IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-2212
[2013] NZHC 2951

BETWEEN	ROBERT ALEXANDER MOODIE Plaintiff
AND	ELIZABETH GRACE STRACHAN Defendant

Hearing: 31 October 2013

Counsel: Plaintiff in person (in opposition)
J O Upton QC for Defendant (in support)

Judgment: 8 November 2013

JUDGMENT OF THE HON JUSTICE KÓS
(Partial strike out application)

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[1] This is an application to strike out parts of a defamation claim on the basis that they are prejudicial, vexatious or an abuse of process.

Background

[2] The general circumstances of this proceeding are set out in detail in Mallon J's judgment of 21 May 2010.[1] They need not, therefore, be repeated in great detail here.

[3] Fully six and a half years ago, on 17 March 2007, the *New Zealand Listener* magazine published an article called "Moodie Blues". It gave an account of a falling out between the plaintiff, Mr Moodie (a solicitor practising in Fielding) and a Mr Tony Ellis (a barrister practising in Wellington). Mr Moodie had retained Mr Ellis to appear for him in contempt proceedings. Irreconcilable differences emerged, including as to fees. In the article Mr Ellis is quoted as referring to a

[1] *Moodie v Strachan* HC Wellington CIV-2007-485-2212, 21 May 2010.

number of complaints about Mr Moodie's work by the defendant, Ms Strachan. She was a part-time lawyer who worked with Mr Moodie. Ms Strachan is also quoted directly towards the end of the article.

[4] In October 2007 Mr Moodie filed these defamation proceedings against Mr Ellis, Ms Strachan and APN Specialist Publications NZ Limited (APN) (the publisher of the *New Zealand Listener*). Two years later, in October 2009,[2] Mr Moodie settled with the defendants, other than Ms Strachan. Ms Strachan then sought, successfully, further particulars of Mr Moodie's claim. That required a fifth amended statement of claim (against Ms Strachan only) to be filed.

[5] That claim advanced two causes of action against Ms Strachan. Mallon J described them thus:

> [11] The first cause of action sues on the publication made by Ms Strachan to Ms Black. The pleading identifies the statements from Ms Strachan to Ms Black that are relied on and then sets out the alleged natural and ordinary meaning of those words which are said to be defamatory.
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> [12] The second cause of action sues on the publication of the article in the *New Zealand Listener* on the basis that Ms Strachan caused the publication of defamatory statements. The pleading (at paragraph 43) sets out the words in the article which are attributed to Ms Strachan. It pleads (at paragraph 44) the alleged defamatory meanings of those words.

[6] This judgment now deals with the sixth amended statement of claim filed on 30 July 2013.

Three earlier judgments

Judgment of Mallon J (21 May 2010)

[7] One of the things Mallon J had to deal with was an application by Ms Strachan to strike out 26 paragraphs of the fifth amended statement of claim, as well as parts of two further paragraphs. The basis for the application was that the pleading was oppressive, vexatious and irrelevant, and that some of the defamatory statements pleaded were not capable of supporting the meanings alleged.

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2 Following filing of a fourth amended statement of claim.

[8] I have prepared a table comparing the 15 paragraphs I am asked to strike out with those before Mallon J. It will be seen that, on a paragraph-by-paragraph basis, the drafting is little changed. A number of the paragraphs I am asked to strike out were also the subject of like applications before Mallon J.

Sixth statement of claim - paragraph	**Comparison to**	**Fifth statement of claim - paragraph**	**Ruling of Mallon J**
3	Same as	3	Not struck out
4	Same as	4	Strike out not sought
5	Similar to	12	Not struck out
6	Same as	25	Not struck out
7	Same as	26	Not struck out
8	Same as	27	Not struck out
9	Same as	28	Not struck out
11	Similar to	31	Strike out not sought
12	Same as	33	Strike out not sought
13	Same as	34	Not struck out
15	Same as	36	Strike out not sought
16	New pleading	-	-
17	Same as	37[3]	Not struck out
18	Similar to	38	Strike out not sought
21	Similar to	41	Strike out not sought

[9] Eight out of the fifteen paragraphs objected to in the sixth amended statement of claim involve the same or similar wording to pleadings addressed by Mallon J. She struck out none of them. Another six paragraphs involve same or similar wording but were not previously the subject of strike out application. One is completely new. Critical to Mallon J's reasons, however, was that those pleadings were relevant to the then second cause of action.[4] I will revert to that point later.

[10] An appeal against Mallon J's judgment by Ms Strachan was subsequently abandoned.

Judgment of Wild J (26 August 2010)

[11] In October 2009 Mr Moodie settled with Mr Ellis and APN. In his judgment of 26 August 2010[5] Wild J held that the effect of that settlement was to engage the

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3 Meanings (a)–(e), (h), (i), (k) and (m)–(q) were the subject of application before Mallon J. On this occasion the defendant seeks to strike out (b), (c) and (m) only.

4 See [5] above.

5 *Moodie v Strachan* HC Wellington CIV-2007-485-2212, 26 August 2010.

joint tortfeasor release rule.[6] Settlement against Mr Ellis and APN meant that Ms Strachan could no longer be sued on the second cause of action. As a result, Wild J struck out the second cause of action in Mr Moodie's fifth amended statement of claim. That meant, as the Judge noted, that Mr Moodie could still pursue the first cause of action (based on publication by Ms Strachan directly to the journalist). But not the subsequent publication or republication in the *Listener* the subject of the second cause of action.

[12] Mr Moodie appealed the judgment of Wild J. The appeal was later abandoned.

Judgment of Young J (12 June 2013)

[13] Young J's judgment[7] deals with two things. First, an application by Mr Moodie to add two new causes of action (based on emails and a draft affidavit sent by Ms Strachan to Mr Ellis). Secondly, an application by Ms Strachan to strike out the remaining cause of action against her.

[14] Mr Moodie was not successful in his application to add the new causes of action. Young J held them to be time-barred.

[15] Ms Strachan's strike out application was (unlike the application before Mallon J, and now before me) a global application alleging that the entire remaining "limited publication" cause of action should be struck out or stayed. The basis for the application was that the cause of action was unlikely to succeed, damages would be minimal (especially in comparison to costs) and because there had been substantial delays.

[16] Young J was not prepared to strike out the plaintiff's remaining cause of action. Even though the relevant publication was only to one person, that would simply be relevant to quantum. The plaintiff should have the opportunity to establish that what was said about him was not true. The alleged defamatory comments by Ms Strachan to Ms Black were serious, at least in terms of the meanings alleged.

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6 See *Brooks v New Zealand Guardian Trust Co Ltd* [1994] 2 NZLR 134 (CA) at 140.
7 *Moodie v Strachan* [2013] NZHC 1394.

Delay was a matter of mutual responsibility, and was not such as to constitute an abuse of process. In the end Young J concluded:[8]

> Dr Moodie is entitled to the opportunity to bring these proceedings to vindicate himself. That is so, in my view, despite the settlement of the action against Mr Ellis and APN as publisher of the Listener.

[17] Ms Strachan has appealed Young J's judgment.[9] Mr Moodie has not.

Are the individual paragraphs complained of prejudicial, vexatious or an abuse of process?

[18] This application is confined to strike out based on prejudice, delay, vexatiousness or abuse. In other words, the grounds in r 15.1 of the High Court Rules. It is, therefore, a narrower application than that considered by Mallon J. That application explicitly challenged the meanings alleged (now in paragraph 17 of the sixth amended statement of claim) on the basis that they could not bear the natural and ordinary meanings pleaded. There is no such application in this case.

[19] Before considering the individual paragraphs complained of, five points are important.

[20] First, the striking out of the second cause of action by Wild J is critical. That, of course, came after Mallon J's decision. But for the striking out of the second cause of action, I would not have considered giving the defendant a "second bite at the cherry". But I accept that the striking out of the second cause of action makes a very considerable difference. That is clear from Mallon J's judgment. In relation to what are now paragraphs 3 and 5, Mallon J said:

> [23] Ms Strachan's objection to this group is that they are irrelevant. In the main I agree. In the main they are not about what was published, nor why Ms Strachan has responsibility for the alleged defamatory words. However, parts of paragraphs 12(a), (b), (c) and (d) concern what Ms Strachan allegedly told Mr Ellis about Dr Moodie's alleged dishonesty (etc). These parts may be relevant to the pleading presently part of the second cause of action. If Mr Ellis is to be referred to in these and other paragraphs that will remain, then paragraph 3 (identifying who Mr Ellis is) should not be struck out either.

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8 At [68].

9 The appeal is yet to be heard.

Similarly, in relation to what are now paragraphs 6 to 13 of the sixth amended statement of claim (and were then paragraphs 25 to 34), Mallon J said:

> [45] ... As pleaded (paras 45 and 47), Dr Moodie contends that Ms Strachan is responsible for the whole of the comment made by Mr Ellis in the interview and as appeared in the article. It is therefore relevant to plead what Mr Ellis said to Ms Black, which statements are alleged to be defamatory and what defamatory meanings are alleged.

(Paragraphs 45 to 47 were part of the now struck out second cause of action).

[21] Secondly, the remaining cause of action is confined to defamatory statements alleged to have been made by Ms Strachan to the journalist. It is not concerned with statements made by Ms Strachan to Mr Ellis. It is not concerned with remedying defamatory statements made allegedly by Mr Ellis. And it is not concerned with the republication of Ms Strachan's observations in the *Listener*.

[22] Thirdly, the only relevance of *Mr Ellis'* statements to the journalist, therefore, is to the extent that Ms Strachan republishes them, either simpliciter, or with endorsement, enlargement[10] or even disassociation.[11]

[23] Fourthly, Mr Moodie pleads that the words allegedly used by Ms Strachan in speaking to the journalist, whether original or by endorsement of Mr Ellis' statements ("I understand Tony Ellis' comments")[12] are defamatory in their natural and ordinary meanings. Deliberately, Mr Moodie does not plead any innuendo. It follows that the only meaning that the Court is concerned with is what is conveyed by the publication to an ordinary reasonable person, with ordinary intelligence and with general knowledge.[13] The ordinary reasonable person in this situation has no special knowledge beyond the general knowledge of the world and its population.[14] Where a meaning is dependent on special knowledge not known to the ordinary, general reader, an innuendo must be pleaded.[15]

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10 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [12].
11 *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at [6.35].
12 Rendered in the *Listener* as "I understand Tony Ellis' [conman] comments".
13 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA); Burrows & Cheer *News Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at 44 to 45.
14 *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 (CA) at 327.
15 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA).

[24] In this case I would have thought that an innuendo needed to be pleaded, as the statement published is meaningless without special knowledge (and was meaningful to the sole recipient only because of special knowledge).[16] However that is beyond the scope of the present application.

[25] Fifthly, the pleading principles recently restated in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* apply.[17] After setting out the essential requirements of a competent statement of claim, the Court of Appeal in *Chesterfields* restated a passage from *Hopper Group Ltd v Parker:*[18]

> One essential part of pleadings is to state precisely the basic facts on which the plaintiff relies so as to clearly define the issues which the defendant has to meet. If that is not done, it is difficult for a defendant to prepare for trial and questions such as payment into Court or offers of settlement can hardly be considered. Furthermore, if the case goes to trial without precise pleadings, much time can be wasted and a defendant might be taken by surprise when the real issue not previously stated clearly suddenly emerges.

The Court of Appeal in *Chesterfields* then went on to say "verbose, ill drafted pleadings may defeat the purpose of the statement of claim to such an extent that it is an abuse of process".[19] Pleadings should not be used as a means of oppression. Apart from r 15.1(a), each of the remaining grounds in r 15.1 – on which the defendant here relies – involve a measure of impropriety and abuse of the Court's process. As the Court put it:[20]

> The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceeding that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is

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16 *Leigh v Attorney-General* HC Wellington CIV-2008-485-2315, 14 July 2009 at [15]–[17]; *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148.

17 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679.

18 *Hopper Group Ltd v Parker* (1987) 1 PRNZ 363 (CA) at 366.

19 At [87].

20 At [89].

> that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[26] In *Chesterfields* the statement of claim was "overwhelming prolix". It contained large tracts of factual material, and was difficult to follow. Much of the factual material pleaded was irrelevant, or provided excessive detail or evidence rather than pleading.[21] It also omitted to plead relevant matters, such as which defendants committed which acts. The Court considered the entire second amended statement of claim to be an abuse of process warranting striking out. In the outcome, the Court stayed the proceeding. It made certain directions: that the proceeding be case managed by an assigned Judge; that no further amended statement of claim be filed except by leave granted by that Judge; and that leave was not to be granted unless the Judge was satisfied that the proposed amended statement of claim had been settled substantially by a practising barrister or solicitor.

[27] I should say immediately that in the present proceeding, the statement of claim is not of that order of deficit. But in my view it does contain a significant measure of irrelevant and evidential "pleading". And to it is appended a large number of schedules (containing evidential material) which simply form no proper part of a pleading.

[28] I turn now to the paragraphs objected to.

Paragraph 3

[29] Paragraph 3 pleads Mr Ellis' residence, profession and place of business. Mr Ellis and his profession remain relevant to the extent that part of the remaining cause of action against Ms Strachan is an allegation of republication by her of defamatory remarks by Mr Ellis. The paragraph is excessive (and appears to date from when Mr Ellis was himself a party). But it is neither irrelevant nor an abuse of process. It may remain.

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[21] At [91].

Paragraph 4

[30] Paragraph 4 pleads details about APN (the publisher of the *Listener*), and that that magazine is published on a weekly basis and distributed throughout New Zealand. That paragraph is substantially irrelevant, because the present cause of action is now confined simply to the publication (and republication) by Ms Strachan to the journalist, and nothing more. It is struck out.

Paragraph 5

[31] Paragraph 5 is a complex paragraph of one and a half pages' length. It alleges awareness by the plaintiff of a series of statements made by Ms Strachan to Mr Ellis. It has nothing to do with the remaining cause of action, which concerns (as I have said) publication by Ms Strachan not to Mr Ellis, but to the *Listener* journalist. In addition it refers to emails and draft affidavits sent by Ms Strachan to Mr Ellis. Mr Moodie failed in an attempt to use these to found further causes of action before Young J. The pleading in paragraph 5, which I acknowledge is a hangover from the fifth amended statement of claim, now runs the real risk of infringing Young J's decision. Mallon J considered this paragraph permissible because of the former second cause of action, involving publication in the *Listener*. In the absence of the second cause of action, following the strike out decision of Wild J, that justification does not exist. The paragraph does not contain factual pleadings relevant to the matters in issue in the first cause of action. What the plaintiff knew, and what Ms Strachan said to Mr Ellis, is neither here nor there now. Paragraph 5 is struck out.

Paragraph 6

[32] Paragraph 6 pleads that Mr Ellis made a number of statements about Mr Moodie to the *Listener* journalist in an interview prior to 22 February 2007. Mallon J considered this paragraph (which was then paragraph 25). She did not strike it out because she found it relevant to the second cause of action.[22] I accept that what Mr Ellis said to the journalist is relevant, but only to the extent that Ms Strachan republished any part of it when she spoke to the journalist. That requires closer attention to paragraph 7. Paragraph 6 may remain.

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[22] See [8]–[9] above.

[33] Annexure A, cross-referenced in paragraph 6, is different. That is the journalist's notes of that interview. It is evidence, and it has no part in a statement of claim. Annexure A is struck out. The same outcome will apply to the remaining annexures, which suffer the same vice.

Paragraph 7

[34] This is a lengthy pleading comprising three and a half pages. It contains an allegation that Mr Ellis made certain defamatory statements to the journalist. As I have just said, it is relevant now only to the extent that Ms Strachan has republished any such statement to the journalist. The only republication alleged in the current statement of claim is at paragraph 15F, where Ms Strachan is alleged to have said to the journalist "I understand Tony Ellis' comment". What that would mean as a matter of natural and ordinary meaning is unclear. The journalist, who had special knowledge not possessed by the ordinary member of the public, clearly inferred that observation to refer to the statement allegedly made by Mr Ellis that "I think I've been the victim of a conman". I say that that is the inference the journalist drew, because in the article she wrote:[23]

> She [Strachan] said Ellis was honest and "I understand his [conman] comments."

[35] At paragraph 16 (which I will return to) Mr Moodie pleads that what Ms Strachan was referring to when she said, "I understand Tony Ellis' comment" was *all* of Mr Ellis' alleged statements set out in paragraph 7. That contains 28 separate statements alleged to be made by Mr Ellis. Plainly the journalist did not think the observation related to all 28, and self-evidently that cannot be so. Paragraph 17(m) suggests that Mr Moodie does not think so either. Paragraph 7 is irrelevant except to the extent that any statement made by Mr Ellis was effectively republished by Ms Strachan. To that extent only, the plaintiff may plead what Mr Ellis said. That involves a much narrower compass than applies presently to paragraph 7. It is struck out, but may be repleaded in accordance with these directions.

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[23] Her notes, and Mr Moodie's pleading refer to "comment" singular.

Paragraph 8

[36] Paragraph 8 is a pleading relying on the whole of annexure A (which I have struck out) and involves a pleading as to the natural and ordinary meaning of the words said to have been published by Mr Ellis and pleaded in paragraph 7. When this pleading was considered by Mallon J she accepted that it was relevant then to the second cause of action. That cause of action no longer existing, paragraph 8 is not relevant almost in toto. But as in the case of paragraph 7, Mr Moodie may plead the natural and ordinary meaning of the words expressed by Mr Ellis which the defendant Ms Strachan has allegedly republished in stating that she "understands Mr Ellis' comment". Paragraph 8 is struck out, but also may be repleaded in accordance with these directions.

Paragraph 9

[37] Paragraph 9 is an allegation that words in annexure A (struck out), and otherwise set out in paragraph 7, and published by *Mr Ellis to the journalist*, were false and defamatory. This pleading is now irrelevant in light of the striking out of the second cause of action. Whether Mr Ellis' statements were defamatory is immaterial. What matters is the status of what Ms Strachan said. Paragraph 9 is struck out.

Paragraph 11

[38] Paragraph 11 pleads that prior to filing proceedings in October 2007, Mr Moodie advised Ms Strachan that he required proposals from her for the "retrieval" of the alleged defamatory statements. It is not immediately apparent to me why this allegation is material. But a similar allegation appeared in paragraph 31 of the fifth amended statement of claim. Strike out was not sought at that time. I am satisfied that this pleading, while at best of modest relevance, does not infringe r 15.1. It may remain.

Paragraph 12

[39] Paragraph 12 alleges that the defendant continues to defend on the basis of truth and honest opinion. Exactly the same comments apply to this paragraph as to the preceding one. It may remain.

Paragraph 13

[40] Paragraph 13 pleads that by statements and emails to Mr Ellis, in which she made defamatory remarks about Mr Moodie, Ms Strachan was the original source of the defamatory words published by Mr Ellis to the journalist (recorded in annexure A in paragraph 7). Paragraph 13 was paragraph 34 of the fifth amended statement of claim. Strike out was sought before Mallon J. She considered it was relevant to the second cause of action. I accept that that would be so, but it is not relevant to the remaining first cause of action, concerning the limited publication by Ms Strachan direct to the journalist. Paragraph 13 is struck out.

Paragraph 15

[41] Paragraph 15 concerns what is directly in issue in the remaining cause of action. That is, what Ms Strachan said to the journalist. Ms Strachan however seeks that parts of paragraph 15 (referring to the "Moodie Blues" article and to annexures A, C, D and E) be struck out. Some of the pleading involves a hangover from the original pleading of the second cause of action. The words "for an article published in the March 17-23 2007 edition of the Listener entitled "Moodie Blues" are irrelevant. They are struck out.

[42] I have already struck out the annexures, on the basis that they are evidence and have no place in a statement of claim.

Paragraph 16

[43] We have seen this paragraph before.[24] It alleges that Ms Strachan knew what Mr Ellis had said to the journalist (as set out in paragraph 7 – now substantially struck out). And that that was what she was referring to when she said "I understand

[24] At [32] above.

Tony Ellis' comment". It goes on to plead that the defendant was "adding her voice to and endorsing what Mr Ellis had said to Ms Black". To the extent that that is a pleading of republication, it is entirely appropriate. It is arguable that the statement attributed to Ms Strachan, "I understand Tony Ellis' comment", may be defamatory. But as I have already said, it is not appropriate that the cross-reference be to the whole of paragraph 7. The plaintiff must identify which comment by Mr Ellis is republished and endorsed by Ms Strachan. Plainly it is not all 28 observations pleaded in paragraph 7, and plainly the journalist (with her particular knowledge) did not see it that way. Nor it seems does Mr Moodie either, in paragraph 17(m). Subject to repleading in this way, paragraph 16 may remain.

Paragraph 17(b), (c) and (m)

[44] Paragraph 17 alleges what the natural and ordinary meanings of the words set out in paragraph 15 are. This pleading was the subject of prior application by Ms Strachan for strike out before Mallon J. Each of the three sub-paragraphs which it is now sought be struck out were the subject of application before Mallon J. I am satisfied that the striking out of the second cause of action does not make a difference here. Mallon J's refusal to strike these paragraphs out did not depend on the second cause of action. I am not prepared to give Ms Strachan a second bite at the cherry. Paragraph 17 may remain, save to the extent that it seeks to incorporate annexures A, B and D.

Paragraph 18

[45] Paragraph 18 pleads that the *Listener* was a national publication on sale throughout New Zealand. It is irrelevant, and it replicates paragraph 4 which I have already struck out. Paragraph 18 is struck out.

Paragraph 21

[46] Paragraph 21 pleads that in publishing the alleged defamatory words to the journalist, Ms Strachan knew she was a journalist at the *Listener* (with nationwide publication) and that she knew that her and Mr Ellis' comments were intended for publication. This pleading was previously paragraph 41 of the fifth amended

statement of claim. No application to strike it out was made before Mallon J. While I have real doubts as to its relevance, it does not necessarily infringe r 15.1. It may remain.

Conclusion

[47] The effect of this judgment is to strike out parts of the pleading of the remaining cause of action that are otiose and improper. Those parts do not conform to proper pleading principles, described above at [23]–[25]. Their removal does not impair the real issues being identified and advanced to trial. That is the entire purpose of pleading. Once amended, for the last time and in accordance with this judgment, the pleadings will be fit to be tried.

Result

[48] The following paragraphs are struck out: 4, 5, 9, 13 and 18.

[49] In addition, parts of paragraphs 7, 8, 15, 16 and 17 are struck out to the extent referred to in this judgment.

[50] The annexures attached to the statement of claim are struck out.

[51] The defendant's application otherwise is dismissed.

[52] If costs are in issue, I will consider memoranda. However my sense is that both parties have been successful to some extent and costs should lie here they fall.

Stephen Kós J

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