IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-002212

BETWEEN	ROBERT ALEXANDER MOODIE Plaintiff
AND	ELIZABETH GRACE STRACHAN Defendant
AND	APN SPECIALIST PUBLICATIONS NZ LIMITED Cross Claim Defendant

Hearing: 24 August 2010

Counsel: Plaintiff in Person
J O Upton QC and R M Vokes for the Defendant
B D Gray QC for the Cross Claim Defendant

Judgment: 26 August 2010

JUDGMENT OF WILD J:
STRIKE OUT APPLICATIONS BY DEFENDANT AND CROSS CLAIM DEFENDANT

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[1] For decision are two interlocutory applications:

- An application dated 9 July by the defendant (Ms Strachan) for an order dismissing or staying the proceeding the plaintiff (Mr Moodie) has brought against her.

- An amended application dated 26 July by the cross claim defendant (APN) for an order striking out Ms Strachan's cross claim against it or, alternatively, striking out the second, third and fourth causes of action in Ms Strachan's statement of claim against it.

[2] These two applications are made in a proceeding commenced on 4 October 2007 in which Mr Moodie originally sued Mr Ellis, Ms Strachan and APN for damages for defamation. He alleged that Mr Ellis and Ms Strachan had each severally defamed him in comments they had made to the Features Editor of the *New Zealand Listener*, Ms Black, that all three defendants were jointly and severally liable for defaming him in an article entitled "Moodie blues" published in the 17-23 March 2007 edition of the *Listener* in March 2007, and that Mr Ellis and APN were jointly and severally liable for defaming him in a second article "Lawyer v Lawyer" published in the *Listener* on 31 March 2007.

[3] Mr Ellis and APN settled with Mr Moodie on 30 September last year and he discontinued his proceeding as against them. Clauses 4 and 5 of the settlement agreement (comprised in an exchange of letters) provided:

> 4. Payment of the settlement sum referred to in 2 above is in full and final settlement of the causes of action against the first and third defendants (but not the second defendant) in the Court proceedings, Dr Moodie's defamation claims against the first and third defendants (but not the second defendant), and any other claim of whatever nature Dr Moodie may have now or in the future against APN Specialist Publications NZ Limited ("APN") or Mr Ellis, or any company or entity related to them, or any of their employees, agents or contractors, relating either directly or indirectly or in any other way to the communications between Mr Ellis and APN referred to in Dr Moodie's fourth amended statement of claim in the above proceedings ("the communications") or to the "Moodie blues" or "Lawyer v Lawyer" articles.
>
> 5. In consideration of payment of the settlement sum Dr Moodie discharges and releases APN and Mr Ellis, any company or entity related to them, and their employees, agents and contractors, from all liability, losses, disputes, differences, claims, demands, actions, proceedings, costs or expenses and issues of any kind whatsoever, whether or not they are known or discoverable or contingent at the date of this document, of whatever nature and however arising, which relate either directly or indirectly or in any other way to the communications or to the "Moodie blues" or "Lawyer v Lawyer" articles, and acknowledges and agrees that this agreement may be pleaded and tendered as a complete and absolute bar to any such claims.

[4] Mr Moodie pursued his claims against Ms Strachan by filing, on 6 November last, a fifth amended statement of claim. This named Ms Strachan as the only

defendant. That fifth statement of claim contains two causes of action against Ms Strachan:

a) A first cause of action seeking damages for defamation in respect of comments Mr Moodie alleges Ms Strachan made during an interview shortly before 22 February 2007 with Ms Black of the *Listener* for an article subsequently published in the 17-23 March edition of the *Listener* ie the article entitled "Moodie blues". In this cause of action Mr Moodie sues Ms Strachan alone, that is, he sues her severally.

b) A second cause of action claiming damages against Ms Strachan for defamation on the basis she "published or caused to be published" (para 43) the allegedly defamatory "Moodie blues" article. In paragraph 45 Mr Moodie alleges:

> (The "Moodie blues" article was) published or caused to be published by (Ms Strachan) because the article and words resulted from the interview (between Ms Black and Ms Strachan, particulars of which are then given).

In paragraph 46 Mr Moodie then alleges:

> 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.

[5] These two causes of action mirror the two pleaded by Mr Moodie against Ms Strachan in his fourth amended statement of claim dated 17 April 2009, which was the pleading live at the time Mr Moodie settled his proceeding as against Mr Ellis and APN. The one difference is the reference in paragraph 46 to Ms Black. That is not in the corresponding paragraph 60 of the fourth amended statement of claim and Mr Moodie has never sued Ms Black personally.

[6] Ms Strachan's amended statement of cross claim against APN dated 21 July 2010 contains four causes of action:

a) Breach of confidentiality: in relation to Mr Moodie's first cause of action against her (relating to what she allegedly said to Ms Black in a February 2007 interview), breach by APN of its obligation of confidentiality in that all the information she supplied to Ms Black was supplied in confidence and the interview was carried out in confidence.

b) Negligence: breach by APN of the "newspaper rule" in discovering (including of course to Mr Moodie) the transcript of Ms Strachan's February 2007 interview with Ms Black.

c) Breach of confidentiality and/or negligence: a claim made on the same basis as a), but this time in relation to Mr Moodie's second cause of action against her.

d) Contribution/indemnity: in relation to both Mr Moodie's causes of action against her, a claim pursuant to s 17 Law Reform Act 1936 for indemnity or contribution on the ground that Mr Moodie "has sued" her jointly with APN.

APN's application

[7] For APN Mr Gray accepted that Mr Moodie could pursue his first cause of action against Ms Strachan, because he sues her severally in respect of the allegedly defamatory statements she made to Ms Black during the interview. However, he submitted that Mr Moodie's second cause of action against Ms Strachan was fundamentally misconceived. The reason is that Ms Strachan's allegedly defamatory statements to Ms Black are one publication, and APN's "Moodie blues" *Listener* article is a separate and distinct publication. Ms Strachan alone is liable for the first publication, APN alone liable for the second. As demonstrating that, Mr Gray referred me to Harrison J's judgment in *Osmose New Zealand Ltd v Wakeling* [2007] 1 NZLR 841 at [85]-[96], but in particular:

> [92] What is the harm or damage for which Osmose sues? It is the loss of all its sales of TimberSaver®. On its case, that damage was substantially,

> materially or operatively caused by a concurrence or combination of published and republished defamatory statements. Each concurrent tortfeasor is liable to Osmose for the separate consequences of its separate wrongdoing. So each publisher and republisher must compensate the company accordingly.

[8] Mr Gray conceded there are what he termed "outlier" cases which represent exceptions to that "separate publication" principle. He instanced *McManus & Ors v Beckham* [2002] EWCA Civ 939; [2002] 1 WLR 2982 (CA). In the course of a shopping expedition Ms Beckham had shown signed photographs of her husband to the accompanying paparazzi and to other customers in the shop remarking that they were fakes, with the obvious intention that the media published her comments, which it did on a wide scale.

[9] Mr Gray contended this was not that type of case and that none of the particulars alleged by Mr Moodie in paragraph 45 of his fifth statement of claim could conceivably make Ms Strachan liable for APN's publication of the "Moodie blues" article in the *Listener*. He contended that this was the conventional situation of the print media publishing an article based on a source(s) of information.

[10] This submission was not one foreshadowed, at least not in any informative way, in APN's application and was not one advanced in APN's written submissions. For the reasons I am about to mention, I am also not persuaded that it is correct. Further, as Mr Gray succeeds on his second submission, it is unnecessary to consider this first submission. For all those reasons, I put Mr Gray's first submission to one side. *Todd on Torts* (5th ed, Brookers, Wellington, 2009) at [16.5.03] states that if the repetition of a defamatory publication was foreseeable as the natural and probable consequence of the original publication, then the original publisher will be liable for the subsequent damage caused to the plaintiff's reputation. The correct approach is now clear in the United Kingdom. The touchstone is whether, on the facts, it is "just to hold [the defendant] responsible for the loss in question": *McManus* at [39]. Noting that a reference to "foreseeability" is to be avoided, yet acknowledging that foreseeability is the underlying concept, Waller LJ concluded in *McManus* at [34]:

> If a defendant is actually aware (1) that what she says or does is likely to be reported, and (2) that if she slanders someone that slander is likely to be

> repeated in whole or in part, there is no injustice in her being held responsible for the damage that the slander causes via that publication. I would suggest further that if a jury were to conclude that a reasonable person in the position of the defendant should have appreciated 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 slander, it is not unjust that the defendant should be liable for it.

[11] Questions of causation will be for the jury or trial Judge. But, applying the legal approach I have just outlined to the facts as pleaded by Mr Moodie, and applying also conventional strike out principles, I hold that it is arguable that the circumstances surrounding Ms Strachan's original publication to Ms Black could render her liable also for the damage arising out of the subsequent publication in the *Listener*, were it not for the operation of the release rule to which I now turn.

[12] Mr Gray's second submission is the one foreshadowed. He submits that the terms of Mr Moodie's settlement with Mr Ellis and APN operated to release Ms Strachan also, because Mr Moodie had sued all three as joint tortfeasors in respect of the "Moodie blues" article (I explain why this was so in [23]-[24]). That submission invokes the "release rule". The effect of this rule is that in cases of joint tortfeasors, if one is sued and then released, the release operates in favour of all. The Court of Appeal in *Brooks v New Zealand Guardian Trust Co Ltd* [1994] 2 NZLR 134 at 140 confirmed that the rule still applies in New Zealand.

[13] Mr Gray stressed the very comprehensive nature of the settlement agreement, and highlighted these points about its clauses 4 and 5:

- They expressed payment of the settlement sum to be "in full and final settlement of the causes of action" against Mr Ellis and APN. It was the causes of action themselves that were settled.

- Similarly, payment of the settlement sum fully and finally settled any claims against Mr Ellis or APN "relating either directly or indirectly or in any other way ... to the "Moodie blues"" article.

- The agreement expressly stated that in consideration of payment of the settlement sum Mr Moodie "discharges and releases" Mr Ellis and

APN from all liability or claims "of whatever nature and however arising which relate either directly or indirectly or in any other way" to the "Moodie blues" article.

- The agreement also expressly provided that the agreement may be pleaded and tendered "as a complete and absolute bar to any such claims".

[14] For those reasons, particularly the express discharge and release of Mr Ellis and APN, Mr Gray submitted the release rule squarely applied here. The rule therefore operated to discharge and release also Ms Strachan in respect of publication of the "Moodie blues" article.

[15] That is the way in which Mr Gray answered any suggestion that, in terms of his settlement with Mr Ellis and APN, Mr Moodie had merely covenanted not to sue them instead of releasing them. The distinction was neatly made by Asher J in *Nandro Homes Ltd v Datt* HC Auckland CIV-2008-404-6676, 16 March 2009 at [63]:

> The release rule does not operate if a plaintiff covenants not to sue a joint tortfeasor rather than releases the tortfeasors: *New Zealand Trainers Association Inc v Cranson* HC Wellington AP14/98 22 March 1999, Ellis and Wild JJ. Here the settlement was not expressed as a promise not to sue, or a stay. Rather it was expressed as a full and final settlement. Its effect was to release Nandro, and so therefore it also releases Mr Singh and Ms Khalil as joint tortfeasors.

Clause 4 of the settlement agreement here is also expressly stated to be "in full and final settlement of the causes of action against the first and third defendants (but not the second defendant) to the Court proceedings ...".

[16] Mr Gray then addressed *Gardiner v Moore* [1969] 1 QB 55, a judgment of Thesiger J relied upon by Mr Moodie. Mr Gardiner, a Wimpole St cosmetic surgeon, had sued the author, publisher and printer of an article in the "Stethoscope" magazine entitled "Be wary of those smooth tongued 'plastic surgeons'". A settlement agreement was reached between counsel for the plaintiff, publisher and printer discharging the latter two on terms, in particular that an agreed statement was

to be made in open Court. The author claimed the release rule operated to release him also. In a lengthy and, with respect, somewhat indigestible judgment, Thesiger J construed the agreement as a covenant not to sue the publisher and printer further, and also implied a term that Mr Gardiner had reserved all his rights to pursue the author.

[17] For three reasons I do not regard *Gardiner v Moore* as having any application here. First, as Mr Upton pointed out, it concerned a single defamatory publication in respect of which three defendants were sued. That distinguishes it factually, and in a material way. Secondly, the comparatively brief settlement terms in *Gardiner v Moore* made no reference to the author (the first defendant), whereas the very comprehensive settlement agreement here expressly refers to Ms Strachan. That enabled Thesiger J to imply a term, which had the effect of avoiding the prospect of personal liability on the counsel who had negotiated the settlement agreement. Thirdly, although the settlement terms in *Gardiner v Moore* "discharged" the claim against each of the publisher and printer, they did not expressly discharge and release them from the causes of action directed against them and from any claims directly or indirectly related from the publication, as does the settlement agreement here.

[18] I also consider there is force in a further point Mr Gray made. If Mr Moodie had wanted to reserve his right to sue Ms Strachan in respect of the "Moodie blues" article, then Mr Gray contended Mr Moodie needed to make that explicit in the proposed settlement agreement. Mr Ellis and APN would then have known that the proposed settlement agreement, despite the settlement sum they were to pay and the discharge and release they were to receive, may not mark an end of the litigation for them. Such an inconclusive agreement may not have been acceptable to them – there is no way of knowing. Had the settlement agreement been so expressed, it would have been open for Mr Moodie to pursue Ms Strachan in respect of the "Moodie blues" article, and for Ms Strachan to seek indemnity or contribution from APN, exactly as she has done.

[19] If *Gardiner v Moore* has any relevance here, Mr Gray suggested that it was to demonstrate that it may have been possible for Mr Moodie, Mr Ellis and APN to reach a settlement agreement different from the one they did reach. However, the

release and discharge in respect of the "Moodie blues" publication for which Mr Moodie had alleged Mr Ellis, Ms Strachan and APN were jointly and severally liable was comprehensive and APN now raised that release and discharge as a bar to Mr Moodie's second cause of action against Ms Strachan, as it was entitled to do.

[20] Counsel were not aware of any New Zealand case which had referred to, let alone followed, *Gardiner v Moore*. I cannot find one either. I treat it as a fact-specific decision, influenced I think by the Judge's anxiety to avoid the prospect of personal liability falling upon the counsel who had negotiated the settlement agreement in good faith, but with neither the authority nor the intention of settling Mr Gardiner's claim against the author. Before leaving *Gardiner v Moore*, I note that the High Court of Australia, in *Thompson v Australian Capital Television Pty Ltd* [1996] 186 CLR 574 at 582 cites *Gardiner v Moore* as authority for the proposition that "where there was a mere covenant not to sue one joint tortfeasor, as opposed to a release under seal or by accord and satisfaction, the covenant did not preclude recovery against the other joint tortfeasors".

Ms Strachan's strike out application

[21] For Ms Strachan, Mr Upton was content to support Mr Gray's submission that Mr Moodie's second cause of action against Ms Strachan must be struck out, and for the reasons advanced by Mr Gray. Mr Upton added a few points of his own, one of which I have already referred to.

[22] Like Mr Gray, Mr Upton conceded that Mr Moodie could pursue his first cause of action against Ms Strachan.

Mr Moodie's opposition to the two applications

[23] Mr Moodie had filed comprehensive submissions opposing the strike out applications by APN and Ms Strachan. He had been addressing these orally for some 45 minutes when Mr Gray finally rose and objected to Mr Moodie effectively giving evidence as to what he had intended by the settlement agreement. I upheld

that objection and told Mr Moodie he needed to move on with his argument. I took the opportunity to point out that it was 12.59 pm and that these applications had been set down for half a day which was all the time available. In case it becomes important, I summarise what then occurred. Mr Moodie told me he had some distance to go and said that the matter would need to be adjourned to another date to complete the hearing. I explained to Mr Moodie that no further time was available and that I needed to complete hearing the applications now. I offered to continue sitting into the luncheon adjournment and inquired of Mr Moodie how much more time he needed. Mr Moodie responded that if no further time was available there was no point in his going on, he said he gave up, and sat down. I told Mr Moodie that I had not said there was no more time available, and reiterated my offer to sit into the luncheon adjournment in order to complete the hearing. I again inquired of Mr Moodie how much more time he needed. Mr Moodie responded by reiterating that there was no point in his going on, that he gave up, and he again sat down. I then asked Mr Moodie about a comment he had made early in his submissions about the power in s 35 Defamation Act 1992 for a Judge to convene a conference, and asked Mr Moodie why he had mentioned that. Mr Moodie responded to my question, but did not make further oral submissions in opposition to the two strike out applications. I then heard from Messrs Gray and Upton in reply, and completed the hearing at 1.15 pm, reserving my decision.

[24] It follows from what I have said that I take Mr Moodie's arguments in opposition to APN's strike out application largely from his written submissions.

[25] Mr Moodie opposed an order striking out his second cause of action against Ms Strachan. First, Mr Moodie submitted that Ms Strachan was not a joint tortfeasor with Mr Ellis and APN in respect of the publication of the "Moodie blues" article. He expanded on this in considerable detail, referring both in his written and oral submissions to the alleged defamatory remarks. However, as Mr Gray points out, Mr Moodie's own pleading is squarely against him on this. In his fourth amended statement of claim (the pleading live at the time of the settlement) Mr Moodie alleged that:

- Mr Ellis was jointly and severally liable with APN in respect of the "Moodie blues" article in the *Listener* (para 36, p 29).

- Mr Ellis was jointly and severally liable with APN in respect of the "Lawyer v Lawyer" article in the *Listener* (para 45, p 33).

- Ms Strachan was jointly and severally liable with APN in respect of the "Moodie blues" *Listener* article (para 60, p 46).

- APN was jointly and severally responsible with Mr Ellis and Ms Strachan for the *Listener* "Moodie blues" article (para 71, p 55).

- APN was jointly and severally liable with Mr Ellis in respect of the "Lawyer v Lawyer" article in the *Listener* (para 77, p 58).

[26] Despite that somewhat disjunctive method of pleading, the end result is that Mr Moodie alleged that Mr Ellis, Ms Strachan and APN were jointly and severally liable to him in respect of the "Moodie blues" article in the *Listener*. That is the article which is the subject matter of Mr Moodie's second cause of action against Ms Strachan in his fifth amended statement of claim – the cause of action APN and Ms Strachan seek to strike out.

[27] Next, Mr Moodie submitted that the settlement agreement expressly excluded Ms Strachan, and that this was effective despite the release rule. He supported this submission by relying on a number of authorities. First, Mr Moodie submitted that this case is "on all fours" with *Gardiner v Moore*. For the reasons I have given in [16]-[20], I reject that submission and reiterate that *Gardiner v Moore* is of no assistance to Mr Moodie. Rather, the question for me is: does the settlement agreement permit Mr Moodie to pursue his second cause of action against Ms Strachan?

[28] Next, Mr Moodie referred me to the judgment of the English Court of Appeal in *Duck v Mayeu* [1892] 2 QB 511 and invited me to interpret the exclusion of Ms Strachan from the settlement agreement effectively as a covenant by Mr Moodie not

to sue Mr Ellis and APN, as the Court had done in *Duck v Mayeu*. In that case, having sued two joint debtors, the plaintiff settled with one of them on these terms:

> Dear Sir
>
> 'Our Boys'
>
> I beg to acknowledge receipt of yours of the 9th, with cheque for 2*£*.2*s*.0*d* inclosed, in respect of fee and costs, in full discharge of your personal liability in connection with Miss Marie Mayeu's performance of above at Wandsworth Town Hall, on 23rd January, 1891. This is, of course, without prejudice to my client's claim against Miss M. Mayeu.

Despite the earlier wording, the Court held that the last sentence constituted the document a covenant not to sue, and not a release of the joint cause of action (against Ms Mayeu).

[29] Mr Moodie reinforced this submission by referring to this observation by Diplock LJ in his dissenting judgment in *Bryanston Finance Ltd & Ors v de Vries & Anor* [1975] 1 QB 703 (CA) at 732:

> ... courts nowadays are reluctant to construe an agreement with one tortfeasor as a release rather than a covenant not to sue him, unless it is plain that the agreement was intended by the plaintiff to operate also as a release of the other joint tortfeasors from their liability.

[30] Mr Moodie referred also to the judgment of McGregor J in *Eyre v New Zealand Press Association Ltd* [1968] NZLR 736 (the infamous "basinful of bombs" case) in which McGregor J at 745 mentioned a similar sentiment expressed by North P in the Court of Appeal, in a judgment on an interlocutory application in the case. McGregor J added, however, that it seemed that the question whether the two defendants involved were joint tortfeasors had not been argued in the Court of Appeal.

[31] The interpretation of the settlement terms adopted by the Court of Appeal in *Duck v Mayeu* is certainly not one available here. I need to apply the contractual interpretation principles enunciated by Lord Hoffmann in the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913, and since firmly adopted for this country by both the Supreme Court (most recently in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR

444) and in numerous cases by the Court of Appeal, including very lately in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317.

[32] Further, the answer to Mr Moodie's reliance on the comments of Lord Justice Diplock and North P, adverse to the release rule, is of course the subsequent affirmation by the Court of Appeal in *Brooks v NZ Guardian Trust Co Ltd* that the "release rule" remains part of New Zealand law, as Tipping J pointed out in his judgment in *Robinson v Tait* [2002] 2 NZLR 30 (CA) at [98].

[33] Mr Moodie made two further points. The first was that s 49 Defamation Act 1992, which he said appeared to modify the application of s 17(1)(a) Law Reform Act 1936, had no application to this proceeding. I agree; no party suggested it did. His last point was that Mr Ellis and APN are estopped by the settlement agreement from asserting that the agreement released Ms Strachan from any liability she may have to Mr Moodie in respect of his second cause of action against her. That point begs the question of the proper interpretation of the settlement agreement, to which I now turn.

[34] Applying *Investors Investment* interpretation principles, I hold that the effect of the settlement agreement is to release Ms Strachan also from any liability she may have to Mr Moodie in respect of the publication of the "Moodie blues" article, for which Mr Moodie held her jointly and severally liable with Mr Ellis and APN. That is the only way in which clauses 4 and 5 can be interpreted. In particular, as Mr Gray emphasised, clause 4 settles the causes of action. Although Mr Moodie pleaded separate causes of action against Mr Ellis, Ms Strachan and APN in respect of the publication of the "Moodie blues" article in the *Listener*, I have pointed out (in [26]) that the end result was that he alleged they were jointly and severally liable for that publication. The resulting legal position was explained with characteristic clarity by Stout CJ in *Kelliher v Bridges* (1911) 31 NZLR 203 at 204:

> It is, however, clearly laid down that in cases of joint tort feasors, if one is sued and is released, then the release operates in favour of all, and the reasons for this are given in the case of *Duck v Mayeu* [1892] 2 QB 511. The cases of *Brinsmead v Harrison* (LR 6 CP 584), *Thurman v Wild* (11 A & E 453), and *Munster v Cox* (10 App Cas 680) are to the same effect. Here there is one offence; it is one publication; it is one tort or wrong. If one

> person who commits a tort or wrong is released from that tort or wrong, that is held to be a release of all, because the tort or wrong is one thing – it is indivisible. Two persons may be concerned in an assault, but if the person assaulted chooses to accept satisfaction from one the other is released. This is so in actions for libel. I am therefore of opinion that, as it is clear from the evidence that there was a discharge, the plaintiff cannot be heard now to sue on the publication in the Age.

Gatley on Libel and Slander (11th ed, Sweet & Maxwell, London, 2008) at [19.28] states the law in exactly that way, citing *Kelliher v Bridges* as one of two authorities.

[35] If clauses 4 and 5 are interpreted in the way contended for by Mr Moodie, then APN remained exposed to a future claim, whether direct or indirect, in respect of publication of the "Moodie blues" article. That is exactly the type of claim APN now faces at the suit of Ms Strachan. I accept Mr Gray's submission that Mr Moodie, if he wished to pursue Ms Strachan in respect of the "Moodie blues" article, needed to make that clear in the settlement agreement. Mr Moodie has in fact done the opposite: he is party to language which can only be interpreted as ending his rights to pursue any of the three defendants he had alleged were jointly and severally liable to him in respect of the "Moodie blues" article. Perhaps unnecessarily, I add that Mr Moodie is a well qualified and experienced lawyer and would have been aware of the release rule, or must be taken to have been aware of it. The same applies to the experienced barrister who represented Mr Moodie in the negotiation of the settlement agreement.

[36] Mr Moodie's strongest point is perhaps the express exclusion of Ms Strachan from the settlement agreement. I interpret that exclusion as relating to any several liability Ms Strachan may have to Mr Moodie, not to her joint liability with Mr Ellis and APN and not, therefore, as cutting across the release rule. That is what I meant when I said in [17] that *Gardiner v Moore* was factually different in a material way – Mr Moodie had another, separate cause of action against Ms Strachan.

[37] That result makes it unnecessary to deal with APN's alternative application, to strike out the second, third and fourth causes of action pleaded by Ms Strachan in her amended statement of cross claim against APN.

Result

[38] Upon Ms Strachan's application, I strike out the second cause of action in Mr Moodie's fifth amended statement of claim against her, dated 6 November 2009.

[39] Upon APN's application, I strike out Ms Strachan's amended statement of cross claim against APN dated 21 July 2010, insofar as it is based on the second cause of action I have struck out in [38].

[40] This result means that Mr Moodie can pursue the first cause of action in his fifth amended statement of claim against Ms Strachan, though not in relation to the damage arising out of the subsequent publication in the *Listener*. It also retains Ms Strachan's ability to pursue the first cause of action in her amended statement of cross claim against APN, which Mr Gray accepted must stand.

Costs

[41] As requested by counsel, costs are reserved for application by memoranda failing agreement.

Solicitors:
Moodie & Co, Feilding for the Plaintiff
Rainey Collins, Wellington for the Defendant
Bell Gully, Auckland for the Cross Claim Defendant