SUPREME COURT OF QUEENSLAND

CITATION:	*Palmer v Turnbull* [2018] QCA 112
PARTIES:	**CLIVE FREDERICK PALMER** (applicant) **v** **MALCOLM TURNBULL** (respondent)
FILE NO/S:	Appeal No 7351 of 2017 SC No 1634 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Civil
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 5 June 2017 (Douglas J)
DELIVERED ON:	5 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2017
JUDGES:	Fraser and Gotterson JJA and Brown J
ORDERS:	**1. Leave to appeal granted.** **2. Appeal allowed in part.** **3. Order 1 of the primary judge insofar as it strikes out paragraph 3 of the further amended statement of claim set aside.** **4. Otherwise, appeal dismissed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where the applicant sues the respondent for defamation in respect of the publication of words spoken at a press conference in China – where the applicant seeks leave to appeal against the strike out of paragraph 3 and paragraph 7(a) of the applicant's further amended statement of claim – where the applicant ultimately sought to rely on the presumption that Chinese Law does not differ from local law – where the respondent contends that the applicant was obliged to plead the applicable Chinese law and as such failed to plead a material fact – whether the applicant was required to plead Chinese law – whether an imputation could not be

distilled further or lacked precision

Uniform Civil Procedure Rules 1999 (Qld), r 444, r 445

Drummoyne Municipal Council v Australian Broadcasting Corporation (1990) 21 NSWLR 135, cited
Dyno Wesfarmers Ltd v Knuckey & Ors; Dyno Wesfarmers Ltd v Dyer [2003] NSWCA 375, applied
Fairfax Media Publications Pty Ltd v Alex [2014] NSWCA 273, considered
Interval Resort Networks (Australasia) Pty Ltd v Western Australian Newspapers Ltd [1999] WASC 2, considered
Puttick v Tenon Limited (2008) 238 CLR 265, [2008] HCA 54, distinguished
Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491; [2002] HCA 10, applied

COUNSEL: A M Nelson with P Mason for the applicant
R J Anderson QC, with P McCafferty, for the respondent

SOLICITORS: Alexander Law for the applicant
Bennett & Philip for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Brown J and the orders proposed by her Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Brown J and with the reasons given by her Honour.

[3] **BROWN J:** The applicant, Mr Palmer, sues the respondent, The Honourable Malcolm Turnbull, MP, Prime Minister of Australia, for defamation in respect of the publication of words, spoken to the attendees of a press conference held by the respondent in Beijing, China on 15 April 2016. In his further amended statement of claim the applicant did not plead the applicable Chinese law or its content. The respondent contends that the applicant is obliged to do so. The applicant contends that he was not so obliged, but rather could rely upon the presumption that Chinese law does not differ from Australian law. The respondent also complained that the applicant had failed to properly plead a defamatory imputation arising from the publication. The applicant contends that he has pleaded the imputation to the extent he can and is not required to plead anything further. The respondent successfully applied to strike out paragraph 3 and paragraph 7(a) of the further amended statement of claim. That aspect of the decision of the learned primary judge is the subject of this appeal.

Background

[4] Paragraph 3 of the further amended statement of claim pleaded that:

> "3. On or about 15 April 2016 the Defendant spoke during a press conference given in Beijing, China ('the China Press

Conference') and he thereby published to the journalists and other persons that were at the China Press Conference the following words:

(1) I do. I do. It is a tragedy. Ewen Jones has valiantly defended the workers there in

(2) Townsville. He stood up for them. I discussed the issues and the challenges there

(3) with him just before I left Australia in fact, only on Wednesday. As you know,

(4) Michaelia Cash has been there, the Employment Minister and has announced that

(5) the Fair Entitlement Guarantee, the FEG payments, will be made. This will be the

(6) largest payout under that scheme in its history, over $70 million and you know that

(7) she's also announced that the Commonwealth will apply for a special purpose

(8) liquidator to be appointed to the company for the purpose of ensuring that every

(9) asset that can be recovered from every other party for the benefit of the creditors

(10) of Queensland Nickel will be done.

(11) Mr Palmer's role in this is disgraceful. As you know, he's been taking money out of

(12) that company for his own purposes and that has played a major part in the dire

(13) state the business is in."

[5] Paragraph 7 of the further amended statement of claim pleaded that the matters in paragraph 3 conveyed the following defamatory imputations, each alleged to arise on the natural and ordinary meaning of the words complained of:

"(a) The plaintiff has acted fraudulently by taking money from Queensland Nickel;

(b) Omitted;

(c) The plaintiff acted disgracefully in his management of Queensland Nickel;

(d) The plaintiff was the major cause of the collapse of Queensland Nickel;

(e) The plaintiff is a greedy self-serving man who does not care for the welfare of his workers."

[6] On 24 April 2017, the respondent's solicitors wrote a letter to the applicant's solicitors pursuant to rule 444 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*). Relevantly it stated as to paragraph 3:

"2.1 Paragraph 3 of the Statement of Claim appears to rely upon words spoken in person by our client to journalists and other persons at Beijing, China, as a cause of action for defamation. If that is the case, the place of publication is Beijing, and that is where any tort was committed, and the applicable law in respect of that cause of action will be that which is applicable in Beijing (per *Dow Jones & Co v Gutnick* [2002] HCA 56; 210 CLR 575).

2.2 Please clarify whether your client intends to pursue a claim which is subject to Chinese law and will ask the Court in this matter to apply Chinese law. If so, please confirm whether you take the position that paragraph 3 (and the remainder of the Amended Statement of Claim) properly pleads the cause of action as it is required to be pleaded under Chinese law (and identify the relevant law). If not, the formulation of your client's claim will need to be revised."

[7] In relation to paragraph 7, the rule 444 letter stated that:

"2.7 Paragraph 7 of the Statement of Claim sets out the imputations relied upon by your client. Several are liable to be struck out as disclosing no reasonable cause of action and/or having a tendency to prejudice or delay the fair trial of the proceeding.

2.8 Imputation 7(a) is not reasonably capable of arising. Nowhere in the words attributed to our client as set out at paragraph 3 of the Amended Statement of Claim is it is alleged that your client engaged in fraud. It is a strained, forced and utterly unreasonable interpretation of the publication as pleaded and accordingly liable to be struck out: *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158. Further, the imputation is imprecise, in that the nature of the alleged fraud is not specified. The words 'acted fraudulently' suffer from the same vice as that of the word 'corrupt' (cf *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135) and render the imputation liable to confusion and uncertainty. The reference in the imputation to your client 'taking money from Queensland Nickel Pty Ltd' does not assist matters as it does not in and of itself describe any kind of fraud, or explain what the alleged fraud is said to be."

[8] In response, pursuant to rule 445 of the *UCPR,* the solicitors for the applicant wrote to the solicitors for the respondent in the following terms with respect to paragraphs 3 and 7(a) respectively:

> "It is correct to say that paragraph 3 of the Amended Statement of Claim pleads words spoken by your client to journalists in Beijing, China and that, accordingly, the law of China will apply. The Plaintiff's position is that the Statement of Claim adequately pleads a cause of action under Chinese law, namely:
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> (a) Articles 101 and 102 of the General Principles of the Civil Law of the People's Republic of China (General Principle), 1987; and
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> (b) the 1993 *Answers of the Supreme People's Court on Certain Issues Concerning Trials of Cases Involving the Right to Reputation*.
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> …
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> We disagree with your comments regarding imputation 7(a) and intend to take no action in respect of it."

[9] The respondent subsequently sought to strike out those paragraphs of the further amended statement of claim.

Decision at first instance

[10] Following an application being made by the respondent to, *inter alia*, strike out paragraphs 3 and 7(a) of the further amended statement of claim, his Honour struck out paragraph 3 on the basis that:[1]

> "In this matter, the defendant asks that paragraph 3 of the further amended statement of claim be struck out on the basis that it fails to comply with rule 149(1)(b) of the *Uniform Civil Procedure Rules*, in failing to plead a material fact on which the plaintiff relies, namely, a foreign law.
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> The proceedings are defamation proceedings, where the alleged defamation is said to have occurred at a press conference given in Beijing in China, on or about 15 April 2016. The pleading in paragraph 3 asserts that material fact, but does not allege, in effect, what the legal regime was affecting the publication in China of the words complained of.
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> The defendant's point is that, at least since *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, the law is that the substantive law for the determination of rights and liabilities in respect of foreign torts is the law of the place of the wrong. As the

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[1] Reasons at pp 2-3; AB 125 - 126.

headnote in that decision says, the double actionability rule had no application in Australia to international torts.

On that basis, it is argued for the defendant that the pleading needs to recite, as a material fact, the law applicable to the publication of those words in China at the time…

Mr Nelson's [Counsel for the plaintiff] submission was that there was no obligation on his client to plead the foreign law, on the basis that there was no particular forensic advantage to be sought in it, and that the normal presumption that the law of the jurisdiction here would apply in the foreign forum was sufficient for his purposes.

It does seem to me, however, that his client is relying on the foreign law as a material fact, disclosed as such in the correspondence, but also because it seems to me to be a material fact necessary to establish that the law of the place of the tort does provide a remedy in a case like this. See the last sentence of paragraph 71 in the Zhang decision:

> *... namely that, "a party" who relies on a foreign lex loci delicti "must allege, and, if necessary, prove it".*

In those circumstances, therefore, it seems to me that the application should be granted in respect of paragraph 3, with, of course, leave to replead."

[11] In relation to paragraph 7(a) of the further amended statement of claim, his Honour rejected an argument that the pleaded words could not support an imputation that the applicant had acted fraudulently by taking money from Queensland Nickel. However, notwithstanding that, his Honour found that the allegation lacked precision, particularly because its internal definition of "fraudulently" by the use of the words "by taking money from Queensland Nickel" was so imprecise as to justify being struck out. His Honour considered that the imputation left the respondent in the position of asking what is the fraud and what exactly is required to be proved in order to establish that the imputation is true.[2] His Honour considered that it was incumbent on the applicant to plead further words that make it clear why the imputation does arise by, in effect, specifying the conduct said to arise from the publication which leads to the imputation that taking money from Queensland Nickel was fraudulent.

[12] In striking out both paragraphs, his Honour gave liberty to replead.

Issues on appeal

[13] Two issues were raised in the proposed grounds of the substantive appeal:

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2 Reasons at p 4; AB 127.

(a) Whether the primary judge erred in striking out paragraph 3 of the applicant's further amended statement of claim, on the basis that the applicant failed to plead material facts, namely, the applicable Chinese law and the basis upon which it provides a remedy in a case such as the present;

(b) Whether the primary judge erred in striking out the imputation in paragraph 7(a) of the further amended statement of claim on the basis that the imputation lacked precision.

[14] Leave to appeal had to be sought as the appeal was filed out of time. Leave was opposed only on the grounds that the substantive appeal must fail.

Contentions as to whether the applicant was obliged to plead Chinese law

[15] The applicant contends that the learned primary judge erred in striking out paragraph 3 because the applicant was under no obligation to plead foreign law. By reference to *Regie Nationale des Usines Renault SA v Zhang*,[3] the applicant submits that he was only obliged to plead the applicable Chinese law and its content where he sought to rely on it. The applicant submits that he made his position clear at least in oral submissions before the primary judge.

[16] The respondent contends that the passage from *Zhang* relied upon by the applicant endorses the principle that a party is not obliged to plead foreign law in order to establish a cause of action but does not support the applicant's contention that it is not obliged to plead Chinese law in the present case. The respondent relies particularly upon [68] and [71] of *Zhang,* in support of its contention.

[17] The respondent contends that, given the correspondence that had been exchanged between the parties under rule 444 and rule 445, modern pleading practice and the provisions of the *UCPR*, it was orthodox and justifiable for the primary judge to demand that the applicant adequately plead the foreign law upon which he relied in his further amended statement of claim. The respondent claims that the applicant made it clear in his rule 445 letter that he relies upon Chinese law as being applicable to his claim and as such was obliged to plead it as a matter of fact. The respondent contends that it is uncertain whether the applicant can in fact rely on the articles referred to by the applicant in the rule 445 letter as the applicable provisions of Chinese law and he should have to plead the basis of his entitlement.

Was the learned primary judge in error in striking out paragraph 3 of the further amended statement of claim?

[18] While the letter sent on behalf of the applicant to the respondent pursuant to rule 445 did suggest that the applicant intended to rely on Chinese law and indeed referred to the relevant articles of the Chinese law that he contended applied, and the applicant's written submissions were equivocal,[4] the applicant did in the hearing

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3 (2002) 210 CLR 491 at [70].

4 In paragraphs 14 and 15 of the applicant's written submissions at first instance the applicant contended that there is little, if any, discernible difference in the law regarding publication of

before the primary judge expressly disavow that position. The applicant did not plead anything other than the location of the publication in his further amended statement of claim in relation to Chinese law.

[19] The decision in *Zhang*,[5] referred to by both parties in submissions, related to whether New South Wales was the inappropriate forum for the trial of an action arising out of a car accident in New Caledonia, which was said to have resulted from the negligent design and manufacture of the Renault vehicle driven by Mr Zhang. In particular it was alleged that the Court of Appeal had erred in determining the law to be applied in the substantive action. In issue was whether it is the *lex loci delicti* which should be applied by courts in Australia as the law governing questions of substance to be determined in a proceeding arising from a foreign tort as well as an Australian tort or whether the "double actionability" rule applied.[6] The majority of the High Court determined that the *lex loci delicti* should be applied by Australian courts as the law governing questions of substance to be determined in a proceeding arising from a foreign tort.[7] In its reasons, the majority of the High Court considered whether a plaintiff is required to plead foreign law to establish a cause of action where an Australian court has jurisdiction in relation to a matter and Australian choice of laws determines that foreign law is the *lex causae*.[8] The majority did not confine themselves to considering that question. The majority then considered whether a plaintiff was obliged to plead foreign law where it sees a forensic advantage in the foreign law. The consideration of the majority as to what is required to be pleaded in the case of a tort where the *lex causae* is the foreign law is therefore highly persuasive.

[20] At paragraphs [68] to [71], the majority of the High Court in *Zhang* addressed what a party was required to do in pleading foreign law where it was the *lex causae* and stated that:[9]

> "[68] Once the distinction between jurisdiction as a "threshold requirement" and choice of law is appreciated, it will be seen that there is no obligation upon either party to plead foreign law in order to render a claim or cross-claim justiciable. If, however, either party seeks to rely on foreign law, rules of

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defamatory material between China and Queensland and, absent any contrary plea by the respondent, the court will presume the law to be the same. However, paragraphs 10 to 12 of the submissions confused the applicant's position in setting out what he contended were the relevant articles of Chinese law and the elements required to be established under Chinese law in relation to defamation; see AB 103.

5 (2002) 210 CLR 491 at [70].

6 At [61]. In so finding the majority determined that the "double actionability" rule had no application in Australia to international torts: [60].

7 At [75].

8 At [68].

9 (2002) 210 CLR 491.

court and general principles of pleading may oblige the party to plead the relevant foreign law. As is said in *Bullen & Leake & Jacob's Precedents of Pleadings*:

> "Where a party relies on foreign law to support his claim or as a ground of defence thereto, he must specially plead the foreign law relied on in his statement of claim or defence, as the case may be, and he should give full particulars of the precise statute, code, rule, regulation, ordinance or case law relied on, with the material sections, clauses or provisions thereof. A mere allegation that an instrument depending on foreign law is null and void is too vague."

In the present case, on one reading of the statement of claim, the plaintiff alleged that the *lex causae* was that applicable in New Caledonia but did so in terms which did not comply with the above principles.

[69] Two particular questions arise respecting foreign law in tort actions…

…

[70] The first question is whether it is *necessary* for the plaintiff to plead the foreign law in order to establish a cause of action. The answer preferred by Dicey is in the negative." In *Walker v W A Pickles Pty Ltd*, Hutley JA explained:

> 'An action of tort may be brought in New South Wales courts irrespective of where the facts founding the action may have occurred, even if they occurred in a place where there may be no law at all: see *Mostyn v Fabrigas*. A pleading of a cause of action in tort which did not allege that the facts occurred in any particular law district would be formally valid. On the basis that the utmost economy is enjoined by the rules, it would seem to me that pleading of a foreign element in the initiating process in a claim in tort can never be necessary …
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> This approach is reinforced by the principle that foreign law, which is, except between the States and the Territories of the Commonwealth, a fact, is presumed to be the same as local law; and a fact presumed to be true does not have to be pleaded: see Supreme Court Rules, Pt 15, r 10(a).'

On the other hand, if the defendant seeks to rely upon a foreign *lex causae*, then, in the ordinary way, it is for the defendant to allege and prove that law as an exculpatory fact.

> [71] The second question is whether, whilst not obliged to do so, it is for a plaintiff who sees a forensic advantage in the foreign law (for example, it its provision for strict liability) to plead that law in its statement of claim or other initiating pleading. In *Walker*, Hutley JA concluded not only that it was *unnecessary* for the plaintiff to plead the foreign law but *wrong* to do so. However, what is involved here is the application of a choice of law rule. It cannot be beyond the competence of the plaintiff to invoke that rule and be solely for the defendant to rely upon it for any exculpation it offers. The term 'justifiable' may have conveyed a suggestion of exculpation but since the reformulation of the second limb by Brennan J in *Breavington*, that term has not appeared and it cannot control the operation of a choice of law rule which selects the *lex loci delicti* as that to be applied in Australia to govern questions of substance in a proceeding arising from a foreign tort. It follows that the rule must be that which *Dicey* regards as 'well established', namely that a 'party' who relies on a foreign *lex loci delicti* 'must allege, and, if necessary, prove it'." (footnotes omitted)

[21] The effect of *Zhang* is that where the foreign law is the *lex causae* by application of Australian choice of law rules, a plaintiff is not required to plead the foreign law to make it justiciable and establish a cause of action.[10] However, if a plaintiff seeks to rely on foreign law or otherwise wishes to rely on a forensic advantage in the foreign law, the plaintiff is required to plead the foreign law in its statement of claim. In the absence of such a pleading it will be presumed that the foreign law is the same as local law. Similarly if the defendant wishes to rely upon a foreign law but the plaintiff does not and relies on the presumption, then it is for the defendant to allege and prove that law. To the extent that the respondent sought to rely upon the last sentence in [71] of *Zhang* as supporting its contention that the applicant was obliged to allege, and if necessary prove, the foreign *lex loci delicti,* the argument is misconceived. That sentence relates to the question posed at the beginning of [71], namely, whether a party is obliged to plead foreign law in its statement of claim where the party sees a forensic advantage in the foreign law. That is not the case here.

[22] In *Dyno Wesfarmers Ltd v Knuckey & Ors*; *Dyno Wesfarmers Ltd v Dyer*,[11] Mason P, with whom Young CJ in Eq agreed,[12] analysed the decision in *Zhang* in relation to a complaint that the primary judge had erred in not requiring the plaintiffs to plead

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10 At [68] and [70].

11 [2003] NSWCA 375.

12 Handley JA relevantly agreed with Mason P in this regard at [43].

the Papua New Guinean statute, where the law of Papua New Guinea was the *lex loci delicti* in relation to the cause of action:[13]

> "24. This 'pure' pleading point lacks even technical merit, because Part 15 r 10 of the *Supreme Court Rules* provides:
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> > 'A party need not plead a fact if –
> >
> > (a) the fact is presumed by law to be true, or
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> > (b) the burden of disproving the fact lies on the other party,
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> > except so far as may be necessary to meet a specific denial of that fact by the other party in his pleading.'
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> 25. In *Zhang*, the High Court held that it is not necessary for a plaintiff to plead the *lex loci delicti* in order to establish a cause of action justiciable under Australian law. If the plaintiff refrains from pleading the foreign law in the statement of claim then he or she will be taken to have invoked the principle that foreign law is presumed to be the same as local law. In so concluding, the Court approved *Walker v WA Pickles Pty Ltd* [1980] 2 NSWLR 281 at 284-5 and statements to similar effect in Collins (ed), Dicey and Morris on the Conflict of Laws 13th ed (2000), Vol 2 p 1568-9, applying them in the current legal context where choice of the *lex loci delicti* has replaced double actionability (see *Zhang* at 518-9 [69]-[71]). It was held that a party seeking a forensic advantage in the foreign law must invoke it by specific pleading, otherwise the trial will proceed on the basis that the applicable foreign law is identical to the law of the forum.
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> …
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> 29. Nothing occurred to preclude the plaintiffs from maintaining their pleaded claims. Given the correspondence of the fatal accidents legislation in New South Wales and Papua New Guinea, *Zhang* made no difference to the material facts that had to be proved by the plaintiffs. And, whatever the defendant's complaint before Mathews AJ, there was no suggestion that post-*Zhang* reliance on the *lex loci delicti* took it by surprise." (emphasis added)

[23] I consider that the analysis of Mason P is correct and applicable to the present case. The fact that the Court referred to the correspondence of fatal accidents legislation in New South Wales and Papua New Guinea does not as a matter of principle distinguish that case from the present. Absent some specific plea by the respondent,

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13 At [24] to [25] and [29].

Chinese law will be presumed to be the same as the law of the forum, namely Queensland.

[24] It is uncontentious that, insofar as paragraph 3 of the further amended statement of claim refers to the relevant publication being in China, Chinese law is the applicable law determined by the *lex loci delicti*. However, the question is whether the applicant is required to plead the applicable Chinese law. In the circumstances of the present case, I consider that the applicant is not so required.

[25] The case of *Puttick v Tenon Limited*,[14] does not lead to a different conclusion. It was relied upon by the respondent as authority for the proposition that *Zhang* requires the applicant to plead the applicable Chinese law. The passages referred to by the respondent however are not applicable to the present case, as in *Puttick* an amended statement of claim did not make the location of the occurrence the subject of the cause of action clear, such that the *lex causae* was not apparent.[15]

[26] The applicant has not pleaded anything as to foreign law and specifically has stated that he does not intend to rely on any aspect of Chinese law as differing from Australian law.

[27] The majority decision in *Zhang* supports the proposition that where the *lex loci delicti* is a foreign law, it is presumed that it is the same as local law, relevantly in this case, the same as the law in Queensland, and it does not need to be pleaded nor proven as a matter of fact unless the plaintiff sees a forensic advantage in relying on the foreign law and intends to rely on it as differing from local law.

[28] Contrary to the respondent's submission, the applicant in oral submissions made to the primary judge disavowed any reliance on foreign law[16] or the suggestion of such reliance in the rule 445 letter sent by the applicant's solicitors to the respondent's solicitors.[17] Where the applicant does not wish to rely on the law of China to claim a forensic advantage in the foreign law, he is not required to plead the foreign law and can rely on the presumption that foreign law is the same as local law.[18]

[29] Given the clarification by the applicant of his position in oral submissions before his Honour at first instance, the respondent's contention that the applicant does seek to rely on Chinese law to his advantage is not made out.

[30] If the respondent wishes to claim that the action is not maintainable due to some difference in Chinese law or that he has a defence under Chinese law, then that is a matter for the respondent to allege in his defence and for him to rely on accordingly. To the extent that the respondent foreshadows that the applicant may

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14 (2008) 238 CLR 265 at [17] to [18].

15 See [18].

16 Save insofar as it is the *lex loci delicti*.

17 AB 147, T1-8/11-16 and 40-45; AB 148; T1-9/8-13 and 30-34.

18 See also Hely J in *Australian Wool Innovation Ltd v Newkirk (No 2)* [2005] FCA 1307 at [68].

seek to rely on some aspect of Chinese law at trial and the respondent will be taken by surprise, that will be a matter to be dealt with by the trial judge.

[31] In circumstances where the applicant relies on the presumption as to foreign law, the applicant has not failed to plead material facts as to the Chinese law and its content. In considering the applicant was obliged to plead foreign law as a material fact and relying upon [71] of *Zhang* as supporting that obligation where the applicant had disavowed the position in the rule 445 letter and any reliance upon foreign law advantage, the primary judge erred.

[32] In the circumstances the applicant could rather rely on the presumption that Chinese law and Queensland law are the same as provided in r 151 of the *UCPR*. This ground of the appeal is established. Leave to appeal should be granted to the applicant. The order of the primary judge striking out paragraph 3 of the further amended statement of claim should be set aside.

Contentions as to whether paragraph 7(a) should have been struck out

[33] In relation to paragraph 7(a) of the further amended statement of claim, the applicant contends that the paragraph should not have been struck out, because contrary to the primary judge's view a further distillation of the imputation is not able to be provided. The applicant contends that the imputation can only be distilled to the extent permitted by the material complained of,[19] and that the learned primary judge was in error to require the applicant to plead anything further. It contends that the material complained of did not identify the precise manner in which it says the applicant fraudulently took money from Queensland Nickel.

[34] The respondent, however, contends that his Honour's decision was justified. The respondent submits that the lack of precision arose because the pleading of the imputation incorporated the word "fraudulently" and also the phrase "by taking money from Queensland Nickel" in circumstances where the words complained of did not include the word "fraud" or any derivative of it. The respondent claims that he could not, as the pleading stood, plead a defence to meet the "sting" of the matter complained of by the applicant.

[35] The respondent submits that the vice in the use of the word "fraudulently" is that it potentially involves a range of conduct. In this regard he relies on the decision of Steytler J in *Interval Resort Networks (Australasia) Pty Ltd v West Australian Newspapers Ltd*:[20]

> "… [it] discloses no final distillation of the sting of the article. The use of broad words such as 'fraudulently', 'surreptitious' and 'underhanded' does introduce an element of ambiguity. If the

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19 Relying on *Luna v Porter* [2016] NSWSC 1727 at [10] to [12].

20 [1999] WASC 2 at [11]. The relevant imputation was that "the Plaintiffs conduct a business which fraudulently offers prizes including airfares to attract customers and then withholds the prizes only to subject the customer to a surreptitious and underhanded selling campaign of the First Plaintiff's product."

> adjective 'fraudulently' does no more than categorise the conduct of offering and then withholding prizes it adds nothing to the pleaded imputation. If, on the other hand, it does something more than this then this has not been made clear."

Was the learned primary judge in error in striking out paragraph 7(a) of the further amended statement of claim?

[36] The degree of precision required in respect of the pleading of an imputation is a matter of judgment and will vary according to the circumstances of the case. Gleeson CJ in *Drummoyne Municipal Council v Australian Broadcasting Corporation* stated, *inter alia*:[21]

> "In any given case a judgment needs to be made as to the degree of particularity or generality which is appropriate to the occasion, and as to what constitutes the necessary specificity. If a problem arises, the solution will usually be found in considerations of practical justice rather than philology. …"

[37] The New South Wales Court of Appeal in *Fairfax Media Publications Pty Ltd v Alex* stated:[22]

> "The issue which has to be decided in the particular case as to whether there is ambiguity in an imputation is whether there is likely to be confusion either at the pleading stage or at the trial in relation to the meaning for which the plaintiff contends: *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148 (at 155) per Hunt J. Gleeson CJ agreed with Hunt J's formulation of the question in *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 (at 138); see also Priestley JA (at 155) where his Honour expressed the issue as depending 'on the long-established (and probably always self-evident) rule that a pleading must be sufficiently clear to the opposing party to enable that party to plead substantially in answer to it (if the party can) and to prepare for a trial in which the case proved by the evidence will not come as a surprise."

[38] As to paragraph 7(a) of the further amended statement of claim His Honour considered that in the circumstances of the publication, "the ordinary reasonable reader, looking at the publication as a whole, could take the view that it did have that meaning of fraud, rather than a more innocent meaning".[23] His Honour therefore did not strike out paragraph 7(a) of the further amended statement of claim on the basis it could not carry such an imputation.

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[21] (1990) 21 NSWLR 135 at 137.

[22] [2014] NSWCA 273 at [23].

[23] Reasons at p 4; AB 127.

[39] His Honour however went on to consider whether the imputation was too imprecise, particularly because of its internal definition of "fraudulently" by the use of the words "by taking the money from Queensland Nickel". His Honour considered that the imputation was too imprecise and struck out paragraph 7(a) on that basis.

[40] The applicant contends that the relevant imputation is unable to be further distilled because the publication complained of does not identify the precise manner in which it is said that the applicant acted fraudulently by taking money from Queensland Nickel. However here the attribution is not as unambiguous and as specific as the nature of the material published permits.[24] The term "fraudulently" was not used in the publication and the applicant is not hampered in that regard by the language used in the publication.[25]

[41] I consider that his Honour did not err in determining that the imputation was too imprecise and should be struck out. "Fraudulent" can carry a number of meanings and taking money out of Queensland Nickel is not of itself necessarily fraudulent and could be fraudulent on a number of different bases. The basis of the fraud which is associated with the taking of the money is not apparent from the pleading. The phrase could be productive of confusion and should be further clarified by the applicant, as was found by his Honour.

[42] There was no error by the learned primary judge as to the relevant principles or the application of those principles. Given the fact that his Honour granted the liberty to replead, an injustice does not arise as a result of the order to strike out. In those circumstances, the second ground of appeal is not made out.

Orders

[43] In the circumstances I would order:

(1) Leave to appeal granted;

(2) Appeal allowed in part;

(3) Order 1 of the primary judge insofar as it strikes out paragraph 3 of the further amended statement of claim set aside;

(4) Otherwise, appeal dismissed.

[44] As each party has been successful in respect of different parts of the application, each party should bear their own costs of the appeal. Paragraph 3 of the orders made below by his Honour in terms of costs should not be disturbed, given that the strike-out of paragraph 3 was properly brought, given the terms of the rule 445 letter.

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24 *Cf* the position discussed by McCallum J in *Luna v Porter*, [2016] NSWSC 1727 at [9] relied upon by the applicant. The discussion by her Honour at [10] to [12] is more relevant to the present pleading.

25 *Cf Ahmed v Harbour Radio Pty Ltd (No 2)* [2011] NSWSC 20 at [25].