IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008674

BETWEEN	SIMPSON GRIERSON Plaintiff
AND	ROBERT FARRER GILMOUR Defendant

Hearing: 21 August 2009

Appearances: L McEntegart for the plaintiff
C Patterson and E Grove for the defendant
P Collins for NZLS as amicus curiae

Judgment: 27 August 2009

JUDGMENT OF STEVENS J

This judgment was delivered by me on Thursday, 27 August 2009 at 4pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
L McEntegart, PO Box 1417, Shortland Street, Auckland 1140
C Patterson, PO Box 2886, Shortland Street, Auckland 1140
P Collins, PO Box 63, Shortland Street, Auckland 1140

Table of Contents

	Para No
Introduction	[1]
Procedural issues	[6]
Factual background	[11]
Pleadings	[21]
Issues	[29]
Statutory scheme	[30]
Jurisdiction	
Law Society submissions	[41]
Defendant's submissions	[51]
Plaintiff's submissions	[54]
Discussion	[62]
Applicable principles	[69]
Summary judgment - Simpson Grierson invoices	
Plaintiff's submissions	[76]
Defendant's submissions	[79]
Discussion	[82]
Summary judgment - Clayton Utz invoices	
Plaintiff's submissions	[85]
Defendant's submissions	[89]
Discussion	[91]
Result	
Simpson Grierson invoices	[97]
Clayton Utz invoices	[99]

Introduction

[1] This is an application by the plaintiff, Simpson Grierson, for summary judgment against Dr Robert Farrer Gilmour (the defendant). The application was filed in December 2008 and concerned the defendant's liability, first for fees for services provided by the plaintiff in the sum of $391,624.43 (the Simpson Grierson invoices), and second for the sum of $396,362.05, being the outstanding amount owed by the defendant and paid by the plaintiff to Clayton Utz in Sydney for services provided by the firm for the benefit of the defendant (the Clayton Utz invoices).

[2] In late March 2009, the New Zealand Law Society (the Law Society) received a complaint from the defendant seeking a review of the reasonableness of the fees and disbursement of both the plaintiff and Clayton Utz. The Law Society responded that it had no jurisdiction to investigate the majority of the disbursements comprising the Clayton Utz invoices. The complaint covering the Simpson Grierson

invoices was accepted as a complaint and was referred to Standards Committee 3 for investigation.

[3] Following the complaint, the plaintiff filed an amended application for summary judgment in respect of liability only for the Simpson Grierson invoices and for liability and quantum in relation to the Clayton Utz invoices. A stay of proceedings in respect of the quantum of the Simpson Grierson invoices was also sought.

[4] As the complaint was made under the Lawyers and Conveyancers Act 2006 (the Act), an issue arose as to the effect of s 161 of the Act which provides for a stay of proceedings for recovery of costs in certain circumstances. Such a stay applies until the complaint about the amount of a bill of costs has been finally disposed of. It is therefore necessary to determine the nature and scope of the stay provision as a preliminary point before deciding the amended application for summary judgment.

[5] For the reasons discussed below, I am satisfied that s 161 of the Act does not prevent the plaintiff from proceeding with the claim for liability in respect of the Simpson Grierson invoices and the claim for both liability and quantum of the Clayton Utz invoices. The plaintiff is therefore entitled to summary judgment in terms of its amended application. The stay sought by the plaintiff in respect of the quantum of the Simpson Grierson invoices will be granted.

Procedural issues

[6] The parties agreed that the Law Society should be involved in the application as *amicus curiae*. The Court has been greatly assisted by the role played by Mr Collins, counsel for the Law Society. His involvement led to the complaint as to the amount of the bills of costs being expedited by a committee under delegation from Standards Committee 3. The committee, led by Mr Gray QC, is working to a timetable which aims to address the complaint as quickly as possible. Nothing said in this judgment is intended to comment on the issue of the amount of the bills of costs, nor any aspect of the scope and terms of the contract of retainer. These matters will be determined by the committee. The only issue determined on this

application in relation to the Simpson Grierson invoices is the existence or otherwise of a contractual relationship between the plaintiff and the defendant.

[7] Another procedural issue concerned the number of the Simpson Grierson invoices which should properly be the subject of the complaint. The submissions of the Law Society raised a jurisdictional issue arising from the transitional provisions of the Act (ss 351 – 353 and 361) that would allow only bills of costs dated 1 August 2008 or later to be the subject of a complaint. It transpires that only two of the plaintiff's invoices would be covered by the complaint, leaving some 12 invoices rendered before 1 August 2008 to be dealt with on a different basis, with complications arising as to the possible applicability of provisions of the Law Practitioners Act 1982.

[8] Given the existence of such issues, the parties have agreed by way of a consent memorandum to a practical resolution whereby the complaint should be accepted as relating to all of the plaintiff's invoices, irrespective of the date of issue. Further, both Standards Committee 3 and, if applicable the Legal Complaints Review Officer, should have all necessary powers and immunities to deal with all relevant aspects of the complaint including the amount of all 14 bills of costs and any related issues concerning the scope and nature of the contract of retainer between the parties. A copy of the consent memorandum was provided to the Court to confirm the arrangement.

[9] In particular, the parties agreed that the plaintiff's invoices:

> …are to be investigated, and determinations are to be made, on the basis that Part 7 of the Act applies for all purposes, including but not limited to:
>
> (a) The nature and scope of the investigation itself and any findings arising out of it;
>
> (b) Any determinations made by the Standards Committee;
>
> (c) Any orders made by the Standards Committee under s 156 of the Act;
>
> (d) Any entitlement to review by the Legal Complaints Review Officer; and
>
> (e) The availability of the immunities and protections under ss 185 & 272 of the Act.

[10] The agreement reached has benefits for both parties in the particular factual circumstances that apply to this case. Having been informed of key aspects of the relevant background to the complaint, it is fair to observe that the agreement seems sensible, practical and appropriate. The concurrence of the committee of Standards Committee 3 and the Legal Complaints Review Officer is appreciated.

Factual background

[11] The defendant engaged the plaintiff in September 2007 to act on behalf of a company in which he was interested, New Zealand Diagnostic Ltd. This company was considering a commercial interest in litigation in Australia and New Zealand between the Inverness Medical Group of companies and MDS Diagnostics Ltd (MDS) and a Dr Appanna (the Inverness litigation). Such litigation concerned certain intellectual property rights to pregnancy testing technology. In November 2007, the terms of the plaintiff's engagement changed. The defendant retained the plaintiff on the basis that the defendant would be responsible for the plaintiff's fees to advise MDS and Dr Appanna in the conduct of the Inverness litigation in New Zealand. The plaintiff was also instructed to engage Clayton Utz to act for MDS and Dr Appanna in respect of the Inverness litigation in Australia. Clayton Utz was instructed on the basis that the defendant would be responsible for payment of their fees. The role of the defendant essentially became one of a litigation funder.

[12] On 5 November 2007, the defendant, Dr Appanna and MDS executed an agreement whereby MDS granted the defendant the option to acquire 50% of its shares at any time in the future for $1. The defendant agreed to pay all professional costs relating to the Inverness litigation, both in New Zealand and Australia, incurred after 5 November 2007. The defendant also took control of the running of the litigation from MDS's perspective. On 7 November 2007, the defendant emailed Mr Earl Gray, a partner of the plaintiff, confirming that work in November and beyond was to be billed to him personally.

[13] In January 2008, the plaintiff formally took over the defence of MDS and Dr Appanna in the New Zealand proceedings. On 13 January 2008, the defendant emailed Mr Gray saying that whatever happens in the end, the plaintiff's fees for

MDS were underwritten by the defendant and a James Henderson. On 17 January 2008, the defendant emailed Mr Gray again confirming that he was personally responsible for the November and December 2007 accounts.

[14] Between January and August 2008, the plaintiff and Clayton Utz undertook the work and provided legal services regarding the Inverness litigation in New Zealand and New South Wales, Australia. Fourteen accounts were rendered by the plaintiff. In the case of the Simpson Grierson invoices, the tax invoices contained a narrative of the professional services provided and the time over which they were provided. In addition, time and attendance details were provided setting out a code identifier, the date, the code of the person who provided the services, the hours involved and the fees charged. On occasion, for example the invoice for February attendances, an email was sent to the defendant explaining the invoice and confirming that it had been reduced from the time actually spent.

[15] With respect to the Clayton Utz invoices, the tax invoice provided a summary of the time cost for professional services, the details of which were set out in an attachment entitled "Details of Professional Services". Such detail contained specific information under listed headings of date, name of lawyer providing the services, the hours involved, the hourly rate, the amount billed and the relevant details. It is fair to say that extensive detail was provided in all respects. Similarly, the disbursements incurred on behalf of the client were listed and an attachment gave details of the item or party involved.

[16] On 1 August 2008, the defendant emailed Mr Gray agreeing that he owed the plaintiff a considerable sum of money, but expressed the view that some of it was inappropriate. On 4 September 2008, the plaintiff filed a notice of application for order that solicitor (Mr Gray) cease to be solicitor on record. On 19 September 2008, the order was granted by this Court. On 14 November 2008, the plaintiff issued a letter of demand to the defendant. On 25 November 2008, the defendant emailed Mr Fisher and others. In this email the defendant disputed the quantum of the fees to the plaintiff and Clayton Utz and that he was solely responsible for such fees.

[17] In early December 2008, the plaintiff paid the Clayton Utz invoices amounting to NZ$396,362.05. This payment discharged the liability which the plaintiff claimed was the responsibility of the defendant. On 23 December 2008, the plaintiff filed the notice of proceedings and statement of claim, together with an application for summary judgment and the Gray affidavit in support.

[18] As already noted, the defendant wrote to the Law Society in late March 2009 about all of the fees and disbursements claimed by the plaintiff, including the Clayton Utz invoices that it had paid. The defendant sought a "complete review of all fees charged and disbursements claimed as to quantum and appropriateness". The defendant claimed that the charges were manifestly excessive and not reasonable. Further, he disputed that he was "solely responsible for these fees". Shortly afterwards the defendant served a notice of opposition to application for summary judgment and a draft affidavit of the defendant.

[19] The complaint in respect of the Simpson Grierson invoices only was accepted by the Law Society. The defendant was notified in early April that his concerns were being treated as a complaint and would be referred to a Standards Committee for investigation. The Law Society also advised that it had no jurisdiction in relation to the Clayton Utz invoices. The defendant was told that he might wish to contact the New South Wales Law Society for information regarding its complaints procedures.

[20] The committee delegated by Standards Committee 3 to investigate the complaint regarding the plaintiff's invoices was appointed in late July 2009. The committee is now conducting its investigation which is likely to lead to a hearing to determine the issues before it in October 2009.

Pleadings

[21] The key part of the plaintiff's statement of claim alleges that:

> 3. IN November 2007, the defendant engaged the plaintiff to advise MDS Diagnostics Limited (MDS) and Dr Prakash Appanna (a director of MDS) in respect of litigation in New Zealand and Australia brought by

the Inverness medical group of companies relating to intellectual property rights (Engagement).

Particulars of litigation

(a) *Inverness Medical Innovations Inc & Anr v MDS Diagnostics Limited & Anr – CIV-2007-404-748,* High Court, Auckland (the New Zealand Proceedings);

(b) *Inverness Medical Switzerland GmbH v MDS Diagnostics Pty Limited and MDS Diagnostics Limited*, No NSD 1722 of 2006, Federal Court of Australia, District Registry of New South Wales (the Australian Proceedings).

4. THE material terms of the Engagement were:

(a) The plaintiff would act as barristers and solicitors for MDS and Dr Appanna in the New Zealand Proceedings;

(b) The defendant would be solely responsible for the plaintiff's fees in respect of the New Zealand Proceedings.

(c) The plaintiff would engage Clayton Utz, solicitors of Sydney, Australia to act for MDS in connection with the Australian Proceedings, expressly on the same basis that the defendant would be solely responsible for payment of Clayton Utz's fees in the Australian Proceedings.

[22] The plaintiff pleaded the written confirmation of the arrangements in paragraph 4(b) and (c) and the provision of legal services between September 2007 and August 2008 to MDS and Dr Appanna consistent with the Engagement. Following the pleading of failure of the defendant to pay the Simpson Grierson invoices and the Clayton Utz invoices, the plaintiff claimed the following relief:

a) NZ$391,624.43;

b) NZ$396,362.05;

c) Interest thereon at the Judicature Act 1908 rate; and

d) Costs.

[23] The defendant's notice of opposition to the application for summary judgment invoked the stay provision of s 161 of the Act and alleged that:

> 1. The defendant has a reasonably arguable defence to the plaintiff's claims. Specifically,
>
>   a. The defendant has no contractual relationship with the plaintiff and therefore is not liable for any of the plaintiff's fees and charges;
>
>   b. In the event that the Court determines that the defendant has a contractual relationship with the defendant then:
>
>   i. The plaintiff's fees and charges are not reasonable and are manifestly excessive;
>
>   ii. The defendant has a counterclaim against the plaintiff in negligence which exceeds the amount claimed by the plaintiff;
>
>   …

[24] The notice of opposition also relied upon an unsworn affidavit of the defendant, which was later sworn and filed. Importantly, the affidavit stated in paragraph 6 that:

> At no stage have I ever agreed to be responsible for MDS' fees or charges rendered by Simpson Grierson.

[25] The plaintiff recognised the force in the stay point so far as the quantum of the Simpson Grierson invoices were concerned. Accordingly, on 27 May 2009 an amended notice of application for summary judgment was filed as follows:

> 1. The applicant, Simpson Grierson, will…apply to the court for orders for:
>
>   (a) summary judgment on the plaintiff's claim against the defendant on the issues of liability raised in the plaintiff's Statement of Claim; [namely, paragraphs 3 and 4, referred to at [21] above].
>
>   (b) summary judgment on the plaintiff's claim against the defendant for the Outstanding Clayton Utz Sum…[NZ$396,362.05] as defined in the Statement of Claim, plus interest thereon;
>
>   (c) a stay of proceeding as to the amount of the Outstanding Plaintiff Invoices [NZ$391,624.43] (as defined in the Statement of Claim) pending disposal of a complaint under section 132(2) Lawyers and Conveyancers Act 2006;
>
>   (d) any further directions that may be required; and
>
>   (e) costs;

[26] The defendant did not file an amended notice of opposition, neither did counsel for the defendant seek leave to do so at the hearing. The plaintiff went into the hearing facing the same grounds as were set out in the notice of opposition referred to at [23] and having to meet Dr Gilmour's sworn denial of a contract of retainer as set out in his affidavit.

[27] In terms of the pleadings, the defendant has not filed a counterclaim against the plaintiff alleging negligence against it. Further, in relation to the Clayton Utz invoices, the defendant's counsel confirmed at the hearing that no complaint had been filed with the New South Wales Law Society. Counsel for the defendant noted that the defendant had standing to bring a costs complaint under s 350 of the Legal Profession Act 2004 (NSW). But because of applicable time provisions, the defendant now requires leave of the Supreme Court of New South Wales to bring a costs complaint. For reasons not explored by the defendant, no application for leave has been sought.

[28] The defendant's written submissions contended that it would be just and equitable for the Court to grant the defendant leave to seek a stay of the plaintiff's claim in relation to the Clayton Utz invoices. Such stay should be granted pending the bringing (and determination) of either proceedings or a complaint under the relevant New South Wales legislation. However, despite this reference in the submissions no application for stay has been filed by the defendant.

Issues

[29] The application raises two issues. First, the meaning and scope of the stay provision in s 161 of the Act. Secondly, the question of whether the plaintiff should obtain an order for summary judgment in respect of either liability in respect of the Simpson Grierson invoices and/or liability and quantum in respect of the Clayton Utz invoices.

Statutory scheme

[30] The starting point is s 161(1) of the Act which provides for a stay in certain circumstances as follows:

> **Stay of proceedings for recovery of costs**
>
> (1) If, under section 141, a Standards Committee gives notice to a practitioner or former practitioner or an incorporated firm or former incorporated firm that it has received a complaint under section 132(2) about the amount of a bill of costs rendered by that practitioner or former practitioner or incorporated firm or former incorporated firm, no proceedings for the recovery of the amount of the bill may be commenced or proceeded with until after the complaint has been finally disposed of.

[31] The question of when a complaint is finally disposed of is determined by further provisions in s 161 as follows:

> (2) Where a Standards Committee makes a final determination on a complaint made under section 132(2), it must certify the amount that is found by it to be due to or from the practitioner or former practitioner or incorporated firm or former incorporated firm in respect of the bill and under the determination.
>
> (3) The certificate of the Standards Committee or, as the case may be, the decision of the Legal Complaints Review Officer on a review of the determination is final and conclusive as to the amount due.
>
> (4) For the purposes of this section, a complaint is finally disposed of—
>
> (a) if—
> (i) the Standards Committee has made a final determination on the complaint or has, under section 138, decided to take no action, or, as the case may require, no further action on the complaint; and
> (ii) the complainant has not, within the time allowed, applied to the Legal Complaints Review Officer for a review of the determination or decision; or
>
> (b) if the Legal Complaints Review Officer has conducted a review of the determination or decision made by the Standards Committee on the complaint and has reported the outcome of the review to—
> (i) the complainant; and
> (ii) the practitioner or former practitioner or incorporated firm or former incorporated firm; and
> (iii) the Standards Committee.

[32] The interpretation of s 161 of the Act necessitates consideration of the statutory framework pertaining to the jurisdiction of the Standards Committee in Part 7 of the Act. Counsel for the Law Society submitted that the purposes of the Act refer to core values that underlie Part 7 of the Act and provide assistance in matters of interpretation. The statutory purposes of the Act are expressed in s 3, which provides:

> **Purposes**
>
> (1) The purposes of this Act are—
>
> (a) to maintain public confidence in the provision of legal services and conveyancing services:
>
> (b) to protect the consumers of legal services and conveyancing services:
>
> (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.
>
> (2) To achieve those purposes, this Act, among other things,—
>
> (a) reforms the law relating to lawyers:
>
> (b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers:
>
> (c) enables conveyancing to be carried out both—
> (i) by lawyers; and
> (ii) by conveyancing practitioners:
>
> (d) states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services:
>
> (e) repeals the Law Practitioners Act 1982.

[33] These core values were reflected in the Parliamentary debates during the third reading of the Lawyers and Conveyancers Bill (2 March 2006) 629 NZPD 1697:

> The bill significantly improves the existing complaints and discipline regimes for lawyers…The bill provides a far more efficient and independent complaints process. The focus is on fairness and transparency for all parties…

[34] Counsel for the Law Society submitted that there had been a conceptual shift in the Act from the Law Practitioners Act 1982. This involved the abandonment of a

separate costs revision jurisdiction and the categorisation of fee complaints as another form of conduct complaint to be dealt with under Part 7 of the Act.

[35] Complaints about practitioners, including a complaint concerning a bill of costs by a person who is chargeable with a bill of costs, are made under s 132 of the Act. This section relevantly provides:

> **Complaints about practitioners, incorporated firms, and their employees**
>
> (1) Any person may complain to the appropriate complaints service about—
>
> (a) the conduct—
> (i) of a practitioner or former practitioner; or
> (ii) of an incorporated firm or former incorporated firm; or
> (iii) of a person who is not a practitioner but who is an employee or former employee of a practitioner or an incorporated firm; or
>
> (b) the standard of the service provided, in relation to the delivery of regulated services,—
> (i) by a practitioner or former practitioner; or
> (ii) by an incorporated firm or former incorporated firm; or
> (iii) by a person who is not a practitioner but who is an employee or former employee of a practitioner or an incorporated firm; or
>
> (c) the alleged failure of a practitioner or former practitioner or an incorporated firm or former incorporated firm, or an employee or former employee of a practitioner or an incorporated firm, to comply, within a specified time or a reasonable time, with any order or final determination made under this Act by a Standards Committee or the Legal Complaints Review Officer.
>
> (2) Any person who is chargeable with a bill of costs, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner or former practitioner or an incorporated firm or former incorporated firm (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint).
>
> (3) Nothing in subsection (2) limits the provisions of sections 160 and 161.

[36] Where a complaint is received, the relevant Standards Committee must provide notice to the party to whom the complaint relates. Section 141 governs notice as follows:

Notice to person to whom complaint or inquiry relates

The Standards Committee—

(a) must send particulars of the complaint or matter to the person to whom the complaint or inquiry relates, and invite that person to make a written explanation in relation to the complaint or matter:

(b) may require the person complained against to appear before it to make an explanation in relation to the complaint or matter:

(c) may, by written notice served on the person complained against, request that specified information be supplied to the Standards Committee in writing.

[37] The powers of a Standards Committee to determine a complaint are established by s 152 of the Act. If a Standards Committee makes a determination in respect of a complaint under s 152(2) of the Act, there is power under s 156 of the Act to make a range of orders including for example an order censuring or reprimanding the person to whom a complaint relates; an order requiring payment of a sum by way of compensation; an order that the practitioner reduce or cancel his, her, or its fees for any work; an order that the practitioner refund any specified sum already paid to the practitioner; an order that the practitioner rectify any error or omission or pay a fine not exceeding $15,000.

[38] Relevant to the issues which a Standards Committee may need to consider is the question of unsatisfactory conduct of a practitioner. This is defined in s 12 of the Act as follows:

Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—

(a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or

(b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
  (i) conduct unbecoming a lawyer or an incorporated law firm; or
  (ii) unprofessional conduct; or

> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
>
> (d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under section 7).

[39] In terms of a complaint about a bill of costs, the obligation on a practitioner is to charge a fee that is no more than a fair and reasonable fee. Such obligation is established by r 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Conduct and Client Care Rules). Rule 9 relevantly provides:

> 9 A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.
>
> 9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:
>
> (a) the time and labour expended:
>
> (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
>
> (c) the importance of the matter to the client and the results achieved:
>
> (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
>
> (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount of value of any property involved:
>
> (f) the complexity of the matter and the difficulty or novelty of the questions involved:
>
> (g) the experience, reputation, and ability of the lawyer:
>
> (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
>
> (i) whether the fee is fixed or conditional (whether in litigation or otherwise):

> (j) any quote or estimate of fees given by the lawyer:
>
> (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
>
> (l) the reasonable costs of running a practice:
>
> (m) the fee customarily charged in the market and locality for similar legal services.
>
> 9.2 The terms of any fee agreement between a lawyer and client must be fair and reasonable, having regard to the interests of both client and lawyer.
>
> …

[40] Finally, the procedures for the making of a complaint, the steps to be taken on receipt of a complaint and the limitations on such complaints are dealt with in reg 8, 9 and 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Regulations). The administrative functions of the Law Society in relation to complaints are set out in s 124 of the Act.

Jurisdiction

Law Society submissions

[41] Mr Collins submitted that s 161(1) of the Act should be interpreted so as to stay the entire proceeding where such proceeding is concerned with bills of costs that are the subject of an uncompleted complaint investigation. He submitted that a summary judgment proceeding could conceivably frustrate and usurp the complaints investigation and any determination by a Standards Committee. Mr Collins referred to the breadth of powers of a Standards Committee investigating a complaint to make orders following the completion of an investigation. He cited the example where there was a finding of unsatisfactory conduct as defined in s 12 of the Act, noting that a Standards Committee may make orders under s 156 of the Act reducing or extinguishing altogether the fees charged by the practitioners.

[42] Mr Collins submitted that a Standards Committee could potentially be prevented from exercising the full range of statutory powers available if a Court proceeding for determination of liability were able to continue while the

investigation remains uncompleted. Mr Collins did not elaborate upon what aspects of a liability determination might impact upon the powers of a Standards Committee.

[43] Mr Collins next referred to the Court of Appeal decision in *Erwood v Glasgow Harley* [2002] 1 NZLR 251 where the Court ruled that the stay provision in s 155(2) of the then applicable Law Practitioners Act should apply only to the solicitor's action in relation to quantum but not liability. Mr Collins submitted that the Court of Appeal appeared to be reluctant to take that course, but was able to do so because no injustice would result. Counsel submitted that the cost revision processes in that case were concerned with determining the extent of the client's liability for his barrister's costs and there did not seem to have been any suggestion that the fees would be extinguished outright. Mr Collins cited the conclusion of McGrath J at [48] as follows:

> Gallen J could have simply set aside the summary judgment in its entirety and restrained the respondent from proceeding with its action for recovery of the bill of costs until the costs revision process, including appeals, had been completed. There was power to do that under s155(2) of the Law Practitioners Act as the bill of costs had been referred for revision by the High Court and the statute must be read as permitting orders restraining recovery to be made subsequent to the original order of referral by the Court. The alternative approach, taken by the Judge, was to enter summary judgment for liability adjourning the issue of quantum until the Law Practitioners Act process was complete. In general the former approach will be preferable, as it avoids any suggestion the Court is foreclosing the scope of challenge to the bill of costs under the Law Practitioners Act. In principle summary judgment should not be entered on liability, under Rule 137 of the High Court Rules, where there is a risk of findings after a trial on quantum which are inconsistent with holding there was no defence to the claim. However, in the present case, we are satisfied that no injustice can result. The process under the Law Practitioners Act is sufficiently flexible to address such circumstances and the appellant is further protected by rights of appeal and review.

[44] Mr Collins submitted that it would be wrong to allow the plaintiff to proceed to summary judgment on liability while it remained open to the Standards Committee to make a finding extinguishing liability for fees as part of the range of powers possible under s 156 of the Act. He submitted that, unlike *Erwood*, the possibility of an injustice to the defendant could not be ruled out. In conclusion on s 161, he submitted that the starting point for interpreting a stay provision should be to maintain the status quo leaving any issues of liability unresolved until the complaint procedure reached finality.

[45] Mr Collins also made submissions as to the jurisdiction of a Standards Committee to determine liability and quantum. He emphasised that the Law Society was not suggesting that a Standards Committee possessed the jurisdiction of a civil court to make binding rulings on parties about negligence, breach of contract or the like. But he submitted that a Standards Committee had jurisdiction to make findings on matters of fact and law relevant to the determination of complaints in so far as it became necessary for the committee to consider terms and conditions of the retainer. He accepted that this did not extend to a finding relating to the existence or otherwise of a contract of retainer.

[46] In terms of the matters which might arise in the course of an inquiry into a complaint, Mr Collins submitted that these would include:

a) Whether a fee is fair and reasonable for the services provided (r 9);

b) The circumstances of any fixed or conditional fee arrangement between the parties: see r 9.1(i);

c) The facts surrounding any quotes or fee estimates given by the practitioner: see r 9.1(j); and

d) The terms of any fee agreement entered into between the practitioner and the client: see r 9.1(k).

[47] Mr Collins submitted that it would be artificial and impracticable for a Standards Committee to inquire into such matters without at the same time making determinations about the contractual arrangements between the parties. In this context, counsel cited a further passage from *Erwood* at [45] as follows:

> …Because the terms of agreements between legal practitioners and clients may be taken into account in determining whether costs are fair and reasonable, the Act necessarily contemplates that in the course of hearing the parties, which the Council is required to do, it will determine the terms of any contract and have regard to such terms. It also contemplates an overall assessment of the fee that is fair and reasonable having regard to any such contractual arrangement and to all the circumstances as they emerge from the hearing.

[48] Mr Collins argued that the fact that the Standards Committee could reduce or extinguish fees renders the concept of liability meaningless. But he conceded that, if liability only refers to the existence or otherwise of a contract, the notion of liability would not be meaningless.

[49] Turning to the issues relating to the Clayton Utz invoices, Mr Collins endorsed the conclusion in the letter of the Law Society to the defendant dated 2 April 2009 that the Clayton Utz invoices could not be part of the investigation. The letter stated:

> The majority of the disbursements that you have been billed for by Simpson Grierson consisted out of invoices issued by Clayton Utz for services they provided MDS Diagnostics Limited in the Federal Court of Australia. The New Zealand Law Society does not have jurisdiction to investigate bills that have been issued by a law firm outside the borders of New Zealand. You might wish to contact the New South Wales Law Society for information regarding their complaints procedures.

[50] Mr Collins agreed that the Law Society had thereby signalled to the defendant that the complaint relating to the Clayton Utz invoices was not being accepted as a complaint under the complaints procedure established by the Act. Mr Collins then made a concession that it followed that the stay provision in s 161 of the Act had no application to the Clayton Utz invoices. As will emerge below, I consider that such concession was properly made.

Defendant's submissions

[51] Mr Patterson for the defendant adopted the submissions made on behalf of the Law Society in respect of s 161 of the Act. In so doing, he emphasised the consumer protection aspects of the purposes provision in s 3 of the Act. He submitted that, if a client raised a dispute in relation to a bill of costs, it must be determined solely pursuant to the dispute resolution mechanisms in Part 7 of the Act. Mr Patterson accepted the proviso expressed in s 270 of the Act that, except as provided in Part 7, nothing should limit the jurisdiction of the High Court.

[52] Mr Patterson referred to the provisions of r 9 of the Conduct and Client Care Rules and the requirements of the Regulations regarding the making of complaints.

He submitted that these, together with the statutory scheme in Part 7 of the Act, were intended to be more consumer friendly than the adversarial context of litigation in the High Court. Mr Patterson acknowledged, however, that where a client simply refused to pay a bill of costs of a practitioner, and did not respond to correspondence in relation thereto, a practitioner would have no alternative than to issue proceedings in the absence of a complaint to the Law Society.

[53] In relation to the concession by the Law Society regarding the scope of s 161 of the Act in relation to the Clayton Utz invoices, Mr Patterson on behalf of the defendant, formally conceded that s 161 could not operate to stay the application for summary judgment.

Plaintiff's submissions

[54] Mr McEntegart submitted that the Law Society submissions failed to distinguish between the scope and terms of a contract of retainer and an issue as to the very existence of a contractual relationship between the practitioner and the client. He submitted that issues of the former type may properly be determined by a Standards Committee in the course of deciding a complaint by a person who is chargeable with a bill of costs: see s 132(2) of the Act. He submitted that having the status as a "person who is chargeable" is a prerequisite to making a complaint. Therefore, the lodging of a complaint necessarily acknowledges or implies the existence of a contract between the complainant and the practitioner.

[55] Mr McEntegart submitted that a Standards Committee does not have exclusive jurisdiction to make a determination as to whether a complainant under s 132(2) of the Act was in a contractual relationship with the practitioner. He accepted that in most cases it would be clear who was the person chargeable with the bill of costs and there would be no issue for the Standards Committee to deal with. The lodging and receipt of the complaint would be sufficient. But it would be unusual for a Standards Committee to have the sole right to investigate a point which was fundamental to its own jurisdiction and was more suitable for determination by a court of law. Therefore, absent express statutory power to determine such an issue, a

Standards Committee would be usurping the functions of the Court if it purported to make such a determination.

[56] Mr McEntegart submitted that a judgment by the Court to the effect that the defendant is a contracting party with the plaintiff could not possibly frustrate or usurp the complaints investigation. The mere fact that a contractual relationship exists says nothing about the issues of quantum and no order that a Standards Committee is empowered to make, including one reducing or extinguishing the fees charged, could possibly be undermined by a Court judgment determining the parties to a contract of retainer. Leaving the Standards Committee to determine the existence of a contract of retainer, as opposed to its terms and conditions, would create a number of potential difficulties.

[57] Mr McEntegart also relied upon the decision of the Court of Appeal in *Erwood*. He submitted that there is no conflict between the Court finding that the defendant contracted with the plaintiff or engaged the plaintiff (and is therefore the person properly chargeable) and a Standards Committee determining that there is a nil amount to pay. This was recognised as a possibility in *Erwood*. Mr McEntegart pointed to an inherent inconsistency in the submissions of the Law Society on the basis that power to extinguish liability pre-supposed a liability in the first place.

[58] In relation to the risk of injustice to the defendant (mentioned in *Erwood*), Mr McEntegart submitted that there is no risk of inconsistency if the existence of a contract of retainer were determined as opposed to the determination of quantum on the Simpson Grierson invoices. This is because the Standards Committee will still be free to examine the scope and terms of the contract of retainer and the question of contract. Meanwhile, the summary judgment proceeding in respect of quantum would remain stayed.

[59] Mr McEntegart referred to the decision of Gault J in *Gross v Shieff Angland Dew & Co* HC AK CP2008/87 30 August 1990 in relation to the revision process under the Law Practitioners Act. The Judge concluded that the revision process is not directed to liability for payment. He stated:

> As I understand it, the revision process is directed to the reasonableness and propriety of the fees charged – *Cortez Investments Limited v Olphert & Collins* [1984] 2 NZLR 434, 437, 438, 440. It is not directed to liability for payment. That is a matter for normal debt recovery procedures. …
>
> I do not understand the Law Practitioners Act to provide exclusive jurisdiction by the revision process for determining the contractual issues such as the existence or scope of a retainer.

[60] Mr McEntegart accepted that this decision was under the former regime, but submitted that clear language in the new legislative provision would be required if the legislative intention were to make the underlying existence of a contract the sole domain of the Law Society. In conclusion, he submitted that the language of Part 7 of the Act did not say this and the plain and ordinary meaning of s 132(2) of the Act positively disavows it.

[61] With respect to the Clayton Utz invoices, Mr McEntegart relied upon the concession by the Law Society and the formal concession by the defendant that s 161 of the Act did not preclude the Court from granting the plaintiff's application for summary judgment.

Discussion

[62] Whether or not a statutory provision for a stay of proceedings applies to a particular proceeding turns on the interpretation of the section in the light of the statutory context, the purpose of the provision and its applicability to the factual circumstances of a particular case. The stay provision provides that no proceedings for the recovery of the amount of the bill may be commenced or proceeded with until after the complaint has been finally disposed of.

[63] Section 161(1) of the Act expressly refers to a complaint under s 132(2) about the amount of a bill of costs. Section 132(2) gives a statutory right to a person who is chargeable with a bill of costs to complain about the amount of any bill of costs rendered by a practitioner. The focus is on a complaint about the quantum of a bill of costs. Any complaint about conduct, or the standard of service provided or other alleged failure of a practitioner to comply with an order or determination falls to be considered under s 132(1) of the Act. The phrase in s 161(1) of the Act

"proceedings for recovery of the amount of the bill" does not define whether issues of liability come within s 161(1) of the Act. It is on this point that reference to s 132(2) is instructive. The opening words of that subsection are important. Such person must be one "who is chargeable with a bill of costs". This depends upon there being a contract of retainer between the practitioner and the person concerned.

[64] In many cases the issue of standing will be obvious. In some cases perhaps not. The question is whether, as a matter of interpretation and policy, the stay should extend to preclude the Court from determining the existence or otherwise of a contract of retainer. If there is a genuine issue as to who is the person who is chargeable with a bill of costs, there may well be good reason why this issue should be determined by the Court. It may be of assistance to the parties in terms of any overall resolution of the dispute to have a judicial determination of the issue as to who is the party or parties chargeable at the earliest opportunity.

[65] I accept that any such determination should not trench on the jurisdiction and powers of the Standards Committee. Normally, the focus of the inquiry into the complaint will be on the reasonableness or otherwise of a bill of costs. It may be that other issues arise indirectly, for example, with regard to the scope and terms of a contract of retainer. This possibility was contemplated by the Court of Appeal in *Erwood* at [45]. Therefore, where such an issue could arise, a Court should be careful to ensure that nothing it did in the course of a judicial proceeding should cut across the jurisdiction and powers of the Standards Committee. But the existence or otherwise of a contract of retainer will usually be an entirely different issue. I agree with the submissions on behalf of the plaintiff that the issue of liability is a matter which is appropriate for the courts to decide, particularly where in a given case it can do so without in any way prejudicing the role of the Standards Committee or causing an injustice to the defendant. Whether there was a risk of prejudice or injustice would depend entirely on the facts of a given case. I note that this was a factor which weighed with the Court of Appeal in *Erwood*: see [48].

[66] The purpose of s 161(1) also provides assistance in its interpretation. Its purpose is to prevent a party such as a practitioner taking any steps in relation to the recovery of the amount of a bill that might prejudice any of the issues that will be

determined by a Standards Committee in the context of a complaint about the amount of a bill of costs. This is not an inflexible rule; much may depend upon the circumstances of the particular case. There may be situations where some steps can be taken preliminary to the recovery of the amount of the bill that will not in any way prejudice the issues to be determined by a Standards Committee.

[67] Turning then to the facts of this case, the defendant has clearly put in issue in his notice of opposition and his affidavit (paragraph 6) the existence of a contract of retainer. Such denial is relevant to how a Court might rule in relation both to the Simpson Grierson invoices and the Clayton Utz invoices. I am satisfied that there is no good reason why the Court should not deal with the issues of liability for the Simpson Grierson invoices in so far as it relates to the existence of a contract of retainer in each case. Counsel for the defendant could point to no prejudice or risk of injustice if liability were to be so decided as part of the summary judgment application.

[68] On the facts of this case, I do not consider that s 161(1) of the Act precludes the Court from determining the issue of liability for the Simpson Grierson invoices (limited only to the existence of a contract of retainer) and liability for, and quantum of, the Clayton Utz invoices on the factual basis pleaded in paragraphs 3 and 4(c) of the statement of claim. The concession made by Mr Collins in relation to the Clayton Utz invoices was appropriate. As no complaint was accepted for the Clayton Utz invoices, s 161(1) does not operate. Any such determination cannot, and will not, affect issues of quantum or any issues pertaining to the scope and terms of any contract of retainer of the Simpson Grierson invoices. Those issues, or at least the former, are within the purview of the Standards Committee. I therefore propose to proceed to consider the application for summary judgment on its merits.

Applicable principles

[69] An application for summary judgment is made under r 12.1 of High Court Rules (HCR). Rule 12.2 provides:

> **Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.
>
> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[70] The principles relating to summary judgment are established in the leading cases of *Pemberton v Chappell* [1987] 1 NZLR 1, *Bilbie Dymock Corp v Patel & Anor* (1987) 1 PRNZ 84 (CA), and more recently in *Jowada Holdings Limited v Cullen Investments Ltd* CA248/02 5 June 2003. The approach to be taken on a summary judgment application was outlined by the Court of Appeal in *Jowada* at [28]:

> [28] In order to obtain summary judgment under Rule 136 of the High Court Rules a plaintiff must satisfy the Court that the defendant has no defence to its claim. In essence, the Court must be persuaded that on the material before the Court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the Court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the Court has been satisfied there is no defence Rule 136 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy, and unexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the Court including *Pemberton v Chappell* (1987) NZLR 1, 3-4, 5; *National Bank of New Zealand Ltd v Loomes* (1989) 2 PRNZ 211, 214; and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205, 209.

[71] The applicable principles may be summarised as follows:

a) A plaintiff seeking summary judgment has the onus of showing that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter;

b) The Court will not hesitate to decide questions of law where appropriate;

c) The Court will not attempt to resolve genuine conflicts of evidence, or to assess the credibility of statements in affidavits;

d) In determining whether there is a genuine and relevant conflict of fact, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable;

e) The Court will not attempt to resolve conflicts between experts; and

f) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

[72] I remind myself that summary judgment will be inappropriate where there are disputed issues of material facts and where the ultimate determination depends on a judgment only able to be properly arrived at after a full hearing of the evidence: see *Westpac Banking Corporation v MM Kembla (New Zealand) Ltd* [2001] 2 NZLR 298.

[73] I also refer to the following passage of the Court of Appeal judgment in *Doyles Trading Company Ltd v West End Services Ltd* [1989] 1 NZLR 38 at 41:

> While the desirability of eliminating the frustration and delays which can be caused by unmeritorious or tendentious defence needs no emphasis, it is important to pay proper regard to the defendant's interest and to be wary of allowing the rule to become an instrument of oppression or injustice in the laudable interest of expediting litigation. It is true that "justice delayed is justice denied", but not at the expense of a fair hearing for both parties, unless the Court is sure there is no real defence. It is unlikely to reach this conclusion if the affidavits disclose disputed questions of fact, the resolution

> of which depends on an assessment of credibility or reliability of witnesses. …

[74] But, importantly, the Court of Appeal added:

> There may be cases in which the answer clearly emerges from the material before the Court, or where the credibility of one party is shown to be so suspect that his evidence can be rejected without the need to assess him as a witness or to listen to any further explanation he may wish to make.

[75] Finally, counsel for the plaintiff relied upon the following passage by Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Summary judgment – Simpson Grierson invoices

Plaintiff's submissions

[76] Mr McEntegart accepted that in a summary judgment application a plaintiff has the onus of satisfying the Court that the defendant has no defence to the claim: see r 12.2(1) of the HCR. He dealt first with liability for the Simpson Grierson invoices in respect of which he accepted that there was a conflict in the affidavits. Mr McEntegart referred to Mr Gray's first affidavit where he deposed that Simpson Grierson and Clayton Utz had been engaged on the express basis that the defendant would be responsible for the fees incurred. This is to be compared with the clear denial in paragraph 6 of Dr Gilmour's affidavit. Mr McEntegart accepted that, as a general rule, in determining summary judgment applications the Court will refrain from attempting to resolve genuine conflicts of evidence or to assess the credibility of the statements of the parties in their affidavits: see McGechan (ed) *McGechan on Procedure* (1998) at HR12.2.08.

[77] But with respect to Dr Gilmour's denial, Mr McEntegart submitted that the three criteria for the Court determining a lack of credibility in *Eng Mee Yong* were

met, namely, inconsistency with undisputed contemporary documents, other statements by the same deponent and inherent improbability. Mr McEntegart then referred to the various documentary exhibits produced by the plaintiff including the agreement entered into by the defendant on 5 November 2007 and the email to Mr Gray on 7 November where the defendant said he was happy with being billed personally for the work in November and beyond. Counsel referred to the inconsistency of the defendant's current position with the defendant's email to Mr Gray on 13 January 2008 where he stated, in respect of legal fees: "whatever happens in the end your fees for MDS are underwritten by James and myself". The same inconsistency applied in relation to the email to Mr Gray on 17 January 2008, the email to Mr Gray on 1 August 2008 and the email to Mr Fisher and others on 25 November 2008.

[78] Counsel referred to the inherent improbability of the defendant's denial when compared with his complaint to the Law Society which, by statutory definition (see s 132(2) of the Act) was required to be made by a person who is chargeable with a bill of costs.

Defendant's submissions

[79] Mr Patterson referred first to what he submitted were the inherent disadvantages of summary judgment from the defendant's perspective. For example, he argued that the defendant had not had the opportunity to carry out discovery procedures or other interlocutory processes of the HCR. Mr Patterson submitted that it was relevant that the defendant was served by way of substituted service and in the end only received the proceedings by email when he was overseas. The defendant's affidavit in response had been prepared at short notice and provided initially in an unsworn form. It was only later that the affidavit was sworn following a tight timetable.

[80] Mr Patterson referred to the content of the notice of opposition dated 27 March 2009 (referred to at [23]) and accepted that paragraph 1(a) ought to have been more specifically pleaded. When asked why the defendant had not filed an amended notice of opposition or given written notice to the plaintiff's counsel that

further particularisation would be referred to at the hearing, Mr Patterson chose to accept responsibility for that as counsel. Whether that is a fair acknowledgement, I cannot say. In this context, Mr Patterson submitted that the defendant proposed to raise allegations with the Standards Committee relating to alleged unsatisfactory conduct of the plaintiff as defined in s 12 of the Act. Such allegations had not yet been particularised but were the subject of a brief submission to the effect that the plaintiff had failed to properly manage the provision of the services provided to the defendant. Mr Patterson accepted that such a contention, if pursued by the defendant, related to the scope and terms of the contract of retainer.

[81] Mr Patterson then formally conceded on behalf of the defendant that the defendant was in a contractual relationship with the plaintiff. In other words, the defendant at the hearing abandoned the point contained in 1(a) of the notice of opposition. Mr Patterson accepted that henceforth the defendant would only be challenging the Simpson Grierson invoices on the basis of quantum and alleged unsatisfactory conduct on the part of the plaintiff.

Discussion

[82] I am satisfied that the defendant has no defence to the claim for liability on the basis that then was a contract of retainer for the Simpson Grierson invoices. Such a determination follows from the abandonment of the defence based on the denial of the contract with the plaintiff for the provision of legal services. Such late abandonment means that Dr Gilmour's denial in paragraph 6 of his affidavit was untrue. Such a statement, along with many of the others in the affidavit purporting to support that denial, ought not to have been made.

[83] Quite apart from the abandonment, the case for the plaintiff based on the documents and the correspondence is compelling. The exhibits filed by the plaintiff clearly supported the existence of a contract of retainer for the provision of legal services and demonstrated that Dr Gilmour's denial was unsustainable. I agree with the submission on behalf of the plaintiff that the affidavit evidence of the defendant met the three criteria in *Eng Mee Yong* rendering the evidence inherently improbable.

[84] It follows that the plaintiff has succeeded in discharging the onus of satisfying the Court that the defendant has no arguable defence to the part of the claim based on the existence of a contract of retainer.

Summary judgment - Clayton Utz invoices

Plaintiff's submissions

[85] Mr McEntegart relied first in this part of the claim on the submissions made in respect of liability for the Simpson Grierson invoices. He submitted that there was no evidence to suggest that Clayton Utz was retained on any other basis than that set out in paragraphs 3 and 4 of the statement of claim.

[86] As to quantum, Mr McEntegart submitted that there has never been, and is not now, any credible challenge by the defendant to the Clayton Utz invoices. Putting it at its highest, the defendant had expressed a vague "unhappiness" with those invoices. Counsel submitted that such concern or unease was improbable, vague and unsubstantiated. Counsel referred to various paragraphs in Dr Gilmour's evidence where such concerns or unhappiness found expression.

[87] Mr McEntegart noted the submission on behalf of the defendant that, if he were to have summary judgment for the Clayton Utz invoices entered against him, he would face an additional financial burden in seeking to challenge the Clayton Utz invoices with the New South Wales Law Society, and that such burden was contrary to the protection afforded by the New Zealand legislation. Mr McEntegart submitted that such a submission cannot possibly be correct. He submitted that such consideration should carry no weight when the defendant had eschewed his rights to raise the matter with the New South Wales Law Society and had, either deliberately or by his own inaction, come to a point where he now needed leave of the Supreme Court of New South Wales to proceed.

[88] Finally, Mr McEntegart submitted that the Court should not entertain any form of stay, as suggested by counsel for the defendant, to enable the defendant to pursue a challenge to the Clayton Utz invoices either by proceedings or a complaint

under the Legal Profession Act (NSW). Mr McEntegart said that the defendant had brought this situation on himself. Further, he submitted that had the defendant genuinely wished to seek a stay then he ought to have filed an application supported by appropriate affidavit evidence. He had failed to do so.

Defendant's submissions

[89] With respect to the question of liability by way of the existence of a contract of retainer, Mr Patterson realistically accepted that he could advance no further submission on behalf of the defendant. He also accepted that, in terms of the quantum of the Clayton Utz invoices, he could not point to any document where a concern or unhappiness was raised by Dr Gilmour at the time when the invoices were first presented. Mr Patterson pointed to one or two parts of the evidence but in the end accepted that the Court would be drawing a "long bow" to accept such evidence as a contemporaneous or corroborative challenge to the quantum of the Clayton Utz invoices.

[90] Mr Patterson helpfully drew the Court's attention to the relevant procedures regarding complaints under the New South Wales legislation. He accepted that it was now a matter of seeking leave of the Supreme Court of New South Wales if the defendant wished to proceed further with a challenge to the quantum of the Clayton Utz invoices. Finally, Mr Patterson argued the point faintly that it would be just and equitable to now grant the defendant leave to seek a stay pending further steps being taken in New South Wales.

Discussion

[91] I am satisfied that the plaintiff has discharged the onus upon it to satisfy the Court that the defendant has no defence to the Clayton Utz invoices. This applies both in relation to liability and as to quantum. I have carefully considered the contents of Dr Gilmour's affidavit regarding the Clayton Utz invoices and consider that his statements are inherently improbable. What the defendant said at the hearing was that Clayton Utz had done work without instructions. The difficulty with this claim is that there is no record of any correspondence either by letter, email or

otherwise, showing any dissatisfaction by Dr Gilmour with the professional services being provided by Clayton Utz in respect of the Australian litigation. His silence is evidence that Dr Gilmour was happy with the services provided by Clayton Utz. Moreover, in one email in April 2008, Dr Gilmour, when referring to an intellectual property partner at Clayton Utz, said "her advice is always excellent".

[92] It is significant that Clayton Utz had provided with each tax invoice extensive detail of the professional services involved. Copies of the invoices with attached detail included were provided to the Court for review. But not once was there a single challenge by Dr Gilmour at the time to either the adequacy of the advice, the nature of the professional services being provided or the quantum of the account rendered. Neither did Dr Gilmour at the time suggest any work was done without authority or instructions.

[93] I agree with the submission on behalf of the plaintiff that his affidavit is replete with vague and incredible allegations, none of which is supported by any form of corroborative evidence.

[94] The defendant's belated assertions of unease, unhappiness or concern about the quantum of the Clayton Utz invoices can carry no credibility in the face of a complete absence of contemporaneous expressions of concern or protest. There is no evidence to support such a stance by the defendant. Rather, it seems that the defendant was willing to permit Clayton Utz to continue to undertake professional services on his behalf pursuant to his contract of retainer with Simpson Grierson. He agreed to pay for the professional services rendered by Clayton Utz in respect of the Australian proceedings.

[95] The defendant's position is made worse by the fact that, having been notified by the Law Society on 2 April 2009 that the Law Society do not have jurisdiction, the Law Society noted that he should contact the New South Wales Law Society for information regarding its complaints procedures. Yet there is no evidence that the defendant did so. He seems to have taken no steps in this regard and is now, according to his counsel, in a position where if he wishes to take advantage of the relevant complaints procedure in the Legal Profession Act 2004 (NSW) he will need

to obtain leave of the Supreme Court of New South Wales to do so. There was no evidence before me that the defendant had taken any steps whatsoever to pursue this course.

[96] The fact that the defendant did not take the matter up with the Law Society of New South Wales is a matter for him. There is no explanation from the defendant as to why he did not do so. Further, there is no explanation from the defendant as to why he came to be in a position where he now needs leave of the Supreme Court of New South Wales to proceed further. I am satisfied that there is no proper basis upon which it would be just and equitable to grant the defendant leave to seek a stay of the plaintiff's claim for summary judgment relating to the Clayton Utz invoices to enable him at this late stage to consider taking further action in New South Wales. The time for him to do so has passed and it is inappropriate for the Court, in the absence of an application and clear affidavit evidence to support it, to grant such an indulgence.

Result

Simpson Grierson invoices

[97] I am satisfied that the plaintiff is entitled to relief by way of summary judgment in terms of the liability of the defendant as to the existence of a contract of retainer as pleaded in paragraphs 3 and 4 of the statement of claim.

[98] For the avoidance of doubt, I make it clear that in respect of the Simpson Grierson invoices, such summary judgment does not purport to deal with any issues of quantum or any issues as to other terms or scope of the engagement of either Simpson Grierson or Clayton Utz. Such matters would be the preserve of Standards Committee 3 when dealing with the complaint based on the quantum of the Simpson Grierson invoices. Whether the defendant raises any issue regarding the scope and terms of the contract of retainer is a matter for him. No particularised claim has been referred to in the course of this application for summary judgment. It follows from the above that this is a proper case for the Court to grant a stay of proceedings in respect of any further step towards the recovery of the Simpson Grierson invoices in

the sum of $391,624.43 pending the final disposal of the defendant's complaint to the Law Society under s 132(2) of the Act.

Clayton Utz invoices

[99] With respect to the Clayton Utz invoices, there will be summary judgment in the sum of NZ$396,362.05 being the amount paid by Simpson Grierson to Clayton Utz. The plaintiff is entitled to interest thereon at the statutory rate set out in the Judicature Act 1908.

[100] Further, the plaintiff is entitled to costs. If the parties cannot agree on the amount of costs payable, counsel may file memoranda of no longer than four pages and will determine the quantum of costs.

____

Stevens J