

SUPREME COURT OF QUEENSLAND

CITATION: *Palmer v Nationwide News Pty Ltd and Ors* [2014] QSC 174

PARTIES: **CLIVE FREDERICK PALMER**
(plaintiff)

v

NATIONWIDE NEWS PTY LTD

ACN 008 438 828

(first defendant)

HEDLEY THOMAS

(second defendant)

ADAM SHAND

(third defendant)

FILE NO/S: BS 5572 of 2013

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 5 August 2014

DELIVERED AT: Brisbane

HEARING DATE: 25 June 2014

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the form of orders, and as to costs.**

CATCHWORDS: DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – PARTICULAR STATEMENTS – IMPUTATION – Where the plaintiff claims damages for defamation in respect of five articles published in the newspaper *The Australian* – where the three defendants are the publisher of *The Australian* and the authors of the subject articles – where the defendants apply for a separate determination as to whether the challenged imputations were capable of being conveyed by the articles – where the defendants alternatively apply for orders striking out the challenged imputations – whether the challenged imputations were capable of being conveyed by the articles to the ordinary reasonable reader

Uniform Civil Procedure Rules 1999 (Qld), r 171

Queensland Newspapers Pty Ltd v Palmer [2012] 2 Qd R 139, applied

Amalgamated Television Services Pty Ltd v Marsden (1998)

43 NSWLR 158, applied

COUNSEL: T J Bradley QC with N H Ferrett for the plaintiff
T D Blackburn SC with P J McCafferty for the defendants

SOLICITORS: HopgoodGanim for the plaintiffs
Kelly Hazell Quill Lawyers for the defendants

- [1] **BODDICE J:** The Plaintiff, a well known businessman and now member of Parliament, claims damages for defamation in respect of five articles published in the newspaper *The Australian* on 17 June 2013, 18 June 2013, 9 July 2013, 11 July 2013 and 9 December 2013. The First Defendant is the publisher of the newspaper. The Second and Third Defendants are journalists, and authors of the articles.
- [2] The Defendants apply for the separate determination of the capability of the complained of words to convey certain of the pleaded defamatory imputations. Alternatively, the Defendants seek orders striking out those imputations. The imputations in question pertain to only the first, fourth and fifth articles.

Publications

- [3] Each of the articles specifically named the Plaintiff and various companies of which the Plaintiff was a director and the beneficial owner of the issued share capital. The article also referred to entities associated with CITIC Pacific Limited, a company said to have business relationships with the Plaintiff's companies.
- [4] The first article, published on 17 June 2013 on page 1 of the newspaper, carried the headline "Palmer warns Chinese 1000 jobs threatened if cash doesn't come his way". The article continued on page 5 of the newspaper. The First Defendant published the article. The Second and Third Defendants wrote the article.
- [5] The fourth article, published on 11 July 2013, appeared partially on page 1, and in full on page 3 of the newspaper. Page 1 carried the headline "Palmer may forfeit port rights". Page 3 carried the headline "Palmer to lose right to operate port". The First Defendant published the article. The Second Defendant wrote the article.
- [6] The fifth article, published on 9 December 2013 on page 4 of the newspaper, carried the headline "Letter shows bitterness of Palmer's China rift". The First Defendant published the article. The Second Defendant wrote the article.

Pleadings

- [7] Relevantly, the Third Further Amended Statement of Claim pleads:
- (a) the first article contained the following words:

“Clive Palmer has told his closest advisors and a major Chinese company that he will have to axe about 1000 Australian jobs from his businesses unless he receives a massive cash injection.

The Australian has obtained a document in which Mr Palmer warns ‘the livelihood of over 1000 employees (of his) group and associated companies depends upon’ receiving an urgent payment from the company, CITIC Pacific.

The warnings in the leaked March 13 document show that the tycoon is desperate for cash as his main businesses, a nickel refinery in Townsville and a Sunshine Coast resort, continue to rack up heavy losses.

The contents of the document, which originated in Mr Palmer’s Mineralogy group, are in stark contrast to his public claims of extraordinary wealth and job creation as he campaigns to be prime minister under the banner of his Palmer United Party.

Mr Palmer, a former Gold Coast property developer who has had a major split from the Liberal National Party, claims to be a multi-billionaire...

But the leaked document, which was written on Mr Palmer’s instructions by his senior Brisbane-based lawyer, warns CITIC Pacific that he urgently requires about \$200 million.

...

The combined staff of Mr Palmer’s nickel refinery and his Sunshine Coast resort, known as Hyatt Regency Coolum until he abruptly severed ties with Hyatt and was forced to pay the hotel chain significant damages, is about 1000...

An investigation by *The Australian* has identified a litany of broken promises, job cuts, false claims and poor operational decisions directly linked to Mr Palmer’s businesses.”

- (b) in their natural ordinary meaning, the words of the first article meant and were understood to mean:
- “(a) The plaintiff lacked judgment, efficiency, capacity and competence to manage his company Mineralogy;
 - (b) The plaintiff was insolvent;
 - (c) The plaintiff had lied to the public and made false claims about his wealth; and
 - (d) The plaintiff lacked the capability, judgment and competence to make good operational decisions in the businesses of the companies he controlled.”
- (c) the fourth article contained the following words:
 “Deputy Prime Minister Anthony Albanese’s department is taking legal steps to strip Clive Palmer’s company, Mineralogy, of its lucrative rights to operate the new port for China’s \$7 billion iron ore project in Western Australia.

An internal review of sensitive information has led to a high-level decision in the Department of Infrastructure and Transport to start the process of removing Mineralogy as operator of the security regulated port of Cape Preston, near Karratha, government sources told *The Australian*.

...

The West Australian Government of Premier Colin Barnett has pressed Mr Albanese's department to revoke the operator approvals of Mineralogy, owned by prime ministerial aspirant Mr Palmer, amid concerns about the company's credentials and ability to operate the new port...

...

Insiders said Mineralogy had a handful of staff in a temporary building on the site and should never have been handed the legal control of the port. Mr Albanese's department expects to be accused of not doing proper due diligence on Mineralogy's ability to operate the port.

...

The move against Mr Palmer's company as operator is a significant reversal after the federal government's regional head of transport security operations, Steven Rowson, gave formal approval to Mineralogy in January."

- (d) in their natural ordinary meaning, the words in the fourth article meant and were understood to mean:
- “(e) the Plaintiff had so managed the business of his company Mineralogy that it acquired the right to operate the Port of Cape Preston when it did not have the credentials and ability to do so;
 - (f) the Plaintiff had so managed the business of his company Mineralogy that it acquired the right to operate the Port of Cape Preston that it ought not to have acquired;
 - (g) the Plaintiff had so managed the business of his company Mineralogy that there were reasons to revoke its approval to operate the Port of Cape Preston; and
 - (h) the Plaintiff lacked the skill, capability, judgment or competence to ensure that a company of which he was in charge, Mineralogy, had the credentials and ability to operate the Port of Cape Preston.”
- (e) the fifth article contained the following words:
- “Letter Shows Bitterness of Palmer’s China Rift**
- Clive Palmer issued a written edict to a Chinese government-controlled company requiring it to shut down its \$7 billion-plus iron ore project within 60 days, sack several thousand workers and remove infrastructure it has been developing for a decade.

The demands in Mr Palmer's legal letter, leaked to *The Australian* yesterday, highlight the bitterness of a dispute that has put billions of dollars of investment at stake with potential to disrupt commercial and political relationships with the Chinese.

The litigation strategy of Mr Palmer and his company, Mineralogy was criticised as 'absurd' by West Australian Supreme Court Judge, James Edelman, on Wednesday amid a row over royalties from the mining of iron ore in the Pilbara region. Justice Edelman said Mineralogy's pleas for an urgent trial 'ring hollow' after its many delays.

In the leaked November 22 letter, China's CITIC Pacific was told by Mineralogy Deputy Chairman, Geoff Smith, 'to wind up all mining operations and dispose of all equipment remaining at the mine and finalise all outstanding obligations in connection with mining operations' by late January. The Chinese company, majority owned by the Chinese government as its international investment vehicle, was told that its rights were being revoked and that 'all mine facilities must be removed and site remediation carried out at (Chinese) cost'. The letter warned that 'Mineralogy requires that the land be rehabilitated to the condition it was in prior to entry into the above agreement and prior to any work being undertaken by (CITIC Pacific).

The demands have infuriated Chinese executives who have been backed by court findings in rejecting Mr Palmer's repeated demands for hundreds of millions of dollars in royalty payments.

Senior sources said federal ministers and the West Australian Premier Colin Barnett had been briefed about the conduct of the leader of the Palmer United Party in his disputes with CITIC Pacific, which has paid him US\$415 million so far to mine iron ore from Pilbara tenements. The first shipment from the Port of Cape Preston is imminent with a Chinese vessel taking on 40,000 tonnes of iron ore concentrate this week.

The head of CITIC Pacific has accused Mr Palmer of 'obstructive legal behaviour' and warned: 'it's our view that (his) behaviour and Mineralogy's litigious approach will be closely examined by the wider community'.

Mr Palmer's November 22 letter to CITIC Pacific purporting to revoke the company's rights to mine and ship the iron ore came five days before *The Australian Financial Review* published an interview in which he said he was 'considering' such action.

According to other legal correspondence leaked to *The Australian* earlier this year, Mr Palmer warned the Chinese that the relationships between the two countries would be hurt if he were not paid as a matter of urgency.

..."

- (f) in their natural and ordinary meaning, the words of the fifth article meant and were understood to mean:

- (a) the plaintiff was a cruel and hostile person who, out of intense animosity and extreme acrimony, had given a written order, having the force of law, that required CITIC Pacific to shut down a \$7 billion project and sack several thousand workers within 60 days;
- (b) the plaintiff had cruelly and out of intense animosity and extreme acrimony put at risk billions of dollars of investment in Australia and threatened to disrupt commercial and political relationships between Australia and China;
- (c) the plaintiff had cruelly and out of intense animosity and extreme acrimony revoked the legal rights of CITIC Pacific;
- (d) the plaintiff had been found by a court to have wrongly demanded hundreds of millions of dollars in royalty payments; and
- (e) the plaintiff had falsely told the Australian Financial Review that he was only considering revoking CITIC Pacific's legal rights to mine and ship iron ore when he had already done so.

The application

- [8] The application pertains only to the following imputations:
- (a) in respect of the first article, the pleaded imputation 14(b);
 - (b) in respect of the fourth article, the pleaded imputations 14C(e), 14C(f), 14C(g) and 14C(h);
 - (c) in respect of the fifth article, the pleaded imputations 14D(a), 14D(b), 14D(c) and 14D(d).
- [9] In respect of all of the imputations, save for imputation 14D(d) in respect of the fifth article, the basis for the challenge is that each is not reasonably capable of being conveyed by the words complained of. In respect of the imputation 14D(d), the challenge is one of form under Rule 171, *Uniform Civil Procedure Rules 1999* (Qld).
- [10] The Plaintiff, in subsequent written submissions, has foreshadowed an intention to further amend his statement of claim by deleting imputation 14D(d), and replacing it with other imputations. In the circumstances, it is appropriate to treat the Plaintiff's foreshadowed amendment as an indication imputation 14D(d) in relation to the fifth article is no longer pressed by the Plaintiff. It is unnecessary to further consider the challenge to that imputation.

Applicable principles

- [11] It is accepted the determination of the capability of words to convey a particular imputation is a question of law, to be determined prior to any consideration by a jury as to whether the words in fact conveyed the pleaded imputation.¹
- [12] In determining the capability of words complained of to convey a particular defamatory meaning, material matters include the mode or manner of publication. A sensational article in a newspaper is likely to be read with a different degree of analytical care to that given to material published in a book.² Further, the ordinary reasonable reader may only read an article once.
- [13] The question is whether the words are reasonably capable of conveying the imputation to the ordinary reasonable reader. The relevant principles were summarised in *Queensland Newspapers Pty Ltd v Palmer*:³
- “[19]... The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is inferred from it. However, any strained, or forced, or utterly unreasonable interpretation must be rejected.
- [20] The ordinary reasonable reader is a person of fair, average intelligence who is neither perverse nor morbid nor suspicious of mind nor avid of scandal. However, that person does not live in an ivory tower but can, and does, read between the lines in light of that person’s general knowledge and experience of worldly affairs. The ordinary reasonable reader considers the publication as a whole, and tends to strike a balance between the most extreme meaning that the publication could have and the most innocent meaning. That person has regard to the content of the publication. Emphasis given by conspicuous headlines or captions is a legitimate matter the ordinary reasonable reader takes into account.
- [21] Whilst the test of reasonableness guides the determination of whether the matter complained of is capable of conveying any of the pleaded imputations, a distinction must be drawn between what the ordinary reasonable reader (drawing on his or her own knowledge and experience of human affairs) could understand from what the defendant has said in the matter complained of and the conclusion which the reader could reach by taking into account his or her own belief which has been excited by what was said. The approach to be taken must be the former, not the latter.” (Citations omitted)
- [14] The distinction between an implication and an inference was discussed in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158:⁴

¹ See generally, *Queensland Newspapers Pty Ltd v Palmer* [2012] 2 Qd R 139.

² *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165-167.

³ [2012] 2 Qd R 139 at [19]-[21].

⁴ At 167.

“... An implication is included in and is part of that which is expressed by the publisher. It is something which the reader (or listener or viewer) understands the publisher as having intended to say. An inference is something which the reader (or listener or viewer) adds to what is stated by the publisher; it may reasonably or even irresistibly follow from what has been expressly or impliedly said, but it is nevertheless a conclusion drawn by the reader (or listener or viewer) from what has been expressly or impliedly said by the publisher...”

...

An inference is drawn from an inference when the reader, listener or viewer draws an inference which is available in the matter complained of and then uses that inference as a basis (at least in part) from which a further inference is drawn. The publisher is held responsible for the first of those inferences but not for the second because – as I have already said – it is unreasonable for the publisher to be held so responsible.” (Citations omitted)

Defendants’ submissions

- [15] The Defendants submit the first article refers only to a need for cash, which is indicative of cashflow difficulties. The references to a threat to 1,000 jobs, and the Plaintiff being “desperate for cash”, are insufficient to impute insolvency. Insolvency means an inability to pay debts as and when they fall due. Further, the article must be read as a whole. That includes the reference to the Plaintiff saying he has the ability to continue to operate “for the next 10 years”. Read as a whole, the ordinary reasonable reader would read the article as referring to the Plaintiff’s business, not the Plaintiff himself. A conclusion the article was conveying the Plaintiff was personally insolvent would constitute a strained or forced and unreasonable interpretation.
- [16] The Defendants submit the central thrust of the fourth article is that there is a push to remove the Plaintiff’s company, Mineralogy, as the port operator. The contested imputations seek to link that move with the Plaintiff’s management of the company. There is no such link in the article. It reports government concerns about Mineralogy’s credentials and ability to operate the port. To find imputations that the Plaintiff lacks qualification, knowledge, skill, capacity, judgment or efficiency in his management of Mineralogy involves the reader speculating and drawing an impermissible inference.
- [17] The Defendants submit the fifth article simply reports an event which has occurred in the course of Mineralogy’s legal dispute with CITIC. The use of the word “bitterness” does not, in context, impute cruelty, hostility or intense animosity and extreme acrimony. Such inferences only arise from a consideration of the dictionary meaning of “bitterness”. The ordinary reasonable reader does not have regard to the dictionary meaning. In any event, “bitterness” refers to the dispute, not the Plaintiff.

Plaintiff's submissions

- [18] The Plaintiff submits the first article focuses on the Plaintiff and his relationship with his company Mineralogy. It draws a picture of Mineralogy being in financial difficulty, with the Plaintiff considering whether it should continue to trade. Its thrust was that the Plaintiff and his companies were in severe financial difficulty. It was well within the bounds of reasonableness for the ordinary reasonable reader to draw the meaning that the Plaintiff was insolvent, in the sense he could not pay his debts.
- [19] The fourth article expressly stated Mineralogy was “Clive Palmer’s company”, thereby implying decisions as to Mineralogy’s conduct were those of the Plaintiff. The article invited the inference the Plaintiff had directed the company to obtain an advantage, despite its lack of credentials and ability. As such, the article drew a connection between the Plaintiff and the company’s ability to perform the relevant role. An ordinary reasonable reader could interpret the article as reflecting upon the Plaintiff’s skill, capability, judgment or competence.
- [20] The fifth article used “bitterness” in its headline. The dictionary definitions of “bitter” include cruelty and intense animosity. The challenged imputations were within the range of meanings open on the face of the article.

Discussion

First article

- [21] Reading the article as a whole, the ordinary reasonable reader would distil the Plaintiff had said most of the employees from his businesses will be axed unless he receives a massive cash injection. This warning had been given against a background of those businesses being “desperate for cash” as they were incurring heavy losses. This position was “in stark contrast” to public statements made by the Plaintiff, and occurred against a background of broken promises, job cuts, false claims and poor operational decisions.
- [22] Most of the imputations relied on by the Plaintiff as having arisen from the natural ordinary meaning of words refer to a lack of judgment, efficiency, capacity or confidence and false claims. The capability of the words complained of to convey those imputations is not in dispute in this application.
- [23] The impugned imputation goes further. It contends the ordinary reasonable reader would distil from the words complained of that the Plaintiff “was insolvent”. Even to the ordinary reasonable reader, the word “insolvent” has a particular meaning. It is akin to bankruptcy. It suggests an inability to pay your debts as they fall due.
- [24] The impugned imputation is that the Plaintiff, not his companies, was insolvent. That is a different concept to those companies incurring ongoing losses and having

a desperate need for cash. Even an assertion retrenchment would include all of the Plaintiff's staff does not mean the Plaintiff, as opposed to his companies, is unable to pay his debts as and when they fall due.

- [25] Whilst an inference may be open that the Plaintiff's companies were unable to continue trading without an injection of cash, the ordinary reasonable reader, reading the article in accordance with the established principles, even reading between the lines, could not conclude it was conveying the Plaintiff was insolvent. Such a conclusion could only be reached by a reader "taking into account his or her own belief which has been excited by what was said". It would involve drawing an inference from an inference. That is an impermissible approach.
- [26] The imputation pleaded in paragraph 14(b) is not capable of being conveyed by the words contained in the first article.

Fourth article

- [27] The thrust of the fourth article is that legal steps are to be taken to strip Mineralogy, the Plaintiff's company, of its lucrative rights to operate a new port in Western Australia as a result of concerns about Mineralogy's credentials and ability to operate the new port. These steps were to be taken in circumstances where Mineralogy ought never to have been handed legal control of the port.
- [28] Read as a whole, and in context, the ordinary reasonable reader would distil the fourth article is referring to concerns as to Mineralogy's capacity and ability to operate the new port. The impugned imputations do not relate to Mineralogy's capacity or ability. They relate to the Plaintiff's skills and abilities in managing Mineralogy.
- [29] Imputations 14C(e), 14C(f) and 14C(g) specifically refer to the way in which the Plaintiff had "managed" the business of Mineralogy. An ordinary reasonable reader, reading the fourth article as a whole in accordance with the established principles, could not draw an inference that the words were conveying imputations about the way the Plaintiff had managed his company. The words of the article refer to Mineralogy's actions, or lack thereof in respect of the operation of the port.
- [30] Only a reader taking into account his or her own beliefs, which had been excited by what was said, could draw a conclusion the words are referring to the Plaintiff's management of Mineralogy. None of the imputations 14C(e), 14C(f) and 14C(g) are capable of being conveyed to the ordinary reasonable reader by the words complained of in the fourth article.
- [31] Imputation 14C(h) is in a different category. It does not refer to the Plaintiff's management of Mineralogy. It refers to the Plaintiff's skills, capability, judgment or competence to ensure his company had the necessary credentials and ability to operate the port.

- [32] In the context of an article which expressly identified Mineralogy as “Clive Palmer’s company”, an ordinary reasonable reader, reading the article in accordance with the appropriate principles, and drawing on his or her own knowledge and experience of human affairs, could understand the article was conveying an imputation in respect of the Plaintiff’s capacity, skill, judgment and competence to ensure his company could operate the port.
- [33] The words in the fourth article are capable of conveying the pleaded imputation 14C(h) in the Third Further Amended Statement of Claim.

Fifth article

- [34] The thrust of the fifth article is the dispute between the Plaintiff and CITIC Pacific. An ordinary reasonable reader, reading the article in accordance with the established principles, would read “bitterness” as a reference to the escalating dispute. That reader, even reading between the lines, could not conclude the words in the article were conveying that the Plaintiff was a cruel and hostile person or that he had taken those actions cruelly. Such an interpretation would require the ordinary reasonable reader to attribute to the word “bitterness” a meaning which does not arise in the context of the article read as a whole.
- [35] Each of the imputations pleaded in paragraphs 14D(a), 14D(b) and 14D(c) are not capable of arising from the words complained of in the fifth article.

Conclusions

- [36] The words complained of in the first article are not capable of conveying the imputation in paragraph 14(b) of the Third Further Amended Statement of Claim.
- [37] The words complained of in the fourth article:
- (a) are not capable of conveying the imputations pleaded in paragraphs 14C(e), 14C(f) and 14C(g) of the Third Further Amended Statement of Claim;
 - (b) are capable of conveying the meaning pleaded in paragraph 14C(h).
- [38] The words complained of in the fifth article are not capable of conveying the meanings pleaded in paragraphs 14D(a), 14D(b) and 14D(c) of the Third Further Amended Statement of Claim.
- [39] I shall hear the parties as to the form of orders, and as to costs.