IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 95
WRC 16/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	ELIZABETH GRACE STRACHAN Plaintiff
AND	ROBERT ALEXANDER MOODIE (ALSO KNOWN AS "MISS ALICE") TRADING AS MOODIE & CO, A LAW FIRM First Defendant
AND	ROBERT ALEXANDER MOODIE Second defendant
AND	SUZANNE PATRICIA MOODIE Third Defendant
AND	RA AND SP MOODIE LIMITED Fourth Defendant

Hearing: 23 February, 22-26 March and 17-20 May 2010
(Heard at Wellington)

Appearances: Peter Churchman, Lauren Beecroft and Rachel Vokes, counsel for plaintiff
Robert Moddie in person and as counsel for third and fourth defendants

Judgment: 14 June 2012

JUDGMENT OF CHIEF JUDGE G L COLGAN

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Introduction

[1] This proceeding, removed by the Employment Relations Authority[1] for hearing at first instance in this Court, involves claims by one lawyer against another. It is a very unfortunate case in the sense that, quite apart from the justiciable issues between the parties, it illustrates also the profound effects on the professional careers of each lawyer that this bitter feud between them has brought about. For the plaintiff, Elizabeth Strachan, the fallout from her relationship with Robert Moodie has included not only the frustration of a hoped-for career at the bar but also of perhaps her last opportunities, as a single woman, to adopt a child. For Mr Moodie, now in his early to mid 70s and well known as a crusading lawyer for those who despair of advocacy of their causes, his own case may be, if not his last, then a precursor to the end of his career.

[2] These remarkable and very unfortunate consequences were the subject of evidence: Mr Moodie acknowledged the steps that he took to oppose and frustrate Ms Strachan's adoption application the merits of which had no logical connection to

[1] WA 66/09, 22 May 2009.

the parties' dispute. Mr Moodie himself acknowledged that this case would probably be the final act of his career in the law.

[3] How those apparently extraordinary outcomes of an employment dispute can have come about can only be explained by observation of the parties and their numerous witnesses over the course of many days in Court and the contents of thousands of pages of documentary exhibits. These together illustrate what can only be described as destructive warfare between two people who were once close colleagues with significant mutual admiration for each other. At times during the hearing, when substantial time and energy was taken up arguing about insignificant sums of money expended on some item or other of office stationery, I was reminded of the same phenomenon in some matrimonial (now relationship) property litigation driven entirely in many such cases by vindictive recrimination. Frequent terse and even intemperate and prolonged interchanges between the principal parties and some of their witnesses and counsel illustrated the enmity between them. This litigation is only one of several proceedings in which they are involved and at least two of which may not yet be resolved.

[4] Those other proceedings mentioned include a civil prosecution of Mr Moodie by the Solicitor-General for contempt of court in which Mr Moodie engaged Anthony Ellis as his counsel and in respect of which Ms Strachan (as counsel) assisted Mr Ellis at Mr Moodie's request. Next, there are defamation proceedings still alive in the High Court in which Mr Moodie as plaintiff has sued Mr Ellis, Ms Strachan, and a media organisation. Although there has been a settlement of those defamation proceedings between Mr Moodie and Mr Ellis and the media organisation, Mr Moodie's causes of action against Ms Strachan remain alive. The third piece of associated litigation is another High Court proceeding brought by Mr Ellis against Mr Moodie alleging fraud and other serious causes of action. That proceeding was struck out, although only after vigorous preliminary exchanges affecting a number of preliminary issues that have arisen again in this case. Finally, there emerged in evidence the existence of yet more High Court litigation between (in effect) these parties over their rights and obligations in the future of the commercial premises at 1 Denbigh Square, Feilding which features also in this case.

[5] This has been a sad case to hear and decide.

[6] The second defendant holds the academic qualification of Doctor of Philosophy. He is thus entitled to be called Dr Moodie as he refers to himself and as he is widely known. As counsel, however, the convention is that he is referred to as Mr Moodie. Academic honorifics of counsel are not used in court in pursuit of the ideal of egalitarianism before the law. Because he has not only appeared in person but as gowned counsel for the other defendants, I propose to refer to him consistently throughout the judgment in the same way in which he was addressed in court, that is as Mr Moodie.

[7] This point is more significant, however, than merely justifying how Mr Moodie is described. Before trial, counsel for Ms Strachan, Mr Churchman, expressed his concern that Mr Moodie was proposing to act for himself and as counsel for other parties in a manner that was the subject of adverse comment in the judgment of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd.*[2] McGrath J wrote at [99]:

> Finally I wish to say that I agree with the observations of Wilson J concerning the desirability of practitioners not acting as counsel in litigation where they have been personally involved in the matters in issue.

[8] Wilson J expanded on this at [147] of the judgment, identifying that counsel are at risk of blurring their roles with those of witnesses and, pertinently in this case I regret to say, of losing their necessary objectivity as counsel. I agree with Mr Churchman that one of the consequences of Mr Moodie's conduct in this regard was to have lengthened and complicated unduly the trial of these proceedings. Ultimately, however, not only did this not operate to the defendants' advantage in the proceeding but my assessment is that it disadvantaged them and Mr Moodie in his role as party in particular.

[2] [2010] NZSC 5, [2010] 2 NZLR 444..

The parties

[9] The plaintiff and the second defendant encountered each other in the following circumstances. After a career in nursing and midwifery, Ms Strachan attained a law degree and undertook professional qualifications for Bar admission in New South Wales, Australia. Returning to New Zealand to care for her elderly mother in the Feilding area, Ms Strachan sought local employment in law whilst completing a post graduate degree in law at Victoria University and undertaking part time voluntary work in an advice bureau in Whanganui. There was not much opportunity for litigation specialisation in Feilding, even for a new lawyer wanting experience and supervision.

[10] After careers as a police officer, engineer, and farmer, Mr Moodie practised as a barrister sole and then on his own as a barrister and solicitor from his home near Feilding. Mr Moodie's specialty was in difficult, complex and potentially long running civil litigation. He developed a reputation as a lawyer prepared to act for underdogs, those who regarded themselves as up against the establishment, and whose proceedings might not be attractive to most lawyers because of their long game economic nature and apparently questionable prospects of success. Age was catching up on Mr Moodie and he was considering his professional options.

[11] Their circumstances threw Mr Moodie and Ms Strachan together. She saw her involvement in his practice as a way of gaining experience in her new profession that allowed her to undertake a transition from nursing to legal practice and to remain in the rural area in which her elderly mother and other family resided. Mr Moodie, conscious of the need for assistance in the preparation of his cases and practice and to allow himself to reduce his intense involvement, offered Ms Strachan an opportunity to have a professional association that would be mutually beneficial. This much was accepted background but it is the development and eventual explosive demise of that professional association which has been the focus of this proceeding and must be analysed to determine Ms Strachan's claims and the defences of Mr Moodie and the other defendants.

Witness credibility

[12] I regret to have to say that one of the reasons for the unduly long delay in deciding this case was the nature of Mr Moodie's approach to it. From the outset he contended strongly that the case was principally, if not solely, about the respective credibilities of Ms Strachan and himself. His lengthy written closing submissions did not focus so much on the issues to be determined on the plaintiff's claims, the relevant law, the facts to be found supporting or rejecting those claims, or other conventional elements of case analysis. Rather, they dwelt on a multitude of attempts to throw doubt on Ms Strachan's credibility as a witness by attempting to persuade the Court that parts of her evidence were inconsistent with previous documents including draft affidavits and statements of problem in the Employment Relations Authority. Although, in some respects, there are stark credibility contradictions between Ms Strachan and Mr Moodie, this approach to the case by the defendants was not only unhelpful but delayed the judgment significantly because of the necessity to examine carefully what in the end transpired to be unhelpful and unfocused arguments.

[13] Unfortunately, in pursuit of his contest of credibility approach, Mr Moodie invited the Court to determine the plaintiff's claims by disbelieving her evidence, the evidence of her witnesses and, in some instances, inconvenient parts of the evidence of his own witnesses. That was in the manner that counsel in a criminal trial might invite a judge or jury to conclude that there was reasonable doubt about the accuracy of their evidence. This was, of course, a civil trial based on statutory and civil causes of action, a balance of probabilities approach to contested credibility, and one in which witnesses for all parties may be genuinely mistaken about their recollections of events which occurred several years previously, and not simply manipulative and inveterate liars as Mr Moodie urged upon me.

[14] The principal protagonists and witnesses in this case, Mr Moodie and Ms Strachan, disagreed sharply on a very large number of crucial issues. The transcript of Ms Strachan's long cross-examination by Mr Moodie shows that large parts of this are taken up by Mr Moodie putting to the plaintiff that she was lying about issues and with the plaintiff's equally adamant rejections of those contentions. It is,

unfortunately, necessary for the decision of this case to prefer one account of a relevant disputed event to the other and therefore to accept the evidence of one witness and to reject that of the other. I have done so by the conventional methods of applying the onus and burden of proof of relevant facts in civil proceedings, by reference to contemporaneously generated documentation, by observing the witnesses during very extensive and probing cross-examination, and by applying a commonsense test of inherent probability or improbability.

[15] Although Mr Moodie put the credibility of all Ms Strachan's evidence in issue, it has not been necessary to decide whether her accounts or Mr Moodie's contrary accounts of a substantial number of aspects of their relationship are accurate. That is because, in many cases, resolution of such conflicts is unnecessary to determine the particular issues in the case. Unfortunately, substantial time was taken up to isolate those irrelevant contradictions which has, in turn, contributed to the delay in issuing this judgment. I will determine credibility disputes about relevant evidence as and when they arise in the course of this judgment.

The issues

[16] The issues for decision are as follows:

- Was the plaintiff an employee of one or more of the defendants?

- For what period did this employment relationship last?

- What were the terms and conditions of Ms Strachan's employment and, in particular, of remuneration?

- Were the office purchase and rental arrangement incidents of the employment relationship (in which case the plaintiff's claims relating to them are within jurisdiction) or a separate commercial transaction, other than between employer and employee so that the plaintiff's claims are beyond jurisdiction?

- Did the relevant defendant or defendants breach the plaintiff's employment agreement by not paying her agreed remuneration?

- Did Ms Strachan raise those complaints (that she now categorises as a personal grievance or personal grievances) with her employer within time?

- If so, was Ms Strachan constructively dismissed unjustifiably?

- What remedies is the plaintiff entitled to for unjustified disadvantage and/or unjustified dismissal and/or breaches of contract?

- Is Ms Strachan entitled to damages or other compensation for the loss of opportunity to acquire the legal practice?

- Were there breaches by the defendants or any of them of the parties' employment agreement and/or the Employment Relations Act 2000 (the Act) that warrant the imposition of penalties and, if so, how much?

- Costs.

Relevant facts

[17] Contrary to Mr Moodie's strenuously advanced position that his and Ms Strachan's professional association came about both entirely at her instigation and reluctantly on his part, I find that in late 2004/early 2005 they agreed willingly that she would henceforth be associated with the practice in a voluntary capacity which is probably best encapsulated by Mr Moodie's own description of it as a "pupilage". In return for gaining experience and skill, Ms Strachan was to assist Mr Moodie in the preparation of his files, to undertake relevant legal research, and to act in much of the way that a lawyer's clerk might in these circumstances. At the time Ms Strachan was both employed as a nurse and was an LLM student at Victoria University in Wellington, so that these loose arrangements to assist in the Moodie practice had necessarily to accommodate those other significant features of her working life. Not

unreasonably, it was the parties' understanding that Ms Strachan would be reimbursed for any out of pocket expenses incurred by her in relation to the practice and that if, from time to time, her contribution was material to a client's success, she might expect a modest gratuity reflecting this although that was not a contractual obligation.

[18] Ms Strachan came later to legal practice than most others. She had qualified first as a nurse in 1986 and subsequently as a midwife in 1990. A New Zealander but a long time resident of Australia, she graduated with a law degree from the University of Newcastle in New South Wales in 2003 but came to live in Feilding almost immediately thereafter, primarily to care for her elderly mother. Ms Strachan had qualified to practise as an employed and supervised solicitor in New South Wales but there is no evidence that she had done so. She completed a Master of Laws degree from Victoria University of Wellington in 2005 and was admitted to the bar in New Zealand in the same year.

[19] To gain experience in her intended field, to satisfy the practical requirements of qualification as a lawyer in Australia, and for the purpose of her Master's thesis, Ms Strachan sought work as a lawyer in and around Feilding. Opportunities were limited. After some time in a Whanganui community law office, Ms Strachan was recommended to contact Mr Moodie which she did. They met and Mr Moodie subsequently agreed to consider her curriculum vitae. At the outset, however, Mr Moodie made it clear to Ms Strachan that she could not expect payment for such work that she might undertake for him.

[20] I am satisfied that Mr Moodie described himself at the outset of his discussions with Ms Strachan as a "pro bono" lawyer. As it would to most people, this meant to Ms Strachan that he undertook legal work at no cost for persons unable to afford what would otherwise have been his fees for doing so. Mr Moodie was then, in 2004, in his late 60s, had retired from previous occupations, and had superannuation interests. It was not inconceivable that he could have been a pro bono lawyer in the sense Ms Strachan believed.

[21] When she began working with Mr Moodie in December 2004 Ms Strachan had, for the previous 10 months, been a volunteer at the Whanganui Community Law Centre. A wish to gain litigation experience (which she had not had in her voluntary role) was, among other things, the plaintiff's incentive to attain a position with a law firm.

[22] As a result of a combination of Ms Strachan's need for experience, the limited work available in or around Feilding, and a belief that, despite his inability to pay her a salary, Mr Moodie was engaged in a noble pursuit of justice for deserving underdogs without regard to the constraints of costs, Ms Strachan agreed to work for Mr Moodie for no, or at least no definite or immediate, income.

[23] She was able to do so financially because of her ability to work part time at weekends as a nurse and because the overheads of practice from home and/or from the Moodie home (where Mr Moodie then conducted his practice) ensured that, albeit very modestly, Ms Strachan had enough to live on.

[24] Over the course of 2005 and especially as her other working commitments dwindled and Mr Moodie was persuaded to take on more legal work, Ms Strachan came to work more regularly, intensively, and productively for the practice. The essentially voluntary work/gratuitous remuneration arrangements continued nevertheless.

[25] From a relatively early stage of this participation by Ms Strachan in the practice in 2005, she became increasingly suspicious that the financial nature of the Moodie legal practice was not as it had been portrayed to her by Mr Moodie. Ms Strachan came to doubt increasingly what she considered had been Mr Moodie's assurances that his practice was in the nature of a retirement hobby and that the work was performed for selected clients on a pro bono basis, that is for no professional fees.

[26] It is not determinative of these proceedings whether Ms Strachan's beliefs were well founded. However, it is clear that whatever Mr Moodie may or may not

have led Ms Strachan to believe, the practice was not, at least entirely, pro bono and he did receive a substantial income from professional fees.

[27] The significance of this well-founded suspicion was that Ms Strachan confronted Mr Moodie and asked that she be remunerated consistently with her input to the practice. Again, there is no dispute about this, nor that the basis of her remuneration would be an equal share in net profits. What the parties disagree about, trenchantly, is whether payment under this arrangement was to be at Mr Moodie's sole and absolute discretion (as he claims), when it was to commence, and whether it was to have any retrospectivity in the sense of including either previously billed work or prospectively billed but past-performed work.

[28] In addition to being given more responsible legal work for Mr Moodie in 2006, Ms Strachan also played a very full part in the administration of the practice including liaising with its accountant and being responsible for banking and office payments including cheques. She therefore took on, effectively, the role of practice manager as well as a staff solicitor. This makes less remarkable the otherwise extraordinary equal profit sharing remuneration arrangement agreed between them.

[29] Although much hearing time was occupied with minute analysis of work performed by the practice for a number of clients, how this work was billed and where the proceeds of those payments ended up, the disputed detail does not require either decision or recording in this judgment. It is sufficient to note that, increasingly during 2005 and 2006, Ms Strachan took on more legal work commensurate with her increasing skill and experience, and more remunerative work. In 2006 she also assumed greater responsibility for the administration of the practice including financial management. Towards the end of 2006, Ms Strachan began to develop her own clientele and to receive instructions in minor litigation from other lawyers, principally civil debt collection work in the Feilding District Court. By this time, also, Ms Strachan was developing an interest in the practice of family law which was not a feature of the Moodie practice. Unfortunately she came increasingly to believe that she was not being remunerated for her work as Mr Moodie had agreed and that he was otherwise operating the practice to her disadvantage.

An employment relationship?

[30] Because parties can only litigate in this Court if they were employer and employee, and because Mr Moodie and the other defendants deny the existence of such a legal relationship at any time, it is necessary to determine first whether, at the times relevant to the plaintiff's claims, Ms Strachan was an employee of one or more of the defendants.

[31] Section 6 of the Act governs this fundamental question. A series of cases interpreting and applying s 6, including the leading authority in the Supreme Court,[3] have given guidance about determining this question. The unusual, if not unique, feature of this case, however, is that the highly regulated field of legal practice adds another element to that decision.

[32] Ms Strachan was admitted as a barrister and solicitor of the High Court of New Zealand on 1 April 2005. It is axiomatic that she could not practise as a lawyer before attaining that status although she may have been engaged in a legal office as a clerk or in some other non-professional capacity. But even after her admission, there were further restrictions on the nature of her practice which make inherently more likely or unlikely the positions advanced for the parties at the relevant time. I shall return to this point later in the judgment,

[33] Mr Moodie was, at all material times, a barrister and solicitor of the High Court of New Zealand registered to practise as such by the Manawatu District Law Society. Formerly a barrister sole, by the time Ms Strachan came on the scene, Mr Moodie was practising as a barrister and solicitor. His practice was conducted under the style "Moodie & Co" although until Ms Strachan's arrival, there was nobody else in practice with him, whether as a partner or a legal practitioner in any other form of professional relationship.

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[3] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

[34] The third defendant, Suzanne Moodie, acted initially as a practice manager and accounts clerk but was not qualified formally to perform, and did not undertake, the work of a legal practitioner.

[35] The fourth defendant, RA & SP Moodie Limited, was a limited liability company that was the vehicle for the conduct of some of the administrative aspects of Mr Moodie's legal practice as well as, perhaps, in respect of other unrelated economic activities. Its directors and shareholders were Mr and Mrs Moodie.

[36] It is also pertinent to note that although not nominated as parties to this proceeding, there also feature more than one family trust entity in which Mr Moodie had an interest. Finally, the case involves also another non-party company, Denbigh Property Limited, in which the equal shareholders were Ms Strachan and the Moodie family trust.

[37] Although Mr Moodie's professional practice appeared conventional on the surface, its conduct by him was unconventional in many respects. As already noted, he specialised in difficult litigation, usually for individual persons, where legal proceedings taken were unlikely to have an outcome for a long period. Not unlike how much personal injury litigation used to be conducted (now more than 40 years ago), Mr Moodie held himself out as being prepared to wait for the payment of a fee from the proceeds of the litigation when these were finally realised. With the exception of payments of some disbursements which he was unable or unprepared to carry for such a long term and for which clients were asked to pay as they went along, the quid pro quo for long delays in charging fees was that these would be both contingent upon the outcome of the litigation and might represent a proportion of the proceeds of it rather than a strict fee for services rendered on a time and attendance basis. There was a fee premium in such circumstances.

[38] The initial agreement in December 2004 between Mr Moodie and Ms Strachan was that although she would undertake work for him, she would not be paid. Despite the fact that remuneration (including minimum remuneration under the Minimum Wage Act 1983) is usually an integral element of an employment relationship, it is not essential to the formation and maintenance of such a contract.

However, people can be employed for experience, effectively as volunteers in the sense of willing but unpaid employees. I am satisfied that was the arrangement between Ms Strachan and Mr Moodie in 2005.

[39] So at the outset of their relationship in December 2004, this was not one of employment. Ms Strachan and Mr Moodie agreed that she would be an observer of, and occasional assistant in, his legal practice. This relationship had the benefit to Ms Strachan of getting her started in a career in the law which would otherwise have been difficult. Ms Strachan wished strongly to live and work in or adjacent to Feilding to be with her elderly mother. In addition to the sort of paralegal work that she carried out with the Community Law Centre in Whanganui, Ms Strachan wanted to have experience of a legal office and of litigation of the sort undertaken by Mr Moodie. She was, and remained while initially at his practice called Moodie & Co, a midwife employed at the local hospital, albeit at nights and on weekends, allowing her free time during business hours with Mr Moodie. There was no obligation on either party to, respectively, provide observation experience or to undertake observation or have other input into cases undertaken by the practice. The nature of the 'work' undertaken for the practice at this time was commensurate with a legal observation arrangement rather than with any more formal sort of relationship including an employment relationship.

[40] During this first period of their association, it would have been logical and fair for the practice to have reimbursed Ms Strachan for any disbursements that she expended or out-of-pocket costs that she incurred, and perhaps even to have made an ex gratia payment to her for work that went above and beyond the expectation of an observer/observee relationship. Indeed I find the parties so agreed. But that did not mean that there was created thereby an employment relationship between them, nor did the mutual benefits provided to each other by some ad hoc arrangements reached over that period. These included the payment to Ms Strachan of her motor vehicle costs of travel to Victoria University in Wellington in return for her use (for Mr Moodie's practice) of the university's electronic databases to which she had access as a student. Although this is not to condone commercial use of facilities provided by the university to a student solely for academic purposes (indeed this was at least amoral conduct by both Ms Strachan and Mr Moodie), the practice's access to these

electronic databases in return for reimbursement of travelling costs was a mutually beneficial arrangement but which did not create or reflect an employment relationship between the parties at that stage.

[41] The plaintiff accepts that when she began work with Mr Moodie in 2004 they agreed that she would not be remunerated. She claimed this changed and she became an employee after he disclosed to her that he was not, as he had originally described himself to her, a "pro bono lawyer" but was, rather, one who invoiced clients and was indeed paid handsomely, albeit belatedly. Mr Moodie did so by showing the plaintiff invoices relating to the *Waugh* case.[4] Although she says that this revelation changed her status from volunteer to employee, I do not accept that this alone had that legal consequence at that point. That did not eventuate until January 2006 when, spurred on by this revelation, Ms Strachan insisted that she be remunerated.

[42] I agree, however, with Mr Churchman's categorisation of Mr Moodie's self-description as a pro bono lawyer as being misleading and deceptive. That phrase meant that he performed work as a public service and for no charge to a client or clients. That was not so. Rather, the evidence satisfies me that Mr Moodie charged many clients on contingency and other informal but real fee arrangements and, in other instances, delayed rendering accounts until litigation had been resolved to the point of producing a fund from which the bills could be paid.

[43] As already noted, however, the position changed significantly in early 2006 when Ms Strachan made arrangements to both work full time for the practice and was given substantial, if not complete, responsibility for its administration as well as working as a solicitor, albeit under supervision.

[44] The nature of the parties' working arrangement had been changing over 2005. By 2006 Mr Moodie directed that the legal work undertaken by Ms Strachan for his clients should be costed and, when appropriate, charged out at Crown Solicitor rates. Although Ms Strachan asked Mr Moodie for a written employment agreement, he declined to provide one because he asserted that it was unnecessary and he would do

[4] See [87] and following.

the right thing by her. Subsequent requests by Ms Strachan for a written agreement (a requirement in law if she was an employee) were consistently rejected by Mr Moodie for those reasons or variations on them. There was, however, no suggestion that there could be no written employment agreement because that was not the nature of their relationship. Rather, Mr Moodie's stated reason for refusing this was his professed emphasis upon trust and informality in their relationship.

[45] It is well established law that although the Act requires employment agreements to be in writing, an unwritten agreement such as that which I have found to have existed between the parties (or certainly one not meeting the minimum requirements of writing specified in the Act) was nevertheless valid and enforceable: *Warwick Henderson Gallery Ltd v Weston (No 2).*[5]

[46] The plaintiff impresses me as someone who was, although mature, intelligent and particularly determined, nevertheless trusting and even naive, certainly as far as business and legal practice are concerned. It is not difficult to understand that both Mr and Mrs Moodie were persuasive and convincing so that even though some assertions about their circumstances and the likely future may not have withstood steely analysis, Ms Strachan was nevertheless agreeable to throw her lot in with them at the time when there was a substantial level of friendship, trust and optimism for the future between them. Furthermore, the plaintiff had few, if any, alternatives open to her to be a litigation lawyer in Feilding.

[47] One indication of Ms Strachan's status is the manner in which Mr Moodie held her out to others. This included that she was a member of the staff of his firm and, on occasion, an employee. For example, in a letter dated 4 February 2005 to the Crown Law Office, Mr Moodie described Ms Strachan as being a new staff member and, in a later letter to her solicitors in this litigation, as being an employee ("… in respect to matters that predate her employment with Moodie & Co …"). In another document Ms Strachan was described as being Mr Moodie's "associate" and he used words such as "us" and "we" in descriptions of Moodie & Co's operations.

[5] [2005] ERNZ 921 (CA).

[48] Moodie & Co's 2006 financial accounts showed payments to the plaintiff there recorded as "salary". I accept that it could only have been Mr Moodie who instructed the accountant and provided financial information at that time for the period ending 31 March 2006.

[49] Contemporaneous documents also confirm that, at times, Moodie & Co charged out Ms Strachan's time as if she was a part of the firm.

[50] Mr Moodie controlled closely the work Ms Strachan performed and how she did so. Although by December 2006 the vast majority of this work was in relation to files that were Mr Moodie's responsibility, even the work that she was beginning to garner for herself was subject to his ultimate supervision and control.

[51] By the end of 2006 Ms Strachan was an integral part of the Moodie legal practice. Her administrative responsibilities had developed to such an extent that the practice was dependent upon their performance by her.

[52] The work that she undertook at and for Moodie & Co was under Mr Moodie's control. The clients that she represented were his clients and indeed she had few or none of her own. The other legal work that she performed was for cases in which Mr Moodie had been and was engaged. She did not work on her own files other than in a minor way and towards the end of 2006. The administrative and financial work she performed for the practice and, in particular, the financial aspects of this were also under Mr Moodie's control and also that of his wife.

[53] Ms Strachan was an integral part of the practice of Moodie & Co. She did not have her own practice. She did, however, appear with Mr Moodie in court as his junior, on occasions in his stead as counsel and on other occasions with counsel Mr Ellis acting for Mr Moodie as a party.

[54] By law, Ms Strachan was unable to practise on her own account. Undertaking work for a firm or a barrister and solicitor, she was required, in effect, to be an employee if she was not a volunteer as I have concluded she ceased to be after late 2005.

[55] Although what the law governing legal practice allowed and prohibited does not, of course, dictate necessarily the nature of the parties' relationship, consistency with legal requirements is one useful indicator of the legal nature of that relationship. At the time, the applicable legislative regime governing the practice of lawyers in New Zealand was the Law Practitioners Act 1982. Section 55(2) provided that except by leave of the High Court, no practitioner was to commence practice as a solicitor on his or her own account (including in partnership or otherwise) unless, during the eight years immediately preceding the date of his or her so commencing practice, he or she had not less than three years' legal experience in New Zealand. "Legal experience" was defined in subs (1) as meaning experience in any one or more of legal work in the office of a barrister or solicitor or firm of solicitors in active practice, experience in legal work in any of the State Services, experience in legal work in the office of a local authority or of a company, experience of full time law teaching at a university or experience as a member of the House of Representatives.

[56] Not only did Ms Strachan not fulfil these requirements for legal experience at the relevant time, but she had not taken the subsequent statutory steps under subs (2)(b) and (c) of satisfying the Council of the Manawatu District Law Society that she was a suitable person to practise on her own account and had received adequate instruction in, and examination of, her duties as a solicitor under the Law Practitioners Act and under relevant regulations and rules relating to the audit of solicitors' trust accounts or to the receipt of money.

[57] I should note that there was no suggestion that Ms Strachan was practising as a barrister sole in which case different qualification conditions would have applied. Rather, the plaintiff was an integral part of Mr Moodie's legal practice as a barrister and solicitor.

[58] Those statutory constraints confirm my conclusion reached on the basis of all other relevant evidence that Ms Strachan was, as she claims, the legal practice's employee between January 2006 and December 2006.

[59] Applying all of the relevant tests to the relationship required by s 6 and the case law under it, there is really no doubt that Ms Strachan was an employee of the Moodie legal practice. It remains, however, to determine the identity of her employer because there are several possibilities.

Who was the plaintiff's employer?

[60] It is easier first to eliminate from the first to fourth nominated defendants who or which was not Ms Strachan's employer.

[61] First, I am satisfied that Mrs Moodie was not the employer. Mrs Moodie is not a lawyer and although she participated in Mr Moodie's legal practice to the same extent that many spouses of sole practitioners do, no doubt in part for the purpose of sharing Mr Moodie's income, Mrs Moodie was an office assistant to the practice. As Mr Moodie was reported to have said at one point, Mrs Moodie may have been the highest paid cleaner in Feilding.

[62] Next, I am satisfied that RA & SP Moodie Limited was not Ms Strachan's employer. Although some elements of the Moodie legal practice used and involved this limited liability company for some administrative purposes, it was not Ms Strachan's employer for the period during which she was employed in the practice. It may be, as Mr Churchman established in cross-examination of Mr Moodie (and on which matter Mr Moodie was evasive), that his legal practice operated unlawfully as a limited liability company before more recent changes to the relevant legislation may have permitted this. But that does not cause Ms Strachan's employer to have been that company.

[63] Although Mr Moodie maintained that the Manawatu District Law Society had approved the operation of his practice and the financial accounting arrangements for it under the auspices of a limited liability company (the fourth defendant, RA and SP Moodie Limited), there was no documentary evidential confirmation of what the Court would have expected to have been an independent arrangement with the Law Society to this effect. My rejection of Mr Moodie's assertion is strengthened by the fact that under the Law Practitioners Act applicable at the time, it was unlawful for a

legal practice to be incorporated. Whether or not the Commissioner of Inland Revenue approved this corporate arrangement for accounting purposes, as Mr Moodie asserted, is really beside the point. The Commissioner's proper concern was not with the permitted legal status of entities operating legal practices and the Commissioner's apparent acquiescence does not thereby make them lawful.

[64] That leaves Mr Moodie personally (practising as Moodie & Co) as having been Ms Strachan's employer. That is not, of course, a conclusion I have reached simply by a process of elimination. It is also the irresistible conclusion on an analysis of all the evidence. Mr Moodie was a sole legal practitioner. It was he to whom Ms Strachan was answerable for the performance of her work. It was at his direction that she worked. Ms Strachan was an employee of the first defendant when she was employed by him.

Employment remuneration

[65] I turn now to the parties' remuneration arrangements in their employment relationship.

[66] I am satisfied that in January 2006 the parties agreed to share equally in the net profits of the practice. In the course of his evidence, Mr Moodie asserted that this arrangement was to share equally in such of the income of the practice as he, in his absolute discretion, was prepared to share. I was then, and remain, sceptical about the truth of this assertion. First, it is inherently unlikely that Ms Strachan would have agreed to work full time for Moodie & Co but only for such remuneration as Mr Moodie considered in his absolute and unfettered discretion that she should have. Ms Strachan did not agree to such an arrangement. There is no suggestion from either party that there was to be an annual salary as would be more usual in such cases, or even any other fixed periodic payment. Although it is very unusual for a new employee to join a legal practice as a staff solicitor with an equal sharing of net profits, that is the only alternative on Ms Strachan's case to the evidence of Mr Moodie's contended arrangement of unilateral discretionary profit sharing.

[67] There are, however, other factors which make such unusual equal sharing arrangements more probable than not. In addition to working full time as a solicitor in the practice, Ms Strachan also undertook the administrative responsibilities that would usually be performed by an office manager, accounts clerk, or other such members of the staff of a small legal office. This work was undertaken in addition to the work performed by Ms Strachan as a solicitor, so that I am satisfied that she worked significantly longer and harder than many other newly qualified solicitors in legal offices, and to this extent, her agreed remuneration may not have been excessive. Further, and following the contingency nature of the practice's client billing arrangements, Ms Strachan was expected to wait for the payment of fees after successful litigation or settlements rather than being paid a regular wage or salary. In these circumstances, also, a higher income in the form of an equal share of profits would be less remarkable.

[68] The financial arrangements from early 2006 were a matter of significant contention between Ms Strachan and Mr Moodie. Her case is that he agreed to pay her half of the practice's net profits. Mr Moodie says, however, that he retained a sole and unequivocal discretion as to how much of half of the net profits would be paid to Ms Strachan. So, while both parties agreed that there was reference to one-half of the practice's net profits, Mr Moodie's case is, in effect, that this would be the maximum that Ms Strachan could expect to receive and, logically, he alone would determine how much less than this she would actually receive. Ms Strachan's case is that this account of their agreed financial arrangements is absurd: as Mr Churchman put it in submissions, no one in their right mind would allow their income to be determined solely at the whim of the employer.

[69] I conclude that the condition Mr Moodie claims to have been agreed by which he alone determined what, if any, remuneration Ms Strachan would receive to a maximum of one-half of the practice's net profits, is so inherently unlikely that it must be discounted.

[70] As I have stated, it is very unusual for a junior barrister and solicitor employed by a legal practice to be remunerated solely on the basis of a share of net profits and, even more unusually, by an equal share in these. However, there is

nothing in law to prevent this and Mr Moodie's was a most unusual legal practice. There are a number of elements of Ms Strachan's employment and of the Moodie practice which tend to confirm that this was the remuneration arrangement to which the parties agreed and for understandable reasons.

Commencement date of remuneration

[71] In early 2006 Ms Strachan threatened to leave Moodie & Co after she found out that Mr Moodie had actually earned a significant income from the practice in the 2004/2005 financial year. Ms Strachan and Mr Moodie then came to a new arrangement which I am satisfied constituted their employment agreement as distinct from the relationship of volunteer assistance which Ms Strachan had provided to that point. The change achieved through this confrontation of Mr Moodie by Ms Strachan in early 2006 not only provided that she henceforth be paid remuneration but also instigated a relationship of employer and employee. Importantly, for present purposes, it must be fixed in time because the parties disagreed when the arrangements for Ms Strachan's payments began.

[72] There is a dispute between the parties as to when their new financial arrangements began in 2006. Ms Strachan says that this was from 31 January 2006, whereas Mr Moodie claims that the arrangement, by which she would have hoped to have been paid, did not start until the beginning of the 2006/2007 financial year. Again, although such arrangements or rearrangements in legal practices usually tend to coincide with the start of a new financial year, that is not invariably so and again there were a number of elements of these parties' unusual arrangements that tend to confirm Ms Strachan's case.

[73] The issue is complicated because this significant relationship change did not occur at the end of the practice's financial year when most such transitions to a remuneration regime governed by profit are usually commenced and because it is usually most convenient to do so. But, if nothing else, the contended 31 January 2006 commencement of an employment relationship in which remuneration was to be governed by profit share was no more unusual than many of the other aspects of Ms Strachan's and Mr Moodie's professional relationship. In these circumstances,

the Court must make the best of such information as it has or can calculate from such information.

[74] First, Ms Strachan rendered an invoice to Moodie & Co dated 20 March 2006 for a sum representing half of the proceeds of the Moodie & Co bank account as at 14 January 2006 which she alleged she had been promised. I accept that the parties agreed that Ms Strachan should receive half of the contents of the practice's bank account so that her claim to these tends to confirm that the (different) new financial arrangements were to operate during the last part of the 2005/2006 financial year.

[75] Next, on 2 February 2006, Mrs Moodie (on behalf of Moodie & Co) gave Ms Strachan a cheque and an accompanying note as a payment for work performed by the practice for a client whose identity is known to the parties but which will be referred to by the letters "BB" in this judgment. Mr Moodie now asserts that the cheque to Ms Strachan reflected some work she had done on the file, but was in fact only about one-quarter of the total fee received from that client. However, the contemporaneous documentation tends to indicate that it was intended to represent half of a fee and that this was the first time that this proportion of a fee had been paid to her.

[76] I accept that the parties' arrangement was that the practice's net fees were to be shared equally for work billed after 31 January 2006 and that the starting point for this arrangement was not 1 April 2006 as argued for by Mr Moodie.

[77] The plaintiff's remuneration was described as "salary" in the practice's accounts for the year ended 31 March 2006 although, by the time the accounts for the following year ending 31 March 2007 came to be compiled, after her employment had ended and these proceedings had been foreshadowed, payments to Ms Strachan made by cheque were recorded as rent or drawings. The description of such payments does not, however, determine their nature in law. I am satisfied that such payments that were made until the conclusion of Ms Strachan's employment in December 2006 continued to be as salary for her as an employee.

[78] Nor is it determinative of the position in law that the more usual payment mechanics for a staff solicitor, including PAYE deducted from regular payments and the like, were not adhered to. That Ms Strachan rendered invoices to the practice was unusual for an employee but not so much when the basis for her remuneration (a proportion of net fees paid when funds were received by the practice) is taken into account. I accept that the instruction to prepare her invoices to Moodie & Co came to Ms Strachan from Mr Moodie and he exercised a significant degree of control over what was included by way of detail in those invoices.

Profit sharing prospective or retrospective?

[79] A further issue affecting remuneration in this case is whether, as from 31 January 2006, the parties agreed that Ms Strachan would share equally in the profits generated by work performed from that date or whether she would share equally in the net profits from bills of costs rendered after that date but including work performed before it, or fees paid to the practice by clients after 31 January 2006 including for work performed before that date.

[80] I have concluded that it is more probable that the parties agreed that Ms Strachan would share equally in the partnership's net profits calculated from 31 January 2006, irrespective of when the work which generated those profits was performed. That would have reflected more or less accurately and fairly the increasingly significant role that Ms Strachan took in the practice and as a fee earner in the latter part of 2005. Although she was still then a volunteer and not entitled to payment of remuneration, whether by way of salary or a share of profits, the plaintiff was by then undertaking work for which most people in those circumstances would have been remunerated. When Ms Strachan confronted Mr Moodie with her dissatisfaction, after realising that he was not the pro bono lawyer that he had held himself out to her to be, she would probably have included among her demands fair compensation for the remunerative work that she had performed for Mr Moodie over the latter part of 2005. In these circumstances, it is more likely than not that the parties agreed to a profit sharing arrangement which was partially retrospective. It follows that Ms Strachan was entitled to a half-share of the net profits attributable to the practice for the two months before the end of its financial year and, in terms of

damages, to the extent that these can be calculated from an essentially annual accounting system.

[81] The plaintiff's uncontested method of fixing a sum for these retrospective profits was to claim a one-half share of the practice's bank account balance as at 31 January 2006. In my view this is probably less than might have been claimed but was and is the fairest way of calculating remuneration that I find the parties agreed would be Ms Strachan's entitlement representing the work which, and the rationale for which, was the value of her remunerative work performed for the practice in 2005 and January 2006. Again, the uncontested evidence is that a one-half share of the practice's bank account balance of 31 January 2006 was $7,027.47. I find that this was the arrangement agreed to by Ms Strachan and Mr Moodie as at 31 January 2006.

The Moodie accounting system

[82] This is another part of the case to which much time and evidence was devoted but also one which does not require a decision about many of the disputed accounts of the various witnesses. The practice's accounts are, of course, relevant to determining its income, expenditure and, therefore, net profit in which Ms Strachan was entitled to share. In this area, also, the situation was both complex and unusual so that it has not been easy to discern the true facts.

[83] Mr Moodie's practice issued statements for work completed, especially where its clients were other firms of solicitors who had instructed Moodie & Co. In other cases where there was a direct solicitor/client relationship and progress payments towards legal fees were sought by Mr Moodie, invoices were not, at least always, issued. What is significant, however, is that payments from clients were made to different bank accounts in the name of a variety of Moodie entities including Moodie & Co, RA & SP Moodie Limited, and one or more of the Moodie-associated family trusts. This was at times the result of an instruction by Mr Moodie to clients that payment was to be made in favour of one of these nominated entities by specifying bank account numbers for deposits.

[84] Mr Moodie was not an easy, and was indeed at times a frustrating, client of his accountant. Despite the latter's frequent recommendations for better accounting practices, Mr Moodie's professional practice operated more like a small family business in which personal expenses were paid for with the office cheque book or, later, its debit cards, and had to be treated subsequently as drawings. Other similar informal accounting practices prevailed.

[85] I agree with Mr Churchman's submission that it did not enhance Mr Moodie's credibility or his case generally that he attempted to shift responsibility for inconvenient financial evidence to his longstanding (and in many respects long-suffering) accountant, Stuart Atkins, whom Mr Moodie had nevertheless called as one of the defendants' witnesses and presumably as a credible and reliable witness of truth. I say "long-suffering" because of the clear impression that I obtained from Mr Atkins's evidence that Mr Moodie's conduct of multiple financial entities was so mixed and muddled that Mr Atkins tried vainly, but eventually unsuccessfully, to have Mr Moodie apply some financial discipline to separate his personal, practice, company and family trust entities in his day to day receipt and expenditure of money.

The *Waugh* case

[86] Mr Moodie had a prominent public profile as a result of his litigation practice. One case that he undertook, and of which he was justifiably proud, was the employment litigation between former Superintendent Alec Kynaston Waugh and the Commissioner of Police. Among the judgments of this Court in that litigation are those which are both reported as *Waugh v Commissioner of Police.*[6] In the first judgment, this Court concluded that Mr Waugh had been disadvantaged unjustifiably in his employment. The second judgment mentioned dealt with remedies for that personal grievance although, following the first judgment, Mr Waugh had been reinstated to his rank of superintendent and a payment on account of arrears of salary had been made to him.

[87] Despite the time and attention given to it in evidence, Ms Strachan has no claim to remuneration earned from that case. Mr Waugh's case illustrates, however,

[6] [2003] 1 ERNZ 236 and [2004] 1 ERNZ 450.

the operation in practice of Mr Moodie's fees arrangements with clients. Before his case was finalised, Mr Waugh advanced money to Mr Moodie at the latter's request. This included not only cash advances to meet case-related disbursements but also the payment by Mr Waugh of some practice-related debts and even some personal Moodie debts. So these were personal loans as well as disbursement advances. When Mr Waugh ultimately received substantial monetary compensation for the wrongs done to him, Mr Moodie took in recompense for his efforts not only the sum allowed for this as a result of the Court's judgment and a final settlement with the Commissioner of Police, but also an agreed and substantial proportion of Mr Waugh's compensatory damages. Mr Moodie had acted for Mr Waugh over a long period of several years, not only in the proceedings in this Court but also in other proceedings which nullified criminal convictions against Mr Waugh and which were associated with his employment issues. Mr Waugh professed himself so satisfied with Mr Moodie's efforts on his behalf that he agreed to all these arrangements even if, as was obvious from his evidence about these, he did not understand them or was even aware of some of them. There is certainly no complaint by Mr Waugh about his financial arrangements with Mr Moodie, even those that involve his substantial ongoing loans to Mr Moodie's family trust.

[88] As already noted, Mr Moodie was entitled to be justifiably proud of the result for the plaintiff in his case against the Commissioner of Police in which he was Mr Waugh's counsel. At times, and with those with whom he felt he could confide about these matters even although he subsequently fell out with many of them, Mr Moodie boasted about the success that Mr Waugh achieved and about the rewards that Mr Moodie received for representing him. He said that he had received fees for his representation of Mr Waugh of about $700,000. That was true on the evidence heard by me. Mr Waugh recovered financial remedies in his case against the Commissioner of Police in the region of $1.8 million. Although the plaintiff believed that Mr Moodie had told her that he had received both $700,000 and $1.8 million for his representation of Mr Waugh, I consider that she was mistaken. More probably, Mr Moodie said that he had taken fees of about $700,000 for a client who had received about $1.8 million in litigation.

[89] Mr Waugh's case is illustrative of the unusual and opaque way in which fees income was dealt with by Mr Moodie after their receipt. Mr Waugh's legal fees and disbursements were paid to, and dealt with by, Mr Moodie in a variety of different ways. Before the judgments of this Court and the eventual financial settlements between Mr Waugh and the Commissioner of Police, Mr Moodie asked for, and Mr Waugh agreed to make, a number of payments to him. These included paying Mr Moodie's telephone bills, paying his annual practising certificate costs, and making sometimes substantial cash loan advances. There were a number of other various ad hoc payments made by Mr Waugh to Mr Moodie in money and otherwise. They were, in effect, loans and/or advances against fees or disbursements.

[90] Equally unconventional for a lawyer was the destination of those payments and money. Most, certainly the more substantial, payments were made by direct credit from Mr Waugh's bank account to Mr Moodie's. This means that although he may not have attached much, if any, significance to it at the time, Mr Waugh must have been aware that the various monetary payments that he was making to Mr Moodie were going to different accounts at different banks. Mr Moodie arranged the direct credits of these amounts following instructions given by him to Mr Waugh including the relevant bank account numbers. These accounts included Mr Moodie's practice account, Mr and Mrs Moodie's company account and a family trust account. I assume that because the Commissioner of Police paid Mr Waugh directly and he then paid Mr Moodie for fees, the payments did not go through the firm's trust account as they would have had the Commissioner paid the settlement monies to Mr Moodie in the usual way after such litigation.

[91] When the *Waugh* litigation was concluded, Mr Waugh did not receive from Mr Moodie a statement or statements of account reconciling these various payments as would have been expected of a lawyer. Rather, in the course of discussions between Mr Moodie and Mr Waugh, a figure for legal costs was agreed on which Mr Waugh understood took into account the monies he had advanced to Mr Moodie. This was all, to say the least, unconventional practice for a lawyer engaged in substantial litigation involving very large amounts of fees for work over a long period.

[92] What Ms Strachan said she was told by Mr Moodie about the financial outcomes of the *Waugh* case are, although not precisely, broadly confirmed by the remarkable information produced to the Court by a combination of documents and Mr Waugh's own evidence. Mr Moodie (personally), together with Mrs Moodie, through the fourth defendant (RA and SP Moodie Limited), and also through the related entity, the Moodie family trust, was paid at least $700,000. Additionally, and more remarkably, the evidence established that Mr Waugh had advanced a further $302,584 to the Moodie family trust which sum had both increased and was still an outstanding debt at the date of trial. I do not accept Mr Moodie's denial of the existence of this loan and his attempt to attribute its existence and knowledge of it to his accountant. The most probable explanation for its existence is that it represented further fees paid by Mr Waugh to Mr Moodie but advanced to the Moodie family trust and treated in its accounts as a loan.

[93] I must note that in no way does Mr Waugh appear to be dissatisfied about the manner in which his case in general, and the fees for Mr Moodie's services in particular, were dealt with. Mr Waugh clearly trusted Mr Moodie implicitly and regarded, and continues to regard, the result of the case and the costs to him of bringing it, as very satisfactory. Mr Waugh seemed, even upon reflection when these matters were pointed out to him in cross-examination, to be largely unaware of a number of significant payments that he acknowledged he must have made to Mr Moodie and the way in which these were treated. One example was the payment of $140,000 from Mr Waugh to the Moodie family trust on 10 February 2004 which was treated in the accounts of the trust as a loan advanced to it by Mr Waugh. Mr Waugh appeared to have not known or forgotten that he had paid such a sum to Mr Moodie, to have been unaware that it had been direct credited to a bank account of a family trust and that it was there treated as a loan from him to the trust. So far as Mr Waugh was concerned, this was one of a number of payments made to Mr Moodie for his work as a lawyer on Mr Waugh's case. The family trust's accounts still show a substantial loan advance by Mr Waugh and indeed this appeared to have increased in the latest set of accounts available at the date of trial to more than $300,000.

[94] I emphasise again that although the Waugh case and Mr Moodie's representation of Mr Waugh are not directly in issue in this case, the financial

arrangements between the two men are illustrative of, and instructive about, other fee arrangements that are in issue. In these circumstances, it has been difficult to establish in evidence, and in this judgment, what were the first defendant's net profits at relevant times.

Remuneration loss?

[95] For reasons already set out, I have determined that the remuneration provisions of the employment agreement between the parties were that Ms Strachan would share equally in the net profits of the practice, that is in its income after expenditure. I have rejected Mr Moodie's case that this equal sharing was only of what he determined in his sole unfettered discretion would constitute that pool.

[96] More particularly, as in a law firm partnership arrangement, some of the attributes of which these parties shared although not being partners, this was calculable finally and precisely by reference to the practice's annual accounts. Clearly, however, the parties would not have agreed (and did not agree) to receive their shares of those net profits only after the end of each financial year. Common sense, and indeed their practice in this case, dictated that there would be periodic payments made to Ms Strachan (and drawings by Mr Moodie) with a final and precise adjustment being made after annual accounts had been prepared and approved. Logically, Ms Strachan's periodic payments should have been about the same as Mr Moodie's drawings throughout the year.

[97] There was, however, a particular and unusual arrangement between these parties in respect of such 'drawings' although, in the case of Ms Strachan at least, this was in the nature of wages or a salary. Because of Mr Moodie's practice to bill clients on a contingency basis and, generally if not inevitably, as and when money or other benefits of proceedings were received, there could be no regular pattern of payments to Ms Strachan. Rather, as and when the practice's accounts could afford to do so after receipt of fees, she would be paid in the same way as Mr Moodie made drawings. On occasions, this would be a round figure sum of several thousand dollars and, on other occasions, this would be a more substantial sum if a particularly remunerative file had been concluded.

Calculation of the plaintiff's claim for unpaid remuneration

[98] This claim is for the sum of $63,519.50 for the period from January 2006 to 18 December 2006. It takes account, by way of deduction, of the amounts Ms Strachan says were paid to her for this period (about $13,000) and also seeks a credit for half of the amount of management fees taken unilaterally by the defendants in 2006. This figure has been calculated to include an amount for the month of January 2006. I have, however, concluded that the equal profit share arrangement did not come into effect until 31 January 2006 so that, by Mr Churchman's calculation, the sum of $4,782.83 should be deducted from the claim. I accept, however, the calculations set out at paras 6.12-6.14 of Mr Churchman's final submissions as amended hereunder.

[99] Again by reference to Mr Churchman's calculations, I accept substantially, but not completely, the claim to an equal profit share for the period from 1 April to 31 December 2006. This produces a net profit for the practice for that period of $109,102 from which must be deducted the amounts already received by the plaintiff totalling $12,803.50, giving a net profit of $96,298.50 which, divided equally, produces a net profit share for Ms Strachan for that period of $48,149.25. That should, in turn, be reduced to $45,000 to take account of the period of about one working week in December 2006 after Ms Strachan left the practice.

[100] For reasons already set out, I also allow the plaintiff a share of the practice's bank account balance as at 31 January 2006 (the claimed share being $7,027.47). I also allow the plaintiff's claim to expenses incurred by her personally but not reimbursed by the practice which total $2,022.27.

[101] Finally in this regard, the plaintiff accepts that she must have a deduction for what were described as "judgment debtor" matters for which she was instructed by Mr Moodie to invoice directly although using the Moodie & Co GST number. I accept that six invoices to external clients are involved and the total deduction amounts to $853.38.

[102] The total amount of damages for remuneration loss for the period from 31 January 2006 to 18 December 2006 is, therefore, $57,989.19.

[103] The plaintiff is also entitled to interest on this sum at the applicable Judicature Act interest rate calculated for the period commencing 31 January 2007 and ending on the date of payment of the principal sum of damages to Ms Strachan.

Office purchase and rental

[104] At about the same time as Ms Strachan's employment began, she and Mr Moodie agreed to purchase a building in central Feilding for use as the office of the legal practice. By that time, the Moodie home from which the practice had been carried out had become inadequate for an operation of two solicitors and the voluminous document files that went with its style of litigation.

[105] A limited liability company (Denbigh Property Limited) was created for the purpose of owning the premises at 2 Denbigh Square, Feilding. The equal shareholders in the company were the Moodie family trust on one side and Ms Strachan personally on the other. It was agreed that the legal practice would pay rent to Denbigh Property Limited on a monthly basis, although that occurred in practice fitfully and incompletely at best.

[106] Ms Strachan contributed approximately $130,000 to the purchase and completion of the property at 2 Denbigh Square as an office. The Moodie family trust contributed a similar amount. The GST refund on the purchase was used to refurbish the premises. The building was used as the Moodie & Co office with each of Ms Strachan and Mr Moodie having their individual offices together with a number of common areas.

[107] After Ms Strachan and Mr Moodie parted company, the building continued to be occupied by them individually, in Ms Strachan's case as her residence but more latterly she vacated what became her exclusive part of the building and it was subsequently let by Mr Moodie to a commercial tenant.

[108] At the date of hearing there has been no agreement reached between the parties about either a sale of Ms Strachan's shares in the company to Mr Moodie or another Moodie entity or, alternatively, to Denbigh Property Limited selling the property and distribution of the proceeds between the parties.

[109] Although there was a good deal of evidence about the parties' conduct and motives in dealing or not dealing with the property after they had parted ways, that is largely immaterial to the questions for decision in this case except, possibly, as it may affect the value of the parties' interests in the property.

[110] Although the dispute between Ms Strachan and Mr Moodie about her entitlement to a share in the office premises property at 1 Denbigh Square, Feilding, cannot be adjudicated on by this Court, the parties' financial arrangements affecting that property are nevertheless an issue in this case because what purport to be rental payments (or the absence of them) to Denbigh Property Limited, which owned the premises, affect the calculation of the net profit of the practice and, thereby, Ms Strachan's remuneration.

[111] The more fundamental question for decision is whether this commercial transaction was an incident of the employment agreement between Ms Strachan and Mr Moodie in which case questions relating to the property may be justiciable (in Ms Strachan's case) or whether, on the other hand, as Mr Moodie contends, this was an independent commercial transaction in respect of which relief cannot be sought in this Court.

[112] I find this was an independent commercial arrangement which, although participated in by Ms Strachan who was a party to the employment relationship, involved another legal entity, the Moodie family trust, which was not her employer. Proceedings for the resolution of the parties' differences about this issue cannot be in this jurisdiction. Ms Strachan cannot claim relief for losses she says she incurred in these commercial transactions in this proceeding.

[113] So far I have dealt with the plaintiff's claim to remuneration loss as one of breach of contract by the defendant. The plaintiff's proceedings in this regard were

brought in the alternative to a personal grievance or statutory claim for wage recovery and, of course, she can only recover such losses once. Her remaining causes of action (being personal grievances for unjustified disadvantage and dismissal from employment) are subject to limitations arguments which must be determined first.

Was the plaintiff's unjustified dismissal personal grievance raised within time?

[114] As Mr Churchman submitted, and I find, there is no question that Ms Strachan raised her unjustified dismissal grievance within 90 days of leaving Mr Moodie's employment. That was on 18 December 2006. Her grievance was raised by letter dated 7 March 2007 received by Mr Moodie within the 90 day period. I reject the defendants' case that Ms Strachan left what they termed "her association" with them on 11 December 2006. Ms Strachan wrote to Mr Moodie on 14 December 2006 advising that her employment would end on the following day. However, as a result of her inability to finalise some of her work, she returned to the office premises on 18 December 2006 leaving Mr Moodie a note on that day confirming her conclusion of work.

[115] The 90 day period in the case of an unjustified dismissal grievance (including an unjustified constructive dismissal grievance) begins at the point of the conclusion of work by the employee: *Charlton v Colonial Homes Ltd*.[7]

[116] In these circumstances, I reject the defendants' claim that Ms Strachan's personal grievance was not raised in time.

Was Ms Strachan dismissed constructively?

[117] Ms Strachan says that Mr Moodie's fundamental breaches of their employment agreement entitled her in law to elect to reject these and to leave her employment in a way that the law categorises as a constructive dismissal. She says these were several.

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[7] [2001] ERNZ 759.

[118] First, the plaintiff says that Mr Moodie failed or refused to pay her agreed remuneration and evinced an intention to continue to so breach their agreement. In addition, she says that Mr Moodie breached the implied terms of trust and confidence in their employment relationship. Ms Strachan's case is that Mr Moodie's breaches were more serious than the manifestation of inconsiderate conduct towards her and were of a sufficiently serious nature, both past and prospective, to permit her decision to abandon her employment to be categorised as a dismissal.

[119] I accept, also, Mr Churchman's submission that this is a case in which the relevant events amounting to breaches accumulated over time (*Harrod v DMG World Media (NZ) Ltd*[8]) so that in considering this claim, the Court must have regard to "all the circumstances of the resignation …, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation.": *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.*[9]

[120] Mr Moodie's erroneous assertion of the remuneration conditions of the parties' relationship effectively decides this question. He not only asserted at trial that the remuneration arrangements were that he would pay Ms Strachan one-half of such profits as he determined in his unfettered discretion would be subject to this arrangement, but that this was also in effect the manner of payment of remuneration to Ms Strachan leading up to her abandonment of employment in December 2006. I have concluded that the parties' agreement was that their profit sharing arrangement was not subject to Mr Moodie's unilateral discretion as he asserted. His adherence to what he claimed was the agreed position was in breach of what I have concluded it to have been and fundamentally so. That is illustrated as much as anything by the minor proportion of her remuneration entitlement that Mr Moodie paid to Ms Strachan over the course of 2006, purportedly in accordance with his claimed entitlement to determine this unilaterally.

[8] [2002] 2 ERNZ 410.
[9] [1994] 1 ERNZ 168 (CA) at 172.

[121] I accept that, on its own, the repeated breach by Mr Moodie of the remuneration obligations of the parties' employment agreement, together with the very clear if not inevitable continuation of that position, entitled Ms Strachan to abandon her employment and that this amounted to a constructive dismissal in the circumstances.

[122] Cumulatively, also, Mr Moodie's past and very likely prospective breaches of his obligations of trust and confidence towards Ms Strachan certainly exacerbated the fundamentality of the remuneration payment breaches.

[123] For these reasons, I conclude that Mr Moodie dismissed (constructively) Ms Strachan on 18 December 2007.

Was Ms Strachan's constructive dismissal unjustified?

[124] The statutory test of justification of dismissal then in force was s 103A of the Act, now repealed and replaced with effect from 1 April 2011 by a new s 103A. Following my finding of dismissal of Ms Strachan, Mr Moodie had to satisfy the Court that what he did to her and how he did it were what a fair and reasonable employer would have done in all the relevant circumstances at the time. As in many cases of constructive dismissal, it is difficult to establish justification for a dismissal following substantial or fundamental breaches by the employer of the parties' employment agreement. Mr Moodie has failed to establish justification for his treatment of Ms Strachan, both for her (constructive) dismissal and how he carried out that end to their employment relationship.

[125] There simply was no justification for Mr Moodie to have failed or refused to pay Ms Strachan the remuneration she was due as a full-time employed solicitor in the practice and as the effective manager of it. Nor was Mr Moodie justified in his treatment of Ms Strachan as his employee which amounted to breaches by him of his trust and confidence obligations towards her. Indeed, the detailed evidence of events between Mr Moodie and Ms Strachan over, particularly, 2006 not only does not justify Mr Moodie's treatment of her but also establishes that this was manifestly unjust.

[126] For the foregoing reasons, Ms Strachan was constructively dismissed unjustifiably by Mr Moodie.

Remedies for unjustified constructive dismissal

[127] I have already dealt with Ms Strachan's remuneration loss as a matter of damages for breach of contract. Her claim is also, however, to compensation under s 123(1)(c)(i) of the Act for non-economic loss. That is a remedy for a personal grievance that I now address.

[128] The plaintiff seeks compensation of $30,000, a sum described by the Court of Appeal in 1995 as "a very high figure": *Trust Bank Wellington Ltd v Lavery.*[10] That was, however, more than 15 years ago and other cases have established broader benchmarks since then. For example, in the constructive dismissal case of *NCR (New Zealand) Ltd v Jones,*[11] an award of $20,000 for non-economic loss was described as being at the "lower end" of the scale of such awards.

[129] The Court's award for non-economic loss must reflect the very serious consequences to Ms Strachan of Mr Moodie's conduct towards her after dismissal which had the effect of aggravating the hurt and humiliation that she experienced as a result of it. This conduct (which came to her notice) included copying her in on a letter sent to the accountants for the first, second and third defendants, which accused Ms Strachan of tampering with their accounts.

[130] Mr Moodie made it unnecessarily and very difficult for Ms Strachan to deal with the property that she owned jointly with Mr Moodie's family trust at Denbigh Square in Feilding in which she had invested her life savings and which ought to have been the subject of a professional and orderly divestment consequent upon the ending of their employment relationship.

[131] Mr Moodie complained unmeritoriously about Ms Strachan to the Manawatu District Law Society, a matter of grave moment to a junior and inexperienced legal

[10] [1995] 1 ERNZ 105 (CA) at 109.
[11] [1998] 3 ERNZ 222 at 243.

practitioner. Mr Moodie even went to the extent of alleging, without any proper foundation, that Ms Strachan may not have had a law degree, thus impugning her admission as a barrister and solicitor. Indeed, he persisted with this groundless allegation well into the trial.

[132] As already noted, Mr Moodie withdrew the reference that he had previously provided to Ms Strachan in support of her application to the government department known colloquially as Child Youth and Family to adopt a child on the basis that she was, as he described it, a "psychopathic personality". It is appropriate to record that nothing seen by me would confirm that non-professional diagnosis by Mr Moodie. It is difficult to imagine any more calculated, vindictive and vengeful attack.

[133] Mr Moodie alleged that Ms Strachan had stolen a portable electronic hard drive and threatened to take that matter further with the Police. He threatened the plaintiff that he would undermine the sale of the property in which they each had beneficial interests in Denbigh Square in late 2006 if she did not do what he wanted and, at the time of the auction of this property, he attempted to deprive her of a fair purchase price. Mr Moodie has continued to threaten Ms Strachan with civil litigation, some of which has eventuated and is still ongoing in the High Court.

[134] Having observed him closely as a witness and conducting the defendants' cases during a lengthy trial, it is not possible for me to give Mr Moodie the benefit of the doubt about his intentions in these aggravating features of Ms Strachan's dismissal. They could only have occurred, and I find did only occur, out of vindictiveness, a perverse desire to bring about Ms Strachan's professional and personal ruination, and in an attempt to avoid his own accountability in litigation for the consequences of his bad faith conduct as an employer.

[135] In view of the intense distress, humiliation and injuries to her feelings brought about not only by Mr Moodie's conduct towards Ms Strachan leading up to, and at the time of, her constructive dismissal, but persisted in and aggravated by him afterwards, I consider her claim to compensation of $30,000 to be warranted and, in some respects, modest. An award of money can never compensate completely or

adequately for such consequences of unjustified mistreatment and unjustified dismissal but to the extent that it can do so, it is warranted in this case.

[136] For the foregoing reasons, an award of compensation of $30,000 under s 123(1)(c)(i) of the Act is appropriate, even modest. I award the plaintiff this sum.

Claim for loss of opportunity to acquire legal practice

[137] Ms Strachan says that not only did Mr Moodie assure her that she would be able to take over his legal practice when he retired from it, but that his breaches of their employment agreement and/or her unjustified dismissal meant the loss of this opportunity be compensated for in damages.

[138] This is a difficult claim for the plaintiff to maintain. There is no evidence of the value of Mr Moodie's practice at any time, let alone a prospective valuation reflecting the probable date of his relinquishment of the practice. Next, among many unconventional aspects of it, the legal practice was not like an established mixed provincial legal practice of which there are many throughout New Zealand including in the Manawatu area in particular.

[139] After a working career in different fields, Mr Moodie first practised as a barrister sole before establishing a practice undertaken from his home a relatively short time before the events with which this case is concerned. Even then, Mr Moodie's was a barrister's practice in reality. It focused almost exclusively on litigation. It attracted work from around the country, most of which came because of his high personal public profile and his associated reputation for tenacious conduct of litigation on behalf of underdogs. Despite Ms Strachan's assistance with a number of those files handled by Mr Moodie, it is very likely that much of this custom would have dried up when Mr Moodie was no longer himself practising.

[140] Although, by the time of her abandonment of her employment in December 2006, Ms Strachan had begun to both conduct and attract some work personally, this consisted largely of debt collecting and District Court agency appearances which would not have added much, if any, value to Mr Moodie's unique practice. Ms

Strachan was, by the end of 2006, still a very junior practitioner who had not conducted significant litigation on her own, which factor would also have affected whether litigants or instructing solicitors would have continued to refer work to the practice in the same manner as when Mr Moodie ran it. There is also the probability, in my assessment, that Mr Moodie would not have permitted his name to have continued to be associated with a practice that was not participated in by him. Ms Strachan would probably not, therefore, have taken over a practice that had the inherent value of the 'Moodie' name attached to it, certainly as prominently as it had been when the practice was conducted by Mr Moodie.

[141] Although Mr Churchman submitted that Mr Moodie's promise that Ms Strachan would be able to acquire his practice was an incident of her employment agreement in the sense that she was induced to continue to work for Mr Moodie in spite of limited and sporadic remuneration, that is too simplistic an analysis of the position. I am satisfied that the several operative reasons for her doing so included the following.

[142] Ms Strachan was very strongly motivated to live (and therefore work) in the Feilding area because of her need to support her elderly mother who was in ill-health. This limitation reduced significantly Ms Strachan's opportunity for employment in a legal office in any field of law.

[143] Next, at least until the revelations about Mr Moodie's true practice income became known to her, Ms Strachan was prepared to work for both minimal and sporadic income, believing that she was engaged in the noble professional pursuit of pro bono representation of clients who would not otherwise have their legal rights pursued. She was able to do so by continuing to work in her field of midwifery which compensated for the lack of a regular income from the legal practice. So while the prospect of taking over Mr Moodie's practice, or such of it as may have remained after his retirement from it, was a factor in Ms Strachan remaining until mid-December 2006, there were other and, cumulatively, stronger reasons for her doing so.

[144] I do not uphold the plaintiff's claim for compensation for loss of her opportunity to acquire the Moodie practice. This was more of a hope on Ms Strachan's part than a serious commitment by Mr Moodie to sell or otherwise allow her the opportunity to take over his practice. Further, the inherent value of Mr Moodie's practice upon his retirement from it would have been minimal in view of his unique personal style and the similarly unique style of its clientele. That part of the practice that was in reality barristerial would not have survived Mr Moodie's retirement to have been able to have been conducted thereafter by Ms Strachan.

[145] She has therefore failed to establish this head of claim.

Penalties for breaches of employment agreement and/or the Act?

[146] Ms Strachan seeks to have the Court penalise Mr and Mrs Moodie for aiding and abetting a number of breaches by Mr Moodie as first defendant of his obligations to the plaintiff.

[147] I do not accept, however, that Mr Moodie as second defendant can be said to have aided and abetted himself although he is separately cited as first defendant in the proceedings, trading as Moodie & Co. The reality of the position was that Mr Moodie was Moodie & Co. It was his practice and he was, until Ms Strachan came along as a volunteer and then a junior employee, the only person in the practice undertaking legal work. If he deserves to be penalised, that should only be in his one individual capacity and I proceed on that basis.

[148] First, Ms Strachan says that she requested, more than once, a written employment agreement but was rebuffed by Mr Moodie or at least strung along by assurances that he would eventually provide one but which he had no intention of doing. Mr Churchman relies, justifiably in my view, on Mr Moodie's senior practitioner status and his experience and knowledge of employment law. Failure to provide or enter into a written employment agreement is a breach of s 63A(2)(a)of the Act and of what was described as "an important aspect of employment law" in *The Wellesley Ltd v Adsett.*[12]

[12] WC 31/07, 3 December 2007 at [77].

[149] Mr Churchman for the plaintiff categorised Mr Moodie's breaches of Ms Strachan's employment agreement(s) as "egregious, deliberate and repeated" to use the words employed by this Court in *Prins v Tirohanga Group Ltd (formerly Tirohanga Rural Estates Ltd.*[13] Counsel also submitted that the breaches amounted to a "consciousness of wrongdoing" (*New Zealand Post Ltd v Communication and Energy Workers Union).*[14] I accept that a failure or refusal to pay wages is a breach of a fundamental and serious employer obligation which occurred during 2006. Additional alleged breaches which would have been established in evidence include failure to reimburse the plaintiff for expenses incurred in 2005, failure to reimburse the plaintiff for travel costs undertaken in relation to Moodie & Co, and the taking of substantial management fees from the practice when these were not permitted. These occurred, however, in 2005 before there was an employment relationship between the parties. So despite their reprehensibility, they cannot sound in penalties in this proceeding.

[150] Turning to the liability of the third defendant, Mrs Moodie, Mr Churchman emphasised her role as sometime office manager at Moodie & Co. I accept that at all material times in 2005 Mrs Moodie so acted and in more than a nominal role. Mrs Moodie said in evidence, for example: "Both he [Mr Moodie] and I regard each other as equal contributors to the work of the practice". As I have already noted in relation to the practice's financial arrangements, its bank account was also used as a personal bank account by Mr and Mrs Moodie with the third defendant regularly going through financial material with the practice's and the couple's accountant. Although Mr Churchman says that, in relation to 2006, it was difficult to see how the third defendant cannot have aided and abetted in the breaches of the plaintiff's employment agreement and of the obligation to provide her with a written employment agreement, I do not agree. To render someone who is not the employer liable for aiding and abetting an employer's breaches, a high standard of proof is required and this has not been made out in relation to Mrs Moodie's role during that year.

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[13] [2006] ERNZ 321 at [76].
[14] WEC 10/96, 28 February 1996 at 18.

[151] Mr Churchman accepted that the appropriate test to determine Mrs Moodie's liability was whether she "knew of the general contractual situation" without having to know its exact terms: *Credit Consultants Debt Services NZ Ltd v Wilson (No 3)*.[15] Counsel submitted that Mrs Moodie clearly knew of the contractual situation because, in very early February 2006, she handed Ms Strachan a cheque with an accompanying note that this was for half of the payment for the BB client matter. This, it was said, must have reflected the arrangement between Mr Moodie and Ms Strachan that she would receive an equal share of net profits although subsequent payments were not divided up in this manner by Mrs Moodie who was responsible for those preliminary accounting matters in the practice.

[152] In respect of 2006, I am not satisfied that there is a sufficiently high standard of proof of aiding and abetting attributable to Mrs Moodie to penalise her. The claims for penalties against the third defendant are therefore dismissed.

[153] I turn next to the plaintiff's claims for penalties against Mr Moodie for breaches of the Act.

[154] Section 4A allows for the imposition of a penalty for breach of statutory good faith requirements but, in effect, only for serious breaches. The focus is again not on compensating the party who has suffered from the breach but, rather, to penalise the guilty party and again, as in all cases of penalty payments, a penalty is payable to the Crown unless the Court orders otherwise.

[155] Mr Churchman submitted, however, that by analogy with awards of damages for breach of the New Zealand Bill of Rights Act 1990 (NZBORA), so too are s 4A penalties compensatory in nature and not punitive. That was, he submitted, the rationale of NZBORA penalties in *Simpson v Attorney-General [Baigent's case]*[16] adopting, as one of the purposes of the NZBORA, the promotion of human rights. Mr Churchman also submitted that the Court of Appeal concluded that a breach of an NZBORA duty must give rise to a remedy which, although labelled a penalty, is compensatory rather than punitive in nature.

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[15] [2007] ERNZ 252 at [76].
[16] [1994] 3 NZLR 667(CA).

[156] The breach of good faith identified by the plaintiff is said to have been Mr Moodie's exertion of pressure on Ms Strachan to contribute to the acquisition and refurbishment of the office premises at Denbigh Square. Such was the power of Mr Moodie's persuasion that Ms Strachan both broke a term deposit and contributed what were in effect her life savings to the purchase of this property in equal shares with the Moodie family trust. Ms Strachan's case was that in doing so, Mr Moodie held out to her that she would be able to take over his legal practice within the next two or three years if she continued to work for him. However, her case is that, in reality, he had little, if any, intention of allowing these promises to come to fruition and indeed manipulated Ms Strachan towards the end of her employment into attempting to sell to him, for less than what he had concluded was owed to her by the company in which they were (effectively) equal shareholders and directors, Denbigh Property Limited.

[157] The evidence is that the plaintiff lost between $5,000 and $10,000 by breaking the term deposit on which her funds were held and counsel invites the Court to impose liability for a sum at the mid-point of these, $7,500, for this breach of good faith.

[158] Mr Churchman distinguished the approach of the Court of Appeal to penalties in *Coutts Cars Ltd v Baguley*[17] where the breach of good faith was closely aligned to a personal grievance. Counsel submitted that the Court of Appeal was thereby attempting to avoid an employee "double dipping" by being compensated for both the dismissal and the breach. Here, however, Mr Churchman submitted, the situation which has led to Ms Strachan's claim for breach of good faith is not a factor supporting her personal grievance and I agree. In these circumstances, it is open to the Court to award compensatory penalties reflecting the gravity of the breach and the hurt and humiliation suffered by Ms Strachan as a result of learning that these representations that had been made to her by Mr Moodie were not to occur in fact and had not ever been so intended by him.

[159] It is important that in any penalty imposed on the first defendant, especially if it, or a proportion of it, is to be paid to the plaintiff pursuant to s 136(2) of the Act

[17] [2002] 2 NZLR 533 (CA).

rather than to the Crown, there is no element of double compensation for the plaintiff. I am not, therefore, prepared to impose a penalty for failure to pay salary when the plaintiff has already been adequately compensated by an order for damages and interest in this regard. [1] Similarly, there is no need to determine the plaintiff's unjustified disadvantage claim for failure to pay salary when this has been compensated. I am satisfied, however, that for those acts or omissions for which the first defendant should be penalised, there is no separate element of compensation for the plaintiff in this judgment.

[160] At the time of the first defendant's breaches in 2006, the maximum penalty able to be imposed on an individual person as the first defendant was (as opposed to a body corporate) was $5,000 in respect of each breach: s 135(2)(a).

[161] In respect of the first defendant's refusal to provide or enter into a written employment agreement with the plaintiff, I have concluded that although this breach of the Act was repeated and a response to a clear assertion of a legal right, Mr Moodie's motivation at the time was not as egregious as some of his subsequent conduct in relation to the plaintiff. As against that, however, there was a clear legal obligation set out in a statute with which he was familiar and in an area of law in which he practised. In these circumstances, I impose a penalty on the first defendant of $2,500, one-half of which ($1,250) is to be paid to the plaintiff pursuant to s 136(2) and the balance of which is payable to the Crown.

[162] In relation to the claims for penalties under s 4A of the Act, it is unnecessary for me to determine whether, and if so to what extent, these might be compensatory as well as punitive. That is because, on the facts, the plaintiff has not made out the very onerous standard of breach or breaches required. Section 4A requires that a failure to comply with the duty of good faith in s 4(1) was deliberate, serious and sustained. Those are cumulative and must, of course, relate to matters within the compass of the employment relationship. In respect of the Denbigh Square property transactions, I am not satisfied that this was within the scope of the plaintiff's and first defendant's employment relationship. As I have concluded elsewhere, this was a separate commercial transaction involving Mr Moodie's family trust and in which he interacted with Ms Strachan in his role as a trustee.

[163] Nor, pursuant to s 4A(b), am I prepared to find that, however egregious may have been Mr Moodie's conduct, it was intended to undermine the employment relationship with the plaintiff. At material times, Mr Moodie's intention was to maintain that employment relationship, albeit substantially to his benefit and Ms Strachan's disadvantage.

[164] The claim to a penalty or penalties under s 4A is therefore dismissed.

Summary of judgment

[165] The plaintiff has succeeded substantially in her claims against Mr Moodie.

- The plaintiff was employed by the first defendant from 31 January 2006 to 18 December 2006.

- The plaintiff was entitled to one-half of the net profits of the first defendant's legal practice for the period of her employment together with one-half of the practice's bank balance as at 31 January 2006, representing an allowance for shared net profit from work performed by her before that date.

- Ms Strachan is therefore entitled to damages for unpaid remuneration of $57,989.19 together with interest thereon at the applicable Judicature Act rate, calculated from 18 December 2006 to the date of payment of that sum to her.

- Office purchase and rental arrangements were not incidents of the parties' employment relationship and are, therefore, beyond this Court's jurisdiction.

- The plaintiff's unjustified dismissal personal grievance was raised with the first defendant within time.

- The plaintiff was dismissed constructively and unjustifiably by the first defendant.

- The plaintiff is entitled to compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $30,000.

- The plaintiff is not entitled to damages or other compensation for the loss of opportunity to acquire the first defendant's legal practice.

- The first defendant is to pay a penalty of $2,500, 50 per cent of such penalty being payable to the plaintiff and the balance to the Crown.

Costs

[166] The plaintiff is entitled to a reasonable contribution to her reasonable costs of these proceedings. Although in the circumstances it might be optimistic to do so, I will allow the parties the period of two calendar months from the date of this judgment to attempt to resolve costs issues between them. In the absence of such resolution, the plaintiff may then have the period of one month within which to file and serve a memorandum in support of an order for costs, with the defendants having the same period of one month thereafter to file and serve a memorandum in opposition.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Thursday 14 June 2012