SUPREME COURT OF QUEENSLAND

CITATION:	*Henderson v McCafferty & Ors* [2000] QSC 410
PARTIES:	**PAUL DAVID HENDERSON** (plaintiff/respondent) **v** **PAUL EDWARD McCAFFERTY** (first defendant/applicant) **SCOTT STANLEY CARTER** (second defendant/applicant) **QUEENSLAND LAW SOCIETY INCORPORATED** (fourth defendant/applicant)
FILE NO/S:	S6231 of 1999
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 November 2000
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2000
JUDGE:	Williams J
ORDER:	**Judgment for the first, second and fourth defendants pursuant to r 293 of the *Uniform Civil Procedure Rules.* Costs of and incidental to the action and of and incidental to this application to be assessed.**
CATCHWORDS:	PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – application by defendants for judgment pursuant to r 293 *UCPR*, and other relief. TORTS – MISCELLANEOUS TORTS – OTHER CASES – MISFEASANCE IN PUBLIC OFFICE – CONSPIRING TO INJURE – GENERAL PRINCIPLES – plaintiff solicitor claimed damages for misfeasance in public office and conspiracy alleging president of Queensland Law Society and its legal adviser unlawfully caused to be considered at a meeting of the QLS Council material about the plaintiff allegedly damaging to his reputation – whether first and second defendants were holders of "public office" for the purposes of tort alleged – allegations that first and second defendants acted maliciously or in conspiracy unsubstantiated – no reasonable cause of action established in relation to either claim.

PROFESSIONS AND TRADES – LAWYERS – LEGAL PRACTITIONERS' GUARANTEE FUNDS – plaintiff further claimed that retainer agreements between QLS and its panel solicitors were improper and unreasonable because they exceeded amounts allowable pursuant to Scale – whether QLS decisions concerning expenses involved in administering the Law Claims Levy Fund were exercised in good faith and for relevant purposes – whether QLS decisions concerning payment of legal and administrative expenses and costs from Legal Practitioners Fidelity Guarantee Fund were exercised in good faith and for relevant purposes – all allegations unsubstantiated – claims frivolous and vexatious.

Freedom of Information Act 1992 (Qld)
Queensland Law Society Act 1952 (Qld), s 3, s 4(1A), s 4(6), s 12, s 15, s 41A
Solicitors Act 1891 (Qld), s 3
Indemnity Rules 1987 (Qld), r 6, r 7, r 8
Uniform Civil Procedure Rules 1999 (Qld), r 293, r 171

Beeston and Stapleford Urban District Council v Smith (1949) 1 KB 656
Burgundy Royale Investments Pty Ltd v Wespac Banking Corporation (1992) FCR 492
Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co N L (1968) 121 CLR 483
Re: Central Queensland Developments Pty Ltd [1988] 2 Qd R 476
Tampion v Anderson (1973) VR 715
W A Pines Pty Ltd v Bannerman (1980) 30 ALR 559

COUNSEL: PA Keane QC with PDT Applegarth for defendants/applicants
PA Kronberg for plaintiff/respondent

SOLICITORS: McCullough Robertson for defendants/applicants
Lynch & Co for plaintiff/respondent

[1] **WILLIAMS J:** This is an application by the three remaining defendants in the proceeding for:

(i) judgment pursuant to r 293 of the *Uniform Civil Procedure Rules* ("*UCPR*");

(ii) an order pursuant to r 171 of the *UCPR* that the amended statement of claim be struck out;

(iii) other relief as claimed in the application filed 13 December 1999.

[2] The respondent/plaintiff filed and delivered an amended statement of claim dated 5 November 1999. It should be noted that at the outset of the hearing I gave the plaintiff leave to amend that pleading by deleting the particulars alleged in paragraphs 11 and 26 thereof and in lieu thereof inserting the following particulars:

> "The written retainer agreements utilised a time-costing method of charging by which specific hourly rates were applied to the duration of work undertaken pursuant to the agreement and in circumstances in which waiting time and travelling time were charged at such hourly rates; the retainer agreement permitted the engagement of Counsel and the incurring of disbursements without recourse to the client."

That was the terms of the amendment sought and agreed to in correspondence, but I suspect paragraph 12 and not 11 was intended; nothing in the end turns on that.

[3] The argument proceeded on the basis that such amendment had been made. It was also noted that in paragraph 20 there was an error; in the second last line the reference should be to paragraph 19.

[4] At the outset of the hearing counsel for the plaintiff confirmed, as was apparent from the written outlines of argument exchanged in accordance with an order of Moynihan SJA, that the claim for relief based on alleged breach of confidence was abandoned. Matters said to support that claim are found in paragraphs 58 to 64 inclusive of the statement of claim.

[5] That left for consideration three alleged causes of action against the fourth defendant, Queensland Law Society Incorporated ("the Society"), and two causes of action against the first and second defendants, McCafferty and Carter.

[6] Because the application seeks summary judgment for the defendants pursuant to r 293 they have filed and rely on affidavit material in support of their contention that the statement of claim does not disclose any reasonable cause of action, that the proceeding is frivolous or vexatious, and that the defendants have a defence to the proceeding. The only affidavit material relied on by the plaintiff was an affidavit of P D Henderson filed 8 November 2000.

[7] By way of background the following matters not in dispute should be noted. The fourth defendant, the Society, is a body corporate pursuant to the provisions of the *Queensland Law Society Act* 1952 ("the Act"). Section 4(1A) of that Act provides that "the society shall consist of all persons who for the time being are and whilst they continue to be members of the society." Subsection (6), read with the definition of "practitioner" in s 3, provides that any person who is entitled to practice as a solicitor "shall be eligible to be enrolled as a member of the society". At all material times the plaintiff was a solicitor in private practice and a member of the Society.

[8] The first defendant, McCafferty, is and was at all material times a practising solicitor and a member of the Society. He held the office of President for a period of 12 months from about 14 July 1998.

[9] The second defendant, Carter, is a solicitor and is and was at all material times employed as the solicitor to the Society. His responsibilities include the matters set out in paragraph 3 of his affidavit filed 17 March 2000. The "job description" relating to that position is contained in exhibit 1 to the affidavit of P D Henderson filed 8 November 2000.

[10] Each cause of action must be assessed separately, but there are many common features of the three claims made against the Society, and also of the two claims made against McCafferty and Carter. The latter two claims were dealt with first by each counsel in addresses and there is some benefit in dealing with them first.

Claim for Damages for Misfeasance in Public Office

[11] By paragraph 57 of the statement of claim the plaintiff claims against McCafferty and Carter:

> (a) damages, including aggravated and exemplary damages, for misfeasance in public office;
> (b) interest on damages pursuant to s 47 of the *Supreme Court Act* 1995;
> (c) costs.

[12] The cause of action against each defendant allegedly arises out of the same basic facts, though specific conduct is particularised against each defendant.

[13] By virtue of his election as President, McCafferty was a member of the Council of the Society and acted as Chairman of all meetings of the Council at which he was present during the period of his Presidency. (I would interpolate that the reference to s 25(2)(b) of the Act in paragraph 48(c) of the pleading is obviously erroneous; nothing however turns on that). There is no dispute that McCafferty received remuneration from the Society "in consideration of his discharge of his duties as President".

[14] There then follows in paragraph 48 allegations on which the assertion that McCafferty was a "public officer" for purposes of the tort are based; the relevant allegations are:

> "(e) in consequence of his appointment as President of the Queensland Law Society Incorporated and of his appointment as a member of the Council of the Queensland Law Society Incorporated and of his chairmanship of the Council was engaged in the discharge of the public duty imposed upon the Council of the Queensland Law Society Incorporated by s 41A of the *Queensland Law Society Act* 1952 to properly consider whether:
>
> (i) to refuse to issue a certificate under s 40 of the *Queensland Law Society Act* 1952 if the Council is satisfied on the evidence available to it, that the applicant for a certificate is, by reason of infirmity, injury or illness (whether mental or physical) unfit to carry on and conduct the practitioner's legal practice

and that it is in the interests of the practitioner's clients or in the interest of the public that such certificate should not be issued;

(ii) to cancel a certificate under s 40 of the *Queensland Law Society Act* 1952 if the Council is satisfied on the evidence available to it, that the holder of a certificate is, by reason of infirmity, injury or illness (whether mental or physical) unfit to carry on and conduct the practitioner's legal practice and that it is in the interests of the practitioner's clients or in the interests of the public that such certificate be cancelled;

(iii) to require an applicant for a certificate under s 40 of the *Queensland Law Society Act* 1952 or a practitioner holding a certificate under s 40 of the *Queensland Law Society Act* 1952 to undergo such medical examination by such medical practitioner as the Council of the Queensland Law Society Incorporated may specify;

(iv) to promote or move a motion at a meeting of the Council of the Queensland Law Society Incorporated which sought the refusal or cancellation of the certificate under s 40 of the *Queensland Law Society Act* 1952 or a requirement that an applicant for a certificate undergo a medical examination by such medical practitioner as the Council of the Queensland Law Society Incorporated may specify;

(v) to include such a motion (and supporting material concerning a person's fitness to conduct practice) on the agenda of a Council meeting and in the briefing papers provided to Council members for the purposes of such meeting;

(f) was present and presided as Chairman of a meeting of the Council of the Queensland Law Society Incorporated that occurred on 22 April 1999 and as Chairman of such meeting and President determined what motions were included on the agenda for the said meeting and what material was included in briefing papers provided to Council members for the purpose of such meeting."

[15] Then in paragraph 50 it is alleged that the duties imposed on McCafferty as President are: "duties and powers in which the public has an interest" and "powers conferred for the benefit and protection of the public, including existing and future clients of the applicant for a practising certificate or the holder of a practising certificate."

[16] So far as Carter is concerned it is alleged in paragraph 49 and not disputed that he was the solicitor for the Society and received remuneration from the Society in

consideration of the discharge of his duties. There is also no disputing the allegation that he was obliged, when required, to provide legal advice to the Council as to issues raised pursuant to s 41A of the Act. There is also no dispute that when carrying out those duties he was obliged to give "impartial and independent advice" to the President and the Council; but the allegation in paragraph 49(e) that such was a "public duty" is disputed.

[17] Paragraph 51 alleges that the duty imposed on Carter as alleged in paragraph 49(e) was a "duty in which the public has an interest" and "a duty imposed upon him for the benefit and protection of the public".

[18] Paragraph 52 then alleges that on or about 22 April 1999 McCafferty:

> "in purported discharge of the public duty imposed upon him referred to in paragraph 48 …
>
> (a) caused a motion to be placed on the agenda for the meeting of the Council … held on 22 April 1999 seeking that the Plaintiff submit to a medical examination by a medical practitioner specified by the Council … as to the Plaintiff's fitness to carry on legal practice and for the Plaintiff to show cause why he is psychologically fit to hold a practising Certificate and psychologically fit to be a member of the … Society …;
>
> …
>
> (c) as Chairman of the meeting of the Council … that took place on 22 April 1999, promoted and moved the motion referred to in sub paragraph (a)."

[19] It is then alleged that the acts of McCafferty particularised in paragraph 52 "were undertaken by him with the deliberate intention of injuring and harming the plaintiff". The particulars of that allegation can be summarised as follows:

> (a) McCafferty well knew that the mere placing of such a motion on the agenda would damage the reputation of the Plaintiff in the eyes of Council members and that the Plaintiff would thereby suffer injury and harm to his reputation;
> (b) McCafferty well knew that there was no or no sufficient evidence that the Plaintiff was unfit to carry on and conduct legal practice at that time.

[20] It is also alleged that McCafferty acted "in bad faith". The particulars of that allegation are that he took the course of action alleged for the purpose of inhibiting the plaintiff from seeking information about affairs of the Society or associated bodies pursuant to the provisions of the *Freedom of Information Act* 1992 ("FOI Act").

[21] It should also be noted that it is alleged that McCafferty in acting as alleged did so "maliciously" and "for an improper motive". The particulars thereof essentially

repeat what is set out above. All of those matters are then alleged to constitute "deliberate abuse of office".

[22] Thereafter similar specific allegations are made with respect to Carter. In paragraph 54 his relevant conduct is said to be advising McCafferty and the Council that sufficient evidence existed to justify taking action with respect to the plaintiff under s 41A and compiling the documents to be included with the Council agenda. Then in paragraph 55 it is alleged that his acts in question were undertaken "with the deliberate intention of injuring and harming the plaintiff", "in bad faith", "maliciously", "for an improper motive", "with the knowledge that they would be likely to cause injury and harm to the plaintiff", and constituted "a deliberate abuse of his office". The particulars given in support of each of those allegations essentially mirror those alleged with respect to McCafferty; in consequence they are not detailed again here.

[23] There follows a general allegation that the plaintiff suffered loss and damage to his reputation and mental anguish as a result of that conduct. (The case was argued on the assumption that such was sufficient in the absence of any pecuniary loss.)

[24] Section 41A of the Act so far as is relevant provides:

> "(1) … where … the council, in the case of the holder of a [practising] certificate, is satisfied on such evidence as … it seems proper that –
>
> (a) the … holder of the certificate is, by reason of infirmity, injury or illness (whether mental or physical), unfit to carry on and conduct his … practice; and
> (b) it is in the interests of his … clients or of the public … that the certificate should be cancelled;
> …
>
> the council may cancel, the certificate, ….
>
> (2) For the purposes of subsection (1) … the council –
>
> (a) may require … a holder of a certificate to undergo such medical examination by such medical practitioner as may be specified by … the council; and
> (b) may hold such inquiry as … the council thinks fit."

[25] It is that provision which the plaintiff asserts imposes the public duty in question on McCafferty and Carter. In my view, any relevant duty imposed by that section of the Act is imposed on the Council (a collective responsibility) and not on either or both the president acting as chairman or the solicitor responsible for advising the Council. Of course, the Council can only act by and through its members but that does not mean that there is some statutory duty imposed on those persons individually. Further, if there be any public duty imposed on those individuals by the section, I cannot see that it extends to the decision whether or not a motion and

associated documents should be included on an agenda for consideration at a Council meeting; nor in my view does it extend to "promoting and moving" a motion.

[26] McCafferty and Carter have each sworn affidavits dealing with the Council meeting in question. So also has A J McMahon who was Chief Executive Officer of the Society at the material time. It should be noted that McMahon was a defendant in the proceedings until the action was discontinued against him on 5 November 1999.

[27] That affidavit material (which is all unchallenged) establishes that by December 1998 the plaintiff had caused the Society to receive numerous applications under the FOI Act for access to Society documents. Some of those applications are to be found in exhibit 1 to McMahon's affidavit, and some others in the documents accompanying the Notice to Admit marked as exhibit 1. Those documents arguably establish that the demands made by the plaintiff were unreasonable and intrusive. All of that caused officers of the Society, particularly Carter, to conclude that the plaintiff's conduct was "vexatious and sometimes offensive". Further, in about early 1999 the Society received a complaint from a Mr Bakharia with respect to the professional conduct of the plaintiff. The statement of claim in the action brought by Henderson against Bakharia (6281 of 1997 in this Court) is exhibit 4 to McMahon's affidavit. On or about 31 March 1999 there was a meeting between McCafferty, Carter and McMahon at which the Society's concern with the frequency and cost of the FOI applications was discussed. It was then agreed that Carter should retain a firm of solicitors, Gilshenan & Luton, to advise the Society on those concerns. Exhibit 2 to Carter's affidavit filed 17 March 2000 is a copy of the letter from the Society to Gilshenan & Luton. Essentially the solicitors were asked to advise "as to any remedy or avenue open to the Society to inhibit Mr Henderson's activities". A reply was forthcoming; the Society claims that the advice is the subject of legal professional privilege. It is not presently before the court. Relying on *Wardrope v Dunne* [1996] 1 Qd R 224 counsel for the plaintiff argued that such privilege was lost because the contents of the privileged communication had become the subject of a legitimate and reasonable issue in the litigation. However, notwithstanding that view, the plaintiff took no steps (for example, by serving a subpoena) to place the document before the court.

[28] The affidavit material establishes that after the advice was received from Gilshenan & Luton there was some discussion between McCafferty, Carter and McMahon. It was decided that the matter should be placed on the agenda for the Council meeting to be held on 22 April 1999. Carter prepared the Agenda Paper which is exhibit 3 to McMahon's affidavit. McCafferty approved the Agenda, but denies that he caused the matter to be placed on the Agenda. Carter did not attend the meeting on 22 April 1999 as he was on leave. McCafferty, in his affidavit, denies that he promoted or moved the motion; there is no evidence to the contrary. The matter was considered at the meeting on 22 April, and as the minute (exhibit 5 to McMahon's affidavit) establishes it was "resolved not to take the action recommended in the letter of Gilshenan & Luton". The resolution also noted the complaint of Mr Bakharia would be dealt with in the normal way by Professional Standards.

[29] The material in question was seen by members of Council for the purposes of considering what to do. Each of McCafferty and Carter specifically denies in his

affidavit that he was motivated by malice or had any intention of injuring the plaintiff. McCafferty in particular in his affidavit swears that he felt obliged in the light of the Gilshenan & Luton advice to put the matter on the agenda for consideration by Council; he considered that he would be failing in his duty as President of the Society if he did not do so.

[30] It is in all those circumstances that it falls for the court now to consider whether summary judgment should be given for the defendants or the statement of claim struck out.

[31] There have been a few cases in modern times involving the tort of misfeasance in a public office. In *Northern Territory v Mengel* (1995) 185 CLR 307 Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ said at 345 that it is "a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power". (See also at 347). As qualified by the observations thereon in *Mengel* at 346-7 the definition formulated by Smith J in *Farrington v Thomson* (1959) VR 286 at 293 is helpful: "if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person". Thus the authorities are clear; misfeasance in public office is a deliberate or intentional tort.

[32] There still appears to be no clear definition as to what today constitutes a public office for purposes of the tort. There is an interesting historical discussion by Windeyer J in *Marks v The Commonwealth* (1964) 111 CLR 549 commencing at 567 of the common law concept of the holder of a public office but it is not directly helpful for present purposes. As Lord Goddard said in *Beeston and Stapleford Urban District Council v Smith* (1949) 1 KB 656 at 663: "To the words "public officer" different meanings can be given according to the statute in which they occur." The House of Lords in *McMillan v Guest* (1942) AC 561 held that for the purposes of the income tax legislation of the United Kingdom the director of a company, whether public or private, held a "public office within the United Kingdom". In a different context the Court of Appeal considered the phrase "holder of any public office" in *R v McCann* [1998] 2 Qd R 56. There the court was concerned with the offence of "official corruption" under the *Criminal Code*. The definition of the offence made it clear that a person caught by the phrase "the holder of any public office" was someone employed outside the public service. Macrossan CJ differed from the other members of the court as to the meaning of the phrase; he gave it a wider construction than the other members of the court in holding that it caught any person who performed "functions and duties of a public character, that is matters in which the State has an interest." (at 62). Byrne J (with whom Davies JA substantially agreed) concluded that the appellant was not the "holder of a public office" primarily because he did not exercise any independent authority, was not required to take an oath or to provide a bond, and there was an absence of any specific duty attaching to his job or of any independence in the performance of his functions. What is of some assistance for present purposes is that at 69 Byrne J cited with approval the decision of the Victorian Full Court in *Tampion v Anderson* (1973) VR 715, particularly the passage at 720 where it was stated that the tort of misfeasance in public office may only be committed by the

holder of an office who "owes duties to members of the public as to how the office shall be exercised". (My emphasis).

[33] McCafferty as President of the Society, a body incorporated by statute, may well be a "public officer" for certain purposes (cf *McMillan v Guest*), but that does not necessarily mean that he is the holder of a "public office" for purposes of the tort. I accept the statement in *Tampion v Anderson* (approved by Byrne J in *McCann*) that the tort may only be committed by the holder of an office who "owes duties to members of the public as to how the office shall be exercised". There is nothing in s 41A of the Act which requires the president of the Society to perform any duty in any particular way – it says nothing as to how any duty imposed on the president for the time being is to be performed. Nor would McCafferty be caught by either of the definitions put forward in *McCann*.

[34] I am satisfied on all the evidence that the defendant McCafferty was not the holder of a "public office" for purposes of the tort of misfeasance in public office.

[35] The alleged conduct of McCafferty for present purposes includes causing the motion to be placed on the agenda, and promoting and moving the motion. For present purposes I assume those facts to be proven. It is then alleged that McCafferty well knew that conduct would damage the plaintiff's reputation and also that he well knew that there was no evidence that the plaintiff was unfit to carry on practice at the time. It is those latter allegations which are said to establish that McCafferty acted maliciously. McCafferty has put forward an explanation of his conduct and state of mind which has not been challenged. There is obvious force in his statement that once the advice was received from Gilshenan & Luton he felt obliged to place the matter on the agenda. It is difficult to see any substantiated basis for a finding that he acted maliciously in so doing. The plaintiff's case is that the only inference that can be drawn from the admitted conduct is that McCafferty must have known that irreparable damage would be done to the plaintiff's reputation by placing the matter on the agenda and therefore he must have intended to cause that harm. I am not satisfied that the allegations made in the statement of claim are such that, without further evidence from the plaintiff's side, a court could conclude that McCafferty had acted maliciously. The allegations as to McCafferty's state of mind are no more than unsubstantiated assertions.

[36] It follows that I am satisfied that all the material shows that no reasonable cause of action is established against McCafferty and that he has a defence to the proceeding. He is therefore entitled to judgment pursuant to r 293.

[37] The position of Carter is, in my view, even stronger. His role is more akin to that of Just who was counsel assisting the Board of Inquiry considered in *Tampion v Anderson*. The court there said that the claim against Just was "even more plainly unsustainable. For his position as counsel assisting the Board was obviously not a public office in the relevant sense, and he had no statutory powers with respect to the inquiry." (at 722). Here, there is no basis for concluding that the defendant Carter was the holder of a public office let alone that he owed a duty to members of the public as to how the duties of his office should be exercised. He was an employee of the Society, and obliged to give advice to the Society when called upon.

[38] Carter's conduct appears to be limited to sending the letter requesting advice to Gilshenan & Luton, preparing and placing the material on the agenda for consideration by the Council, and advising McCafferty and the Council. It is difficult to see any substantiated basis for an allegation that he acted maliciously in so doing. The plaintiff's case as presented is essentially that the only inference that can be drawn from the admitted conduct is that Carter must have known that irreparable damage would be done to the plaintiff's reputation by placing the matter in question on the agenda, and therefore he must have intended to cause that harm. I am not satisfied that the allegations made in the statement of claim are such that, without further evidence from the plaintiff's side, a court could conclude that Carter had acted maliciously. The allegations as to Carter's state of mind are no more than unsubstantiated assertions.

[39] Carter has established that there is no reasonable cause of action against him and that he has a defence to the proceeding. He also is entitled to judgment pursuant to r 293.

Conspiracy

[40] In paragraphs 65 to 70 of the Statement of Claim an allegation of conspiracy is made against McCafferty and Carter arising out of the same acts and events asserted to give rise to the tort of misfeasance in public office against each of them.

[41] It is alleged that McCafferty and Carter combined together and thereby conspired to cause the motion in question (and associated documents) to be placed on the agenda for the Council meeting, and that each promoted and moved the motion pursuant to that conspiracy. Against Carter it is also alleged that he advised the Council that sufficient evidence existed to justify action pursuant to s 41A of the Act. It is alleged (paragraph 66) that the predominant purpose of the conduct of McCafferty and Carter in relation thereto "was to injure and damage the plaintiff" by damaging his reputation in the eyes of members of the Council of the Society, and inhibiting his rights to obtain information under the FOI legislation. The only damage claimed (paragraph 69) is loss and damage to reputation and mental anguish.

[42] In their respective affidavits each of McCafferty and Carter has explained the reasons for the conduct alleged and specifically denied any conspiracy or any intention to harm the plaintiff. The details of that have been set out previously. That material is not challenged or put in issue. The fact that it was resolved not to take action pursuant to s 41A of the Act detracts from the plaintiff's contention.

[43] Essentially the submission of counsel for the plaintiff was that the court at trial, after hearing cross examination of McCafferty and Carter, may well not believe the denials contained in their affidavits. It is therefore said that there is a triable issue on those questions. But that can only be so if there is credible evidence before the court supporting the assertion that there was a conspiracy and that each of McCafferty and Carter had an intention to cause harm to the plaintiff. The plaintiff's case is simply that the facts alleged in the statement of claim would support the drawing of an inference to that effect.

[44] The plaintiff's case appears to be that there was a conspiracy to injure, the situation considered in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* (1942) AC 435.

In such a case the object of the combination must be to cause damage to the plaintiff; it is an intentional tort. There is authority that in such a case the plaintiff must establish actual pecuniary loss; damage to reputation and injury to feelings alone are not sufficient (*Lonrho Plc v Fayed (No 5)* (1993) 1 WLR 1489). At best it is only arguable that damage to reputation and injury to feelings would be recoverable where they were superimposed on pecuniary loss. These issues are discussed by Weinberg J in *McKellar v Container Terminal Management Services Pty Ltd* (1999) 165 ALR 409 at 434-9.

[45] Ultimately I have come to the view that McCafferty and Carter have put forward a reasonable explanation for their conduct, and that in the circumstances there is no evidence currently before the court substantiating the assertion that there was a conspiracy to cause harm. There is no credible evidence of an intention to harm. Further, in the absence of any allegation of pecuniary loss it is difficult to see how the tort could be established.

[46] On the material presently before the court on this application pursuant to r 293 I am satisfied that no reasonable cause of action for conspiracy is disclosed. McCafferty and Carter are entitled to judgment.

Claim re Payment of Legal Expenses from Law Claims Levy Fund

[47] This is the first of the claims against the fourth defendant, the Society. This claim is based on allegations in paragraphs 1 to 21 inclusive of the Statement of Claim. Even after hearing submissions from either side I am still unclear as to what is the plaintiff's cause of action. Essentially the plaintiff, as a member of the Society, is asking the court to review certain decisions made by the Society, to make declarations that such decisions were not within power, or unreasonable, or improper, to hold that the plaintiff thereby suffered damage, and to make an order that the Society pay the amount of unlawful payments made pursuant to those decisions into the Law Claims Levy Fund.

[48] Between 21 May 1987 and 24 March 1996 the plaintiff was a solicitor in private practice. In consequence during that period he was required to be insured under the terms of a Master Policy of Insurance taken out and maintained by the Society. He was obliged to pay premiums with respect thereto and, in addition, to pay an administrative levy in an amount determined by the Society. The Law Claims Levy Fund ("the Fund") was established by r 8 of the *Indemnity Rules* 1987. Those rules applied to every solicitor in private practice. Each solicitor was required to pay a levy (in effect a premium) pursuant to r 7 and an administrative levy as determined by the Council pursuant to r 6. The Statement of Claim alleges that the plaintiff, during the period in question, paid all levies required of him to the Society. Those matters are not in dispute.

[49] Paragraph 8 alleges that during the period 1987 to 1996 the Society established a panel of solicitors ("the panel") to conduct the defence of professional negligence claims made against practitioners. It also alleges a Claims Committee was appointed to consult with the insurers. Paragraph 9 alleges that in the course of administration of the Fund the Society was entitled to and did pay out amounts being expenses involved in the administration of the Fund and in satisfaction of

claims made thereunder. Again, none of those allegations appears to be controversial.

[50] In paragraph 11 it is alleged that each of the legal practitioners appointed to the panel signed a written retainer agreement with the Society which included particulars of "the amount and manner of payment to the practitioner in consideration of the provision of legal services as a member" of the panel. Paragraph 12 alleges that such retainer agreements provided for remuneration according to hourly rates specified in the agreement. From the various particulars provided in the Statement of Claim it can be said that the allegation is that the practitioners in question could charge pursuant to the retainers between $200 and $350 per hour, that such charges related also to waiting and travelling time, and that disbursements (including the engagement of counsel) could be incurred without recourse to the client. It is then alleged in paragraph 13 and 14 that payments were made during the period to the solicitors on the panel. In paragraph 14 particulars of total amounts paid out for the years 1987 to 1996 inclusive are stated.

[51] As will be noted later there is some dispute as to the accuracy of particulars, but in broad terms those allegations in the pleading reflect what happened.

[52] The allegations of critical concern for present purposes are to be found in paragraphs 15 to 20 inclusive of the pleading; it is necessary to set them out fully:

> "15. The retainer agreements referred to in paragraph 11 were written agreements between the Queensland Law Society Incorporated and the Law Claims Panel Solicitors concerning the amount and manner of payment by the Queensland Law Society Incorporated to Law Claims Panel Solicitors for legal services done or to be done by the Law Claims Panel Solicitors within the meaning of s 3 of the *Solicitors Act* 1891.
>
> 16. In consequence of the provisions in the retainer agreements referred to in paragraph 11 which permitted Law Claims Panel Solicitors to charge at hourly rates greater than the hourly rates provided by the item charge Scales of Costs for the Supreme Court of Queensland, the District Court of Queensland and the Magistrates Court of Queensland enforced from time to time between 21 May 1987 and 24 March 1996, the said retainer agreements were unreasonable.
>
> 17. Upon its proper construction Rule 8(vi)(a) of the *Indemnity Rules* only empowered the Queensland Law Society Incorporated to pay monies from the Law Claims Levy Fund for the costs, charges and expenses involved in the administration of the Law Claims Levy Fund if such costs, charges and expenses were proper and lawful.
>
> 18. The monies paid by the Queensland Law Society Incorporated out of the Law Claims Levy Fund to Law Claims Panel Solicitors pursuant to the retainer agreements referred to in paragraph 11 between 21 May 1987 and 24 March 1996 did

not constitute lawful and proper costs, charges and expenses within the meaning of Rule 8(vi)(a) of the *Indemnity Rules* since:-

(a) the fees charged by the Law Claims Panel Solicitors were unreasonable, improper and excessive to the extent that they exceeded the amount that would have been allowed to have been recovered by the Law Claims Panel Solicitors against the Queensland Law Society Incorporated had each bill of costs delivered by Law Claims Panel Solicitors to Queensland Law Society Incorporated between 21 May 1987 and 24 March 1996 being taxed by the Taxing Officer of the Supreme Court of Queensland;

(b) the Queensland Law Society Incorporated failed to have each of the retainer agreements entered into between it and Law Claims Panel Solicitors referred to in paragraph 11 examined by the Taxing Officer of the Supreme Court of Queensland to determine the reasonableness and fairness of the said agreement prior to paying the claim fees to Law Claims Panel Solicitors in circumstances in which such solicitors had no entitlement to be paid such monies until the retainer agreement pursuant to which such fees were charged had been examined and allowed as fair and reasonable by the Taxing Officer of the Supreme Court of Queensland having regard to the effect of s 3 of the *Solicitors Act* 1891 and in circumstances in which the Queensland Law Society well knew that the hourly rates prescribed in the retainer agreements were significantly in excess of reasonable hourly rates having regard to the item charge scales utilised by the Supreme Court of Queensland, District Court of Queensland and Magistrates Court of Queensland from time to time during the period 21 May 1987 to 24 March 1996;

(c) the Queensland Law Society Incorporated failed to bring a motion to have the retainer agreements referred to in paragraph 11 declared to be unreasonable and to then seek orders for the taxation of the bills of costs delivered by the Law Claims Panel Solicitors to it pursuant to its rights under s 7 of the *Solicitors Act* 1891 in circumstances in which the Queensland Law Society Incorporated well knew that the hourly rates prescribed in the retainer agreements were significantly in excess of the hourly rates that were recoverable having regard to the item charge scales utilised by the Supreme Court of Queensland, District Court of Queensland and

Magistrates Court of Queensland from time to time during the period 21 May 1987 to 24 March 1996;

(d) The hourly rates charged to the Queensland Law Society Incorporated pursuant to the retainer agreements referred to in paragraph 11 were grossly excessive having regard to the difference between those hourly rates and the hourly rates in the item charge scales utilised by the Supreme Court of Queensland, District Court of Queensland, and Magistrates Court of Queensland from time to time during the period 21 May 1987 to 24 March 1996.

19. In consequence of the unlawful payments by the Queensland Law Society Incorporated to Law Claims Panel Solicitors as alleged in paragraph 18 between 21 May 1987 and 24 March 1996:-

(a) the corpus of the Law Claims Levy Fund has been dissipated to the extent of the unlawful payment;

(b) the Queensland Law Society Incorporated was required to resolve to impose administrative levies and levies upon the Plaintiff and to impose higher premiums on the Plaintiff in order to maintain the Law Claims Levy Fund at prudential levels to the extent of the unlawful payments which it would otherwise not have had to impose but for the making of the unlawful payments;

(c) the Queensland Law Society Incorporated imposed administrative levies and levies upon the Plaintiff and imposed higher premiums on the Plaintiff which would otherwise not have had to impose but for the making of the unlawful payments;

(d) the Plaintiff paid the Queensland Law Society Incorporated the levies and administrative levies and the increased premiums referred to in sub paragraphs (b) and (c) which he would not otherwise have had to pay but for the making of the unlawful payments.

20. In consequence of the Plaintiff's membership of the Queensland Law Society Incorporated for the period 21 May 1987 until 24 March 1996 and of the Plaintiff's constituting the Queensland Law Society Incorporated in consequence of the effect of s 4(1A) of the Queensland Law Society Act 1952 and of the matters alleged in paragraph 19, the Plaintiff has suffered loss and damage and the Plaintiff's interests have been prejudiced.

Particulars

> The Plaintiff has suffered damage equal to the extent to which the Law Claims Levy Fund has been dissipated by the unlawful payments made by the Queensland Law Society Incorporated to Law Claims Panel Solicitors as alleged in paragraph 18."

[53] In the course of submissions counsel for the plaintiff was forced to concede that paragraph 20 was nonsensical insofar as it alleged the plaintiff constituted the Society. In consequence he suggested that the paragraph should be read as if it alleged that in consequence of the plaintiff being a constituent member of the Society he suffered loss and damage. But such an amendment alone would not be sufficient. As counsel for the defendants pointed out, the particulars allege that the plaintiff has suffered damage equal to the extent to which the Fund has been dissipated by the matters complained of, and that is only consistent with the plaintiff and the Society being identical. That in turn caused counsel for the plaintiff to concede that some additional amendment to the particulars would be required; it was suggested that the particulars of damage may equate any additional amount paid by the plaintiff to the Fund because of the alleged wrongful conduct. But again such an amendment would really be nonsensical because the plaintiff is not seeking to recover any damages. The only monetary relief claimed is that specified in paragraph 21(d): "an order that the Queensland Law Society Incorporated pay the amount of the unlawful payments made to Law Claims Panel Solicitors in the period 21 May 1987 to 24 March 1996 into the Law Claims Levy Fund".

[54] I am inclined to agree with the submission made by counsel for the defendants in reply that those difficulties in pleading the plaintiff's case suggest that the claim "has no reasonable basis".

[55] When one cuts through all the verbiage of paragraphs 16 to 20 inclusive one sees that the critical allegation is that the retainer agreements were improper and unreasonable because they provided for charges for the provision of legal services in excess of what was provided for by Scales of Costs for Queensland Courts or which would have been allowed on taxation.

[56] Rule 8(vi)(a) of the *Indemnity Rules* referred to in the pleading provides: "There shall from time to time be paid out of the Law Claims Levy Fund as required and in such order as the Council deems proper – (a) the costs charges and expenses involved in the administration of the Law Claims Levy Fund." That on its face appears to confer on the Council a power to determine what is a proper expense to be charged against the Fund. In those circumstances one has to consider what is the right of a member of the Society to challenge a Council decision that a particular charge is a proper one for purposes of that rule.

[57] Assuming that the plaintiff has appropriate standing to challenge the decision, a court would only review what is in essence a business judgment by the Council of the Society, and substitute its own judgment on the merits, if it was established that the Council's decision was not the result of an exercise in good faith or was made for irrelevant purposes. Barwick CJ, McTiernan and Kitto JJ in *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co N L* (1968) 121 CLR 483 at

493 said: "Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and the judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts." (See also the authorities discussed by and similar conclusion reached by Muir J in *Circle Petroleum (Qld) Pty Ltd v Greenslade* (1998) 16 ACLC 1577 at 1591-2). In my view that indicates the relevant test to apply here. Ultimately the question will be whether or not the plaintiff can establish that the Society failed to satisfy that test in determining what were the expenses involved in the administration of the Fund.

[58] The statement of claim also asserts that the Society should have had the retainers reviewed pursuant to s 3 of the *Solicitors Act* 1891. That section empowers solicitors to make agreements in writing with clients respecting the amount and manner of payment of fees for legal services. The wording of the section is wide enough to include an agreement to pay fees on a time-costing basis.

[59] The section goes on to provide that if the agreement is in respect of work to be done in any action in the Supreme Court "the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by the taxing master, and if it appears to the taxing officer that the agreement is not fair and reasonable" the Court on a reference from the taxing officer may order that the amount payable under the agreement be reduced or that the costs be taxed in the ordinary way. It should be noted that it is provided in s 15 of the Act that an agreement made in pursuance of s 3 shall not be subject to any taxation except pursuant to an order made under s 3.

[60] One of the plaintiff's complaints here is that the Society did not have the agreement reviewed by the taxing officer pursuant to the second paragraph of s 3 of the 1891 Act. The only consequence of that failure is that the agreement loses the privilege attached to it by s 15, and the solicitor entitled to the fees may be required to submit a bill in taxable form and have it taxed. Section 3 is in substantially the same terms as s 60(5) of the *Solicitors Act* 1932 (UK) and s 15 is mirrored in s 62 of the English statute. Those provisions were considered by the Court of Appeal in *Re Simmons and Politzer* (1954) 2 QB 296. The following passages from the judgment of the court delivered by Romer LJ at 303 and 304 are relevant:

> "It is not at first sight easy to discover what results were intended by Parliament to follow upon a disregard of this revision [s 60(5)] … no express sanction is imposed on a solicitor for its infringement. …
>
> In our judgment, the court can reopen an agreement covering contentious business even though the agreement has been approved by a taxing officer …
>
> In our judgment the effect of disregarding subsection (5) is to deprive a solicitor who ignores it of the privilege conferred by s 62 of the Act. … The conclusion which we have expressed is supported by such authority as there appears to be upon the subject."

[61] That decision was cited with approval by de Jersey J in *Re Central Queensland Developments Pty Ltd* [1988] 2 Qd R 476. It follows that there is no basis for the

allegation in paragraph 18(b) of the statement of claim that, absent examination by the Taxing officer, the solicitors on the panel had no entitlement to be paid in accordance with the agreements.

[62] Here the position is that the Society (the client) neither sought to have the agreement reviewed under s 3, nor sought to have the fees charged by the solicitors who performed the work in question subjected to taxation in the ordinary way. Again it seems to me that that was a decision reached by the Council, and it could only be successfully challenged in this court if it was demonstrated that either it was a decision not made in good faith or was a decision made for some irrelevant purpose.

[63] As this is an application for summary judgment for defendants, evidence has been placed before the court by the defendants in affidavit form. It is now necessary to refer to that material. Again it should be noted that none of this was challenged either by way of cross examination or by placing affidavit material in response before the court.

[64] The critical affidavits are by M C Behm, a solicitor who was Assistant Director of Law Claims throughout most of the period in question, and M Fox, a chartered accountant who throughout the relevant period was Director of Finance of the Society. In those affidavits details of the relevant insurance scheme are set out, as are details of how the Fund was administered. It is not necessary to recount such matters in detail here. Claims were primarily the responsibility of a Claims Committee of the Society comprising volunteer practitioners who had a hands-on role on a daily basis in administering claims. The solicitors on that Committee were selected on the basis of expertise in litigation, particularly involving professional indemnity insurance.

[65] According to Behm solicitors were engaged to handle the claims and retainer agreements were entered into with such solicitors. Those solicitors were "selected having regard to their expertise in handling commercial litigation, particularly involving professional indemnity claims, and the complexity of the issues involved". According to Behm during the period October 1988 to March 1996 the range of hourly charge out rates were:

Partner	$190 to $280
Associate	$135 to $231
Solicitor	$100 to $173
Articled Clerk	$ 50 to $ 95

He also deposes to the fact that some solicitors were engaged on "scale rate" depending on the type of work involved. Then follows paragraph 12 of his affidavit, which is of some importance:

> "From the time I joined Law Claims in 1988, it has been my understanding that insurers and the QLS have not paid panel solicitors anything more than the market rate applicable to the type of work which was being conducted, that is, professional indemnity litigation. Indeed, when the Law Claims panel was restructured in 1993, panel solicitors were asked to accept the low market rates on

> the basis that it would be for the "good of the profession". Law Claims staff were required to check panel solicitor's accounts, particularly the professional cost charged. Panel solicitors were asked to provide considerable detail as to the work which was performed so that a view could be formed as to whether the account was reasonable. Any account which was considered unreasonable was normally queried with the panel solicitor involved."

[66] Fox in his affidavit is concerned with how the levy was struck and how administrative charges were calculated. In accordance with the material in that affidavit he concludes that it is incorrect to state, as is alleged in paragraph 19(c) of the statement of claim, that the payment of Panel Solicitors' legal costs from the Fund impacted upon the fact of or the level of administrative levies imposed by the Society.

[67] There is no evidence to the contrary of anything stated by either Behm or Fox. There is no reason for the court not to now act on that evidence. There is nothing from the plaintiff other than an allegation that the retainer agreements provided for fees in excess of Scale. That can be assumed for present purposes. There is, however, no evidence from any quarter that the fees paid were in excess of market rates or were unreasonable given the fees usually charged for work requiring expertise of the type in question. There was no evidence from any costs assessor to the effect that the fees were unreasonable.

[68] The plaintiff exhibited to his affidavit filed 8 November 2000 copies of Memoranda of Costs rendered by McCullough Robertson to Law Claims with respect to the defence by Law Claims of an action brought against Flower and Hart, a firm of solicitors, by White Industries. Nothing was said in the course of submissions to indicate the relevance of that for present purposes. There is no evidence before the court indicating that any particular fee charged therein was unreasonable or improper.

[69] Judges have always recognised that fee agreements were reviewable by the courts primarily because of the consideration that the client was in a vulnerable position and the lawyer could take improper advantage of that. But subject to that there is nothing improper about a lawyer entering into a costs agreement with the client. That principle is clearly recognised by Gleeson CJ in *New South Wales Crime Commission v Fleming* (1991) 24 NSW LR 116 at 123-124, by White J in *Re Crouch and Lyndon's Bill of Costs* [1998] 2 Qd R 228 at 247, and by Fryberg J in *Re Morris Fletcher and Cross' Bills of Costs* [1997] 2 Qd R 228 especially at 243. In the latter case the learned judge indicated that the obligation on the solicitor was to make full disclosure, particularly of what was involved where fees were being charged on a time-costing basis. That concern of the judges is not relevant here. The Society, its Council, and the Claims Committee were each comprised of highly experienced lawyers well acquainted with what was involved in charging on a time-costing basis. Those experienced litigation lawyers would also have been fully aware of market rates charged for the type of work involved. In this case, rather than the client being in a disadvantaged position, it was, if anything, more in a position of power compared with the solicitor engaged to do the work. Indeed as Behm indicates there was some pressure put on solicitors to charge less than going market rates.

[70] It would have been odd for the Society to have sought a review of the agreements pursuant to s 3 of the 1891 Act. Given the factors just referred to one could hardly expect the Society to have submitted to the taxing officer that the fees it had agreed to pay were unreasonable. Further, the fact that the Society apparently never saw fit to require a practitioner to submit a bill in taxable form indicates general acceptance that the fees ultimately charged were reasonable.

[71] Such considerations mean that the plaintiff is forced back to the basic proposition that merely by agreeing to charges greater than Scale the Society's decision was not made in good faith or was made for some improper purpose. Such an argument is not sustainable. Fogarty J in *Weiss v Barker Gosling* (1994) FLC 92/474 and Einfeld J in *Burgundy Royale Investments Pty Ltd v Wespac Banking Corporation* (1992) FCR 492 recognised that an agreement to charge on a time-cost basis was not necessarily unreasonable simply because more than Scale was being charged. Fogarty J recognised at 80921 that the Scale was a legitimate starting point in the exercise but it was no more than "a useful guide". Einfeld J referred to a number of authorities on the point at 496-9 and made thereat the following relevant observations:

> "A primary factor affecting the reasonableness of the legal expenses for which provision is sought will be the market for the legal services in which the client, as a consumer, is obliged to seek such services. …
>
> There is in principle nothing exorbitant about an agreement to charge a regular hourly rate appropriate to the skills and experience of the fee earner and to the work involved."

[72] At the end of the day there is nothing more than an "unsubstantiated assertion" (in the sense used by Brennan J in *W A Pines Pty Ltd v Bannerman* (1980) 30 ALR 559 at 569) of the fact that the fees charged and paid were not lawful and proper, were grossly excessive, and were unlawful payments.

[73] Given the affidavit material relied on by the defendants no reasonable cause of action against the Society is disclosed by the pleading, and in any event the defendants have a good defence to the proceeding. Further, in the circumstances I would hold that this claim was frivolous and vexatious.

Claim re Payment of Legal Expenses and Costs from Legal Practitioners Fidelity Guarantee Fund

[74] This claim is virtually identical with that previously considered with respect to the Law Claims Levy Fund. Here the plaintiff is concerned with payments of costs and expenses from the Legal Practitioners Fidelity Guarantee Fund ("the Fidelity Fund") established pursuant to s 12 of the Act. Paragraphs 22 to 36 inclusive of the statement of claim deal with this cause of action. Section 15 of the Act specifies what can be paid out of the Fidelity Fund, and such matters are generally referred to in paragraph 23 of the pleading. Paragraph 24 then alleges that between 1 July 1989 and 1 July 1998 the Society appointed a number of legal practitioners to conduct the defence of claims made against the Fidelity Fund and to conduct proceedings on behalf of the Society with respect to disciplinary matters. A number

of solicitors so retained are then named. It is then alleged in paragraph 25 that each of those solicitors entered into a written retainer agreement with the Society pursuant to which fees were charged on a time-costing basis, which also included waiting and travelling time, and counsel could be engaged and other disbursements made without consultation with the Society. Paragraphs 27 and 28 then allege that fees were charged by the practitioners and paid by the Society in accordance with those retainer agreements. Totals are given for the payments made for each of the years from 1989 to 1998. There then follow paragraphs which mirror paragraphs 15 to 19 inclusive quoted above; paragraph 33 mirrors paragraph 19. Here the allegation is that the payments did not constitute lawful and proper expenses within s 15 of the Act.

[75] Paragraphs 34 and 35 should be noted; they allege:

> "34. The Queensland Law Society Incorporated has indicated an intention to impose a further levy on the Plaintiff pursuant to Rule 7 of the Rules of the Queensland Law Society for the purpose of advancing monies raised by such levy to their fund in order to keep the fund at prudential levels which levy would not have been needed to be imposed but for the unlawful payments made by the Queensland Law Society Incorporated to Fidelity Fund Panel Solicitors as alleged in paragraph 28.
>
> 35. In consequence of the matters alleged in paragraphs 33 and 34, the Plaintiff has suffered loss and damage and the Plaintiff's interests have been prejudiced.
>
> **Particulars**
>
> The Plaintiff has suffered damage equal to the extent to which the fund has been dissipated by the unlawful payments made by the Queensland Law Society Incorporated to Fidelity Fund Panel Solicitors as alleged in paragraph 28 including the amount of the levies imposed upon the Plaintiff as alleged in paragraph 33 and will suffer further loss to the extent of any future levies under Rule 7 imposed upon him as alleged in paragraph 34."

[76] For the reasons given previously the fees agreed to and charged by the practitioners in question, and paid by the Society, are not improper and unreasonable merely because they were in excess of Scale.

[77] The defendant Society has placed material before the court relevant to this claim in the form of an affidavit by K W Thompson who during the relevant period was Director of Professional Standards of the Society. He deposes that prior to 13 December 1990 there was no written retainer agreement between Panel Solicitors and the Society as to the rate of charge for work carried out by those solicitors. He then states that after 13 December 1990 Panel Solicitors advised the Society as to their charge-out rates and of any variation to those rates. Any variation had to be by agreement with the Society. His affidavit then sets out a range of specific charge-

out rates which were nominated by Panel Solicitors between 1990 and the present for the type of work in question.

[78] Finally, he says that it has always been the practice of the Society for accounts to be reviewed by the Society to ensure that the charges were in accordance with relevant charge-out rates at the time.

[79] The evidence of Thompson has not been challenged in any way. On the material before the court the allegations in the statement of claim remain entirely unsubstantiated.

[80] In my view there is no basis on which a court could find that the decisions made by the Society with respect to the costs and expenses in question were not made in good faith or were made for some improper purpose.

[81] It follows that the defendants are entitled to judgment pursuant to r 293 and I would also hold that on the material presently before the court the proceeding is frivolous and vexatious.

Claim re Payment of Administrative Expenses from Legal Practitioners Fidelity Guarantee Fund

[82] The final claim against the Society relates to the alleged unlawful payment of administrative expenses from the Fidelity Fund. These matters are dealt with in paragraphs 37 to 46 of the statement of claim.

[83] In paragraph 38 it is alleged that a total of $17,237,499 was paid out of the Fidelity Fund for managerial and administrative purposes. It is asserted in paragraph 39 that of that sum $9,519,369 was for salaries and allowances and in paragraph 40 that $2,995,777 of that sum was for rent. The claim is then made that the amount for salary and wages was approximately 42% of all salaries and allowances paid to Society staff during the period, and that the payment for rent represented approximately 46% of all rental charged to departments of the Society for the same period.

[84] The statement of claim does not say so but it is interesting to note that the difference between the total for salaries and wages and rent and the amount specified in paragraph 38 approximates that paid out to solicitors as particularised in paragraph 28.

[85] Paragraph 42 alleges that the payments for salaries and wages and rent were "excessive, unreasonable and improper". Paragraph 42(a) appears to contend that the amount for salaries and wages was "excessive, unreasonable and improper" because the figure represented approximately 42% of all salaries and wages paid to staff of the Society whereas only 25% of the total staff were employed in the Professional Standards department. The amount of the overcharge is said to be $4,308,826 though it is not stated how that amount is calculated. One might infer that it represents the difference between 25% and 42% of staff salaries.

[86] In paragraph 42(b) of the Pleading it is alleged that the amount charged for rent was excessive, unreasonable and improper because it represented 45% of total rent charged by the Society "when at best only one quarter of the floor space of Law

Society House was occupied by staff engaged in the administration of the Fund". A claim is made that the Fund has been overcharged by $1,316,115 for rent and electricity but no particulars are given as to how that is calculated. Again one could perhaps infer that it represents the difference between 25% and 45% of rent charged.

[87] Notwithstanding that this was an application brought by defendants pursuant to r 293 the plaintiff has not favoured the court with any affidavit material supporting the allegations contained in the paragraphs in question. On the other hand these issues have been addressed in the defendant's material, particularly the affidavit of Fox. He has put forward material seriously challenging the unsubstantiated assertion in the statement of claim that the salaries and wages represented 42% of total and the rent and electricity 46% of total. His evidence has not been challenged.

[88] In any event, in accordance with *Harlowe's Nominees Pty Ltd* the plaintiff would have to establish that the decisions of the Society were not made in good faith and for a relevant purpose. It is not sufficient to make unsubstantiated allegations to the contrary.

[89] Again, as with the other claims against the defendant Society I am satisfied that here no reasonable cause of action has been disclosed and, in any event, the defendant Society has a good defence to the proceeding. Further, I am of the view that the claim is frivolous and vexatious.

Order

[90] For all those reasons, pursuant to r 293 of the *Uniform Civil Procedure Rules*, there will be judgment for the first, second and fourth defendants with costs of and incidental to the action and of and incidental to this application to be assessed.