IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-002212

BETWEEN	ROBERT ALEXANDER MOODIE Plaintiff
AND	ANTHONY JOSEPH ELLIS First Defendant
AND	ELIZABETH GRACE STRACHAN Second Defendant
AND	APN SPECIALIST PUBLICATIONS NZ LIMITED Third Defendant

Hearing: 9 June 2008

Counsel: R A Moodie (in person)
D H McLellan for first defendant
J O Upton QC for second defendant
B D Gray QC for third defendant

Judgment: 19 March 2009 at 11:00am

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 19 March 2009 at 11:00am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Moodie & Co, PO Box 376, Fielding 4740 for plaintiff
McElroys, PO Box PO Box 835, Auckland 1140 for first defendant
Rainey Collins, PO Box 689, Wellington 6140 for second defendant
Bell Gully, PO Box 4199, Auckland 1140 for third defendant

Introduction

[1] The plaintiff (Dr Moodie) is suing the defendants for alleged defamation in two articles published in two editions of the third defendant's (APN) magazine *New Zealand Listener*. The articles report statements attributed to the first defendant (Mr Ellis) and the second defendant (Ms Strachan).

[2] Dr Moodie is a barrister who gained some notoriety whilst acting as counsel for two persons (the Berrymans) engaged in long running litigation with the Crown. In the course of the Berryman litigation Dr Moodie was prosecuted by the Solicitor-General for contempt. He engaged Mr Ellis to represent him in the contempt proceeding. A dispute arose as to the terms of that engagement.

[3] Between 2004 and 2006 Dr Moodie and Ms Strachan entered into work and personal relationships as a consequence of which Ms Strachan undertook legal work for clients on Dr Moodie's behalf. They acquired a shared interest in a property in Fielding for use as their professional offices.

[4] These relationships came to an end in late 2006 or early 2007. The edition of *New Zealand Listener* for the week commencing 17 March 2007 contained an article about the dispute between Dr Moodie and Mr Ellis. It reported comments attributed to Mr Ellis and Ms Strachan relating to unresolved issues they had with Dr Moodie and contending that Dr Moodie had taken financial advantage of each of them. A second article about Dr Moodie appeared in the edition of *New Zealand Listener* for the week commencing 31 March 2007. It reported that Mr Ellis was about to file High Court action against Dr Moodie to recover fees for representing Dr Moodie in the contempt proceeding and claiming exemplary damages for alleged misleading and deceptive conduct and deceit.

[5] Dr Moodie says that Mr Ellis and APN have defamed him in both articles, and that Ms Strachan and APN have defamed him in the first article.

The applications

[6] Each of the defendants has an application before the Court:

a) Dr Moodie has pleaded two causes of action against Mr Ellis, one in respect of each article. Mr Ellis has applied for orders striking out Dr Moodie's pleading of lengthy passages of the article on which the first cause of action is based, and directing Dr Moodie to provide an amended statement of claim with particulars of the alleged publication, precise defamatory words and meanings, and the special damages being sought. He also seeks orders that Dr Moodie plead the second cause of action (based on the second article) more particularly. Additionally he wants certain paragraphs in the second cause of action, referring to a separate proceeding issued by Mr Ellis, to be struck out.

b) Dr Moodie has pleaded three causes of action against APN, the first two being the same as those against Mr Ellis and the third being against it and Ms Strachan. APN has applied for an order that Dr Moodie file a further statement of claim clarifying the defamatory words and the meanings being alleged in the two articles underlying the common causes of action with Mr Ellis, identifying the article in issue in the third cause of action, and incorporating particulars provided by letter. It reserves its position on possible strike out until the pleading has been clarified.

[7] Although Ms Strachan supports the applications by Mr Ellis and APN, her application is for security for costs. She claims that there is reason to believe that Dr Moodie cannot pay costs, and that she should be protected by an order that Dr Moodie provide security for costs.

[8] Dr Moodie opposes all applications. He contends that he has pleaded the alleged defamations appropriately and sufficiently. He maintains that he is entitled to rely on general passages from the article, and that it is sufficient for him to plead

natural and ordinary meanings for the passages rather than particular words and phrases. He says that the defendants are also sufficiently informed about the various other matters for which particulars or clarification are sought. In respect of Ms Strachan's application for security for costs he says that she has failed to show reason to believe that he will be unable to pay costs, and that in any event an order would be inappropriate in the circumstances of the case.

Further application by Dr Moodie

[9] The defendants' applications were filed and served well in advance of the hearing. Notices of opposition were filed. The hearing was allocated specifically for those applications.

[10] Shortly before the hearing Dr Moodie filed what may be described as an omnibus application in which he sought orders setting aside or modifying claims by Mr Ellis to privilege or confidentiality, striking out or requiring further particulars of the defences of Mr Ellis and Ms Strachan, and requiring Ms Strachan to surrender documents and equipment allegedly the property of Dr Moodie's firm. Dr Moodie sought to have his application heard at the same time as the defendants' applications.

[11] Counsel for all defendants said that they were not in a position to argue this application on that day. Counsel for Mr Ellis and Ms Strachan both pointed out that the defendants' applications had been identified more than two months earlier. They also said their evidence in opposition was likely to be needed on some aspects of Dr Moodie's application. Although no orders were sought against APN, its counsel also opposed hearing of Dr Moodie's application for strike out or particulars on the grounds that the orders potentially affect it and that the application was premature (as the defendants' applications needed to be determined first).

[12] After hearing from counsel I accepted that the defendants were entitled to greater notice (Dr Moodie had not issued notice requesting particulars) and an opportunity to file evidence in opposition. The outcome of the defendants' applications might also have an impact on the pleading of defences and hence on Dr

Moodie's application for further particulars of those defences. Dr Moodie's application was adjourned for hearing at a later time.

The applications to strike out/provide further particulars

[13] The principles on which these applications are to be determined are not in dispute. Mr Ellis' application to strike out was brought under what is now r 15.1(1) of the High Court Rules (formerly r 186(1)):

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

The principles which the Court applies in determining a strike-out application are well established: *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, 267. Counsel accepted that the jurisdiction is discretionary and that if the defects are curable the plaintiff will usually be given opportunity to amend: *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316.

[14] The applications to provide further particulars are brought under r 5.21 (previously r 185):

> **5.21 Notice requiring further particulars or more explicit pleading**
>
> (1) A party may, by notice, require any other party—
>
> (a) to give any further particulars that may be necessary to give fair notice of—
>
> (i) the cause of action or ground of defence; or
>
> (ii) the particulars required by these rules; or
>
> (b) to file and serve a more explicit statement of claim or of defence or counterclaim.

(2) A notice must indicate as clearly as possible the points on which the pleading is considered defective.

(3) If the party on whom a notice is served neglects or refuses to comply with the notice within 5 working days after its service, the court may, if it considers that the pleading objected to is defective or does not give particulars properly required by the notice, order a more explicit pleading to be filed and served.

(4) Even if no notice has been given under this rule, the court may on its own initiative order a more explicit pleading to be filed and served.

It is common ground that notices have been given.

[15] It has to be said that a number of the issues underlying these applications are a consequence of Dr Moodie having pleaded his causes of action against the defendants together rather than separately. He claims that this is because they are based on the same facts. The defendants maintain that although the claims have common facts, their positions are distinct and need to be recognised and pleaded as such.

[16] As some of the complaints are common to more than one of the causes of action I will deal with all that arise on the first cause of action, and then look at additional matters arising on the second and third causes of action. Before doing so, it will helpful to outline the pleadings in dispute.

[17] The statement of claim before the Court at the time of the applications was an amended statement of claim filed on 30 November 2007. I will refer to this version throughout this judgment as the statement of claim. After the hearing Dr Moodie filed a further amended statement of claim responding in part to issues that had been traversed at the hearing. Counsel for Mr Ellis has filed a memorandum identifying aspects of his application which have been remedied, and in respect of which Mr Ellis no longer seeks a ruling. Counsel for APN has advised, also by memorandum, that the amendment to the statement of claim does not deal with APN's objections to the pleading. APN seeks a ruling on the applications as argued.

[18] I propose dealing with the pleading as at the date of the hearing and leaving it to the parties to determine those aspects that have been remedied by the amendment.

I will note, however, the aspects which counsel for Mr Ellis says have been resolved for his client.

[19] Dr Moodie pleads three causes of action:

a) That he was defamed by both Mr Ellis and APN in an article authored by APN's Features Editor, Ms Black, entitled "Moodie blues", which appeared in the edition of *New Zealand Listener* for the week commencing 17 March 2007;

b) That he was defamed by both Mr Ellis and APN in a further article by Ms Black entitled "Lawyer v Lawyer", which appeared in the edition of *New Zealand Listener* for the week commencing 31 March 2007; and

c) That he was defamed by Ms Strachan and APN in the "Moodie blues" article.

[20] The issues over the form of the pleading can be seen clearly in the first cause of action, dealing with the "Moodie blues" article. In paragraph 18 of the statement of claim Dr Moodie pleads that both Mr Ellis and APN falsely and maliciously published the words appearing in four passages of the "Moodie blues" article:

a) An extract of three paragraphs, comprising 191 words;

b) An extract starting with a highlighted heading taken from the article and part of a following paragraph, comprising some 53 words;

c) An extract of two paragraphs, comprising some 116 words; and

d) An extract of four paragraphs, comprising some 150 words.

[21] In the following paragraph (19) of the statement of claim, Dr Moodie has pleaded natural and ordinary meanings for each of the four extracts. He pleads:

a) Five separate meanings from the three paragraphs in the first extract;

b) Two separate meanings for the highlighted passage and subsequent paragraph in the second extract;

c) Four separate meanings for the two paragraphs in the third extract;

d) Five separate meanings for the four paragraphs in the fourth extract.

[22] Dr Moodie then pleads (as paragraphs 20 and 21):

> In their natural and ordinary meaning, the words used in the *New Zealand Listener* article are false, and grossly defamatory of the plaintiff Dr Moodie.
>
> The defendants have acted in flagrant disregard of the plaintiff's right to his excellent reputation.

[23] In his prayer for relief Dr Moodie seeks special damages for loss of business and profits (as a consequence of the impact of the defamations on his professional reputation).

The objections to the first cause of action

(a) Publication

[24] Dr Moodie pleads that all of the words in the four extracts were published by both Mr Ellis and APN. Mr Ellis points to the pleading that Ms Black authored the article and says that many of the words in the article are clearly her words rather than his. He claims that he is entitled to particulars of the specific words that he is alleged to have published.

[25] In general a plaintiff is required to plead separately and clearly distinct causes of action founded on separate and distinct facts: r 5.17 of the High Court Rules. The objective of pleadings has been described (*Pricewaterhouse v Fortex Group Limited* CA 170/98, 30 November 1998) as "an essential roadmap for the Court and the

parties" so the Court knows what it is to rule upon and the defendant knows the case it must meet.

[26] Rule 5.21 of the High Court Rules requires sufficient particulars to be given to "fairly inform" the Court and the other party of the case being advanced. This is particularly important in defamation cases where there is good reason for precision of pleading. The specifics of publication and the words used will be a significant factor in the defences that may be available and will determine what the defendants need to plead and prove for their defences. Mr Ellis has pleaded affirmative defences of truth and honest opinion (as has Ms Strachan). Those defences cannot sensibly be made out without clear definition of the published words and pleaded imputations.

[27] Counsel for Mr Ellis submits that the present pleading lacks clarity and that Mr Ellis is entitled to know which of the published words are attributed to him. Dr Moodie has sought to defend his pleading that the words were published by Mr Ellis and APN on the grounds that Mr Ellis worked on the article with Ms Black. Dr Moodie responds to the criticism that Mr Ellis did not publish the article by saying that he will amend his pleading to read that Mr Ellis either published the words or caused them to be published.

[28] I accept the submission that Mr Ellis is entitled to know which of the published words are attributable to him (the same applies for Ms Strachan). The proposed amendment does not resolve the issue. Mr Ellis is entitled to greater clarity:

a) If Dr Moodie wishes to rely on publication of particular words by Mr Ellis, he needs either to plead words as having been published verbatim or, in respect of words that are not a verbatim quotation, the facts and circumstances which support his contention that Mr Ellis published them.

b) If Dr Moodie wishes to contend that Mr Ellis has a joint and several liability for all of the words (which is what I understand from his

submissions), he needs to plead that explicitly, together with the facts and circumstances which make Mr Ellis liable for all the words. For example he might need to plead, and provide particulars of, an allegation that Mr Ellis co-authored the article or authorised the article in whole or in part.

c) The circumstances of the publication (to whom and when) need to be pleaded.

[29] Counsel for Mr Ellis submitted that Dr Moodie should plead his cause of action against Mr Ellis separately to that against APN. This would undoubtedly clarify the case against Mr Ellis. The same applies to the case against Ms Strachan. I do not accept Dr Moodie's argument that separate pleading of causes of action against Mr Ellis and APN (and Ms Strachan and APN) will result in prolixity. Even on an argument of co-authorship there will be different facts relating to publication by Mr Ellis than those relating to APN.

(b) Specific words and meanings

[30] A major issue between the parties is whether Dr Moodie is able to plead defamatory meanings by reference to four general passages from the article or whether he must narrow his pleading to particular words and phrases.

[31] Dr Moodie argues that he has done all that is required of him by pleading the passages in the article which he says are defamatory of him. He said that it is not so much a matter of specific words as the impression that the ordinary person would obtain from the passages he has identified, and that each of the four passages carried the natural and ordinary meanings pleaded for them. He relied on *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621, 625 in submitting that the Court is not concerned with the literal meaning of words but rather the impression that an ordinary person would gain from reading them, and that the words should be read in context.

[32] Both Mr Ellis and APN challenge Dr Moodie's contention that he can advance the extracts as a whole (as distinct from specific words or phrases) as the relevant defamatory material. They also say that Dr Moodie should identify which of the meanings pleaded in paragraph 19 the specifically identified words or phrases are said to have. Counsel submitted that this was a basic and fundamental requirement for a defamation pleading: s 37 Defamation Act 1992; r 5.26(b) High Court Rules; *Gatley on Libel and Slander* (10th ed) para 26.11.

[33] R 5.26 (b) reads:

> **5.26 Statement of claim to show nature of claim**
>
> …
>
> (b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action; and
>
> …

[34] The relevant parts of s 37 of the Defamation Act 1992 read:

> **37 Particulars of defamatory meaning**
>
> (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.
>
> (2) Where the plaintiff alleges that the matter that is the subject of the proceedings is defamatory in its natural and ordinary meaning, the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself.

[35] The issue in this case is the meaning to be given to the phrase in s 37(1): "every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings." Dr Moodie argues that it is the pleaded passages as a whole that are defamatory. Mr Ellis and APN say that the passages can and should be broken down into specific words, with the alleged meanings identified for each.

[36] In my view the general principles in *New Zealand Magazines Ltd v Hadlee* do not help. This is not a case about applying legal principles to determine whether a meaning exists, but rather to identifying what the alleged words and meanings are.

[37] Assistance on the requirements for pleading can be gained from *Gatley on Libel and Slander* at paragraphs 26.11 and 26.20:

> **26.11 Setting out words complained of: libel.** In a libel claim the words used are material facts and they must therefore be set out *verbatim* in the particulars of claim, preferably in the form of a quotation: it is not enough to describe their substance, purport or effect.
>
> **26.20 Pleadings meanings.** The modern practice has been to require the claimant in almost every case to set out in his particulars of claim the defamatory meaning or meanings which he claims were borne by the words or other publications of which he complains.
>
> ….
>
> It is good practice also to make clear in appropriate cases (e.g. where the words complained of are very lengthy or difficult to comprehend) the part or parts of the words complained of from which each alleged meaning is derived.

[38] All parties also relied on the decision of this Court in *Karam v Australian Consolidated Press NZ Ltd* (HC AK CIV 2003-404000497 12 September 2003 Chambers J) and the following passage in particular:

> [17] …. Section 37(1) of the Defamation Act required the plaintiff to 'give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings'. Only such specified statements can be considered by the jury. Mr Karam's claim as currently drafted does not comply with s 37(1). In paragraphs 5 and 8, Mr Karam purports to rely on the whole article as being defamatory. That is reinforced by paragraph 9, where he pleads that it is the article which bears the specified meanings, rather that the passages specified in paragraph 8.4 which bear those meanings. Paragraphs 8.1-8.4 are not particulars specifying every defamatory statement; they merely give examples, by which Mr Karam claims not to be bound. This non-complying pleading as it currently stands is likely to cause prejudice and embarrassment in terms of r 186 of the High Court Rules and must be brought into conformity with s 37(1).
>
> [18] Mr Reed relied on a passage from *Gatley on Libel and Slander* (9ed, 1998) para 26.12, where the learned authors conceded that 'in the exceptional circumstances where the sting of the matter can properly be said to derive from the publication read as a whole, it may be appropriate to set out the article in its entirety. Mr Reed submitted that was such a case. I do not agree. The circumstances are not 'exceptional'. This is a case where it

> is entirely possible to isolate the allegedly defamatory passages in the article and indeed Mr Karam has done just that.

[39] This is not a case, in my view, where the sting of the matter lies in the whole of the passage. The passages which Dr Moodie has pleaded contain contextual material (such as general views attributed to Mr Ellis) which may be relevant background, but are not words directly about Dr Moodie. However, the passages include some words about Dr Moodie which can be separated out and pleaded specifically. For example, the opening sentence of the third paragraph in the first passage that

> "Ellis claims that it is not the only case of exploitation in which Moodie has been involved."

[40] I do not accept Dr Moodie's submission that *Karam* automatically permits the pleading of sections of text from an article ("passages") as distinct from the article as a whole. This approach is subject to the same criticism as with a whole article, namely it does not sufficiently inform the defendant and the Court (or the jury) precisely what statements are said to be defamatory and untrue. Adapting the language in *Karam*, I do not see the present case as one where "the sting of the matter can properly be said to be derived from the [passages] read as a whole". If Dr Moodie is not saying that particular words or phrases are untrue, but only the passage as a whole, he should re-plead it in those terms. However, I do not understand that to be his case, so he must identify the particular words said to be untrue.

[41] Dr Moodie's response to APN's request for particulars, and his notice of opposition, exemplify the lack of clarity in the pleading. APN asked him to specify precisely which of the words in the article were alleged to be false. In his response to that request, repeated in his notice of opposition, Dr Moodie said that it was the words specifically identified in paragraphs 18 and 24 of the statement of claim. Paragraph 24 is the first paragraph in the second cause of action based on the "Lawyer v Lawyer" article.

[42] This explanation of paragraph 20 seems to confuse the two causes of action. The words of the "Lawyer v Lawyer" article cannot be part of the first cause of

action unless specifically pleaded as an aggravating matter (a topic to which I will return).

[43] The second aspect of complaint is the pleading of several meanings for the passages as a whole, rather than a particular meaning for specific words within the passages.

[44] A plaintiff is required by s 37 of the Defamation Act to provide particulars of every meaning that the defamatory statement carries, unless the meaning is evident from the words. Although Dr Moodie submitted that the meanings are self-evident. I do not accept that to be so. If the meanings were self-evident there would not be several meanings pleaded for each extract.

[45] I accept the submission of counsel for APN that it is not possible to ascertain from Dr Moodie's current pleading (in which multiple meanings have been assigned to what are in most cases lengthy passages of text) which words have which meanings. To take an illustration put forward by counsel for Mr Ellis, the first meaning put forward for the first extract appears to be that the words in the extract meant that Dr Moodie had an obligation to pay Mr Ellis prior to publication of the article and that Dr Moodie had breached that obligation. Some parts of the first extract could support this meaning, but others do not readily do so.

[46] It should not be for the defendants to have to decide which parts support a particular meaning. The defendants are entitled to have meanings identified for specific words or phrases. One meaning for a particular passage of words should be identified, although it is also permissible to plead alternative meanings. It may be that meanings will come from a collection of words (in other words, from more than one phrase) but, if so, Dr Moodie is to identify all words and phrases said to carry the meaning.

[47] The uncertainty is compounded by Dr Moodie's statement in his notice of opposition that "each and all of the words" used in the four extracts from the article bore each of the meanings set out in paragraph 19 for the respective extracts. Counsel for APN argued, correctly in my view, that this was not possible. He

illustrated his point by reference to the four meanings attributed to the third extract pleaded by Dr Moodie. The extract reads:

> **C. And at page 16, column 2, from the second paragraph –**
>
> *While working for Moodie, Ellis says he was also appalled to discover Strachan was either unpaid or not being paid properly. Oddly, even though she was just starting out in a legal career, she was half-owner of the Fielding premises in which she and Moodie had their office.*
>
> *"I had concerns that Dr Moodie, who was championing the rights of the under-dog and also making a significant point about the male-dominated legal profession, had employed his staff solicitor for two years without making any proper payment to her, which didn't seem to be in keeping with his public stance, or even the basic sense of human morality, to exploit somebody in that way."*

[48] The four meanings (pleaded at paragraph 19 (h) – (k) of the claim) are:

> (h) that Dr Moodie's treatment of Ms Strachan was appalling to a human rights lawyer such as Mr Ellis, and
>
> (i) that Dr Moodie was a dishonest hypocrite because whilst he purported to be championing the causes of women in the legal profession, he had not made any proper payment to Ms Strachan for her services for two years when she was just starting out on her legal career; and
>
> (j) that in some way Ms Strachan had been exploited in respect to her investment in (2B Denbigh Square, Fielding) the legal offices of Dr Moodie; and
>
> (k) that by his alleged exploitation of Ms Strachan, Dr Moodie lacked even a basic sense of human morality

[49] Counsel for APN examined each of the meanings to demonstrate that they could not apply to each and all of the words in the extract:

a) The meaning at 19(h) could be pleaded as arising from the first sentence of the three sentences of the extract, but could not be said to arise from the second sentence (referring to Ms Strachan being a half owner of the office premises). He submitted that it was also debatable whether this meaning could arise from the third sentence;

b) The second meaning (i) could be pleaded to arise from the third sentence, or from the third sentence in conjunction with the second part of the first or the first part of the second, but not from the second part of the second sentence (the reference to Ms Strachan being half owner of the office premises);

c) The third alleged meaning (j) did not arise obviously from any of the words in the extract because the word "exploit" at the end of the third sentence was not linked in any apparent way to the reference in the second sentence to Ms Strachan's half ownership;

d) The fourth alleged meaning (k) could be said to arise from the latter part of the third sentence, but did not appear to be capable of being taken from the first two sentences or the first half of the third sentence.

[50] I accept the submission that Dr Moodie's contention, that "each and all of the words" pleaded have all four meanings, cannot be correct. The same criticisms apply to the multiple meanings attributed to the other extracts. To inform the defendants properly, Dr Moodie needs to plead precisely which of the allegedly defamatory words bear which of the meanings Dr Moodie has identified.

(c) Reputation

[51] The next aspect of the first cause of action with which Mr Ellis takes issue is the pleading in paragraph 21 that the defendants had acted with flagrant disregard for Dr Moodie's excellent reputation (there is a similar pleading in paragraph 34 for the second cause of action). Counsel for Mr Ellis submitted that this was legally irrelevant as the law presumes damage. He also submitted that paragraph 21 (and paragraph 34) appears to be a pleading in support of punitive damages, which Dr Moodie is not seeking. He said that the pleading was for both reasons. Although submissions for Mr Ellis have merit, I do not have to make a finding on this pleading as Dr Moodie has removed paragraph 21 (and paragraph 34) in his amended pleading.

(d) Special damages

[52] Each of Dr Moodie's causes of action includes a prayer for:

> Special damages for loss of business and profits in an amount to be determined before trial.

[53] Mr Ellis has requested particulars. Dr Moodie's response in his notice of opposition is that the damage is "nothing more or less than the obvious and natural consequence of the defamatory statements", and that the special damage and its value can only be calculated closer to date of trial.

[54] The defendants say that these particulars should not be left until close to trial. They rely on rr 5.32 and 5.33 of the High Court Rules:

> **5.32 Amount of money claim**
>
> A statement of claim seeking the recovery of a sum of money must state the amount as precisely as possible.
>
> **5.33 Special damages**
>
> A plaintiff seeking to recover special damages must state their nature, particulars, and amount in the statement of claim.

[55] I do not accept Dr Moodie's submission that it is too early to plead the nature of the losses suffered and quantify those losses at this time. The articles were published in March 2007. The proceeding was issued in October 2007. Even if the extent of the damage, and a calculation of loss, can still only be an estimate at this point, or will have to be updated for trial, the defendants are entitled to know now what loss has been suffered: *McGechan on Procedure*, HR 5.33.04.

Objections to the second and third causes of action

[56] The second cause of action is based on the "Lawyer v Lawyer" article. In his application Mr Ellis asked the Court to strike out the whole of this cause of action on the grounds that the article related to a Court proceeding brought by Mr Ellis against Dr Moodie, and was therefore subject to qualified privilege. Mr Ellis did not pursue that argument. At the hearing his counsel submitted that this question of privilege

should be deferred until the other aspects of the defendants' applications had been determined and any amended statement of claim filed.

(a) Lack of essential elements of cause of action

[57] Paragraph 24 of the statement of claim commences:

> 24. In aggravation of the above false and defamatory statements referred to in paragraph 18 above, a further article was published in the Listener dated March 31st 2007 headed **LAWYER V LAWYER** and continued –
>
> **E. At page 8 from column 1, paragraph 1-**
>
> *AS THIS EDITION OF THE LISTENER WENT to press. Wellington-based human right lawyer Tony Ellis was about to file a High Court action against fellow lawyer Rob Moodie accusing him of misleading and deceptive conduct, and deceit.*
>
> **F. And continuing at column 1, from paragraph 4 –**
>
> *... in papers about to filed in the High Court, Ellis says he was "induced into this fee deferment arrangement upon the fraudulent representation of Dr Moodie that his practice was essentially pro bono". Further, the claim says that although Ellis was advised by Moodie that payment from a previous long running case, that of Alec Waugh, "didn't actually amount to much" Ellis says in the court papers that the sum was "at least $700,000"*
>
> **G. And from column 2, last paragraph –**
>
> *Ellis is seeking an order that Moodie pays the $106,165-43 bill and exemplary damages of $50,000, costs and interest.*

[58] The defendants all take issue with the form of the second cause of action. They say that it is unclear whether the "Lawyer v Lawyer" article is pleaded as an aggravation of the alleged defamation in the "Moodie blues" article, or is intended to be a stand alone cause of action. They say that if Dr Moodie is relying on it as an aggravation of the earlier defamation, it should be pleaded as part of the first cause of action. Conversely, if it is intended to be a stand alone cause of action, it should be pleaded as such and references to aggravating circumstances should be removed. Counsel again submitted that references to the "Lawyer v Lawyer" article as an aggravation were irrelevant to a stand alone cause of action, embarrassing to plead to, and should be removed.

[59] In his oral submissions, Dr Moodie said that it was a stand alone cause of action, which was not invalidated by pleading of aggravating matters.

[60] I accept the submission for the defendants that Dr Moodie must establish all of the elements for a stand alone cause of action in respect of the "Lawyer v Lawyer" article, and that pleading that is irrelevant to the cause of action should be removed. For this reason, the opening phrase of paragraph 24, "In aggravation … above", is to be removed.

[61] In paragraph 25 of the statement of claim Dr Moodie refers to "the published comments" in the three extracts set out in paragraph 24 as having been provided by Mr Ellis. Counsel for Mr Ellis submitted that it was unclear what Dr Moodie was alleging Mr Ellis to have published, and that the overall meaning and purpose of the paragraph was ambiguous. He submitted that it was inadequate as a pleading of publication of anything by Mr Ellis.

[62] So far as publication is concerned Dr Moodie needs to plead the nature and circumstances of publication of the "Lawyer v Lawyer" article expressly in relation to Mr Ellis. Dr Moodie submitted that Mr Ellis' complaints were met by a similar amendment to the pleading of paragraph 24 as for paragraph 18, namely addition of the words "cause to be published". He referred at length to evidence which he argued supported such pleading. Unfortunately for Dr Moodie's argument, the issue is not whether he will be capable of establishing his pleading, but rather what he is pleading.

[63] Dr Moodie needs to identify what it is that he alleges Mr Ellis published, both by reference to the words and the circumstances of publication. In particular, he needs to state specifically whether the alleged publication is something other than Mr Ellis' statement of claim in his proceeding.

[64] The defendants also take issue with paragraph 26 of the statement of claim which reads:

> 26. In their natural and ordinary meaning the words quoted in paragraph 24 reiterated the purported truth of the false and defamatory

> statements published in the New Zealand Listener in the immediately preceding March 17-23 2007 edition referred to in paragraph 18 above.

[65] Counsel for Mr Ellis submitted that this paragraph was both incomprehensible and embarrassing. The paragraph appears to be saying that the "Lawyer v Lawyer" article was an aggravation of the "Moodie blues" article. However, as Dr Moodie relies on the "Lawyer v Lawyer" article as a stand alone cause of action, he must provide particulars of the meanings arising out of the words used in that article. Material from the first article cannot constitute particulars of the cause of action on the second article. This pleading should be removed.

[66] In paragraph 27 of the statement of claim Dr Moodie pleads that the words used in paragraph 24, and "in particular the reference to *misleading and deceptive conduct, and deceit fraudulent misrepresentation and exemplary damages of $50,000*", were false and grossly defamatory. Counsel for Mr Ellis submitted that the selective repeating of words already pleaded in paragraph 24 confused matters, and Dr Moodie had failed to comply with the requirement of s 37(2) to plead the actual and ordinary meaning of the allegedly false words.

[67] In answer to the criticism of paragraph 27 Dr Moodie repeated his argument for the first cause of action that he was entitled to rely on passages rather than particular words or phrases within them, and that he had adequately identified the meanings to be given for those passages. Notwithstanding that general submission he also set out (in his notice of opposition) further meanings for the words pleaded in paragraph 24, essentially expanding on the selective wording identified in paragraph 27.

[68] On the same reasoning as for the pleading of the first cause of action, Dr Moodie is to re-plead paragraphs 25 to 27 to provide proper particulars of publication by Mr Ellis, the specific words of the "Lawyer v Lawyer" article alleged to be false, and the natural and ordinary meanings of those specific words. I note that Mr Ellis accepts that Dr Moodie has remedied his complaint about the meanings. Dr Moodie may still need to address any remaining concerns of APN on this point.

[69] Counsel for Mr Ellis next took issue with the reference in paragraph 28 of the statement of claim to a "publicly published intention to pursue legal proceedings". He argued that this was irrelevant and embarrassing. Further, he said that the pleading stating that the selected words "also constituted a most damaging extension, aggravation and further publication" of the statements in the "Moodie blues" article was pleading of an aggravating circumstance to the first cause of action, which should not be part of the second cause of action. I accept this submission.

(b) Pleading of other litigation as aggravating circumstances

[70] In paragraphs 29 to 32 of his second cause of action, Dr Moodie pleads that Mr Ellis' filing of his proceeding against Dr Moodie was an aggravation of the alleged defamations.

[71] Counsel for Mr Ellis argued that the mere filing of a proceeding, and the content of the proceeding, could not give rise to a valid complaint. It was an allegation about a matter "said, written or done" in a proceeding before a Court and was subject to absolute privilege: s 14 Defamation Act 1992; *Rawlinson v Oliver* [1995] 3 NZLR 62. He submitted that the references in paragraphs 30 and 31 to the decision of Associate Judge Gendall on Dr Moodie's application to strike out Mr Ellis' statement of claim, and comments made in that judgment, were irrelevant and vexatious.

[72] As previously mentioned Dr Moodie submitted that even if some matters could not be pleaded as aggravation, that did not invalidate the pleading. However, that overlooks the fact that if material cannot be advanced as part of the cause of action it must be irrelevant and therefore unnecessary, and should be removed. I consider that paragraphs 29 to 32 refer to matters that are absolutely privileged pursuant to s 14 of the Defamation Act 1992. As such they are irrelevant and unnecessary, and can be of no assistance to Dr Moodie's second cause of action. I consider that they should be struck out. I note that Dr Moodie has removed paragraph 32 in his amended pleading.

(c) Specific issues raised by APN

[73] I have already referred to Mr Ellis' challenge to the pleading in paragraphs 21 and 34 of the statement of claim (now deleted). APN also took issue with the pleading in paragraph 34 that "in all the circumstances" the defendants have acted with flagrant disregard for Dr Moodie's rights. It sought particulars of the circumstances to which Dr Moodie refers. In his notice of opposition Dr Moodie says that adequate particulars have been given, but that the circumstances included:

> "*the circumstances in which the words were published* (which of [sic] had reference to the context provided by the remaining balance of the article)".

[74] I accept the submission of counsel for APN that this does not provide any further detail of the circumstances that Dr Moodie is relying on, and that it is difficult to ascribe any meaning to the words in brackets. I believe the point is now moot as Dr Moodie has deleted former paragraph 34.

[75] APN also takes issue with paragraph 40 of the statement of claim. This is in the third cause of action against Ms Strachan and APN jointly. Dr Moodie has pleaded a five sentence (approximately 70 word) passage from the "Moodie blues" article as the defamatory publication, and has given four meanings from that passage. Then, in paragraph 40 he has pleaded:

> 40. In their natural and ordinary meaning, the words used in the New Zealand Listener article of 31st March 2007 are false and grossly defamatory of the plaintiff Dr Moodie.

[76] The "Lawyer v Lawyer" article rather than the "Moodie blues" article appeared in the 31 March 2007 edition of *New Zealand Listener*. APN sought particulars of the "words" referred to in paragraph 40.

[77] Dr Moodie responded to that request in his letter of 23 November 2007, identifying the words as:

> The precise words of those already set out in paragraph 24 of the statement of claim. He repeated this position in his notice of opposition to APN's application.

[78] APN seeks clarification. I consider it reasonable that Dr Moodie should remove this ambiguity and identify which article he is relying on for this cause of action, and the particular words in the relevant article which he says are untrue and defamatory.

(d) Inclusion of particulars provided informally

[79] In his response of 23 November 2007 to APN's request for particulars, Dr Moodie provided particulars to what are now paragraphs 21, 34, and 37 of the statement of claim before the Court on these applications. APN has identified particulars in paragraphs 3(a) and (b), 7(a) and (b), and 9 of Dr Moodie's response which were not incorporated into the amended statement of claim of 30 November 2007.

[80] It is appropriate that these particulars be included in a more explicit statement of claim (to the extent that they may not already have been incorporated in either of the amendments since the hearing of this application).

Decisions on application for strike out/further particulars

[81] Although counsel for Mr Ellis invited me to strike out the whole of the second cause of action having regard to its defects, I consider that Dr Moodie should have the opportunity to re-plead to correct those defects. This does not apply, however, to the introductory words to paragraph 24, nor to paragraphs 28 to 32. I have found that pleading to be irrelevant and potentially embarrassing. I make an orders pursuant to r 15.1(1):

a) Striking out the words commencing with "In aggravation" to "above" in paragraph 24 of the statement of claim; and

b) Striking out paragraph 28 to 32 of the statement of claim (noting, however, that paragraph 32 has already been deleted).

[82] No order is now required in respect of paragraphs 21 and 34.

[83] Dr Moodie is to file and serve an amended statement of claim, to the extent that he has not already done so, on or before 22 April 2009. In that amended statement of claim he is to:

a) Plead his causes of action against Mr Ellis and Ms Strachan separately from those against APN;

b) Give particulars of the precise words that Mr Ellis and Ms Strachan were alleged to have published;

c) Give particulars of facts and circumstances supporting his pleading that Mr Ellis and Ms Strachan were publishers of the alleged defamatory words;

d) Give particulars of the meanings for the words alleged to have been published, with single meanings to be given or meanings to be pleaded in the alternative;

e) Provide particulars of special damage.

[84] It is for Dr Moodie to decide how to plead, but he is to have regard to the findings made through the course of this judgment with respect to the need to break down the allegedly defamatory statements into precise words (and phrases), rather than the general passages pleaded in the statement of claim before the Court on these applications. As was the case in *Karam*, Dr Moodie may allege that meanings for particular words can be taken from their context, including either the passages currently pleaded or the articles as a whole.

Ms Strachan's application for security for costs

[85] Ms Strachan applies under what is now r 5.45 of the High Court Rules for an order that Dr Moodie provide security for her costs in this proceeding. The relevant parts of 5.45 read:

> **5.45 Order for security of costs**

> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> …
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> ….

[86] Under this Rule the defendant must first satisfy the Court that the plaintiff will be unable to pay her or his costs if the plaintiff is unsuccessful. The Court then has discretion, to be exercised in the circumstances of the case, whether to award security and as to the quantum of any award: *A S McLachlan v MEL Network Limited* (2002) 16 PRNZ 747, paras [13] and [14].

[87] Ms Strachan filed an affidavit in support of her application. She referred to and relied on matters told to her by Dr Moodie. She also produced discovered correspondence written by Dr Moodie, referring to his financial circumstances, and documents passing between Dr Moodie and his bank referring to a bank facility (this correspondence was supplemented by further documents produced by the parties, by leave, following the hearing). She also relied on factual findings in a judgment in a bankruptcy proceeding taken against Dr Moodie for non-payment of Court costs.

[88] Dr Moodie filed notice of opposition but did not give an affidavit in support of that opposition. Dr Moodie opposes any order on the grounds that Ms Strachan has not established reason to believe that he will not be able to pay her costs, and on the grounds that the merits of the case are so strongly with him that an order should be declined in any event.

Reason to believe Dr Moodie will be unable to pay costs

[89] Counsel for Ms Strachan relied principally on evidence that was independent of his client's personal knowledge, but also submitted that the Court could place some reliance on Ms Strachan's personal knowledge as it had not been challenged by any evidence from Dr Moodie. He also submitted that the Court should draw an adverse inference from Dr Moodie's failure to respond to the evidence produced generally by Ms Strachan.

[90] There are three aspects to the independent evidence:

a) On 19 April 2007 Dr Moodie wrote a letter to the President of the Wellington District Law Society in which he stated that he had no assets worth speaking about, he had substantial borrowings with the National Bank, and had no money "put away".

b) The contempt proceedings taken by the Solicitor-General against Dr Moodie (for which Dr Moodie engaged Mr Ellis) resulted in three cost judgments against Dr Moodie. The largest was a sum of $31,665.72 ordered in a judgment given on 6 March 2007. There were two further judgments for $7,500.00 and $10,100.78. The Solicitor-General, as judgment creditor, issued a bankruptcy notice in October 2007 for the first of these sums. Dr Moodie applied to set that notice aside. His application was subsequently dismissed but he was given a further 15 workings days in which to pay. In his judgment on Dr Moodie's application to set aside, Gendall AJ recorded that in June 2007 Dr Moodie had advised the solicitors acting for the Solicitor-General that he had no assets, and in December 2007 had offered to provide security over a property held by a family trust.

c) Correspondence between Dr Moodie and the National Bank showed that Dr Moodie and his wife had a loan facility with the bank and that the day after Gendall AJ allowed time for payment of the outstanding costs (the total amount due, including costs was somewhere between $45,000 and $50,000) Dr Moodie requested an increase of that facility by a further $50,000. The correspondence also shows that the property held by the family trust was used as security for the facility, that the facility was in fact increased by a further $100,000, and that $83,654.08 was outstanding under the facility as at the date the facility was increased (18 February 2008).

[91] The (unchallenged) evidence by Ms Strachan was that Dr Moodie had given her to understand that he could not afford to pay her as he worked as a "pro bono"

lawyer and his financial position was not strong. She referred to Dr Moodie having had to borrow money in 2005 to pay GST.

[92] Dr Moodie contended in opposition that his letter to the Wellington District Law Society was not a comprehensive statement of his financial position. He noted that it did not refer to money which he had received for fees on one very large case. He challenged Ms Strachan's evidence on the basis of inconsistency: her position now was that Dr Moodie was not in a strong financial position, but her earlier statements which are the subject of this proceeding were to the effect that Dr Moodie had the ability to pay her but had been exploiting her by not doing so. Dr Moodie also submitted that the evidence produced by Ms Strachan allowed the inference that he was able to meet the earlier costs judgment.

[93] I am satisfied on the evidence put before me that there is reason to believe that Dr Moodie will be unable to meet costs if he is unsuccessful. He makes it plain in his letter to the Wellington District Law Society of 19 April 2007 that he has no assets. This is confirmed by Gendall AJ's findings in the bankruptcy application (again based on a statement by Dr Moodie). It is clear both from factual findings in the bankruptcy application and from the correspondence between Dr Moodie and his bank that Dr Moodie's home is held by a family trust.

[94] Dr Moodie invited me to draw the inference from the outcome to the bankruptcy proceeding and his correspondence with the National Bank that he had been able to meet the earlier cost judgments and similarly would be able to meet any costs order in this case. What is more significant in my view is that the earlier costs remain unpaid for approximately a year. The evidence supports a more compelling inference that the costs were paid only by borrowings against the security of the trust's property (indeed I note that Dr Moodie acknowledged this to be so). There is no certainty that the trustees will elect to support Dr Moodie again in that way at the conclusion of this litigation. There is no evidence or undertaking from the trustees to that effect.

[95] Dr Moodie asserted in his notice of opposition that he was in full time practice. There is no evidence before the Court to support this statement. Ms

Strachan refers to Dr Moodie's practice as a "pro bono" lawyer. The extent of this is not clear, although I understood Dr Moodie to acknowledge that at least a significant part of his work is of this nature, potentially with contingency arrangements. In light of the independent evidence I have already addressed, I draw an adverse inference from Dr Moodie's failure to put forward any evidence in support of his assertion that his "full time practice" will provide the necessary funds to meet any award of costs. He was not able to pay the costs to the Solicitor-General in this way.

[96] In coming to this finding (that there is reason to believe Dr Moodie will be unable to meet any costs) I place slight weight only on the evidence of Ms Strachan. Although it was not challenged by Dr Moodie, I note that there is a dispute as to what money was paid to Ms Strachan in the period that she worked for him.

Exercise of discretion

[97] Although the Court is not restricted as to the matters that it can take into account in deciding whether or not to exercise its discretion, factors such as merits, cause of impecuniosity, and delay in bringing any application are regularly taken into account. Dr Moodie focussed his submissions on what he regarded as merits overwhelmingly in his favour. He did not present any argument on impecuniosity or delay.

[98] Before addressing Dr Moodie's submissions as to merits, I note the remarks in *A S McLachlan v MEL Network Limited* at paras [15] and [16] that the Court must weigh the interests of both parties. An order which could have the effect of preventing a plaintiff from pursuing his claim should be made only after careful consideration and when the claim has little chance of success. As against that, a defendant should be protected from being drawn into unjustified litigation.

[99] Dr Moodie submitted that he had at least a seriously arguable case for defamation, with extensive documentary evidence supporting it. He submitted that in those circumstances the onus switches to Ms Strachan to establish a defence.

[100] Counsel for Ms Strachan challenged this assessment. He submitted that it was far from established that any statements published by Ms Strachan were defamatory, and on top of that she was advancing three affirmative defences (truth, honest opinion and consent) for which she also had substantial documentary support.

[101] I am unable to accept, on the evidence before me on this application, that the merits are strongly in favour of either Dr Moodie or Ms Strachan. At the time of the application there was an unresolved issue over a draft affidavit which Ms Strachan apparently provided to Mr Ellis for his proceeding (Dr Moodie is challenging a claim to privilege for that document). Dr Moodie submitted that this could lead to further amendment to his pleading, and strengthen his case. I cannot assess that at this point. At this time I regard merits, at least as between Ms Strachan and Dr Moodie (which is all that I have to address on this application), as neutral.

[102] Dr Moodie sought to support his argument on the relative merits by pointing out that Ms Strachan had not provided particulars of her three affirmative defences. Counsel for Ms Strachan answered that point conclusively in my view: Dr Moodie has not sought any particulars. If he does they will be provided.

Quantum

[103] Counsel for Ms Strachan has assessed quantum on a 2B categorisation for a one week trial at $45,000, increasing to $70,000 if the trial was to run for two weeks. These figures allow something for disbursements and witness expenses. Dr Moodie did not challenge these estimates.

[104] Against that assessment, counsel for Ms Strachan submitted that a figure of $20,000 - $25,000 was appropriately conservative for the early days of this proceeding. He sought an order in that range.

[105] I accept that these figures are realistic, and an award in that order would not be oppressive in the circumstances of the case. If what Dr Moodie says (that he has the ability to raise funds through his loan facility in the family trust) is true, it should not be oppressive. I propose adopting the lower end of the range suggested by

counsel for Ms Strachan, taking into account that Ms Strachan has, to some extent, been a contributor to this litigation in that she chose to make the comments which are the subject of the claims (even if she is ultimately vindicated in her comments).

[106] I also intend to order costs on the basis of an assessment of a one week trial. I reserve leave to Ms Strachan to seek an increase in the event that trial seems likely to exceed that estimate by more than a day.

Decision on application for security for costs

[107] I direct that Dr Moodie provide security for Ms Strachan's costs in the sum of $20,000.

[108] The security is to be given in accordance with r 5.45(3)(a) within 28 days. If the security is not given within that time, the claim against Ms Strachan is to be stayed until the security is provided.

Costs

[109] Counsel did not address me on costs, other than to indicate that costs were sought. I see no reason to depart from the usual principle that costs should be paid to the successful party (or, in this cases, parties) There is nothing in the material before me to suggest that there is any basis for an award other than on category 2B. As I did not receive submissions, I will determine costs on the basis of memoranda if counsel cannot reach agreement. Memoranda seeking costs are to be filed and served within 21 days. Memoranda in opposition are to be filed and served within a further 7 days.

Associate Judge Abbott