution of him in Dubai.
>
> Particulars
>
> The conspiracy is to be inferred from the following facts, matters and circumstances:
>
> (a) In the case of [the first defendant] the facts, matters and circumstances pleaded in paragraphs … and, or alternatively, paragraphs … above.
>
> (b) In the case of [the second defendant] the facts, matters and circumstances pleaded in paragraphs … and, or alternatively, paragraphs … above.
>
> (a) In the case of [the third defendant] the facts, matters and circumstances pleaded in paragraphs … and, or alternatively, paragraphs … above.
>
> 83. In so conspiring, [the first, second and third defendants] adopted means which were unlawful in that:
>
> (a) The provision of false information to judicial or administrative authorities, in bad faith, that a person committed an act subject to criminal or administrative sanction is, and was at all material times, which is an offence against the law of the United Arab Emirates. …
>
> (b) The provision of false material evidence, contrary to reality and in bad faith, that a crime has been committed by a person, which is, and was at all material times, an offence against the law of the United Arab Emirates. …
>
> (c) The conduct of [the second defendant] in paragraphs [in which he gave knowingly false information to Dubai prosecution authorities] above constituted an offence against the law of the United Arab Emirates;
>
> (d) Alternatively, such conduct comprised lies or misstatements and was improper;
>
> (e) The conduct of [the first, second and third defendants] pleaded in paragraphs [in which the second and third defendants prepared the legal report and gave it to prosecution authorities] above constituted an offence against the law of the United Arab Emirates;
>
> (f) Alternatively, such conduct comprised lies or misstatements and was improper;
>
> (g) The conduct of [the first and third defendants] pleaded in paragraphs ….above, in causing or permitting Sunland to publish false statements and provide false information to the Australian Stock Exchange, was improper;
>
> (h) The conduct of [the first, second and third defendants] pleaded in paragraphs …, in causing or permitting Sunland to commence and maintain the civil proceeding against the plaintiff in Dubai, based on lies and misstatements, was improper[;]

(i) The conduct of [the first, second and third defendants] pleaded in paragraph … above, in refusing to correct the false statements and allegations that had been made or to cause Sunland to do so, was improper.

84. But for the conspiracy:

(a) [the second defendant] would have told the prosecuting authorities in Dubai the truth and corrected the false statements he had made;

(b) there would have been no basis for further investigation of the plaintiff;

(c) the plaintiff would have been released from prison in or about February 2009 or, alternatively, in or about June 2009;

(d) the plaintiff would not have been charged with criminal offences;

(e) the plaintiff's employment would have resumed upon his release from prison and he would have been paid the income and entitlements for the period of the suspension of his employment.

85. As a consequence of the conspiracy, and the acts and omissions carried out in furtherance of it, the plaintiff suffered loss and damage.

[78] It is evident from the plaintiff's pleading and his submissions that the plaintiff seeks to advance a case in respect of conspiracy to injure by lawful means and conspiracy to injure by unlawful means in the alternative. But the problem is that he does so in a way which does not clearly distinguish between the two torts and this failure creates many difficulties, not least of which is for the defendants in understanding which facts are relied upon in support of which cause of action.

[79] I will deal first[16] with the complaints advanced by the first, second and third defendants against the pleading insofar as it is said to advance an arguable cause of action to recover damages in respect of the tort of conspiracy to injure by unlawful means.

[80] The first complaint as to the manner of pleading the unlawful means conspiracy is that the plaintiff fails to plead the complete elements of an unlawful means conspiracy. In particular, that he fails to plead that the first, second and third defendants conspired to employ unlawful means. As to this:

(a) Unsurprisingly, given the wording of the pleading, the complaint was founded on the proposition that the intention of the pleading was that the matters listed at [83] were the unlawful means, but there was no allegation that the nature of the agreement pleaded at [80] was a conspiracy to engage in those unlawful means.

(b) If that had been the way in which the pleading should be read, I would have accepted that complaint.

(c) However, the plaintiff met that complaint by contending[17] that the conduct which amounted to unlawful means was the conduct the pleaded at [80], namely the conduct of "[alleging and maintaining] to the Dubai prosecution authorities and publicly, that Sunland was the victim of a fraud in respect of [the $14 million collateral payment] and that the plaintiff (with others) was a participant in the fraud".

(d) I agree with the observations made by Ryan J in *Elliott v Seymour* [1999] FCA 976 at [97], that what is required is that "the statement of claim specifies with sufficient particularity the time and making of each agreement between the alleged conspirators, **the unlawful means agreed to be employed and the facts or circumstances which made them unlawful**" (emphasis added).

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16 This is to deal with the arguments out of the order in which they were presented in writing and orally, but better suits the analytical framework of this judgment.

17 Plaintiff's written submissions at [28] to [32].

(e) If the agreed conduct amounting to unlawful means is that which the plaintiff contends at [80], then what is missing from the pleading is the precise articulation of the facts or circumstances relied on to contend that the conduct of "[alleging and maintaining] to the Dubai prosecution authorities and publicly, that Sunland was the victim of a fraud in respect of [the $14 million collateral payment] and that the plaintiff (with others) was a participant in the fraud" was unlawful. Paragraph 83 does not do that, because it is in terms directed to how the conspiracy was implemented and why aspects of that implementation were unlawful, when the only aspect of unlawfulness which is relevant is why the agreed unlawful means pleaded at [80] was unlawful. Part of what is pleaded at [83] may be relevant to the requisite proposition of unlawfulness, but not all of it.

(f) In my view [80] and [83] as presently formulated do not satisfactorily comply with the observations by Ryan J in *Elliott v Seymour* to which I have referred. The first, second and third defendants are entitled to have the plaintiff pinned down to what he has clarified is the agreed unlawful means and why that conduct (and not other conduct) is said to have been unlawful. Paragraphs 80 and 83 must be recast.

(g) For completeness, I note that in oral submissions Senior Counsel for the plaintiff seemed at times to depart from the proposition in the plaintiff's written submissions recorded at [80](c) above. He seemed to suggest[18] that the matters listed at [83] of the pleading might be the unlawful means agreed to be employed at the time the conspiracy was entered into. But that is not what the words say. And if it is the intent then, as I have mentioned at [80](b) above, I would have accepted the plaintiff's criticism that there is no clear pleading that there was an agreement either in or about early February 2009 or about mid to late May 2009 to engage in that conduct. The result would still be that paragraphs 80 and 83 would have to be recast.

[81] The second complaint as to the manner of pleading the unlawful means conspiracy is that the plaintiff does not plead that the loss and damage caused by the unlawful means formulations of the conspiracy was caused by the alleged unlawful acts, but apparently relies on a mixture of both lawful and unlawful conduct. As to this:

(a) This complaint was informed by an understandable misreading of what the plaintiff intended to be understood as the agreed unlawful means. I have referred to that and how it should be remedied at [80](a) to [80](f) above.

(b) If the starting point is that the agreed unlawful means was the conduct specified at pleading [80], and if the pleading is amended to specify the facts or circumstances which made that agreed conduct unlawful, then what is required for a proper pleading is a specific identification of the material facts relied on to show the necessary causal relationship between the agreed unlawful conduct and the loss and damage claimed[19].

(c) And, as I have already mentioned, the necessary causal relationship is the conspiracy was carried into effect by commission of the agreed unlawful acts and those agreed unlawful acts caused damage to the plaintiff: see at [75] above. If the agreed unlawful means is alleging and maintaining to prosecution authorities and publicly that Sunland was the victim of a fraud and that the plaintiff was a participant in that fraud (as set out at pleading [80]) then what is required is a pleading of the material facts which show how the commission of those agreed unlawful acts caused damage to the

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18 Transcript 1-84 and 1-85.

19 *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* (1998) 157 ALR 135 at 141 per Drummond J, citing with approval the proposition, now regarded as trite, expressed by French J (as his Honour then was) in *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215 at 222.

plaintiff. Pleading that other matters were causally significant is unlikely to be material to the requisite plea (and, depending on the extent of their causal significance, might even be inconsistent with it).

(d) In this case the required causal nexus is a little complicated because the plaintiff contends for the conspiracy having been struck at alternative times. That will mean that the required pleading of material facts establishing the necessary causal nexus will have to be specified with clarity for each of those alternative hypotheses. It is also complicated by the fact that the reference to "and publicly" at pleading [80] and the various cross-references at [81] to [83] presently operate to attribute causal significance to public statements made in Australia. How that conduct would be relevant to a causation hypothesis which seems fundamentally to turn on decisions made by Dubai prosecution authorities is not at all clear. Unless it is made clear then that aspect of the pleading may be embarrassing and liable to be struck out. (A similar problem might arise if the plaintiff's case truly is that to which I have referred at [80](g) above.)

(e) The present form of the pleading deals with causation by some combination of [81], [84] and [85]. I do not think that is adequate. The pleading at [81] for example calls up a number of parts of the story of what occurred which, at first blush, do not seem to be relevant to the requisite pleading hypothesis because they refer to conduct which did not involve alleging that the plaintiff was a participant in fraud and, indeed, they refer to conduct not pleaded anywhere to be unlawful means. If such events can be demonstrated to be part of the requisite causation hypothesis, then that is not apparent on the face of the pleading. And the introductory words of [85] are not confined in any way, and they must be.

(f) The defendants are entitled to have the plaintiff pinned down to a causation hypothesis which is not characterised by imprecision and ambiguity and which, at least arguably, establishes the requisite causal connection between the implementation of the conspiracy and the suffering of loss. If there is more than one causation hypothesis, then the statement just made must apply to each one. The pleading device of merely cross-referring back to events alleged to have happened is unlikely to be a satisfactory way of addressing a proper plea of causation. There must be a direct and unambiguous identification of the material facts relied on to establish the causal link which the law requires. And it must be something which makes narrative sense. The defendants should not be required to cherry pick through the pleading to work out what the case is that they have to meet in this regard.

[82] The final complaint as to the manner of pleading the unlawful means conspiracy is that the references at pleading [83](d), (f) to (i) that conduct was unlawful because it was "improper" are either entirely superfluous (and so should be struck out) or, if they are intended to add something to the pleaded cause of action, are wrong as a matter of law and should be struck out. As to this:

(a) The thrust of the first, second and third defendants' argument was that given the underlying rationale for the two species of tort, it would be incoherent to permit a plaintiff to maintain an unlawful means conspiracy (where it is not necessary to allege the predominant purpose of causing harm) by relying on acts which are not pleaded to be "illegal" or a "criminal or civil wrong" in themselves, but are "improper" perhaps in the sense of being morally blameworthy. It is incoherent because in such a case the very thing which is said to make the tort actionable in the absence of a predominant purpose to harm – namely, the unlawfulness of the conduct – is missing.

(b) The first, second and third defendants acknowledged (and the plaintiff relied upon) the decision of the Full Court of the Federal Court in *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169 at [16] to [19] and [29] (by majority), that breaches of an undertaking given to the ACCC and false statements made to the ACCC could arguably constitute "unlawful means" on the basis they were "improper".

(c) It is not at all clear to me whether the references to the agreed unlawful means being unlawful because they were "improper" will survive any amendment to the pleading which would comply with my reasoning at [80] above. However, in case they do, I should indicate the view I have taken in relation to the substance of the complaint.

(d) In light of the principles to which I have referred at [38] above, the persuasive weight of the decision of *Dresna* and the facts that –

(i) the argument affected at most only a subset of the unlawful means case against the defendants; and

(ii) the argument would not affect any part of the malicious prosecution case,

I would not have been persuaded that it was appropriate to preclude the plaintiffs from their pleaded contention by striking out the pleaded reliance on conduct which cannot be pleaded to be illegal or amounting to a criminal or civil wrong, but which they characterise as improper. The proper assessment of the pleaded conduct against the standard of "unlawful means" would have seemed to me to be something best resolved at a trial.

[83] I will now deal with the complaints advanced by the first, second and third defendants against the pleading insofar as it is said to advance an arguable cause of action to recover damages in respect of the tort of conspiracy to injure by lawful means.

[84] The first complaint as to the manner of pleading the lawful means conspiracy was that it relied on directly inconsistent allegations which were not pleaded in the alternative. The Sunland defendants contended that the inconsistency was embarrassing and bad at law. As to this:

(a) The critical submission was as follows:

45. In paragraph [80] it is alleged that "the purpose" of "the conspiracy" was to protect Sunland and [the second defendant]. But in paragraph [82] it is (now) alleged that "the dominant intention" of [the first, second and third defendants] in "so conspiring" was to harm the plaintiff.

46. The apparent distinction the plaintiff attempts to draw between the "purpose" of the conspiracy and the "dominant intention" of the parties in "so conspiring" is misconceived. The mental element of the tort concerns the sole or dominant purpose of the defendants in entering the conspiracy. So, in *McKernan v Fraser* (1931) 46 CLR 343, Dixon J identified the question as being what is the "the sole, the true, or the dominating or the main purpose of [the] conspiracy" [at 362; see also 398 to 399 per Evatt J] (emphasis added).

47. Similarly, in *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435 at 445 the point was made that: "[i]f the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person" (emphasis added) [Earlier it is observed that "it is much safer to use a word like 'purpose' or 'object'" than "intention": at 444]

48. It is not enough that [the first, second and third defendants] acted with the knowledge, and an "intention", that the plaintiff be harmed [*McKernan v Fraser* at 361 to 362 (emphasis added)]:

> "to adopt a course which necessarily interferes with the plaintiff… and thus injures him, is not enough. Nor is it enough that this result should be intended if the motive which

> actuates the defendants is not the desire to inflict injury but… the advancement or for the defence of the defendants' trade or vocational interests."

(b) I agree that [80] and [82] of the pleading amount to an embarrassing plea of the mental element of the tort of conspiracy to injure by lawful means. First, and especially in light of the cases to which the first, second and third defendants refer, the reference to both purpose and intention is ambiguous. Second, the use of the definite article in [80] is inconsistent with the dominant intention plea in [82].

(c) Paragraphs 80 and 82 must be recast so that the inconsistent allegations concerning the purpose of the alleged conspirators is removed.

[85] The second matter to be raised in relation to the manner of pleading the lawful means conspiracy was directly a matter of complaint only in relation to the unlawful means conspiracy plea. However it seems to me that logically the flaws in the manner of pleading the requisite causal nexus between implementation of the conspiracy and loss also exist in relation to the tort of conspiracy to injure by lawful means. As I have mentioned at [76] above, the torts have in common that the need to plead that the conspiracy was carried into effect and that so doing caused damage to the plaintiff. The result is that the adverse views which I have expressed at [81] above as to the way in which the pleading addresses causation apply also to the pleading when considered as a plea of a lawful means conspiracy.

Complaints concerning pleas of irrelevant or non-causative conduct

[86] The first, second and third defendants then advanced two separate criticisms in relation to pleaded conduct said to be irrelevant on various bases.

[87] First, the first, second and third defendants submitted that the pleading at [83](c) relies on a cross-reference to the pleading at [12] as unlawful conduct, but the events identified by that paragraph preceded any alleged conspiracy and so were irrelevant and that part of [83](c) should be struck out. This complaint was accepted and the plaintiff conceded that [83](c) of the pleading should not have mentioned [12].

[88] Second, the first, second and third defendants pointed out that the cross-references to the conduct of the defendants in relation to relying on the Dubai civil proceeding to obtain standing for Sunland to make submissions to the Court during the Dubai criminal proceedings that the plaintiff should be convicted quickly and the highest penalties imposed suggested that the conduct was being relied upon as part of the manner by which the alleged conspiracy caused the plaintiff to suffer loss, but that seemed unsustainable given:

(a) that conduct took place after the plaintiff had been charged and after his criminal trial had commenced on 15 September 2009 and, accordingly, could not be regarded as having caused the charges to have been brought; and

(b) the plaintiff was not convicted and there was no plea that the conduct prolonged the plaintiff's criminal trial.

[89] The plaintiff agreed that the conduct was not said to be causative of loss, but relied on it as part of the overt acts from which it sought to have the Court infer the requisite conspiracy with the intention of causing injury to the plaintiff. I agree that the conduct can be pleaded as part of the requisite overt acts relied upon. Any re-pleading of the causation hypothesis must reflect the concession made.

Complaints concerning pleas of conduct said to be subject to immunity from suit

[90] The first, second and third defendants argument was that –

(a) the allegations as to the provision of the legal report to prosecution authorities in Dubai;

(b) the allegations made as to the commencement of civil proceedings against the plaintiff and others in Dubai; and

(c) the allegations made as to the giving of instructions to an advocate to appear before the Court during the Dubai criminal proceedings to submit that the plaintiff should be convicted quickly and the highest penalties imposed,

involved matters the subject of immunity from suit, could not be relied on in the conspiracy to injure case and should be struck out.

[91] The leading examination of the immunity appears in *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1 at 18 to 20 in the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ in the following terms (emphasis added, footnotes omitted):

> *Other immunities from suit*
>
> **Parties who fail in litigation, whatever its subject, may well consider the result of that litigation to be wrong, even unjust. Seldom will a party have contested litigation without believing, or at least hoping, that it will be resolved in that party's favour. If that party does not succeed, an explanation for failure may be sought in what are perceived to be the failures of others – the judge, the witnesses, advocates – anyone other than the party whose case has been rejected**.
>
> **This is no new phenomenon. It is a problem with which the common law has had to grapple for centuries. Its response has been the development of immunities from suit for witnesses, judges and advocates. The origin of these rules can be traced to decisions of the sixteenth and seventeenth centuries.**
>
> From as early as the sixteenth century, **a disappointed litigant could not sue those who had given evidence in the case. That is, the disappointed litigant could not seek to demonstrate that witnesses had given, or parties had suborned, perjured evidence or that witnesses or parties had conspired together to injure that litigant**. Nor could the disappointed litigant seek to demonstrate that what was said by the witnesses had defamed that litigant. All such actions were precluded or answered by an absolute privilege. It mattered not how the action was framed. And it mattered not whether the disappointed litigant alleged that the witness had acted deliberately or maliciously. No action lay, or now lies, against a witness for what is said or done in court. It does not matter whether what is done is alleged to have been done negligently or even done deliberately and maliciously with the intention that it harm the person who would complain of it. **The witness is immune from suit and the immunity extends to preparatory steps**. **That the immunity must be pleaded as a defence makes it nonetheless an immunity from sui**t. As the whole Court said in *Lange v Australian Broadcasting Corporation*:
>
> > "The result [of the defence] is to confer upon defendants, who choose to plead and establish an appropriate defence, an immunity to action brought against them."
>
> …
>
> **Statements can be found in the cases that the immunity of witnesses serves to encourage "freedom of expression" or "freedom of speech" so that the court will have full information about the issues in the case. Statements also can be found that place the immunity of those who participate in court proceedings on the desirability of avoiding baseless actions being brought against those who were merely discharging their duty**, but these considerations are advanced in answer to another kind of argument. As Fry LJ said in *Munster v Lamb*:
>
> > "Why is it that a judge who disgraces his office, and speaks from the bench words of defamation, falsely and maliciously, and without reasonable or probable cause, is not liable to an action? Is not such conduct of the worst description, and does it not produce great injury to the person affected by it? Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another?"
>
> The answer proffered (that it is more necessary to prevent the baseless action than provide for the kind of case described) may well suffice to meet the point**. But the deeper consideration that lies beneath the principle is that determining whether the complaint made is baseless or not requires re-litigation of the matter out of which the complaint arises.**

> In *R v Skinner*, Lord Mansfield said that "neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office". Of that immunity it has been said in *Mann v O'Neill* that it responds to two related considerations, "to assist full and free access to independent courts for the impartial quelling of controversies, without fear of the consequences" and "the avoidance of the re-agitation by discontented parties of decided cases after the entry of final judgment" other than by appellate processes. **That view of the matter reflects the consideration that what is at stake is the public interest in "the effective performance" of its function by the judicial branch of government**.

[92] In *D'Orta-Ekenaike*, McHugh J observed (at 35 [99]) (emphasis added, footnotes omitted):

> Persons who institute prosecutions owe no actionable duty to the defendant to take reasonable care in launching the prosecution. A prosecutor can be sued for the damage to the liberty and reputation of the defendant only when the prosecutor acted maliciously and without reasonable and probable cause. Moreover, the action is not in negligence but for the tort of malicious prosecution. Judges and witnesses owe no actionable duty of care not to make careless statements that may cause loss of liberty, reputation or money. **Neither a judge nor a witness nor counsel can be sued even for false and defamatory statements made maliciously in the course of judicial proceedings. A witness's immunity from suit extends even to out-of-court conduct that is intimately connected with the giving of evidence in court**.

[93] The immunity from suit which applies to witnesses applies to statements made in the ordinary course of a judicial proceeding. However the judgment of the plurality in *D'Orta-Ekenaike* also noted that the immunity extended to preparatory steps, citing cases in which it was held that the immunity of a witness from an action of slander in respect of his evidence in the box also protected the witness against the consequence of statements made to the client and solicitor in preparing the proof for trial.

[94] The immunity also extends to other out of court statements which are relevantly connected to the court process. Thus in *Ollis v New South Wales Crime Commission* (2007) 177 A Crim R 306 at 317; [2007] NSWCA 311 at [47], Beazley JA held (emphasis added):

> The authorities establish that the immunity extends to a range of statements made out of court but which are connected in a relevant way to the court process. These include statements made in pleadings: [*Jamieson v The Queen* (1993) 177 CLR 574] at 583 [8]; statements from potential witnesses in criminal proceedings made at a time when proceedings are in contemplation but not yet commenced: *Evans v London Hospital Medical College* [1981] 1 WLR 184; **statements made out of court that could fairly be said to be part of the process of investigating crime with a view to prosecution**: *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177: see generally *Meadow v General Medical Council* [2007] QB 462 at 475 [12].

[95] In *Taylor* (cited by Beazley JA), Lord Hoffman (with whom Lords Goff and Hutton agreed) expressed the test in this way (at 215) (emphasis added):

> I therefore agree with the test proposed by Drake J in *Evans v London Hospital Medical College* [1981] 1 WLR 184, 192:
>
> > "the protection exists only where the statement or conduct is such that **it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated**."
>
> **This formulation excludes statements which are wholly extraneous to the investigation**—irrelevant and gratuitous libels—but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other.
>
> **As the policy of the immunity is to encourage freedom of expression, it is limited to actions in which the alleged statement constitutes the cause of action**. …

[96] It is notable also that the circumstances giving rise to witness immunity should not be extended, unless it is necessary to do so: *Mann v O'Neill* (1997) 191 CLR 204 at 213 to 214 per Brennan CJ, Dawson, Toohey and Gaudron JJ. And in *Taylor*, Lord Hoffman stated (at 213):

> Judges have rightly cautioned against further extension merely by analogy. In *Mann v O'Neill* (1997) 71 ALJR 903, 912 McHugh J identified two dangers in judicial reasoning—a Scylla and Charybdis through which it was necessary to navigate. The first was:

> "the temptation to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of the underlying rationale for the defence."

On the other hand, there was an opposite peril in:

> "the temptation too readily to dismiss the defence as applicable in novel circumstances because the case is not within or analogous to an existing category but without determining the matter by reference to the defence's underlying rationale."

[97] It does not seem to me that the application of these principles justifies striking out either –

(a) the allegations made as to the commencement of civil proceedings against the plaintiff and others in Dubai; and

(b) the allegations made as to the giving of instructions to an advocate to appear before the Court during the Dubai criminal proceedings to submit that the plaintiff should be convicted quickly and the highest penalties imposed,

because the conspiracy to injure causes of action do not seek to establish liability for that conduct. As Lord Hoffman noted in the passage which I have quoted at [95] above "[the immunity] is limited to actions in which the alleged statement constitutes the cause of action." The plaintiff relies on the pleas of those allegations as part of the overt acts from which it sought to have the Court infer the requisite conspiracy with the intention of causing injury to the plaintiff and seeks to establish liability for the damage caused by the implementation of the conspiracy. The plaintiff has conceded that the conduct could not be said to have been causative of loss.

[98] The question of reliance on the allegations concerning the provision of the legal report (and its translation) to the prosecution authorities requires closer consideration. Those allegations seem to be critical allegations in the causation hypotheses which necessarily underlie both of the conspiracy to injure causes of action. I will assume, without deciding, that it is relevant to consider whether the immunity applied to that conduct for that reason. For the following reasons I would conclude that it would not be appropriate to determine that question on a strike out application.

[99] First, it does not seem to me to be so obvious that the pleaded conduct necessarily falls within the ambit of the statements in *Ollis* and *Taylor* which I have emphasised at [94] to [96] above. Although the legal report was provided – on the plaintiff's case – with a view to persuading the prosecution authorities to prosecute the plaintiff, it does not seem to me to be inevitably true that it should fairly be regarded to be part of the process of investigating crime with a view to prosecution. The plaintiff submitted, the legal report was "…neither an expert report nor a witness statement. It was a legal opinion from a law firm, intended as a 'brief report covering strategy' which could be given to the Assistant Prosecutor General in Dubai (para. 31(g)). Insofar as it concerned the plaintiff, there was no statement or recitation of evidence by a potential witness. Insofar as it concerned the plaintiff, it contained only assertions of liability." Whether that is a proper characterization of the legal report and whether that is relevant to the application of the immunity seem to me to be matters to be resolved at trial.

[100] Second, as the judgment of the plurality in *D'Orta-Ekenaike* recognised, the immunity is a matter to be pleaded in a defence rather than to form the basis for a strike out application. I accept, of course[20], that if the boundaries of the case were sufficiently clear and a defendant indicated that it would plead the immunity, there would be no good reason to postpone

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[20] Cf per McMurdo J in *Ligon Sixty-Three Pty Ltd v ClarkeKann* [2015] QSC 153 at [36].

striking out the case for which there was an absolute defence. But I do not think that the factual matters which would be involved are so clear.

[101] Third, if an analogy is to be drawn between the circumstances of the provision of the legal report to the Dubai prosecution authorities and the circumstances referred to in *Ollis* and *Taylor*, then, following the observations made by McHugh J in *D'Orta-Ekenaike* (quoted with approval by Lord Hoffman in *Taylor*) it would be appropriate to examine the case for recognition in light of the underlying rationale for the immunity. In this regard, the plaintiff contended that the rationale referred to in *D'Orta-Ekenaike*, namely that of avoidance of re-litigation of the matter out of which the complaint arises, does not arise where the plaintiff is not a disappointed litigant, but a litigant who succeeded. Whether there is merit to this contention could best be examined in light of the defendants' pleading.

[102] Fourth, while the plaintiff acknowledged that in *Chahoud v Koleda* (2008) 72 NSWLR 740 at 753 to 754; [2008] NSWSC 1060 at [45] to [48], Rothman J applied the immunity in respect of statements made in proceedings in a foreign country, the plaintiff also noted that no argument had been presented to Rothman J that it was inappropriate to apply the immunity. The plaintiff contended that it was open for him to contend that it was inappropriate to apply the immunity to circumstances in which the legal report was provided to the authorities, referring to the unusual circumstances in which the legal report was provided. This seems to me to be another reason why it is inappropriate to determine the question of the applicability of the immunity in this case on a strike out application. The plaintiff should have the opportunity to develop this argument in a reply to any defence which does plead the immunity.

Conclusion

[103] The appropriate response to the conclusions I have reached to the complaints alleged in relation to the conspiracy to injure causes of action and discussed at [78] to [89] above is that [80] to [85] of the pleading should be struck out, with leave to re-plead.

The malicious prosecution cause of action

[104] The Sunland defendants contend that insofar as the pleading seeks to advance a cause of action against them for damages for the tort of malicious prosecution, it involves the objectionable rolling up of matters which should be pleaded out, misconceptions about the elements of the cause of action and reliance on facts which do not make out the cause of action.

The elements of the cause of action

[105] It is necessary first to articulate some aspects of the law governing the cause of action.

[106] The elements of the cause of action are not relevantly controversial between the parties. In *Beckett v New South Wales* (2013) 248 CLR 432 the High Court identified the elements of the tort of malicious prosecution as follows:

(a) the prosecution was initiated by the defendant;

(b) the prosecution terminated favourably to the plaintiff;

(c) the defendant acted with malice in bringing or maintaining the prosecution; and

(d) the prosecution was brought or maintained without reasonable and probable cause.

[107] Whilst often the defendant to a suit for malicious prosecution will be the actual prosecutor, the law does admit of the possibility that other people might be liable.

[108] The law as to the circumstances in which someone who is not actually the prosecutor might be liable for having instigated a prosecution was recently canvassed by Gleeson JA (with whom Basten JA and Beech-Jones J agreed) in *Sahade v Bischoff* [2015] NSWCA 418 at [113] to [120] (emphasis added):

Instigation of a prosecution

[113] In *A v New South Wales* at [34], the High Court pointed out that "[t]he identification of the appropriate defendant in a case of malicious prosecution is not always straightforward." The joint judgment continued: **"[t]o incur liability, the defendant must play an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion"** (citing John G Fleming, The Law of Torts, (9th ed 1998, Law Book Company Information Services) at 676). Their Honours referred at [35] to *Martin v Watson* [1996] AC 74, a case involving a complaint made to the police:

> "In *Martin v Watson*, a woman made an allegation that her neighbour had indecently exposed himself to her whilst standing on a ladder in his garden. She went to a police station and complained. A detective constable laid an information against the neighbour. At a hearing before the Magistrates' Court, the Crown Prosecution Service offered no evidence, and the charge was dismissed. **The House of Lords held that, since the facts relating to the alleged offence were solely within the complainant's knowledge, and that as a practical matter the police officer who laid the information could not have exercised any independent discretion, the complainant could be sued for malicious prosecution, and upheld an award of damages against her. The complainant had "in substance procured the prosecution" [at 89].** The police officer to whom the complaint was made had no way of testing the truthfulness of the accusation [at 89]. Lord Keith of Kinkel quoted with approval a statement by McMullin J in the Court of Appeal of New Zealand [*Commercial Union Assurance Co of New Zealand Ltd v Lamont* [1989] 3 NZLR 187 at 207-208], that a person may be regarded as the prosecutor if he puts the police in possession of information which virtually compels an officer to bring a charge."

[114] Earlier Dixon J in *Commonwealth Life Assurance Society Ltd v Brain* [1935] HCA 30; 53 CLR 343 at 379, in a passage which was referred to by Lord Keith in *Martin v Watson* at 81, referred to the criteria by which a complainant to the police may be said to have instigated the prosecution:

> "It is clear that no responsibility is incurred by one who confines himself to bringing before some proper authority information which he does not disbelieve, even although in the hope that a prosecution will be instituted, if it is actually instituted as the result of an independent discretion on the part of that authority ... . **But, if the discretion is misled by false information, or is otherwise practised upon in order to procure the laying of the charge, those who thus brought about the prosecution are responsible ... . The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings**. If the actual prosecutor acts maliciously and without reasonable and probable cause, those who aid and abet him in doing so are joint wrongdoers with him." [Citations omitted.]

[115] Notwithstanding the reference by Dixon J to "joint wrongdoers" in the passage set out in the preceding paragraph, it is not a necessary condition for the effective pursuit of an action for malicious prosecution that the actual prosecutor himself or herself was party to the wrongdoing: *Johnston v Australia & New Zealand Banking Group Ltd* [2006] NSWCA 218 at [39]-[40] (Basten JA). His Honour noted that the authorities for this proposition included *Commonwealth Life Assurance Society Ltd v Brain* at 379 and 381-382 (Dixon J) and *Mahon v Rahn (No 2)* [2000] 1 WLR 2150 at [255].

[116] In *Mahon v Rahn (No 2)* at [266], Brooke LJ (Mantell and Laws LJJ agreeing) noted that in *Martin v Watson* at 84, Lord Keith also relied on the *Restatement of the Law, Torts, 2d* (American Law Institute, 1977), s 653, which deals with the matter in this way:

> "When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings. If, however, the information is known by the giver to be false, an

> intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. **In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false**."

[117] Brooke LJ drew a distinction (at [268]) between a "simple" case involving a complaint to the police, like *Martin v Watson*, and more complex cases in which the prosecuting authority is in receipt of evidence from a variety of sources and has to decide in the exercise of its discretion whether it is in possession of sufficient evidence to justify setting the law in motion against the defendant.

[118] Brooke LJ posed the following questions for determination (at [269]) with respect to a "simple" case:

> "(1) Did A desire and intend that B should be prosecuted? (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment? (3) Has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?"

[119] It has been said that one should never assume that tainted evidence persuaded the police to prosecute: *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 NZLR 187 at 199 (Richardson J). His Honour continued (at 199):

> "In some very special cases, however, the prosecutor may in practical terms be obliged to act on apparently reliable and damning evidence supplied to the police."

[120] These statements reflect public policy considerations that members of the community should be encouraged to aid the police in their function of investigating and prosecuting breaches of the criminal law without fear of being harassed by actions of malicious prosecution. This consideration, together with the independent discretion exercised by prosecutors, led Richardson J to conclude that the circumstances in which third parties are to be regarded as having instigated a prosecution should be "rare and exceptional" (at 199). It is unnecessary to go so far in the present case. It can be accepted that there is a need for caution even in a "simple" case in determining what persuaded the police to prosecute.

[109] It is notable that the Court of Appeal referred with approval to the statement of the "rule" by Dixon J in *Brain*, to the approach taken in the Restatement, and to decisions in the English Court of Appeal and the House of Lords which also referred with approval to both. Citations with approval of the judgment of Dixon J in *Brain* at 379 may be multiplied[21], including by reference to the Queensland Court of Appeal in *Seabrook v Asher* [2006] QCA 238 at [12] per Holmes JA (as her Honour then was) (with whom de Jersey CJ and Helman J agreed) and *Cosentino v Kent* [2009] QCA 355 at [18] per Ann Lyons J (with whom McMurdo P and Chesterman JA agreed).

[110] The Sunland defendants relied on *Seabrook v Asher* to submit that a third party who is not the actual prosecutor can only regarded as liable (emphasis in orginal, citations omitted):

> … where the third party "had some real role in inducing the police officer to commence the prosecution; **so much so that the informant must 'virtually' have driven the prosecution**": *Seabrook v Asher* … at [17] per Holmes JA (emphasis added). Similarly, in *Martin v Watson* … it was regarded as critical that the defendant's conduct made it "virtually impossible for the police officer to exercise any independent discretion or judgment", so that an essential question is, as stated by the Queensland Court of Appeal [in *Consentino v*

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21 See, for example, *State of New South Wales v Abed* [2014] NSWCA 419 at [197] per Gleeson JA (with whom Bathurst CJ and Macfarlan JA agreed); *Woodham v Roberts Ltd* [2010] TASSC 31 at [20] per Holt AsJ; *Curry v Commonwealth of Australia* [2009] NSWSC 1354 at [15] per Hulme J; *Coles Myer Limited v Webster; Coles Myer Limited v Thompson* [2009] NSWCA 299 at [116] per Ipp JA (with whom Hodgson and Handley JJA agreed); *Johnston v Australia & New Zealand Banking Group Ltd & Ors* [2006] NSWCA 218 at [38] to [40] per Basten JA (with whom Giles and Santow JJA agreed); *Porter v OAMPS Ltd* [2005] FCA 232 at [42] per Goldberg J.

Kent at [43]]: "did the provision of false information render the exercise of a discretion to prosecute impossible?"

[111] However I think that is wrongly to characterise the judgment of Holmes JA (as her Honour then was) in *Seabrook v Asher* and the judgment of the House of Lords in *Martin v Watson*.

[112] As to *Seabrook v Asher*:

(a) The case before the Court was an appeal from a successful defendant's summary judgment application where the Court had before it the evidence of the police officer, which was found to be unlikely to change at any trial, and which was inconsistent with the plaintiff's case.

(b) Prior to the passage relied on by the Sunland defendants Holmes JA reviewed a number of the cases to which I have earlier referred that relate to prosecutions instigated by third parties[22]. Her Honour did not indicate that she intended to depart from the principles contained in those cases.

(c) In my view, Holmes JA was not intending to express disagreement with the articulation of the rule by Dixon J in *Brain* or seeking to express a test of "virtually having driven the prosecution" or "rendering the exercise of a discretion to prosecute impossible" as a test appropriate for all cases at all times. Her Honour was merely articulating the considerations which were appropriate for the simple case with which she was dealing.

[113] I also reject the way the Sunland defendants seek to employ the House of Lords decision of *Martin v Watson*. That it might be stated as critical in a particular case that the defendant's conduct made it virtually impossible for the exercise of an independent discretion is not to articulate a test which must be met for all cases at all times. Indeed, Lord Keith of Kinkel in fact stated in *Martin v Watson* that the principles to be derived from the sources which he had quoted (which included *Brain* and the approach taken in the Restatement) should be accepted as valid in English law[23].

[114] I reject the way in which the Sunland defendants characterise the test of the circumstances in which a third party may be rendered liable for prosecution actually conducted by prosecution authorities. It seems to me that the rule as expressed by Dixon J in *Brain* is still good law. Moreover, it is at least arguable, that – in light of its citation with approval in *Martin v Watson* and recently in *Sahade v Bischolff* [24] – the way the test is stated in the Restatement is also good law. Certainly, the correctness or otherwise of the argument is not something which I would resolve on a strike out application. It follows that if the plaintiff had pleaded the material facts which establish an arguable case that the first, second or third defendant instigated the prosecution within the law as so articulated, I would not strike out such a case.

[115] Against that background I turn to consider the particular complaints advanced against the manner by which the plaintiff pleaded his malicious prosecution case.

Complaint that the pleading is embarrassing because it rolls up allegations against three separate alleged tortfeasors

[116] It was common ground that the pleading had to assert material facts which established an arguable cause of action against each of the first, second and third defendants by reference to their own acts (or at least acts for which they were responsible).

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22 *Seabrook v Asher* at [12] to [16].

23 *Martin v Watson* [1996] AC 74 at 84 to 85.

24 See also, *Johnston v Australia & New Zealand Banking Group Ltd & Ors* [2006] NSWCA 218 at [41].

[117] The malicious prosecution part of the pleading is, however, structured in a way which pleaded the material facts as conduct by the first, second and third defendnats without distinguishing between them. Thus, for example:

(a) Paragraph 97 pleads that "in the premises of" [94] to [96], the first, second and third defendants instigated the criminal prosecution of the plaintiff.

(b) Paragraph 94 asserts that the first, second and third defendants provided bases for, and encouraged the laying of, criminal charges against the plaintiff by their conduct "as follows" and then listed nine aspects of conduct, some by one of them and some by two of them.

(c) Paragraph 96 says that "but for the conduct of [the first, second and third defendants] (or any of them) referred to in [94], the criminial charges would not have been laid against the plaintiff";

(d) Paragraph 105 pleads that as a consequence of the conduct of the first, second and third defendants referred to in [94] the plaintiff suffered loss and damage.

[118] The complaint here was that the pleading was embarrassing because there should have been a full and distinct pleading of the cause of action against each of them individually.

[119] I agree that if a pleading is structured in such a way that any one defendant has difficulty in working out which facts are relied on in respect of the cause of action against that defendant, that ambiguity is undesirable and will often justify the conclusion that the pleading should be struck out.

[120] In this case, I think that ambiguity exists. It seems to me that it is unclear whether, for example, each of the defendants is said to be responsible for each aspect of the conduct referred to in pleading [94] and if so why that is. Similarly, when it comes to each defendant considering the causation case advanced against them, it seems to me to be unclear why the causal significance of the conduct of one of the other defendants is relevant to the case against them.

[121] I agree that each of the defendants is entitled to a distinct pleading of the cause of action against them. If that cause of action treats the conduct of any other defendant as relevant to an element of the cause of action then why that is so should be apparent on the face of the pleading. The paragraphs alleging the cause of action for malicious prosecution at [94] to [105] must be struck out and recast in a way which addresses this problem.

Complaint that the facts pleaded to not make out the cause of action

[122] The relevant part of the pleading was as follows:

> 94. Further, or alternatively, [the first defendant], [the second defendant] and [the third defendant] provided bases for, and encouraged, the laying of criminal charges against the plaintiff by their conduct as follows:
>
> (a) By [the second defendant's] false statements to the prosecution authorities on 21 January 2009 (as pleaded in paragraph 12) and on 16 February 2009 (as pleaded in paragraph 23);
>
> (b) By [the second defendant's] failure to correct his false statements and, instead, informing the Assistant Prosecutor General, when meeting with him on 17 May 2009, that he ([the second defendant]) was there to assist him in any way possible (as pleaded in paragraph 30);
>
> (c) By [the third defendant's] preparation of [the legal report] and provision of it to [the first defendant] and [the second defendant] knowing that its contents concerning the plaintiff were false and intending that it be given to the Assistant Prosecutor General in Dubai to assist and encourage him in the prosecution of the plaintiff (and others) and his failure to disclose in the document or otherwise that he was not independent by reason of his directorship of, and shareholding in, Sunland (as pleaded in paragraph 33);

(d) By [the second defendant's] failure to correct his false statements when meeting with the Assistant Prosecutor General on 31 May 2009 and, instead, taking the steps referred to in subparagraphs (e), (f), (g) and (h) below;

(e) By [the second defendant's] and [the first defendant's] provision to the Assistant Prosecutor General a copy of [the legal report] on 31 May 2009, knowing that its contents concerning the plaintiff were false and their statement to the Assistant Prosecutor General that they would support the prosecution of the plaintiff where necessary (as pleaded in paragraph 34);

(f) By [the second defendant's] and [the first defendant's] offer to the Assistant Prosecutor General to obtain an Arabic translation to be made of [the legal report] (as pleaded in paragraph 34);

(g) By [the second defendant] and [the first defendant] urgently obtaining an Arabic translation of [the legal report] (as pleaded in paragraph 35);

(h) By [the second defendant's] delivery of the Arabic translation of [the legal report] to the offices of Dubai Public Prosecution on 1 June 2009 and his request that the documents be attached to the file relation [*sic*] to the criminal investigation (as pleaded in paragraph 38);

(i) By [the second defendant's] provision of a copy of [the legal report] and the Arabic translation to [the director of the Financial Audit Department for the Ruler's Court] on or about 1 June 2009 (as pleaded in paragraph 39).

95. But for the information referred to in paragraph 94, there was no factual basis for the criminal charges against the plaintiff.

96. Further, or alternatively, but for the conduct of [the first defendant], [the second defendant] and [the third defendant] (or any of them) referred to in paragraph 94, the criminal charges would not have been laid against the plaintiff.

97. In the premises of paragraphs 94 to 96, [the first defendant], [the second defendant] and [the third defendant] instigated the criminal prosecution of the plaintiff.

[123] The Sunland defendants correctly pointed out that there are two categories of conduct which are alleged to make this case one of the rare circumstances in which a third party is to be regarded as liable for having instigated the prosecution:

(a) first, the conduct of the second defendant in conveying falsehoods to the prosecution authorities when he gave statements to them; and

(b) second, the conduct concerning the provision of the legal report and its translation to the prosecution authorites.

[124] The complaint here was that the parts of the pleading relied on to plead that the first, second and third defendants instigated the prosecution do not make out that element of the cause of action because "they fall short of demonstrating that they effectively drove the prosecution by rending the exercise of prosecutorial discretion virtually impossible". The Sunland defendants submit that the pleading of "but for" causation does not plead that the conduct operated on the prosecutorial discretion by virtually compelling the prosecution.

[125] The submission as expressed must fail because of the conclusion I have reached at [114] above. However, there is an underlying validity to the complaint about the inadequacy of the pleading of the requisite facts concerning the impact of the defendants' conduct on the prosecutorial discretion. Just as the mere plea of "because" or "in consequence of" is not an adequate plea of the material facts between impugned conduct and loss in a negligence suit, the plea of "but for" is not an adequate plea of the way in which the defendants' conduct impacted on the prosecutorial discretion in a malicious prosecution suit.

[126] If one considers the application of the rule as explained by Dixon J in *Brain*, one concludes that there must be a proper plea of the material facts which justify the conclusion that the conduct of the defendants dishonestly prejudiced the judgment of the prosecutor. And, if

one considers the application of the rule as expressed in the Restatement, one concludes that there must be a proper plea of the material facts which justify the conclusion that –

(a) the defendants' conduct was the determining factor in the prosecutor's decision to commence the prosecution; or

(b) the false information furnished by the defendants was the information upon which the official acted.

[127] The plaintiff's response was to say that the requisite test is arguably met by inference from:

(a) its earlier pleas that the legal report and the Arabic translation were read and relied on by the prosecuting authorities in reversing the preliminary decision which had been made to approve bail and in deciding to charge the plaintiff; and

(b) matters articulated in separate particulars which identifed various conversations to which the plaintiff's lawyer was party and certain other conduct of the prosecution authorities in terms of releasing files, which together suggested the prosecuting authorities placed significant weight on the legal report.

[128] Having regard to the material to which the plaintiff refers it seems to me to be likely that the plaintiff can plead material facts which arguably meet one or other of the tests to which I have referred. However, it is a trite proposition of the rules of pleading that the provision of particulars will not remedy a failure to plead material facts: see *Bruce v Oldhams Press Ltd* [1936] 1 KB 697 and *H 1976 Nominees Pty Ltd v Galli* (1979) FLR 242. I do not think the pleading presently does plead facts which arguably establish that the way in which the defendants' conduct impacted on the prosecutorial discretion would satisfy the tests to which I have referred at [126]. Accordingly, as the pleading presently stands, I would accept the complaint of the Sunland defendants, although for different reasons than those argued by them.

Complaint that advancing an alternative case of maintaining the prosecution is misconceived.

[129] The argument under this heading was that in the wording of the pleading at [98], [99] and [105] sought to advance a distinct alternative case based only on "maintaining" the prosecution, but without asserting facts which justified that proposition. That complaint was accepted and is unnecessary further to consider.

Conclusion

[130] The appropriate response to the conclusions I have reached in relation to the complaints concerning the malicious prosecution cause of action is that [94] to [105] should be struck out, with leave to re-plead.

<u>Miscellaneous complaints</u>

[131] The Sunland defendants also advanced a miscellany of discrete complaints. I address them below.

Paragraph 8(d)

[132] The plaintiff pleads that Sunland entered into an agreement, but the plaintiff's second further and better particulars identify that the entity was Sunland Waterfront (BVI) Limited, a "subsidiary". It is not pleaded that Sunland Waterfront (BVI) Limited was acting as agent for Sunland Group Limited.

[133] The plaintiff accepts it must amend the pleading to reflect that the agreement was made with the subsidiary and the payment was made by Sunland.

Paragraphs 29 and 49

[134] The paragraphs allege that the third defendant "took no steps to correct false statements" in the media releases, but the plaintiff does not plead that the third defendant was aware of the media releases having been made. The plaintiff accepts that he needs to amend the allegations to plead that knowledge.

Paragraph 33(d)

[135] The complaint is that the paragraph alleges, inter alia, that the third defendant actually knew that the contents of the legal report concerning the plaintiff were false, but that particulars given in respect of that allegation are not particulars of such knowledge are at most particulars of recklessness as to truth or falsity rather than actual knowledge of falsity. The submission is that the allegation that the third defendant knew matters were false is not consistent with the particulars and should be struck out.

[136] The plaintiff resists the complaint on the basis that the particulars do provide a basis for alleging actual knowledge.

[137] The particulars relied on are:

> (ii) [The third defendant] knew that the contents were false because:
>
> (A) [The second defendant] had not provided any statement to him to justify any of its said contents.
>
> (B) [The second defendant] had not provided him with "a statement of [the second defendant]" or "information" which would justify the said statements.
>
> (C) [The second defendant] had provided him with the memorandum entitled "February 2009 Memo and Statement from David Brown COO Middle East".
>
> (D) [The third defendant] possessed no information that could serve as a basis for the allegation that the plaintiff could be liable to Sunland in the manner alleged or any manner.
>
> (E) The contemporaneous records of Sunland in relation to transaction to purchase Plot D17 did not provide any basis for the allegations contained in [the legal report].
>
> (iii) [the first defendant] knew the true state of affairs because:
>
> (A) [the second defendant] had given him the memorandum entitled "February 2009 Memo and Statement from David Brown COO Middle East".
>
> (B) He did not possess any information that could have served as a basis for the allegations contained in [the legal report].
>
> (C) By an email of 17 September 2007 to [the first defendant and another], [the first defendant] had informed them that the payment of [$14 million] to Reed would be an "Introduction Fee".
>
> (D) The contemporaneous records of Sunland in relation to transaction to purchase Plot D17 did not provide any basis for the allegations contained in [the legal report].
>
> (E) During an interview on ABC television broadcast on 19 March 2013, [the first defendant] admitted: *From Sunland's side we did not have any claim against* [the plaintiff]. [The plaintiff] *has nothing to do with that case as long as we know.*
>
> (iv) Further, it may be inferred that [the third defendant] and [the first defendant] knew the true state of affairs from the fact that when Sunland, by its solicitors [the fourth defendants], sent letters of demand to various persons and entities in early June 2009 (including Reed [and two others]), and then, in August 2009, issued proceedings in the Federal Court of Australia, Sunland did not issue any demand to the plaintiff and did not make any claim against him.

[138] I agree with the plaintiff. I think the proposition that actual knowledge may be inferred is arguable. It is arguable that there is a point at which reckless indifference to whether or not something is true or false might actually turn to knowledge that it is false. Whether there is such a line in this case and where it should be drawn is a matter for trial. I am not persuaded

to strike out on the basis of the alleged inconsistency between pleaded particulars and pleaded material facts.

Paragraphs 50, 61 and 62

[139] Paragraph 50 pleads the commencement by Sunland of proceedings in Australia which did not involve the plaintiff. Paragraphs 61 and 62 plead the fact of the ultimate disposition of those proceedings, namely they were dismissed and indemnity costs orders were made against Sunland. The Sunland defendants complain that the pleading of the costs orders made in that proceeding, and an appeal, are irrelevant.

[140] The plaintiff says that the facts which plead the disposition of the civil proceeding in Australia are relevant to the plea at [63] that that the first, second and third defendants failed to inform, or to cause Sunland to inform, the Dubai prosecution authorities that the second defendant had made false statements; that the statements made in the legal report concerning the plaintiff were false and that no claim had been made against the plaintiff by Sunland in Australia.

[141] I am unable to accept the plaintiff's argument. The fact that no claim had been made against the plaintiff by Sunland would be capable of being proved without having to prove the way in which the proceedings were ultimately disposed. And unless allied with facts which demonstrated that the defendants accepted as correct the findings made in the Australian civil proceedings (and there is no such plea), it does not seem to me that proof of the manner of disposition of the Australian civil proceedings is relevant in the way submitted.

[142] Paragraphs 61 and 62 should be struck out.

Paragraph 73

[143] Paragraph 73 asserts the existence of media coverage of the Australian proceeding which included reference to the plaintiff's imprisonment and criminal trial. The Sunland defendants complain that the plea is extraneous to any of the causes of action pleaded, irrelevant and should be struck out.

[144] The plaintiff contends that it is part of the material facts relied on to establish the causal link between impugned conduct and part of his loss. I accept the plaintiff's argument.

Paragraph 85(i)

[145] Paragraph 85 pleads the loss alleged to be suffered in consequence of the conspiracy to injure. Paragraph 85(i) identifies a general damages claim which, amongst other things, pleads a claim for general damages for loss of reputation. The first, second and third defendants contend that the plea is bad on its face since general damages for reputation and injury to feelings are not recoverable in a claim for conspiracy to injure: see *Ballard v Multiplex Ltd* (2008) 68 ACSR 208 at 222; [2008] NSWSC 1019 at [71] per McDougall J and *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 at 436; [1999] FCA 1101 at [141] per Weinberg J.

[146] The plaintiff relies on observations to the contrary in *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2)* [1991] 2 VR 636 at 646 per Brooking J and *Larkin v Long* [1915] AC 814 at 832 per Lord Parker of Waddington. He wishes to be able to contend at trial that damages for loss of reputation may be recoverable in a conspiracy to injure case. He contends that just as such damages are recoverable for the intentional torts of malicious prosecution and false imprisonment they are recoverable for the tort of conspiracy to injure.

[147] The response of the first, second and third defendants to the plaintiff's reliance on the decision of Brooking J in the *Airline Pilots* case was to contend that the authorities which

his Honour relied on have been overtaken by subsequent authorities in the United Kingdom, that the analysis by McDougall J in *Ballard* is more recent, takes regard of those authorities, is correct and should be followed by me in preference to the contrary view on which the plaintiff relies.

[148] Although I have struck out the plaintiff's pleaded case on malicious prosecution, I have concluded that he should have leave to re-plead that case because it seems to me to be likely that there is an arguable case which can be properly pleaded against at least one of the defendants. Loss of reputation damages is recoverable on that cause of action. In those circumstances it does not seem to me that there is anything to be gained in seeking to resolve the conflict between *Ballard* and the *Airline Pilots* case on a strike out application. I decline to do so. The determination of that arguable question of law can be made at a trial.

Conclusion

[149] On the application by the fourth defendants, I order as follows:

(a) The claim against the fourth defendants is struck out.

(b) The plaintiff pay the fourth defendants' costs of the proceeding.

[150] On the application by the first, second, third and fifth defendants, I order as follows:

(a) The claim in negligence against the third defendant and paragraphs 86 to 93 of the statement of claim are struck out.

(b) The following paragraphs of the statement of claim are struck out, with leave to re-plead:

(i) paragraphs 80 to 85;

(ii) paragraphs 94 to 105;

(iii) paragraph 8(d); and

(iv) paragraphs 29 and 49.

(c) Paragraphs 61 and 62 of the statement of claim are struck out.

(d) The plaintiff pay the first, second, third and fifth defendants' costs of the third amended application filed 28 October 2015.

[151] I will hear the parties on whether I should make, as the first, second, third and fifth defendants have sought, a specific order that the plaintiff pay their costs of the amended application filed 4 June 2015 which was set down for hearing on 11 June 2015.