

vineyard through a Nevada limited partnership. Mr Murren invested more than USD 1.6 million and Mr Lee more than USD 700,000. The terms of the limited partnership were recorded in two agreements, in 2002 and 2006. The vineyard business failed and the respondents lost all of their investment. It transpired that Mr Schaeffer had not, in fact, transferred his original 80 per cent interest in the vineyard to the limited partnership, and had dealt with the assets intended to be owned by the limited partnership as if they were his own.

[3] The respondents commenced their proceedings against Mr Schaeffer in the High Court in 2015. Mr Schaeffer filed a protest to jurisdiction on the basis of an arbitration clause in the agreements. He also sought a dismissal or stay on the ground that New Zealand was not the appropriate forum. Both the protest and dismissal or stay application failed in the High Court.³ There was no review or appeal of that decision. The respondents' claim was heard in 2018. Collins J found Mr Schaeffer was liable for negligent misstatement as well as under the Fair Trading Act 1986 (New Zealand) and the Nevada Deceptive Trade Practices Act NRS § 598.⁴

[4] The case proceeded on the basis of New Zealand law. The reason for this was recorded by Collins J as follows:⁵

Except for the cause of action based on the Nevada Deceptive Trade Practices Act, all the causes of action were based on New Zealand law, despite both the 2002 and 2006 Agreements being governed by Nevada law. This was a result of Mr Murren's and Mr Lee's election not to plead foreign law, in which case the Court will apply domestic law irrespective of whether it would have been the applicable law had choice of law rules been engaged.

[5] Mr Schaeffer appealed to the Court of Appeal. Although his written submissions to that Court covered a number of proposed appeal grounds, the appeal itself proceeded on the basis of only one ground of appeal, which had not been signalled in the notice of appeal. That was that the High Court ought to have applied Nevada law and, because Nevada law had not been proved by the respondents, the High Court ought to have dismissed their claims.⁶

³ *Murren v Schaeffer* [2015] NZHC 2759 (Associate Judge Matthews).

⁴ HC judgment, above n 2, at [236].

⁵ At [96], n 6 (citation omitted).

⁶ CA judgment, above n 1, at [7].

[6] The Court of Appeal dismissed the appeal. The argument for Mr Schaeffer in the Court of Appeal was said to be based on a number of passages from *Dicey, Morris and Collins on The Conflict of Laws*.⁷ The Court of Appeal said it found no support for the proposition advanced by Mr Schaeffer in *Dicey* or any other relevant source.⁸

[7] The applicant wishes to advance three grounds of appeal if leave is granted. These are:

- (a) whether the High Court was correct to apply New Zealand law to negligent misstatements made and acted on in Nevada;
- (b) if the High Court erred in applying New Zealand law to the negligent misstatement claim, whether that invalidates its findings on the Fair Trading Act and Nevada Deceptive Trade Practices Act claims; and
- (c) whether the High Court was correct to apply the Fair Trading Act, given that s 3(1) of that Act limits its application to conduct outside New Zealand “to the extent that such conduct relates to the supply of goods or services, or the granting of interests of land, within New Zealand”.

[8] The application for leave is advanced on the basis that the points at issue are matters of general and public importance and that, if leave is not granted, a substantial miscarriage of justice will arise.⁹

[9] The proposition that Mr Schaeffer wishes to advance on appeal, that the High Court was required to determine the legal question of which substantive law applied, even though neither party pleaded that Nevada law applied, appears to be inconsistent

⁷ Lord Collins (ed) *Dicey, Morris and Collins on The Conflict of Laws* (15th ed, Sweet and Maxwell, London, 2012) [*Dicey*] at ch 9.

⁸ CA judgment, above n 1, at [28].

⁹ Senior Courts Act 2016, s 74(2)(a) and (b).

with the commentary in *Dicey*. In *Dicey*, the relevant rule, r 25, is expressed as follows:¹⁰

- (1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
- (2) In the absence of satisfactory evidence of foreign law, the court will apply English (domestic) law to such a case.

[10] As the Court of Appeal acknowledged, *Dicey* qualifies this rule with the following observation:¹¹

But in recent years there have been increasing signs that [the default rule] cannot invariably follow, and in cases where it would be wholly artificial to apply rules of English law to an issue governed by foreign law, a court may simply regard a party who has pleaded but who has failed to prove foreign law with sufficient specificity as will allow an English Court to simply apply it, as having failed to establish his case without regard to the corresponding principle of English domestic law.

[11] This is not a case where that qualification applies.

[12] The position outlined in *Dicey* is confirmed in the recent New Zealand text, *The Conflict of Laws in New Zealand*.¹² It is also consistent with the position stated in other leading texts.¹³

[13] In light of this, we do not consider that the argument that the applicant wishes to advance on appeal has sufficient chance of success to justify the cost and expense of a further appeal.

[14] Having reached that conclusion, we do not consider that either the second or third grounds of appeal could assist the applicant. There may be room for argument as to the soundness of the conclusion in relation to the application of the Fair Trading

¹⁰ *Dicey*, above n 7, at [9R-001] (footnote omitted).

¹¹ At [9-002] (footnote omitted).

¹² Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [3.87].

¹³ Paul Torremans (ed) *Cheshire, North & Fawcett: Private International Law* (15th ed, Oxford University Press, Oxford, 2017) at 105–106; David McClean and Verónica Ruiz Abou-Nigm *The Conflict of Laws* (9th ed, Sweet & Maxwell, London, 2016) at 8; and Martin Davies, Andrew Bell and Paul Le Gay Brereton *Nygh's Conflict of Laws in Australia* (8th ed, LexisNexis, Chatswood (NSW), 2010) at [17.4] and [17.37].

Act, but the arguments that the applicant wishes to raise are fact-specific and do not give rise to any significant point of law. Even if this Court were to disturb the findings in relation to the Fair Trading Act and the Nevada Deceptive Trade Practices Act, that would not affect the outcome of the case, because the negligent misstatement finding, and the damages awarded in respect of it, would remain.

[15] In these circumstances, we are not satisfied that it is in the interests of justice to grant leave to appeal. We therefore dismiss the application for leave.

[16] We award costs to the respondents of \$2,500.

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