SUPREME COURT OF QUEENSLAND

CITATION:	*Sunshine Coast Hospital and Health Service v Webb* [2020] QCA 189
PARTIES:	**SUNSHINE COAST HOSPITAL AND HEALTH SERVICE** (appellant) **v** **BEVERLEY JUNE WEBB** (respondent)
FILE NO/S:	Appeal No 634 of 2020 SC No 5796 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 316 (Douglas J)
DELIVERED ON:	4 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2020
JUDGES:	Fraser and Morrison and Mullins JJA
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – GENERALLY – where the appellant appeals against an order dismissing an application for summary judgment – where decisions in QCAT below expressly excluded any consideration of any issue of unlawfulness under the *Public Service Act* 2008 (Qld) – where it was unnecessary to show the respondent's supervisor had acted maliciously or in bad faith because the relevant section under the *Anti-Discrimination Act* 1991 (Qld) set an objective test, rather than a subjective test – where issue estoppel is not established in a manner that permits an order for summary judgment – whether the matter is more apt to be dealt with by trial than by summary judgment PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – GENERALLY – where the appellant appeals against an order dismissing an application to strike out the respondent's further amended statement of

claim – where the appellant complains that the respondent's further amended statement of claim contains paragraphs that are "irrelevant narrative", unnecessary, contain evidence, constitute a rolled up pleading and are embarrassing – where the application to strike out was an interlocutory application concerning practice and procedure with there being high hurdles in seeking to overturn the exercise of a judicial discretion in this respect – whether the reasons of the primary judge were inadequate

Anti-Discrimination Act 1991 (Qld), s 10
Public Service Act 2008 (Qld), s 137, s 189(1)

Blair v Curran (1939) 62 CLR 464; [1939] HCA 23, considered
GAX v The Queen (2017) 91 ALJR 698; [2017] HCA 25, cited
R v Inhabitants of the Township of Hartington Middle Quarter (1855) 4 E & B 780; [1855] EngR 264, considered
R v Kay; Ex parte Attorney-General (Qld) [2017] 2 Qd R 522; [2016] QCA 269, cited
Wainohu v New South Wales (2011) 243 CLR 181; [2011] HCA 24, considered

COUNSEL: K A McMillan QC, with S S Monks, for the appellant
A J H Morris QC, with V G Brennan, for the respondent

SOLICITORS: Crown Law for the appellant
Corney & Lind Lawyers for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[2] **MORRISON JA:** The appellant seeks to challenge orders made on 19 December 2019 dismissing two applications: the first, for summary judgment; and the second, to strike out the respondent's further amended statement of claim.[1]

[3] The history of the dispute can be summarised in relatively short fashion.

[4] The respondent, Mrs Webb, was a school teacher who re-trained as a pharmacist. In January 2004, then aged 51, she commenced work with the Sunshine Coast Hospital and Health Service[2] as a pharmacy trainee. Ten months later she was employed in the Caloundra Hospital pharmacy department. The Health Service contended that her employment was characterised by conflict. She resigned in 2016.

[5] She commenced proceedings against the Health Service, essentially claiming damages for constructive dismissal. Her further amended statement of claim, as it stood at the time of the applications, alleged a number of causes of action each arising from particular factual allegations, including wrongful dismissal at common law (the constructive dismissal claim), misfeasance in public office, breach of fiduciary duty, negligence, and unconscionable conduct.

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1 *Webb v Sunshine Coast Hospital and Health Services* [2019] QSC 316.
2 To which I shall refer as the Health Service.

[6] Prior to the summary judgment application, Mrs Webb had brought several unsuccessful proceedings in the Queensland Civil and Administrative Tribunal (**QCAT**). The Health Service's application was based on evidence and findings in QCAT which, it was contended, demonstrated that her claim could not succeed.

The pleaded case

[7] The pleaded case was complex and detailed, encompassing 15 separate but internally linked parts setting out allegations directed to establish that the Health Service, principally by its Chief Executive, Mr Hegarty, had been guilty of numerous failings that forced Mrs Webb to resign.

[8] The pleading commenced in parts A and B by setting out Mrs Webb's qualifications and her employment with the Health Service, initially at Nambour Hospital in 2004 and the Caloundra Hospital from September 2008. It identified Mr Hegarty as the Chief Executive of the Health Service.

[9] Part C[3] pleaded that Mrs Webb made complaints of bullying to the Crime and Misconduct Commission (**CMC**) in 2012, and later that year told the CMC about suspected official misconduct by Health Service employees.

[10] Part D[4] then pleaded that between March and December 2012 Mrs Webb was on sick leave or other leave. Some of the sick leave was alleged to be due to stress suffered as a consequence of the bullying, and the failure of the Health Service to take any action in that respect.

[11] Part E[5] then pleaded conduct by Mr Hegarty including: (i) on 11 December 2012, directing Mrs Webb to attend an independent medical examination; (ii) suspending her from duty on full pay, from 31 December 2012; and (iii) directing her to get prior permission before attending any health facility conducted by the Health Service, and not to ask employees for support without first contacting the "People and Culture" unit.

[12] Part F[6] pleaded the circumstances of the independent medical examination and its aftermath. That was: (i) the doctor gave a report which found she was fit to work; (ii) Mr Hegarty had a copy of the report and considered it; (iii) the original doctor's conclusion was supported by another doctor; (iv) however, Mr Hegarty refused to provide a copy of the report.

[13] Part G[7] pleaded that suspension of Mrs Webb was illegal. It alleged that the letter of suspension was in breach of s 137 of the *Public Service Act* 2008 (Qld) because it had technical deficiencies, and at the time of its issue Mr Hegarty: (i) did not believe, and could not have reasonably believed, that the proper and efficient management of the department might be prejudiced if Mrs Webb was not suspended; (ii) had not considered all alternative duties that may be available to Mrs Webb; and (iii) did not hold the belief, nor could he have formed the belief, that the indefinite suspension would continue no longer than the period necessary to avoid any prejudice.

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3 Paragraphs 13-16.
4 Paragraphs 17-18.
5 Paragraphs 19-20.
6 Paragraphs 21-27.
7 Paragraphs 28-36.

[14] Further, paragraph 35 pleaded that Mr Hegarty's suspension of Mrs Webb was in bad faith, for an ulterior or collateral purpose, in breach of seven different sections of the *Public Service Act*, when he was biased against her, and therefore constituted an improper exercise of power.

[15] Part H[8] pleaded that Mr Hegarty's direction to attend the independent medical examination was illegal, in part because: (i) Mrs Webb was performing her duties satisfactorily; and (ii) her absence was not caused by mental or physical illness, and Mr Hegarty did not hold that belief, nor could he reasonably have held that belief. Once again it alleged that the direction was made in bad faith, for an ulterior or collateral purpose, in breach of seven different sections of the *Public Service Act*, when he was biased against her, and therefore constituted an improper exercise of power.

[16] Parts I and J[9] pleaded that Mr Hegarty commissioned a bogus organisational wellness assessment of the Health Service's Caloundra staff, and used that report as a pretext for: (i) ending Mrs Webb's suspension under s 137 of the *Public Service Act*; (ii) continuing it under s 189 of that Act; (iii) commencing and then terminating disciplinary proceedings against her; and (iv) terminating the s 189 suspension. This was alleged to have been done by a letter in July 2015 (in which he advised of his decisions to suspend her on full pay under s 189, and commence disciplinary action against her) and a letter in January 2016 (in which he advised of the termination of the s 189 suspension and directed her back to work).

[17] Part K[10] then alleged the illegality of the suspension notified in a letter of July 2015. The allegations in this part were that:

(a) the letter suffered from technical deficiencies;

(b) Mr Hegarty had not formed the requisite belief to ground the suspension, nor could he have reasonably formed such a belief; and

(c) Mr Hegarty had not considered all alternative duties that might be available, and acted in bad faith, for an ulterior or collateral purpose, at a time when he was biased, and contrary to the seven sections of the Act.

[18] Part L[11] then pleaded the illegality of the notification that disciplinary action had been started against Mrs Webb. It was alleged that in giving that notification the principles of natural justice were not followed, the requirements of s 190(1) of the *Public Service Act* were not observed, and (once again) Mr Hegarty's act was carried out in bad faith, for an ulterior or collateral purpose, when he was biased, and contrary to the seven sections of the Act.

[19] Part M[12] pleaded the case based upon the direction given in January 2016, terminating the suspension and directing Mrs Webb back to work. It was alleged that the direction was calculated and intended by Mr Hegarty to be an insult and affront, and contrary to Mrs Webb's health and wellbeing in a variety of ways. It was then pleaded that it was, in fact, an insult and affront, and deleterious to her health and wellbeing. Paragraph 72 pleaded that the direction to return to work exerted pressure on Mrs Webb to resign from her employment. It then pleaded that

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8 Paragraphs 37-40.
9 Paragraphs 41-57.
10 Paragraphs 58-63.
11 Paragraphs 64-67.
12 Paragraphs 68-77.

Mr Hegarty was aware of that and in the circumstances his conduct was carried out in bad faith, for an ulterior or collateral purpose and contrary to seven sections of the *Public Service Act*. Paragraph 77 pleaded that the direction in January 2016 constituted a constructive dismissal of Mrs Webb from her employment with the Health Service.

[20] Part N[13] pleaded the loss and damage claimed. Part O[14] then drew together the various causes of action including constructive dismissal from employment, misfeasance in public office,[15] intentional misuse of public power,[16] breach of fiduciary duty and unconscionable conduct.

The QCAT proceedings

[21] The first QCAT proceeding in time was before Senior Member Endicott, on 31 January 2014. The decision[17] reveals the basis of the cause of action and what occurred. Mrs Webb had lodged a complaint with the Anti-Discrimination Commission, which had been referred to QCAT. Subsequently, the Health Service notified her that it intended to conduct the organisational wellness assessment. Mrs Webb applied to QCAT for an injunction to prevent the engagement of a consultant to do that assessment. The injunction was sought on an interim basis until the finalisation of the anti-discrimination complaint by QCAT.[18] Senior Member Endicott was not satisfied that the proposed assessment process would, as Mrs Webb submitted, have a predetermined outcome designed to result in the termination of her employment.[19] The Senior Member found that the assessment process was not intended to terminate Mrs Webb's employment,[20] nor that the assessment would have a deleterious effect upon her employment or relationships with other staff.[21]

[22] The injunction was refused, but upon acceptance of an undertaking by the Health Service to consult Mrs Webb about the terms of reference for the assessment, provide a draft copy of its report and provide a reasonable period for her to respond.

[23] That summary of those proceedings is sufficient to indicate there is no possibility of any issue estoppel arising from it. The injunction sought was an interim injunction, and consequently there was no occasion to make findings of fact based on evidence.

[24] The second proceeding in time was before Member Browne.[22] What Mrs Webb sought was an order that the Health Service and Mr Hegarty had breached the *Anti-Discrimination Act* 1991 (Qld), and consequent orders to return her to work. As the decision reveals, the central issue was whether Mrs Webb had established a breach of the *Anti-Discrimination Act*, the allegation being that she had been discriminated against on the basis of her alleged mental health. As Member Browne noted, in considering the evidence, QCAT had to consider the true basis or real reason for the

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13 Paragraph 78.
14 Paragraphs 79-94.
15 Which included allegations of reckless indifference on the part of Mr Hegarty, as well as malice.
16 Again, alleging reckless indifference and malice.
17 *Webb v Sunshine Coast Hospital and Health Service & Anor* [2014] QCAT 40; AB 503.
18 Paragraphs [2]-[5] of the reasons.
19 Paragraphs [6]-[9] of the reasons.
20 Paragraph [14] of the reasons.
21 Paragraphs [15]-[17] of the reasons.
22 *Webb v Sunshine Coast Hospital and Health Service & Anor* [2015] QCAT 31; AB 511.

conduct, including why Mrs Webb was required to attend the independent medical examination, and why she continued to be suspended from her employment.[23]

[25] Evidence was given by Mrs Webb and Mr Hegarty and Mr Dalgliesh, the Assistant Director of Pharmacy at the Health Service. Each was cross-examined. Other evidence was given by affidavit, from witnesses who were not required for cross-examination.

[26] Mr Hegarty's evidence was that he did not take any steps because of his perception about Mrs Webb's mental health problems, but for reasons to do with safety at the workplace and concerns raised by other staff members.[24] Ultimately, Member Browne accepted Mr Hegarty's evidence that there were workplace concerns, and as to the reasons why he took certain actions in relation to Mrs Webb, including directing her to attend an independent medical examination and suspending her employment.[25]

[27] Member Browne then examined various factual issues, but all under the umbrella of the main issue, namely had there been a breach of the *Anti-Discrimination Act*. The ultimate finding was that there had been no breach of the *Anti-Discrimination Act* and therefore relief was denied.[26] The other question which arose, namely the legality of the suspension, was not determined because it was held that jurisdiction on that issue lay with the Industrial Relations Commission, not with QCAT.[27]

[28] That synopsis demonstrates that the live issue before Member Browne was whether the decisions made by Mr Hegarty were made because of a concern which breached the *Anti-Discrimination Act*. The particular concern was as to Mrs Webb's mental health. No issue arose as to whether any of the conduct was carried out in bad faith, for an ulterior or collateral purpose, under circumstances of bias or in breach of the various provisions of the *Public Service Act*.

[29] The third proceeding was the appeal against Member Browne's decision.[28] The contention advanced by Mrs Webb was that Member Browne had erred in finding that the unlawfulness of Mr Hegarty's conduct was irrelevant to a consideration of whether the direction made by him offended the *Anti-Discrimination Act*.[29] The Appeal Tribunal held that the question for their determination was whether Member Browne had erred in finding that the real reason for Mr Hegarty's actions was not Mrs Webb's mental state, but his concerns for workplace health generally.[30] The Appeal Tribunal determined that the evidence supported the Member's finding that the real reason for Mr Hegarty's decision to refer Mrs Webb to the independent medical examination was workplace health and safety concerns.[31] The treatment of that issue reveals that the question was still whether Mr Hegarty's conduct offended against the *Anti-Discrimination Act*.[32]

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23 Member's reasons [17].
24 Member's reasons [56]-[68].
25 Member's reasons [74]-[75] and [78]-[80].
26 Member's reasons [124]-[128].
27 Member's reasons [129].
28 *Webb v Sunshine Coast Hospital and Health Service & Anor* [2016] QCATA 20; AB 540.
29 QCATA reasons [7].
30 QCATA reasons [15].
31 QCATA reasons [21].
32 QCATA reasons [23]-[26].

[30] The Appeal Tribunal then considered the other conduct of Mr Hegarty, including Mrs Webb's suspension and decisions made for her return to work. The Appeal Tribunal did not find that there was error in the conclusion that the lawfulness of the action was irrelevant to the issue of whether the action was also discriminatory.[33] In making that finding the Appeal Tribunal referred to the evidence, finding that it confirmed the correctness of the decision at first instance, and observing that the reason (as opposed to the source of power) for Mr Hegarty's decision to suspend Mrs Webb were his concerns about workplace health and safety.[34]

[31] The Appeal Tribunal also found that the *Public Service Act* provided a right of appeal which Mrs Webb had chosen not to exercise.[35]

[32] Therefore the reasons of the Appeal Tribunal turned on whether there had been an error on the part of the Member in determining that Mr Hegarty's conduct did not offend against the *Anti-Discrimination Act*. In doing so the Appeal Tribunal endorsed the findings that the real reason for Mr Hegarty's conduct was other than discriminatory, and concerned with questions of workplace health and safety. However, no issue arose as to whether the conduct was unlawful, either because it offended against the *Public Service Act*, or because it was carried out in bad faith, for an ulterior or collateral purpose, as a result of bias, was an improper exercise of power, or was unconscionable.

[33] In the course of the hearing we were referred to the cross-examination of Mr Hegarty in the QCAT proceedings. There is no need to refer to that in any detail, as it suffices to say that there is no cross-examination directed to issues such as bad faith, ulterior or collateral purpose, bias and the like. The one fleeting question that might be said to fall in that category does not demonstrate that the cross-examiner was grappling with those issues at all.

The approach of the primary judge

[34] The reasons delivered were short and were attacked as being inadequate. It is true to say that the reasons were short, and for that reason the central six paragraphs can be set out in full below. However, as will appear, whilst they attract the criticism of inadequacy a close analysis reveals that they are sufficient for the purpose.

[35] The learned primary judge summarised the pleaded case,[36] in a way which is not challenged as deficient. His Honour then turned to the QCAT proceedings:

> "[13] The basis for the defendant's claim for summary judgment is that all but one of the general issues pleaded in what is admittedly a complex further amended statement of claim, had been dealt with in three decisions of the Queensland Civil and Administrative Tribunal ("QCAT"); two by Members Browne and Endicott, and a third by Senior Member Stilgoe and Member Gardiner. The results of the decisions were against the claims made by the plaintiff. That was in circumstances, however, where the issue of malice or bad faith or

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33 QCATA reasons [30].
34 QCATA reasons [30]-[32].
35 QCATA reasons [25].
36 Reasons below [2]-[12].

unconscionability in Mr Hegarty's behaviour had not been raised and is raised here.

[14] What was in issue in QCAT included, for example, whether there had been unlawful discrimination by the defendant against the plaintiff on the basis of an attribute, namely her mental health, by indirect discrimination of the kind proscribed by the *Anti-Discrimination Act* 1991 (Qld)."

[36] His Honour then dealt with whether there was an arguable case for issue estoppel arising from the QCAT proceedings:[37]

> "[15] Mr Morris QC argued, therefore, that there was no issue estoppel because all that was decided before QCAT was, for example, whether there had been unlawful discrimination constituted by indirect discrimination of the kind prohibited by that statute. He submitted that it was not necessary in those proceedings to show Mr Hegarty or anyone else was acting maliciously or in bad faith because the relevant section under the *Anti-Discrimination Act* was objective rather than subjective. Those submissions seem to me to be correct and to argue against any issue estoppel having arisen in respect of the claims for common law damages, equitable compensation or damages and for aggravated exemplary and/or punitive damages for, amongst other things, misfeasance in a public office, advanced in this pleading."

[37] The learned primary judge then turned to whether summary judgment was warranted:[38]

> "[16] Mr Morris QC also argued against the alternative relief sought based on the argument that the plaintiff's prospects of success were poor by pointing out that there had been no cross-examination of Mr Hegarty before QCAT in respect of these allegations of lack of good faith. He also submitted that whatever cross-examination took place did so without the benefit of the disclosure obtainable in this court so that I could not determine at this stage what his client's prospects of success were. Again, that submission appears to me to be correct with the consequence that I should decide against the application bearing in mind the well-known limitations in respect of the grant of summary relief."

[38] Finally his Honour dealt with the application to strike out the pleading:[39]

> "[17] There were also individual complaints made against particular paragraphs of the further amended statement of claim on bases such as that they were "irrelevant narrative", contained evidence or constituted a rolled-up pleading. Some are also criticised as not being particularised properly.

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37 Reasons below [15].
38 Reasons below [16].
39 Reasons below [17]-[18].

> [18] Little attention was directed to those issues in the submissions made before me orally. It is true that the pleading has a narrative form to it but I am not persuaded that, for that or the other reasons argued, the relevant passages should be struck out. They seem to me to be relevant to the structure and conclusions expressed in the pleading. The defendant will also be in a situation to seek clarification of any allegations that it does find embarrassing or irrelevant by seeking further and better particulars. If there are claims properly characterised as claims for damages for personal injuries, that can also be clarified by seeking further and better particulars."

The issue estoppel argument

[39] The appellant took a relatively unusual approach to its application for summary judgment. That is, it relied upon affidavits which were sworn and used in the QCAT proceedings rather than affidavits sworn for use in the Supreme Court proceedings. In doing so, the appellant relied not only upon the evidence adduced in QCAT, but upon the QCAT findings both at first instance and by the Appellate Tribunal. Reliance was placed upon the reasons for judgment by Member Browne, and the fact that those reasons were upheld upon appeal.[40] It was contended that Member Browne's findings gave rise to binding issue estoppels because the finding was that Mr Hegarty acted for reasons to do with his concerns about health and safety.[41] The contention was (and it was repeated before this Court) that because QCAT found that Mr Hegarty took the steps he did because of concerns he had about workplace health and safety, that excludes issues such as malice, recklessness, bad faith, unconscionable conduct and the like.

[40] There are difficulties, in my view, which confront acceptance of that contention.

[41] Firstly, the issue in the relevant QCAT proceedings[42] was whether the decisions made by Mr Hegarty were for a reason which offended the *Anti-Discrimination Act*, namely the belief that Mrs Webb had mental health issues. There were no issues raised of bad faith, ulterior or collateral purpose, bias and the like. Moreover, no issue of unlawfulness by reason of breach of any provision of the *Public Service Act* was determined. Both Member Browne and the Appeal Tribunal found that the unlawfulness of the conduct was irrelevant to the question of whether there had been a breach of the *Anti-Discrimination Act*. Therefore, quite apart from any other issue, there was no determination at all in respect of the issue of the unlawfulness of Mr Hegarty's conduct by reason of contraventions of the *Public Service Act*.

[42] Secondly, whilst it is true to say that Member Browne and the Appeal Tribunal found that Mr Hegarty's reasons for acting were his concerns for workplace health and safety, those findings were made in a context where only two possible outcomes were framed for consideration. That is, the conduct was either discriminatory under the *Anti-Discrimination Act*, or it was caused by concerns over workplace health and safety. There was no opportunity to raise issues such as are raised in the current proceedings.

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40 Appellant's summary of argument at first instance, paragraph 22, AB 758.
41 Member Browne's reasons [62]-[64], and QCATA [27].
42 Those before Member Browne and QCATA.

[43] Thirdly, the factual findings made were on the basis of evidence given by Mr Hegarty in circumstances where he was not cross-examined about the issues raised in the present proceedings. Indeed, he could not have been cross-examined on such issues, as they were irrelevant to the question of whether the conduct was discriminatory.

[44] Fourthly, for the reason that certain issues could not be raised, or were not raised, in QCAT, it could not be assumed in the current proceedings that the evidence of Mr Hegarty would remain the same.

[45] The learned primary judge noted the difference between the issues in QCAT and those here[43] and accepted the submission that it was not necessary in the QCAT proceedings to show that Mr Hegarty had acted maliciously or in bad faith because the relevant section under the *Anti-Discrimination Act* set an objective test, rather than a subjective test.[44] On the basis of the different issues, and the fact that issues such as bad faith could not be raised in QCAT, the learned primary judge reasoned that an issue estoppel did not necessarily arise. The phrase used by his Honour was that the circumstances "argue against any issue estoppel having arisen". Bearing in mind that his Honour was dealing with a summary judgment application, his Honour stopped short of a finding that there was no issue estoppel, but rather proceeded on the basis that the likelihood of an issue estoppel was not so certain as to permit summary judgment to be ordered.

[46] Before this Court the appellant relied upon *Blair v Curran*[45] where Dixon J said:

> "A judicial determination directly involving an issue of fact or of law disposes once [and] for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, degree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between *res judicata* and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
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> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence

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43 Reasons below [13]-[14].
44 Reasons below [15].
45 (1939) 62 CLR 464, 531-532; [1939] HCA 23; emphasis added; internal citations omitted.

> of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J. in *R. v. Inhabitants of the Township of Hartington Middle Quarter*, **the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous**."

[47] The contention was that QCAT had to find what the reason for acting was in order to conclude that it was not discriminatory under the *Anti-Discrimination Act*. Thus, Mr Hegarty's evidence was accepted and the finding as to the true reason for acting was a cardinal matter, attracting an issue estoppel.

[48] Dixon J's reference to "matters cardinal" derives from what was said by Coleridge J in *R v Inhabitants of the Township of Hartington Middle Quarter*.[46] Before setting out what was said by his Honour, it is important to note the issues in that case. Two pauper children were removed from Lancaster to Hartington Middle Quarter by an order (**the first order**) which described them as the lawful children of X (the father) and Y (the mother). There was no appeal from the first order. Later, Y was sent to an asylum in Lancashire where she was confined. Two justices of Lancashire enquired into her last legal settlement, and concluded that it was in Hartington Middle Quarter. They therefore determined that the authorities in Hartington Middle Quarter should pay the expenses incurred by the Lancashire asylum. Hartington Middle Quarter appealed. The Court of Sessions conducted the trial of the appeal, and was of the view that Y's settlement was not, in fact, in Hartington Middle Quarter. However, the court reserved the following question to the Court of Queen's Bench: was the first order conclusive as to Y's settlement?

[49] It was held that the first order was conclusive proof that the mother was settled in Hartington Middle Quarter. As to that Coleridge J said:[47]

> "The question then is whether the judgment concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue. And we think it does conclude to that extent.
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> It is unnecessary now to rely on the judgment having been in rem; for it was a judgment between the same parties: the matters which are cardinal in the present litigation cannot now be disputed, without asserting that the decision upon them in the former case was erroneous. But this they cannot do directly; they have passed their time, and neglected the lawful mode; they cannot now shew by adducing new evidence that the Court was misled as to the facts, nor by new argument or authority that it drew a wrong conclusion in law. In the case of *Regina v Wye* (7 A & E. 761), a case sometimes misunderstood, this principle was very clearly affirmed, in

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46 [1855] EngR 264; (1855) 4 E & B 780, 794.

47 *Hartington Middle Quarter* at [794]; emphasis added.

> accordance with prior decisions. **If, then, the former decision cannot be impeached, and these facts are so cardinal to it that without them it cannot stand, on principle, when these facts are again in question between the same parties, they must be considered as having been conclusively determined**."

[50] The word "cardinal" in that context may be accepted as meaning central, essential, or of paramount importance.

[51] In *Hartington* a finding had been made as to the particular town in which the mother was actually settled. Because the issue was which town would be liable for the expenses, that finding had to be made; it was a cardinal matter. That is not the case here. In QCAT the issue was whether the relevant actions taken by Mr Hegarty (the suspensions, the direction to take part in a medical examination and the process of the organisational wellness assessment) were undertaken on the basis of a presumed attribute, namely mental illness.

[52] Section 10(4) of the *Anti-Discrimination Act* provides that if there are two or more reasons why a person treats another person with an attribute less favourably, it still constitutes discrimination if the attribute is a substantial reason for the treatment.

[53] As Member Browne found, when considering the evidence QCAT must consider the true basis or real reason for the conduct, including why Mrs Webb was required to attend the medical examination, and why she was and continued to be suspended from employment.[48] However, acceptance of Mr Hegarty's evidence that he acted for reasons to do with workplace health and safety did not amount to an essential finding for the purposes of the QCAT proceeding. The only essential finding was that the conduct was not discriminatory within the meaning of the Act.

[54] In his evidence before QCAT Mr Hegarty referred to a number of reasons why he requested Mrs Webb to attend the medical examination. One was so that the Health Service could "properly carry out its duty" to provide a safe place of work, another was that he had a concern about "risk", and yet another was the presence of medical issues "not just related to the rotations".[49] These were swept together in an acceptance of his evidence that he had "concerns about her safety in the workplace".[50]

[55] As for the decision to suspend, Mr Hegarty's evidence before QCAT was for at least two reasons, one being "unresolved issues and … concerns that still exist for [Mrs Webb's] wellbeing", and the other was fulfilment of duty of care towards Mrs Webb and the staff.[51] Once again these were swept together in the acceptance of his evidence that the decision to suspend was based on his responsibilities as a Chief Executive and the duty of care he had to Mrs Webb and staff in the workplace.[52]

[56] The same is the case with respect to the independent medical examination, where several reasons were advanced by Mr Hegarty and swept together in an acceptance

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48 Senior Member's reasons [17].
49 Senior Member's reasons [55], [56] and [59].
50 Senior Member's reasons [57].
51 Senior Member's reasons [62]-[63].
52 Senior Member's reasons [64].

of evidence that he had concerns about whether it was safe for Mrs Webb to resume her duties.[53]

[57] Given that s 10(4) of the *Anti-Discrimination Act* provides that where there are two or more reasons for treating a person with an attribute less favourably, it will be discriminatory if "the attribute is a substantial reason for the treatment", there was no necessity for QCAT to find that Mr Hegarty acted for one particular reason or another. The only requirement was to find whether the attribute was a substantial reason for the treatment. Acceptance of Mr Hegarty's evidence as to why he acted, or findings that he acted because of workplace concerns or fulfilment of a duty of care, were not "cardinal" in the sense used in *Blair v Curran* or *Hartington*.

[58] In my view, therefore, the learned primary judge was right to conclude that issue estoppel had not been established in a way that would permit an order for summary judgment. Rather, given the limitations on the proceedings in QCAT and the express exclusion in QCAT of consideration of any issue of unlawfulness under the *Public Service Act*, this was a matter more apt to be dealt with by trial than by summary judgment.

The strike-out application

[59] The contention below in relation to the application to strike out the pleading was summarised in written submissions which identified the particular paragraphs, the complaint and a short synopsis of the submissions.[54] A number of complaints were common to various paragraphs and therefore can be grouped as follows:

(a) irrelevant narrative: paragraphs 13-16, 18(b), 23-24, 41, 53-54 and 57;

(b) unnecessary: paragraphs 19, 20(b), 58, 64 and 85(b);

(c) contains evidence: paragraphs 25, 27, 43, 45, 47, 50(b) and 56;

(d) rolled up pleading: paragraphs 32-36, 38-40, 62-63, 66-67, 74-75, 81, 84 and 85(d); and

(e) embarrassing: paragraphs 42, 49, 73, 77, 78(a), 83, 87 and 91.

[60] The learned primary judge was right to observe that little attention was given to the strike-out application in the written submissions, and in oral submissions. The appellant's written submissions referred principally to superfluous or incorrect references to the *Public Service Act* as the main point. The response to that was in two paragraphs asserting that a pleading of matters of law including statutory provisions was not embargoed under the *Uniform Civil Procedure Rules*, and the desire to explain the relevance of facts pleaded did not warrant striking out the paragraphs.

[61] It is evident from the learned primary judge's reasons that he had regard to the schedule of paragraphs at AB 789. It is only from that schedule that one derives the categories that his Honour referred to in paragraph [17] of the reasons below. It is also apparent from his Honour's reasons that he addressed those issues, though perhaps not in a form where they were articulated seriatim. His Honour specifically addressed the objection to the narrative form of the pleading but considered that those paragraphs should not be struck out because they were "relevant to the structure and conclusions expressed in the pleading". His Honour went further in that he referred

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53 Senior Member's reasons [70], [72], [74]-[75] and [79].

54 AB 789-793.

to reasons other than the objection to narrative form. In context that was a reference to objections such as that paragraphs "contains evidence" or is a "rolled up pleading" and so forth.

[62] I will examine the categories of complaint as to the pleading.

Irrelevant narrative

[63] It is true to say that the pleading has a narrative feature about it. That renders it somewhat verbose and ponderous, but does not, in my view, necessarily warrant striking the paragraphs out. Relevant to that conclusion is the fact that a number of these paragraphs are ones to which the Health Service has specifically pleaded in its defence. Thus, for example, paragraphs 13-16 are all the subject of a response, albeit that the final subparagraph of each response is that the allegation is not relevant to a cause of action. The same can be said of all the other paragraphs in this category. However, some of the paragraphs in this category are ones to which admissions have been made, which further suggests that the complaints do not warrant striking out.

Unnecessary

[64] Each of the paragraphs in this category are objected to on the basis that the matters to which they refer are also pleaded in other paragraphs of the pleading. In my view, the complaints do not have substantial merit. Some examples will suffice to make the point. It is said that paragraph 19 is also the subject of what is pleaded at paragraphs 37 and 38. That is not strictly true, as paragraph 19 deals only with a letter dated 18 September 2012, whereas paragraphs 37 and 38 deal with that letter and another letter, and make different allegations as to the basis upon which those letters could have been given. Similarly, paragraph 20(b) is said to have been also pleaded in paragraph 28. That is not strictly correct as paragraph 20(b) merely alleges that Mr Hegarty suspended Mrs Webb on full pay in purported pursuance to s 137 of the *Public Service Act*, whereas paragraph 28 alleges that and additional facts concerning the timing of the suspension in relation to doctors' reports. Therefore, whilst there is some overlap, in other respects the paragraphs deal with different subject matter.

[65] Similar comments apply to paragraphs 51, 58 and 64. Paragraph 58 goes further than paragraph 51 and paragraph 64 deals with a notification about a different subject matter.

Rolled up pleading

[66] The essential complaint under this category was that the pleading contained multiple conclusions and failed to plead or identify the material facts in relation to each conclusion. Further, in some cases it was said that the further and better particulars that had been provided were not sufficient to properly particularise the allegations.

[67] Some examples will illustrate the position.

[68] Paragraph 32 pleads that at the time Mr Hegarty issued the 11 December 2012 letter,[55] Mrs Webb had been absent from work on leave for about 37 weeks, and her

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[55] That being the letter by which Mr Hegarty renewed a direction for Mrs Webb to attend an independent medical examination, and suspended her on full pay: see paragraph 20, AB 24.

then leave of absence was scheduled to end on 30 December 2012. Paragraph 32(c) then pleads that on that basis Mr Hegarty: could not have formed the belief that the proper and efficient management of the department might be prejudiced if Mrs Webb was not suspended; he did not hold such a belief; and even if he did, that belief was unreasonable. Finally, paragraph 32(d) pleads that in that situation the suspension beyond 30 December 2012 was unlawful because it contravened s 137 of the *Public Service Act*.

[69] The Health Service defence admitted paragraphs 32(a) and (b). It then denied paragraph 32(c), whilst maintaining that the pleading was embarrassing because of a lack of particularity. The basis of the denial was explained as being that the suspension was lawful and valid and, by reference to nine other paragraphs of the defence, Mr Hegarty reasonably believed that there would be prejudice to the proper and efficient management of the Health Service if Mrs Webb was not suspended.

[70] On the face of the defence it does not readily appear how paragraph 32 of the further amended statement of claim causes embarrassment. Further, reference to the further and better particulars in respect of that paragraph shows that the case was identified as being that because Mrs Webb had been on leave for some time it was not possible to form the belief that the proper and efficient management of the department would be prejudiced if she was not suspended. The lack of that belief was then said to be the basis upon which s 137 of the *Public Service Act* was contravened.

[71] Similar comments apply in respect of the balance of the paragraphs under this category. Whilst the further amended statement of claim might be somewhat convoluted and, because of its narrative approach, repetitive, the Health Service has been able to plead to it, and seek some particulars. In the circumstances, the case which Mrs Webb seeks to run is identifiable and does not, in my view, cause vexation or embarrassment to a degree which requires it to be struck out.

Contains evidence

[72] The essence of this complaint is that the pleading needs to be confined to material facts and, contrary to r 149(1)(b) of the *UCPR*, pleads evidence. There is some substance to this complaint but it is substantially caused by the approach taken to plead the case in a narrative form. That approach creates its own complexities as it has produced a pleading which is convoluted and verbose, but it does not, in my view, take the pleading to the point where it should be struck out. Support for that conclusion is derived from the fact that in each case the Health Service has been able to plead to the paragraph in a substantive way. That means that the objection on the basis that paragraphs contain evidence becomes more a point of form than substance.

Embarrassing

[73] The complaint made here is largely related to the failure to properly particularise the allegation.[56] The first in the sequence of paragraphs is paragraph 42, which alleges that on an unknown date prior to 20 September 2013, Mr Hegarty sought advice from the Health Service's solicitors "as to a pretext for … dismissing [Mrs Webb] … or subjecting [Mrs Webb] to a disciplinary process … or "otherwise preventing [Mrs Webb's] return to work".

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56 I note that in several cases the complaint depends upon other paragraphs being struck out.

[74] The Health Service responded to that allegation, denying it as untrue on the basis of matters then set out as to the advice sought, and the reason for it: paragraph 37 of the defence.

[75] The response to the Health Services' request for particulars reveals that paragraph 42 was not the subject of any such request.

[76] In the circumstances, whilst paragraph 42 and 43 contain very serious allegations made against the then solicitors for the Health Service, in the issues joined between Mrs Webb and the Health Service any failure to properly particularise the allegation does not seem to me to cause real embarrassment.

[77] Paragraph 73 stands in a different light. That paragraph alleges that at the time Mr Hegarty gave a direction on 21 January 2016[57] Mr Hegarty was aware of four matters, or ought to have been aware of those four matters. The four matters are those in paragraphs 69-72 of the pleading:

(a) paragraph 69: that the direction was a gross insult and affront to Mrs Webb;

(b) paragraph 70: that the direction was inconvenient, vexatious and annoying to Mrs Webb;

(c) paragraph 71: the direction was deleterious to Mrs Webb's health and wellbeing; and

(d) paragraph 72: for those three reasons the direction was impracticable, unacceptable and exerted pressure on Mrs Webb to resign.

[78] Paragraph 73, on its face, does not particularise the basis upon which it is alleged Mr Hegarty knew those matters or ought to have known of them.

[79] The request for particulars sought to know, in each case, the basis upon which it was alleged that Mr Hegarty knew or ought to have known the various matters. In the response to that request, paragraphs 67-69 did not provide any real particulars, but merely asserted once again that Mr Hegarty knew those things, or should have known them because a reasonable person would have been aware of them. That response in each case was deficient.

[80] However, the Health Service was able to respond to paragraph 73 in its defence, in each case denying the allegation as being untrue because of direct explanations given in paragraphs 64-67 of the defence. Those paragraphs, both individually and collectively, provide a detailed basis upon which it is contended that the 21 January 2016 direction was none of the things alleged in paragraph 73 of Mrs Webb's pleading. Those explanations also draw upon paragraph 50(b) of the defence, which again sets up the basis upon which the direction was given.

[81] In the circumstances, whilst both paragraph 73 of the statement of claim and the particulars given of that paragraph are deficient, they do not cause such embarrassment that they require to be struck out. The Health Service has been able to plead to the central allegations in such a way that the issues are properly joined and it is not likely that there will be any embarrassment at the trial on this issue.

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[57] That being a letter advising that Mrs Webb's suspension under s 189 of the *Public Service Act* had ended, and directing her to return to work: paragraphs 55 and 56, AB 38-39.

[82] That survey of the complaints about the pleading is sufficient to demonstrate that there was no error on the part of the learned primary judge in refusing to strike it out.

Inadequacy of the reasons

[83] The basis upon which a judicial officer should give reasons was subject to comment in *Wainohu v New South Wales*.[58] French CJ and Kiefel J referred to the centrality of a public explanation of reasons for a final decision and important interlocutory rulings as having been long recognised. Their Honours continued:[59]

> "The duty upon judges to give reasons for their decisions has often been linked to the availability of rights of appeal against those decisions. A wider rationale, foreshadowed in the passage quoted from Broom, can be derived from the nature of the judicial function. In *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd*, Mahoney JA, after referring to the importance of reasons for decision to the effective exercise of appeal rights, said:
>
> > "But, in my opinion, the requirement that reasons be given should not be limited to cases where there is an appeal. There is as yet no finally authoritative decision on this question. I think that the requirement should be seen as an incident of the judicial process."
>
> The proposition that the provision of reasons for decision is an aspect of the judicial function has been supported by other decisions of the Supreme Courts of New South Wales, Victoria and Queensland.
>
> Gummow J in *Grollo* described the essential attributes of the judicial power of the Commonwealth in familiar terms by reference to the resolution of justiciable controversies by ascertainment of the facts, application of the law and the exercise where appropriate of judicial discretion, adding "which are delivered in public after a public hearing, and, where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning". Heydon J in *AK v Western Australia* described the duty of judges to give reasons for their decisions after trials and in important interlocutory proceedings as "well-established". His Honour adopted as a summary of the objectives underlying that duty an extra-curial statement by Gleeson CJ:
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> > "First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Secondly, the general acceptability of judicial decisions is promoted by the obligation to explain them. Thirdly, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public,

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58 (2011) 243 CLR 181; [2011] HCA 24.

59 *Wainohu v New South Wales* at [55]-[56]; internal citations omitted.

> an account of the reasoning by which they came to those decisions."
>
> The duty does not apply to every interlocutory decision, however minor. Its content – that is, the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision."

[84] As can be seen, a distinction was drawn between the requirement to give reasons where what is involved is a final hearing or an important interlocutory hearing, and those where something less than that is involved. There can be little doubt that a summary judgment application is an important interlocutory hearing. Thus, one would expect that it would attract similar requirements for exposure of reasoning as would be the case in a final hearing. The same cannot be said where what is involved is an interlocutory application concerning practice and procedure, such as a strike-out application. There, something less might be required in the circumstances of the case.[60]

[85] Further consideration to this question was given by this Court in *R v Kay; Ex parte Attorney-General (Qld)*.[61] There the court was dealing with a reference under s 668A of the *Criminal Code*, raising a question of law concerning the necessity to give reasons on an application for a judge to recuse himself. McMurdo JA[62] said in that respect:[63]

> "The difficulty in framing the question here is understandable: the point must be one of general application yet, as is well established, what constitutes a sufficient expression of reasons is dependent upon the facts and circumstances of the individual case. In *Cypressvale Pty Ltd v Retail Shop Lease Tribunal*, McPherson and Davies JJA said that "Whether or not reasons given for a decision can be characterised as adequate or otherwise involves a variety of different considerations" and that "What is adequate depends on the circumstances of the case." They cited a statement by Hutley JA in *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd* that "The extent to which a court must go in giving reasons is incapable of precise definition." The judgments in *Cypressvale* extensively discussed the authorities on which courts have attempted to explain what is sufficient in this respect. But ultimately there is no test by which the adequacy of reasons can be assessed, except to say that they should be adequate to serve the purposes for which reasons for judgment are required, as one or more of those purposes apply to the particular case. As French CJ and Kiefel J said in *Wainohu*, the content and detail of the required reasons will vary not only according to the nature of the jurisdiction but the particular matter the subject of the decision."

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60 *Wainohu v New South Wales* at [56]; *The Trustee of the Property of Paul Jason Uhrhane, A Bankrupt v Gunn* [2012] QCA 75 at [18].

61 [2017] 2 Qd R 522; [2016] QCA 269.

62 With whom Fraser JA and Morrison JA concurred.

63 *R v Kay* at [34]; internal citations omitted.

[86] More recently, in *R v Conn; R v Conn; Ex parte Attorney-General (Qld)*[64] this Court adopted what was said by Edelman J in *GAX v The Queen*:[65]

> "The obligation to provide adequate reasons does not require a court of appeal to write reasons which disclose every aspect of the thought process which leads to the court's conclusion independently of the manner in which the case was presented. Submissions provide context to the reasons given by a court."

[87] Bearing those matters in mind some observations can be made about the reasons of the learned primary judge in this case.

[88] Firstly, the reasons deal with two applications, one of a serious interlocutory kind (the summary judgment application), and the other on a matter of practice and procedure (the strike-out). In each case the learned primary judge had the benefit of extensive written submissions and oral submissions which focused more on the summary judgment application than they did on the strike-out application. In fact, even in the written submissions the strike-out application received little attention beyond the scope of the schedule to which I have referred above.

[89] Secondly, the recitation in the reasons of the details of the pleading make it plain that the learned primary judge was familiar with the nature of the case made by Mrs Webb. Similarly, his Honour's reference to the nature of the proceedings in QCAT makes it clear that his Honour was familiar with the issues in that tribunal, both at first instance and on appeal.

[90] Thirdly, his Honour dealt with the central issue upon which the summary judgment application was brought, namely whether there was an issue estoppel. Having identified the nature of the issue in QCAT, his Honour referred to the argument before him that there was no issue estoppel because of those limited issues which did not address issues such as malice or bad faith in the present proceedings. It is true that the reasons on this issue are shortly expressed in one paragraph. However, his Honour referred to the argument advanced by senior counsel for Mrs Webb, and expressed the view that those submissions were correct. Thus, his Honour dealt with the central argument advanced on the summary judgment application.

[91] Fourthly, his Honour then dealt with the question of whether summary judgment should be granted on a wider basis (that the case was hopeless). This, too, was shortly expressed in one paragraph. However, once again his Honour referred to the submissions made which highlighted the fact that acceptance of Mr Hegarty's evidence at QCAT had been in the absence of any cross-examination of him on issues relevant to the present proceedings. On that basis his Honour accepted the validity of the submission made that the case could not be established to be hopeless. Though the reasons are short, they identify sufficient as to the grounds upon which that application was refused.

[92] Fifthly, when dealing with the strike-out, the learned primary judge identified that little attention was directed towards those issues in the oral arguments. That is true. However, his Honour then referred to the narrative form of the pleading (having set out the pleading at some detail earlier in the reasons) and expressed the view that he was not persuaded that because of its narrative form, or for any other reason argued,

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64 [2017] QCA 220 at [91].

65 (2017) 91 ALJR 698; [2017] HCA 25 at [37].

the passages should be struck out. Thus, it is apparent that however shortly expressed, his Honour had reference to the "other reasons argued" on the strike-out. His Honour then offered two reasons why the pleading should not be struck out: (i) the passages objected to were relevant to the structure and conclusions expressed in the pleadings; and (ii) further particulars could still be sought.

[93] However shortly expressed the reasons are, in the circumstances they adequately explain the central reasons why the learned primary judge reached the conclusions he did. The analysis set out above demonstrates that there was no appealable error in that respect. More particularly, on the issue of the application to strike out, one must bear in mind that the matter was a question of practice and procedure and that there are high hurdles in seeking to overturn the exercise of a judicial discretion in that respect.[66]

Conclusion

[94] For the reasons expressed above the appeal should be dismissed, with costs. I propose the following orders:

1. Appeal dismissed.

2. The appellant pay the respondent's costs of and incidental to the appeal.

[95] **MULLINS JA:** I agree with Morrison JA.

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66 *Hollingsworth & Ors v Johnston & Anor* [2018] QCA 351 at [28]; *House v The King* (1936) 55 CLR 499, 505; [1936] HCA 40; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; (1981) 148 CLR 170, 176; *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651, [34].