

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2007-485-2212**

BETWEEN                      ROBERT ALEXANDER MOODIE  
   Plaintiff

AND                              ELIZABETH GRACE STRACHAN  
   Defendant

AND                              APN SPECIALIST PUBLICATIONS NZ  
   LIMITED  
   Cross-claim Defendant

Hearing:            5 May 2010

Appearances: The plaintiff in person  
                         Mr Upton QC and Ms Vokes for defendant

Judgment:        21 May 2010 at 10 am

---

**JUDGMENT OF MALLON J**

---

**Contents**

Introduction .....	[1]
Background .....	[2]
Ms Strachan’s application to strike out.....	[9]
The causes of action .....	[10]
The paragraphs said to be irrelevant .....	[21]
Pleaded meanings – first cause of action .....	[34]
Pleaded meanings – second cause of action.....	[73]
Pleaded meanings – paragraphs 27 and 30 .....	[81]
Dr Moodie’s strike out application .....	[83]
Result and directions .....	[84]

## **Introduction**

[1] Dr Moodie sues Ms Strachan for defamation. For various reasons, Dr Moodie is up to his fifth amended statement of claim whereas Ms Strachan has filed one statement of defence. In her defence she pleads the defences of truth and honest opinion. No particulars of these defences are provided. Before me for determination at this point are:

- a) Dr Moodie's application to strike out the statement of defence for failure to provide particulars to the defences; and
- b) Ms Strachan's application to strike out parts of the fifth amended statement of claim on the basis that parts are irrelevant and the words are not capable of bearing the pleaded defamatory meanings.

## **Background**

[2] Dr Moodie's claim arises out of a *New Zealand Listener* article entitled "Moodie blues" ("the article"), authored by Joanne Black, which appeared in the 17 March 2007 edition of the *New Zealand Listener*. The article reported on comments made by Ms Strachan and by a Mr Ellis to Ms Black. At least some of what Mr Ellis had said to Ms Black had come from statements made by Ms Strachan to Mr Ellis.

[3] Immediately under the headline "Moodie blues" the article had the caption:

Far from being the white knight of his public image, cross-dressing lawyer Rob Moodie is described by a colleague as a robber baron. The pair are embroiled in an extraordinary falling-out over money.

[4] The story proceeded by introducing Mr Ellis and Dr Moodie and their association during a case involving a Mr and Mrs Berryman. It discussed Mr Ellis' claim that he had been conned by Dr Moodie into doing work for him for free. The alleged con was that Dr Moodie had told him he was not paid much for this work

generally. It reported on Mr Ellis saying that Dr Moodie was exploiting Ms Strachan by not paying her properly and “oddly” that she half-owned the premises from which they worked. The article provided Dr Moodie’s response to these claims, including that Ms Strachan was paid \$43,000 one year, \$13,000 another and that she was the beneficiary of work paid for by Dr Moodie and his wife on the building. It then went on to say:

Strachan, who practises law in Wanganui, said when contacted by the *Listener* that there were “still issues unresolved from my time with Rob”. She had been paid \$13,000 one year, but the figure of \$43,000 was incorrect. She said she felt “very exploited by him”. She said Ellis was honest and “I understand his [conman] comments”. She remains a half-owner of Moodie’s office building but denies she has made a cent from it.

[5] After that, the article went back to Mr Ellis saying he felt taken advantage of, that he had concerns about how Dr Moodie practised law and that vulnerable clients were ripped off. It went on to say that Mr Ellis felt “conned”, and that Dr Moodie was not a white knight but a “robber baron, preying on vulnerable clients”.

[6] The claim was originally brought against Ms Strachan and Mr Ellis and APN Specialist Publications NZ Limited (the publisher of the *New Zealand Listener*). A settlement was subsequently reached by Dr Moodie with Mr Ellis and APN. Dr Moodie discontinued against them, but APN remains in the proceeding because Ms Strachan has brought a cross-claim against APN.

[7] As a result of the settlement, and a successful application by Ms Strachan for further particulars of the statement of claim, Dr Moodie was to file his fifth amended statement of claim. Before that was filed and served, but in anticipation of it, on 5 November 2009 Ms Strachan was ordered to file and serve a particularised statement of defence within 30 days of the later of service of the fifth amended statement of claim or confirmation of the lodging of security. The time for filing the particularised statement of defence has passed.

[8] Dr Moodie applies to strike out Ms Strachan’s defence on the grounds that the particularised statement of defence has not been filed and served as ordered. Ms Strachan’s response is to say that upon seeing the fifth amended statement of claim it became apparent that it was oppressive and vexatious and that many of the

claimed defamatory meanings were not capable of supporting the meanings alleged. She therefore filed her strike out application and sought an extension of time for filing her defence. It makes sense to consider Ms Strachan's application first and, in light of that, to then consider Dr Moodie's application.

### **Ms Strachan's application to strike out**

[9] Ms Strachan's strike out application relates to paragraphs 3, 5 to 25, 27 to 30, 34 and Annexures A, C, D, E, G, H, and I of the fifth amended statement of claim as well as some of the meaning pleaded at paragraphs 37 and 44. To assess Ms Strachan's application I first consider the causes of action that Dr Moodie has pleaded. In light of that, I then consider the paragraphs in the claim said to be irrelevant. I then consider whether the pleaded meanings are capable of having their pleaded meanings.

#### ***The causes of action***

[10] The fifth amended statement of claim has two causes of action.

[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.

[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.

[13] It goes on to plead (at paragraph 45):

45. The above article and the above underlined defamatory words in paragraph 43 published in the March 17-23 edition of the *New Zealand Listener* were published or caused to be published by the defendant

because the article and words resulted from the interview with the defendant referred to in the annexure marked “F” during which interview –

- (a) The defendant knew that Ms Black who interviewed her was the Features Editor and/or a reporter for a national publication called the New Zealand Listener.
- (b) The defendant knew that Ms Black was interviewing her for an article about the plaintiff she intended to write and publish in the New Zealand Listener.
- (c) The defendant knew that she had been the original source, the very fountainhead, of the defamatory words complained of and published by Mr Ellis to Ms Black which are recorded in Annexure “A” and paragraph 26 of this amended statement of claim.
- (d) The defendant knew or foresaw that in the context of her interview with Ms Black which is recorded in Annexure “F” to this amended statement of claim –
  - (i) that the underlined defamatory words and/or statements in paragraph 43 and Mr Ellis’s statements in paragraph 26 above were likely to be published in whole or in part in the New Zealand Listener to Listener subscribers and to the New Zealand public at large; and/or
  - (ii) that there was a significant risk that what she said would be repeated in whole or in part in the press and that that would increase the damage caused by the underlined defamatory comments; and/or
  - (iii) that publication in the New Zealand Listener was a natural and probable consequence of the underlined defamatory comments made to Ms Black.

46. By her knowledge and actions detailed in paragraphs 41 and 45 of this statement of claim the defendant is jointly and severally responsible and liable with Ms Black and APN for publishing and/or causing to be published to Listener subscribers and the New Zealand public, the alleged defamatory words contained in Annexure “B” and underlined in paragraph 43.

47. By her use of the underlined words in paragraph 43 published to Ms Black the defendant commended to readers and added her voice to, the whole of the comment made by Mr Ellis in the article, and additionally did, and intended to, endorse the truth of Mr Ellis’s false and defamatory statements in Annexures “A” and “B” underlined in paragraphs 26 and 29.

[14] Annexure F is a transcript of what Ms Strachan said to Ms Black. Annexure A is a transcript of what Mr Ellis said to Ms Black. Annexure B is the article.

[15] After pleading (paragraph 48) that the *New Zealand Listener* is a national publication it then pleads (paragraph 49) that the words in the article and the words in paragraph 43 (ie the specific words attributed to Ms Strachan) are defamatory in their natural and ordinary meaning.

[16] It can be seen that the second cause of action is not simply a pleading that Ms Strachan is responsible for the repetition in the article of her words to Ms Black. It is partly that. As well it alleges that Ms Strachan is responsible for the defamatory statements made by Mr Ellis to Ms Black (in Ms Black's interview with him) and the whole of Mr Ellis' comment in the article. This is said to be because "she commended to readers and added her voice to" and "intended to endorse" the truth of those comments "by her use of the underlined words in paragraph 43 published to Ms Black". Thus, as pleaded, the second cause of action only relies on what Ms Strachan said to Ms Black which is then said to give rise to responsibility for what Mr Ellis said to Ms Black and the whole of the article.

[17] The more straightforward way to include Ms Strachan's responsibility for what Mr Ellis said to Ms Black and which Ms Black then repeated, would have been to include a separate (third) cause of action for what Ms Strachan said to Mr Ellis. Dr Moodie could then have sought to recover, as a consequence of this publication, the damages from Mr Ellis' and Ms Black's republication (if they were found not to be too remote). Alternatively, a further (fourth) cause of action could have been included pleading that Ms Strachan is responsible for the repetition by Mr Ellis and Ms Black.

[18] At the hearing Dr Moodie confirmed that his intention was to sue Ms Strachan for what Mr Ellis had said to Ms Black and which was then published in the article. He noted that he had pleaded this in the way he had for two reasons. First, Ms Strachan had made comments to Mr Ellis in confidence. He considered that, without more, Mr Ellis' statements to Ms Black and their publication in the article may not have been the natural and probable consequence of what Ms Strachan had said to Mr Ellis, because Ms Strachan could have expected her confidentiality request to be honoured by Mr Ellis. However Dr Moodie contends that, when Ms Black interviewed Ms Strachan, Ms Strachan knew that her request for

confidentiality had not been honoured by Mr Ellis and she then proceeded to add her voice to and to endorse what Mr Ellis had said. Secondly, Dr Moodie said that he had framed his pleadings in the way he had because he considered that a separate cause of action, under which he would plead (if I have understood this carefully) that, as the source of the statements, Ms Strachan was jointly and severally liable for the repetition by Mr Ellis to Ms Black of her words to Mr Ellis, would be out of time (under s 55 of the Defamation Act).

[19] As I understand it, it is contended that Ms Strachan knew what Mr Ellis had said to Ms Black because she was “the fountain head” of these comments (as per paragraph 45(c)). It does not appear to be alleged that she knew what Mr Ellis had said to Ms Black because of what Ms Black had said to her. If this is contended it should be made clear.

[20] A potential complication is that Ms Strachan is contemplating a strike out of the proceeding (or a part of it) on the basis that Ms Strachan, Mr Ellis and APN are joint tortfeasors and that the settlement of Dr Moodie’s claim with Mr Ellis and APN extinguishes Dr Moodie’s claim against Ms Strachan. However there is no such application before me at this point so I can put this to one side for now.

***The paragraphs said to be irrelevant***

[21] The paragraphs that are objected to can be dealt with in groups.

[22] The first group is paragraph 3 and paragraphs 5 to 13 which concern who Mr Ellis is, and the background to legal proceedings brought by Mr Ellis against Dr Moodie in connection with the proceeding involving Mr and Mrs Berryman (for whom Dr Moodie was acting) and Ms Strachan’s involvement in Mr Ellis’ legal proceedings.

[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.

[24] The next group is paragraphs 14 to 18. They concern the basis as to payment of fees on which Dr Moodie agreed to act for Mr and Mrs Berryman, and for Police Superintendent Waugh in another case, as well as other pro bono work carried out by Dr Moodie. Ms Strachan's objection to this group is that they are irrelevant. I agree. They are not about what Ms Strachan said to Mr Ellis nor Ms Black, nor what Mr Ellis said to Ms Black. Nor are they otherwise about why Ms Strachan has responsibility for the words published in the article.

[25] The next group is paragraphs 19 to 24. They concern the working relationship between Dr Moodie and Ms Strachan (when it was entered into, how it was to operate, the basis on which a property was purchased and payment arrangements). Ms Strachan says that these paragraphs are not relevant. I agree. They may become relevant depending on the particulars of truth and honest opinion that are provided but at the moment they are not relevant. They are not about what Ms Strachan said to Mr Ellis nor Ms Black, nor what Mr Ellis said to Ms Black, nor Ms Strachan's responsibility for the alleged defamatory words.

[26] Paragraphs 25 to 34 concern Mr Ellis' statements to Ms Black and the publication in the article of what Mr Ellis had said to Ms Black. Paragraph 25 refers to Ms Black's interview with Mr Ellis. Paragraph 26 sets out the statements in the interview said to be defamatory. Paragraph 27 sets out the alleged defamatory meanings. Paragraph 28 pleads that the words are defamatory in their natural and ordinary meaning. Paragraph 29 sets out the statements in the article from Mr Ellis which are alleged to be defamatory. Paragraph 30 sets out the alleged defamatory meanings. Paragraph 34 pleads that, through emails and statements to Mr Ellis, Ms Strachan was the source of the defamatory words.

[27] Ms Strachan's objection to this group is that what Mr Ellis said to Ms Black, and what was then published of this in the article, is irrelevant to the claim against



Ms Strachan, and that it is an abuse of process to include these paragraphs when the claim against Mr Ellis has been settled. I do not agree on the relevance point (and the abuse of process claim does not seem to me to add anything). 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.

[28] The next group are the annexures. Ms Strachan objects to Annexures A, C, D, E, G, H and I on the basis that they are irrelevant and further that it is impossible to plead to the whole of any interview or article.

[29] The pleading at para 37 (under the first cause of action) is that:

[t]he plaintiff relies upon the whole of the content of Annexures “A”, “B”, “C”, “D”, “E” and “F” and says that in their natural and ordinary meaning in the context of the interview, the underlined words set out in paragraph 36 above in context meant, and were intended to mean [the defamatory meanings alleged are then set out]

[30] The second cause of action refers to A, B and F (at paragraphs 45, 46 and 47 – refer [13] above).

[31] Annexure A is what Mr Ellis said to Ms Black. The content of that interview, on the present pleadings, is relevant. Dr Moodie pleads that by her words to Ms Black, Ms Strachan is responsible for the allegedly defamatory statements made by Mr Ellis to Ms Black in the interview. These statements are said to be defamatory in their natural and ordinary meaning, and so all of what Mr Ellis said to Ms Black is relevant context for considering whether the statements do have the pleaded defamatory meaning.

[32] Annexure C is an article in the *New Zealand Listener* subsequent to the article sued upon. Annexure D and E are what Dr Moodie said to Ms Black. I agree that Annexures C, D and E are irrelevant (though will be relevant evidence at the trial). Because the natural and ordinary meaning of the words said to Ms Black are relied on, the only relevant context to their meaning is Ms Black’s interview of

Ms Strachan as a whole. What was later published in the *New Zealand Listener* and what Dr Moodie said to Ms Black are not relevant to their meaning.

[33] Annexure G is a schedule setting out the words that Ms Black has quoted from Mr Ellis in the interview. Annexure H is a schedule setting out the words that Ms Black has quoted from Mr Ellis in the article. Annexure I is a schedule of the words that Ms Black has quoted from Mr Ellis in the later *New Zealand Listener* article. Annexures G and H are potentially relevant, but at the moment the pleading does not identify their relevance. The pleading does not refer to them in any of its paragraphs. Annexure I is irrelevant because it relates to a later article and not the interviews or the article that are the subject of the first and second causes of action.

***Pleaded meanings – first cause of action***

[34] Dr Moodie confirmed at the hearing that he relies on the natural and ordinary meaning of the words and not a “true innuendo”. Because the words are said to be defamatory in their natural and ordinary meaning, the test is what the ordinary reasonable person would understand by the words used. The ordinary reasonable person is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs. But facts known to some members of the public (relevant in a true innuendo pleading) are not relevant to whether the words are defamatory in their natural and ordinary meaning.

[35] In considering whether words have the natural and ordinary meaning alleged it remains necessary to consider the words in their context. As is said in Stephen Todd (ed) *The Law of Torts in New Zealand* (5<sup>th</sup> ed, Thomson Reuters, Wellington, 2009) at [16.3.06]:

It is always dangerous to read one part of an article in isolation from the rest... A passage which by itself appears innocent may take on defamatory connotations when the whole article is read. The converse is also true.

[36] Dr Moodie, as he was required to do, has set out the individual statements within the article which he says are defamatory of him. In respect of each statement he then sets out their alleged defamatory meaning. Ms Strachan says that the words

are not capable of having their pleaded meanings. It is for the Judge to determine if the words are capable of having the meaning alleged. If they are, it is then for the jury to decide if they do in fact bear that meaning.

[37] The first cause of action concerns the statements made by Ms Strachan to Ms Black. The words relied on as being defamatory must be assessed in the context of the whole of the interview. This interview seems to have occurred after Ms Black has interviewed Mr Ellis and Dr Moodie. Ms Strachan makes comment about what Mr Ellis and Dr Moodie have said and on some things that have happened from her perspective.

[38] As to paragraphs 36A/37(a)

a) The words of the interview relied on are:

The figures Rob has given you are totally incorrect. The \$43,000 is totally (sic) incorrect. This is off the record; I'm taking an action against Rob and that is totally off the record ...

b) The alleged meaning is:

That plaintiff was a liar and his statement made to Ms Black that the defendant had been paid \$43,000 (more or less) was not true;

c) Ms Strachan submits:

Ms Strachan did not say that Dr Moodie was a liar. All she said was that the figures that Dr Moodie gave Ms Black are totally incorrect and no more. The words complained of are non-judgmental and not capable of being read in the way that Dr Moodie alleges. The ordinary person reading the words as they stand and without knowledge of any extrinsic facts, would not give them the meaning the plaintiff says they have.

[39] I do not agree with the submission for Ms Strachan. In the context of the interview the words are capable of having that meaning, especially when read with later comments in the interview that “the money is wrong”, “Rob is saying those figures to make himself look better” and “that’s a lie, the \$10,000. I haven’t made a cent.”

[40] As to paragraph 36B(i)/37(b):

a) The words of the interview relied on are:

Tony Ellis is a totally honest up-front person, he's a human rights lawyer, he's very, very good at what he does and he did a lot for Rob.

(i) There was an issue about getting paid and I'm not going to comment on that because I wasn't a party to their agreement. I know Tony Ellis was not paid

b) The alleged meaning is:

That everything Mr Ellis had told Ms Black about the plaintiff referred to in paragraph 26 [allegedly defamatory statements Mr Ellis had made to Ms Black] was true, and, in particular –

- that the first and second defendants had been exploited by him
- that he was a dishonest fraudster, a false pretender and practiced deceit on others
- that he was a conman
- that he was a robber baron posing as a white knight
- that he got paid \$1.8 million in the Waugh case by charging 50% on top of excessive legal fees
- that Superintendent Waugh had paid him more than he should have
- that he exploited his legal colleagues and was ripping off vulnerable clients
- that he preyed on vulnerable clients taking huge fees on top of contingencies
- that he practiced law unprofessionally and unlawfully and was a danger to the public

c) Ms Strachan submits:

The words complained of are simply that there was an issue about getting paid and knowing that Mr Ellis had not been paid. Again, the alleged meanings are not available to Dr Moodie. They are extravagant and not sustainable on the basis of the words in question. It is a jump too far to say that they mean that "everything that Mr Ellis said" was true, as particularised.

[41] I agree with the submission for Ms Strachan. It is not clear on the pleadings what Ms Black said to prompt Ms Strachan's response. It appears from Ms Strachan's response that Ms Black has referred to Mr Ellis and the work he did for Dr Moodie.

As pleaded, the most that can be taken from the interview (as set out in annexure F) is that Ms Strachan considers Mr Ellis is totally honest and that he should be believed in relation to the arrangement with Dr Moodie for payment and that he did not get paid. The alleged meanings go way beyond this. I understand Dr Moodie to say that Ms Strachan's responsibility for what Mr Ellis said arises from her being the fountainhead of the comments. But that of itself does not mean that she knew, when interviewed, what Mr Ellis had said to Ms Black so that "by her ... words" to Ms Black she intended to endorse the truth of them. Unless it is pleaded that Ms Strachan knew that Mr Ellis had said the allegedly defamatory statements (as set out in paragraph 26) to Ms Black, and that this was what she was adding her voice to and endorsing, then the statements Ms Strachan has made to Ms Black are not capable of having the pleaded natural and ordinary meanings.

[42] As to paragraphs 36B(ii)/37(c):

a) The words of the interview relied on are:

(ii) and I have not been paid for what I did for that case either.

b) The alleged meaning is:

That unlike the plaintiff, Mr Ellis was a totally honest up-front person whereas the plaintiff was dishonest and had reneged and/or defaulted on obligations existing at the time to pay Mr Ellis and the defendant for their work.

c) Ms Strachan submits:

Again, the words in question are not capable of having the meaning which Dr Moodie claims. They are a simple statement of fact.

[43] I do not agree with the submissions for Ms Strachan. When read with the preceding words (refer [40] above), and in the context of the interview which also discussed Ms Strachan's views that she felt exploited by Dr Moodie, that the figures Dr Moodie had given were incorrect, a \$10,000 sum was a lie and that she had information that would be damaging to Dr Moodie and different from the public image he has painted, they are capable of having a meaning that Dr Moodie had exploited Ms Strachan in relation to this case by not paying her and/or that he had

renege or defaulted in his obligations to her and that this was dishonest in contrast with Mr Ellis who was honest.

[44] As to paragraphs 36C(i)/37(d):

a) The words of the interview relied on are:

(i) "... we did have an agreement in my second year. We had an agreement everything would be split 50:50 that has not happened.

b) The alleged meaning is:

That the plaintiff had entered into an agreement with the defendant to pay her 50% of everything earned by Moodie & Co in 2006 and had then dishonestly defaulted or renege on that agreement.

c) Ms Strachan submits:

There is no suggestion or inference in the words complained of that Dr Moodie had "dishonestly defaulted or renege" on the agreement. It was a factual statement made by Ms Strachan, explicable on an ordinary commercial basis and incapable of having the meaning attributed to it.

[45] I do not agree with Ms Strachan's submission. In the context of the interview (refer [43] above) they are capable of this meaning.

[46] As to paragraphs 36C(ii)/37(e):

a) The words of the interview relied on are:

(ii) Things aren't right. I can't say anything. The \$43,000 is incorrect. I can't really say an awful lot."

b) The alleged meaning is:

That the plaintiff was lying about having paid the defendant \$43,000 (more or less) when she was working for him.

c) Ms Strachan submits:

All Ms Strachan said was that the \$43,000 was incorrect and that things were not right. The words in question cannot be construed as saying that the plaintiff is "lying" in their fair and natural meaning.

[47] I do not agree with Ms Strachan's submission for the same reasons as above [39].

[48] As to paragraphs 36D(i)/37(f):

a) The words of the interview relied on are:

(i) Rob has painted an image for himself that I don't believe is correct and everybody believes it.

b) The alleged meaning is:

That the plaintiff had falsely painted a favourable public image of himself.

c) Ms Strachan submits:

Ms Strachan does not seek to have this paragraph struck out at the present time. It can remain for the moment.

[49] As to paragraphs 36D(ii)/37(g):

a) The words of the interview relied on are:

(ii) I am the person who actually has the information that could be very damaging and it's very difficult for me.

b) The alleged meaning is:

That the plaintiff had a dishonest side to his character and/or personality that the defendant had discovered whilst working with him which, when disclosed, will be very damaging to his public image and reputation.

c) Ms Strachan submits:

Ms Strachan challenges the first part of the alleged meaning to be given to these words "... a dishonest side ...". This is all in the context of a legitimate business dispute. Dr Moodie is trying to reach far too much into what Ms Strachan is saying. Those words should be struck out.

[50] I do not agree with Ms Strachan's submission. In the context of the interview (refer [43], [45] and [48] above) the words are capable of having this meaning.

[51] As to paragraphs 36D(iii)/37(h):

a) The words of the interview relied on are:

(iii) I know a lot of things have happened. I worked with him for two years very closely. It will be my evidence, if Tony does take him to Court, that he will be pursuing.

b) The alleged meaning is:

That the defendant had discovered evidence of a dishonest side to the plaintiff's character and conduct that she had obtained after working very closely with him that was very damaging to him and which Mr Ellis would be relying upon in Court proceedings he would bring against the plaintiff.

c) Ms Strachan submits:

The same comments apply here to the meaning alleged.

[52] I consider, that in the context of the interview (refer [43], [45], [48] and [49] above) the words are capable of having this meaning.

[53] As to paragraphs 36D(iv)/37(i):

a) The words of the interview relied on are:

(iv) Maybe at the moment you just have to say there are a lot of unresolved issues, the picture is not clear. Cross out the word totally because I did get \$13,000 for one year but the \$43,000 is incorrect.

b) The alleged meaning is:

That the plaintiff lied to Ms Black about having paid the defendant \$43,000 (more or less) when she was working for him.

c) Ms Strachan submits:

Note the comments earlier. This was all in the context of a legitimate business dispute with Dr Moodie. Merely to say that something is "incorrect" cannot mean that lies are involved.

[54] For the same reasons (refer [39]), I consider the words are capable of having this meaning.

[55] As to paragraphs 36E/37(j):



a) The words of the interview relied on are:

[... I am the person who actually has the information that could be very damaging] ... The media is going to jump on it when it comes out. Off the record, did you know Tony had put in a complaint to the law society and part of tjhat (sic) was his concern about my arrangements with Rob.

b) The alleged meaning is:

That as a result of working closely with the plaintiff the defendant had obtained very damaging information about the plaintiff's conduct or some dishonest, dark, bad or flawed side to his integrity, personality or character which, when revealed, would make headline news in the public media.

c) Ms Strachan submits:

The plaintiff has a high media profile (whether in the context of the Waugh case, the Berryman case, or otherwise) and it would be very likely that the media would "jump on it" if anything came out. The comment is a neutral one. The words "or some dishonest, dark ... character" should be struck out. The alleged meaning is not sustainable.

[56] I agree that "dark" is not sustainable. The words, in the context of the interview, are capable of the rest of the pleaded meanings.

[57] As to paragraphs 36F(i)/37(k):

a) The words of the interview relied on are:

(i) ... Rob is saying those figures to make himself look better but I don't want you to say that. Once we get underway with the court, it will come out.

b) The alleged meaning is:

That the plaintiff lied to Ms Black about having paid the defendant \$43,000 (more or less) when she was working for him and the plaintiff was only saying that he had paid her \$43,000 to make himself look better.

c) Ms Strachan submits:

These words in their natural and ordinary meaning are not capable of the meaning attributed to them, specifically – that he "lied to Ms Black". Again, all of this is totally explicable in the context of a business dispute between two parties who have fallen out with each other and are arguing over quantum.

[58] For the same reasons (refer [39]) I do not agree with Ms Strachan's submission.

[59] As to paragraphs 36F(ii)/37(l):

a) The words relied on are:

(ii) I'm going to the ERA. I feel very exploited myself

b) The alleged meaning is:

That the plaintiff had employed, and had then seriously exploited the defendant during that employment.

c) Ms Strachan submits:

Similar comments are made here.

[60] The words are in my view capable of having the pleaded meaning.

[61] As to paragraphs 36F(iii)/37(m):

a) The words relied on are:

(iii) I understand Tony Ellis's comment.

b) The alleged meaning is:

That the defendant's experience of the plaintiff was that he was dishonest, and a conman, as Mr Ellis was saying, namely, that he:

- was a dishonest fraudster, a false pretender and practiced deceit
- was a robber baron posing as a white knight
- exploited his legal colleagues and was ripping off vulnerable clients
- preyed on vulnerable clients taking huge fees on top of contingencies
- practiced law unprofessionally and unlawfully and was a danger to the public

c) Ms Strachan submits:

Ms Strachan is reported as saying that she “understands” Tony Ellis’ comment (singular), but what comment is not identified. She is not saying that she necessarily agrees with it. This paragraph can remain for the moment.

[62] I consider that the words are not capable of having this meaning unless it is pleaded that Ms Strachan knew that Mr Ellis had said these things to Ms Black and that this is what she is referring to when she said “I understand Tony Ellis’ comment”. However I note that Ms Strachan does not seek to strike this out.

[63] As to paragraphs 36G(i)/37(n):

a) The words of the interview relied on are:

We needed a place,

(i) I was working for him, he suggested we buy a place together and at the time I didn’t know what I know now and we bought it.

b) The alleged meaning is:

That the plaintiff had suggested that he and the defendant buy the building and she agreed but then discovered a dishonest side to the plaintiff’s character and personality which made that decision a mistake.

c) Ms Strachan submits:

Once again, the words in question in their natural and ordinary meaning cannot extend to dishonesty. There are other possible reasons for the comments that Ms Strachan is reported as making.

[64] While I accept that there are other possible reasons for what Ms Strachan has said, in the context of the interview (refer [48], [49], [51] and [59] above), I consider that the words are capable of having the pleaded meaning.

[65] As to paragraphs 36G(ii)/37(o):

a) The words of the interview relied on are:

(ii) I own 50, he and his wife own 50. It was very shortly after I bought it that I found out the true Rob Moodie, I don’t particularly want that put in.”

b) The alleged meaning is:

That had she known at the time an existing dishonest side of the plaintiff's character and personality from the damaging information she shortly after discovered, she would not have invested in the office building occupied by his legal practice.

c) Ms Strachan submits:

The same comments apply here.

[66] I consider that in the context of the interview (refer [48], [49], [51], [59] and [64]) the words are capable of having the pleaded meaning.

[67] As to paragraphs 36H(i)/37(p):

a) The words of the interview relied on are:

(i) Off the record we tired (sic) to sell it, he interfered with it and it turned to custard.

b) The alleged meaning is:

That the plaintiff had dishonestly interfered with an attempted sale or auction of the property for his own advantage and as a result the attempt to sell was frustrated.

c) Ms Strachan submits:

Once again, the words used in their natural and ordinary meaning cannot involve an inference of dishonesty or dishonest interference with the sale. There could be any number of legitimate business reasons why the sale did not proceed. Dishonesty is not the only necessary inference.

[68] I consider that the pleaded words are not capable of having the meaning that Dr Moodie acted dishonestly in relation to the sale. The words could be read as meaning that there had been an improper interference and that this was part of Dr Moodie's alleged exploitation of Ms Strachan, but there is nothing to indicate that Ms Strachan meant that the interference with the sale of the building was dishonest.

[69] As to paragraphs 36H(ii)/37(q):

- a) The words of the interview relied on are:
  - (ii) [he interfered with it [the sale]] and it turned to custard. Look, I was going to lose money hand over heels, so I said okay, I'll keep it and that's why I've turned it into a kind of flat.
- b) The alleged meaning is:

That as a result of the plaintiff dishonestly frustrating the sale of the property to his own advantage the defendant was going to lose money hand over heels.

- c) Ms Strachan submits:

Once again, Dr Moodie's complaint is that the words complained of in their ordinary and natural meaning indicate dishonesty on the part of the plaintiff. That meaning does not naturally arise, and is not the only necessary inference.

[70] I agree with Ms Strachan's submission that the words are not capable of meaning that the interference with the sale was dishonest.

[71] As to paragraphs 36I(i)/37(r):

- a) The words of the interview relied on are:
  - (i) That's a lie, the \$10,000. I haven't made a cent and as it stands today I am in a very difficult position.
- b) The alleged meaning is:

That the plaintiff lied when he told Ms Black that he had contributed \$10,000 (more or less) to the development of the Denbigh Square property more than the defendant.

- c) Ms Strachan submits:

For the moment this paragraph can remain.

[72] As to paragraphs 36I(ii)/37(s):

- a) The words of the interview relied on are:

(ii) I would appreciate you running everything by me because Rob tells lies a lot, in fact all the time but I don't want you saying that."

b) The alleged meaning is:

That the plaintiff was a serial or compulsive liar – a person who told lies all of the time, and that Ms Black needed to run anything further the plaintiff had to say past the defendant to check whether it was true or false.

c) Ms Strachan submits:

Again, this paragraph can remain for the moment.

***Pleaded meanings – second cause of action***

[73] This cause of action concerns Ms Strachan's responsibility for allegedly defamatory statements in the article. Ms Strachan contends that the words are not capable of having the pleading natural and ordinary meanings.

[74] As to paragraphs 43A(i)/44(a):

a) The words of the article relied on are:

(i) still issues unresolved from my time with Rob'. She had been paid \$13,000 one year, but the figure of \$43,000 was incorrect.

b) The alleged meaning is:

That he had lied to Ms Black about paying her \$43,000 and had paid her only \$13,000 for two years work when she was in his employment.

c) Ms Strachan submits:

Simply to say that the figure of \$43,000 was incorrect cannot in its natural and ordinary meaning have the meanings attributed to it by Dr Moodie that "he had lied to Ms Black". It is not the only necessary inference.

[75] I do not agree with the submission for Ms Strachan. In the context of the article it was not only capable of meaning that Dr Moodie was not paying Ms Strachan properly it was also capable of meaning that Dr Moodie was dishonest in what he told Ms Black about the payments Ms Strachan had received.

[76] As to paragraphs 43B/44(c):

a) The words of the interview relied on are:

She said Ellis was honest and “I understand his [conman] comments”.

b) The alleged meaning is:

That Mr Ellis was honest and his comments about the plaintiff in paragraph 25 above [in his interview with Ms Black] and of his being one or all of the following were true of the plaintiff; namely

- that Mr Ellis and the defendant had been exploited by him
- that he was a dishonest fraudster, a false pretender and a person who practiced deceit on others
- that he was a conman
- that he was a robber baron posing as a white knight,
- that he got paid \$1.8 million in the Waugh case by charging 50% plus his legal fees
- that Superintendent Waugh had paid him more than he should have
- that he exploited his legal colleagues and was ripping off vulnerable clients
- that he preyed on vulnerable clients taking huge fees and contingencies
- that he practiced law unlawfully and was a danger to the public

c) Ms Strachan submits:

This paragraph says that Ms Strachan understands Mr Ellis’ “comments” (plural). In fact, according to the record of interview she said that she understood his comment (singular). That sentence cannot in its natural and ordinary meaning have the meanings attributed by Dr Moodie to it in his para 44(c). It is noted again that Ms Strachan did not herself use the word “conman” on interview. That word was included in *The Listener* article by APN presumably to “beef up” Ms Strachan’s comments but is nothing to do with her.

[77] I consider that if Ms Strachan has an issue with APN’s insertion of “conman” in the article then her cross-claim can deal with that. For the purposes of Dr Moodie’s claim against Ms Strachan I do not have what Ms Black said to Ms Strachan for her to say that she “understood” Mr Ellis’ “comment”. I proceed on

the basis that Dr Moodie can establish that the “conman” insertion was an accurate statement of what Ms Strachan was responding to. If that is so then the words are capable of having the pleaded “that he was a dishonest fraudster, a false pretender and a person who practiced deceit on others” (which, incidentally, seem unnecessarily repetitive of the same concept) and “that he was a conman” meanings.

[78] The difficulty with the other pleaded meanings is that it is not pleaded Ms Strachan knew that Mr Ellis had said these things to Ms Black so that by her words to Ms Black she could endorse them. In the absence of such a pleading Ms Strachan’s words are not capable of having the pleaded meanings.

[79] As to paragraphs 43C/44(d):

a) The words of the interview relied on are:

She remains a half-owner of Moodie’s office building but denies she has made a cent from it.

b) The alleged meaning is:

That the plaintiff had conned and exploited her and she had not made a cent out of her investment in the property occupied by the plaintiff’s practice.

c) Ms Strachan submits:

That sentence cannot in its natural and ordinary meaning have the meaning attributed to it by Dr Moodie of his having conned and exploited Ms Strachan.

[80] I agree that the pleaded words are not capable of meaning that Dr Moodie had “conned” Ms Strachan this meaning. They are capable, in the context of the article, as meaning that Dr Moodie had exploited her and had not paid her properly and had been dishonest about what she had made out of the building.

***Pleaded meanings – paragraphs 27 and 30***

[81] These paragraphs concern the allegedly defamatory statements made by Mr Ellis to Ms Black and the repetition of those statements in the article.



Ms Strachan is said to be responsible for them on the basis pleaded in paragraph 47 (and discussed above). Although Ms Strachan submitted that the words were not capable of having the pleaded defamatory meanings no analysis was provided in support of this submission.

[82] In view of the possibility of a strike out application in respect of Ms Strachan's responsibility for what Mr Ellis said, and the cross-over of these paragraphs with the other later paragraphs where Ms Strachan is said "by her words" to have endorsed what Mr Ellis said, I do not propose to go through each of the pleaded meanings to assess whether the words are capable of having those meanings. For now these paragraphs are not struck out, but Ms Strachan need not plead to them. I will set a timetable for the filing of any further interlocutory applications and if none are filed Ms Strachan will then need to plead those paragraphs.

#### **Dr Moodie's strike out application**

[83] Dr Moodie's application for striking out Ms Strachan's defence is not granted. Ms Strachan made an application for leave to extend the time for filing her defence upon reaching the view that the fifth amended statement of claim contained irrelevant pleadings and alleged meanings that she should not have to plead to. She has succeeded in some respects on these matters.

[84] However, I agree with Dr Moodie that he is entitled to have particulars to the pleaded defences of truth and honest opinion and there should be no further delay with this. Although there has been some changes to the pleadings, the alleged defamatory meanings pleaded in the fifth amended statement of claim have not changed from the fourth amended statement of claim. If Ms Strachan wished to make an application that the words pleaded were not capable of having their pleaded meaning, this application ought to have been made at the time of her interlocutory application which led to the fifth amended statement of claim. Timetable orders are necessary.

## **Result and directions**

[85] The following paragraphs are struck out: paras 5 to 11, para 12 except to the extent that it pleads what Ms Strachan told Mr Ellis about Dr Moodie, para 13 to 24, “dark” in para 37(j), “dishonestly” in para 37(p) and (q) and Annexures C, D, E, and I.

[86] At the moment, the following paragraphs are not struck out, but potentially may be if particulars are not provided as to why Ms Strachan knew that Mr Ellis had said the allegedly defamatory statements to Ms Black when she made her statements to Ms Black such that by her words she endorsed those statements: paras 25 to 34; paras 36(B)(i) and 37(b); paras 44(c) and Annexures A, G and H. However, with the exception of the pleaded meanings “that he was a dishonest fraudster, a false pretender and a person who practiced deceit on others” and “that he was a conman”, Ms Strachan is not required, at this stage, to provide particulars of her defences of truth and honest opinion in respect of those paragraphs.

[87] The following timetable applies:

- a) The defendant is to provide her particulars to the pleaded truth and honest opinion defences by 11 June 2010 (but this need not cover the defamatory meanings pleaded at paras 27, 30, 37b) and 43B (except that it is to include particulars in respect of “that he was a dishonest fraudster, a false pretender and a person who practiced deceit on others” and “that he was a conman”);
- b) The plaintiff is to file further particulars in respect of how, by her words to Ms Black, she added her voice to and endorsed the statements at paras 26 and 29 and, in particular, how it is alleged that she knew what Mr Ellis said to Ms Black by 11 June 2010;
- c) Any further interlocutory applications by any party are to be made by 2 July 2010.

- d) If there are no further interlocutory applications filed and served by 2 July 2010:
- i) Dr Moodie is to file and serve his sixth amended statement of claim by 23 July 2010; and
  - ii) Ms Strachan is to file her defence to the sixth amended claim (incorporating the particulars at a) above and also particulars of her defences of truth and honest opinion in respect of the defamatory meanings at paras 27 and 30, 37b) and 43B) by 13 August 2010.

[88] Both parties have had a measure of success so costs in respect of the two applications are to lie where they fall.

Mallon J

Solicitors:

R Moodie, Moodie & Co, Feilding, ph: 06 323 4625, fax: 06: 323 4623, moodielaw@xtra.co.nz  
J Upton QC, Wellington, ph: 04 472 5804, fax: 04 471 0672, jou@capitalchambers.co.nz  
T Goatley, Bell Gully, Auckland, ph: 09 916 8766, fax: 09 916 8801, tania.goatley@bellgully.com