SUPREME COURT OF QUEENSLAND

CITATION:	*Perpetual Trustee Company Limited v Cowley & Anor* [2010] QSC 65
PARTIES:	**PERPETUAL TRUSTEE COMPANY LIMITED** **ABN 42 000 002 007** (plaintiff) **V** **DARREN JOHN COWLEY** (first defendant) and **KYLIE JANE COWLEY** (second defendant)
FILE NO/S:	BS 1257 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	15 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2009
JUDGE:	Atkinson J
ORDER:	**Douglas Laing McClelland and Platinum Lawyers pay the plaintiff's costs of these proceedings from 7 September 2009, on an indemnity basis.**
CATCHWORDS:	COSTS AGAINST NON-PARTY – SOLICITOR'S DUTY TO COURT – MISLEADING STATEMENT BY SOLICITOR – where judgment regarding costs against the defendants' solicitor delivered – where defendants falsified documents relied upon by the court – where defendants' solicitor did not inform the court of falsification – where defendants' solicitor made a positive statement to the court that was misleading - where litigation was unreasonably continued as a result *Supreme Court Act* 1995 (Qld) s 221 *Legal Profession Act* 2007 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld) r 681, r 702, 703(2) *Legal Profession (Solicitors Rules) Notice* 2007 (Qld) r 3 *Legal Profession (Solicitors) Rule* 2007 (Qld) r 12, r 13.3, r 14, r 15

*Briginshaw v Briginshaw (*1938) 60 CLR 336, cited
Myers v Elman [1940] AC 282, cited
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 67 ALJR 170; 110 ALR 449, cited
White Industries (Qld) Pty Ltd v Flower & Hart (a firm) [1998] FCA 806; (1998) 156 ALR 169, discussed

COUNSEL: D Thomae for the applicant

G Radcliff for the respondent

SOLICITORS: Bennett & Philp for the applicant

Platinum Lawyers for the respondent

[1] The plaintiff, Perpetual Trustee Company Limited ("Perpetual Trustee"), sought an order that Platinum Lawyers & Conveyancers ("Platinum Lawyers"), who previously acted for the defendants in this matter, pay the plaintiff's costs of these proceedings from 14 July 2009, including reserved costs, on an indemnity basis.

[2] Platinum Lawyers acted for the defendants in an application to set aside a default judgment and enforcement warrant that had been regularly obtained by the plaintiff on the basis of a debt unpaid which was secured by a mortgage over the defendants' property. On that application, the defendants relied on documents from a bank and a credit union which appeared to show that the moneys alleged to be owing had in fact been paid, a matter sworn to both by the defendants and the principal of Platinum Lawyers, Douglas Laing McClelland. The judgment and enforcement warrant were set aside on 9 July 2009. The plaintiffs subsequently brought an application to set aside the orders made on 9 July 2009. They were set aside on the basis that the orders had been obtained by fraud, in that the documents relied upon at the application heard on 9 July 2009 had been altered to make it appear that payments had been made which had not in fact been made or to conceal the fact that payments that had been apparently made had subsequently been dishonoured.

[3] Mr McClelland and Platinum Lawyers were given a full opportunity to file evidence and make submissions as to the costs order proposed to be made against them.

The law as to payment of costs by solicitors

[4] The power of the court to award costs is found in s 221 of the *Supreme Court Act* 1995 (Qld) which provides:

> "The Supreme Court shall have power to award costs in all cases brought before it …."

[5] The rules as to costs are found in the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") in particular Chapter 17A which applies to costs payable or to be assessed under an Act, the UCPR or an order of the court. Rule 681(1) provides that:

> "Costs of a proceeding, including an application in a proceeding are in the discretion of the court but follow the event, unless the court orders otherwise."

[6] This rule reflects the inherent jurisdiction of the court to award compensatory costs at its discretion. In addition to this general rule there is a specific rule, r 690, which

provides that the court may order a lawyer to repay to the lawyer's client all or part of any costs ordered to be paid by the client to another party if the party incurs the costs because of the lawyer's delay, misconduct or negligence. In this case, however, the successful party has not sought its costs against the unsuccessful party but rather directly against the lawyer for the unsuccessful party on an indemnity basis. Such an order is within the inherent jurisdiction of the court as articulated in r 681(1).

[7] Division 2 of Part 2 of Chapter 17A of the UCPR deals with the two bases of assessment of the costs of a party in a proceeding. The first is the standard basis of assessment, which is governed by r 702, and the second is the indemnity basis of assessment, governed by r 703. Rule 703(2) provides that, without limiting the situations in which a court may order costs to be assessed on an indemnity basis, the court may order costs to be assessed on that basis if the court orders the payment of costs out of a fund, or to a party who sues or is sued as a trustee, or of an application in a proceeding brought for non-compliance with an order of the court.

[8] The jurisdiction of the court to order a solicitor to pay the costs of another party to litigation is twofold. The first and primary purpose is to indemnify or compensate the party who has suffered because of the lawyer's behaviour. The second basis is the court's supervisory jurisdiction over legal practitioners whose primary duty is owed to the court.

[9] These principles were considered in detail by Goldberg J in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*.[1] The application that Goldberg J considered was for an order that the firm of solicitors, Flower & Hart, who acted for Caboolture Park Shopping Centre Pty Ltd (in liquidation) ("Caboolture Park"), pay the costs of White Industries (Qld) Pty Ltd ("White Industries") of the proceeding which had been brought by Caboolture Park against White Industries. The application by White Industries was for Flower & Hart to pay their costs on an indemnity basis.

[10] The proceedings were commenced by Caboolture Park in December 1986 against White Industries for damages and other relief in respect of conduct alleged to have contravened s 52 of the *Trade Practices Act* 1974 (Cth) or to constitute fraudulent misrepresentation or negligent misstatement arising out of a building contract entered into between White Industries and Caboolture Park for construction of a shopping centre at Caboolture. The application was filed in the Federal Court. Proceedings brought by various subcontractors against White Industries and Caboolture Park arising out of the construction of the shopping centre which had been commenced in this court were transferred to the Federal Court to be heard with the action by Caboolture Park against White Industries.

[11] After 150 hearing days, Flower & Hart applied for leave to file a notice of cessation to act for Caboolture Park. A fortnight or so later a receiver and manager was appointed to Caboolture Park. There was no appearance on its part and the trial judge ordered that Caboolture Park's application against White Industries be dismissed and that it pay the costs of White Industries including reserved costs to be taxed or fixed in accordance with reasons to be published. As Caboolture Park was in liquidation no proceedings were taken by White Industries to recover the costs awarded to it under the order.

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[1] [1998] FCA 806; (1998) 156 ALR 169.

[12] Subsequently White Industries filed a notice of appeal against the costs order and sought an order that its costs be paid by Flower & Hart on an indemnity basis. The appeal was stood over on the undertaking by White Industries to file a notice of motion in the original proceeding seeking to join Flower & Hart as a party. White Industries by notice of motion sought orders that Flower & Hart be joined in the proceeding and that it pay all of the costs of White Industries on an indemnity basis.

[13] White Industries alleged that Flower & Hart in the course of acting for Caboolture Park:

> "(a) commenced and continued the proceeding on behalf of Caboolture Park in the knowledge that it had no worthwhile prospects of success in the proceedings in order to vex the applicant or in circumstances where had the respondent given reasonable attention to the relevant law and facts the respondent would have had such knowledge;
>
> (b) commenced and continued the proceedings on behalf of Caboolture Park not for the purpose of litigating the claims set forth in the statement of claim but for the collateral purpose of:
>
> (i) delaying action by the applicant against Caboolture Park to recover moneys repayable under the building contract [between White Industries and Caboolture Park];
>
> (ii) putting the applicant under pressure to compromise such claim;
>
> (c) delivered a statement of claim dated 22 December 1986 containing an allegation of fraud in circumstances where there was no factual basis for making that allegation;
>
> (d) accepted instructions to conduct the proceedings in a manner designed to obstruct and delay the hearing of both Caboolture Park's application … and the applicant's cross-claim … and did in fact conduct the proceedings in a manner designed to so obstruct and delay the hearing."

[14] It was alleged that that conduct was in breach of the duty which Flower & Hart owed to the court. Flower & Hart admitted that at all material times it owed a duty to the court:

> "(a) To conduct the proceedings before the court with due propriety.
>
> (b) To be honest with the court.
>
> (c) Not to act so as to obstruct or defeat the administration of justice by the court.
>
> (d) Not to be a party to an abuse of the court's process."

[15] The allegation that a solicitor has breached the duty he or she owes to the court is a very serious allegation. Accordingly it is appropriate that, while the standard of proof is the balance of probabilities, the approach of Dixon J in *Briginshaw v Briginshaw*[2] and the majority in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*[3] be followed. As Dixon J said in *Briginshaw* at 362:

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2 (1938) 60 CLR 336

3 [1992] HCA 66; (1992) 67 ALJR 170; 110 ALR 449.

> "The seriousness of an allegation made … or the gravity of the consequences flowing from a particular finding are considerations which might must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

[16] In *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* Goldberg J discussed in some detail the jurisdiction of the court to award costs against a practitioner explaining that the jurisdiction was compensatory rather than punitive but adding that the power to award costs against lawyers was because of the ability of the court to enforce duties owed by practitioners to the court. His Honour said at 229-231:

> "**Jurisdiction to award costs**
>
> The court's primary jurisdiction to award costs is found in s 43 of the *Federal Court of Australia Act* 1976 (Cth) which provides in subs (1):
>
> > 'Subject to subsection (1A), the Court or a Judge has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which any other Act provides that costs shall not be awarded.'
>
> This section confers jurisdiction on the Court to award costs not only against parties to proceedings but also against persons who are not parties to proceedings: *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 229. Cf: *Knight v FP Special Assets Limited* [1992] HCA 28; (1992) 174 CLR 178 at 185, 190, 192, 202; *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 at 979.
>
> In particular the court has jurisdiction to order costs against solicitors representing parties in proceedings before it. This jurisdiction is based upon the ability of the court to enforce duties owed by practitioners to the court: *Caboolture Park Shopping Centre Pty Ltd (In liquidation) v White Industries (Qld) Pty Ltd* at 231-234; *Myers v Elman* [1940] AC 282 at 318-319; *Grassby v The Queen* [1989] HCA 45; (1989) 168 CLR 1, 16-17; *Knight v FP Special Assets Limited* at 188. This jurisdiction is available notwithstanding the fact that the Federal Court does not maintain a roll of practitioners and does not have any strike off jurisdiction in relation to practitioners; it is available when practitioners appearing before the court have acted with impropriety: *Caboolture Park Shopping Centre Pty Ltd (In liquidation) v White Industries (Qld) Pty Ltd* at 233-234.
>
> The primary object of the jurisdiction is to reimburse to a party to proceedings costs which that party has incurred because of the default of the practitioner, that is to say it is a jurisdiction which is compensatory rather than punitive or disciplinary: *Myers v Elman* [1940] AC 282 at 289, 319 (cf 303 per Lord Atkin at 303 who said that the jurisdiction was punitive); *Davy-Chiesman v Davy-Chiesman* [1984] Fam at 48, 59, 60; *Edwards v Edwards* [1958] P 235 at 248;

Orchard v South Eastern Electricity Board [1987] 1 QB 565 at 571; *Michael v Freehill Hollingdale & Page* (1990) 3 WAR 223 at 233; *Monitornix Ltd v Michael* (1992) 7 WAR 195 at 201. The judgments in *Myers v Elman* are not consistent particularly in relation to whether the relevant jurisdiction is compensatory or punitive but subsequent cases have proceeded on the basis that the jurisdiction is compensatory: *Mauroux v Soc Com Abel Pereira da Fonseca SARL* [1972] 1 WLR 962 at 970; *Currie & Co v The Law Society* [1977] 1 QB 990 at 997; *Orchard v South Eastern Electricity Board* [1987] 1 QB 565.

There have been a number of formulations of the circumstances in which the jurisdiction is exercisable and enlivened. In *Myers v Elman* (at 319), Lord Wright said it is enlivened where a practitioner has conducted himself or herself in such a manner that the conduct involves:

> '… a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting in his own sphere the cause of justice.'

(See also *Currie & Co v The Law Society* at 997; *Davy-Chiesman v Davy-Chiesman* at 66).

Lord Wright had earlier said that:

> 'A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice.'

In *Myers v Elman* [1940] AC 282 at 292 Viscount Maugham agreed with the contention that the jurisdiction ought only to be exercised when there has been a 'serious dereliction of duty'. Lord Atkin at 302 referred to a duty to conduct litigation 'with due propriety' (see also *Re Bendeich (No 2)* (1994) 53 FCR at 427; *Orchard v South Eastern Electricity Board*; *Edwards v Edwards* [1958] P 235 247).

However, what amounts to a serious dereliction of duty will vary from case to case and there are many variations on this theme.

In *Re Bendeich (No 2)* [1994] FCA 1504, 53 FCR 422 at 427, Drummond J said:

> 'Lawyers should know that, so long as they are not guilty of either professional misconduct or gross, as opposed to mere, negligence in the way they conduct their client's case, they will not be exposed to any personal liability to pay either the costs of their own client or those of the opposing litigant.'

His Honour relied on *Myers v Elman* as "a sound guide to the circumstances in which it will be proper under s 43 of the *Federal Court of Australia Act 1976* and under s 32 of the *Bankruptcy Act 1966* (Cth) to make an order against a solicitor".

> In *Davy-Chiesman v Davy-Chiesman* at 67 Dillon LJ (with whom Sir John Donaldson MR agreed) said that what had to be shown was that the solicitor had been guilty of a serious dereliction of duty or serious misconduct and that to unreasonably initiate or continue an action when it has no or substantially no chance of success might constitute conduct attracting the exercise of the jurisdiction (see also *Orchard v South Eastern Electricity Board* at 572; *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544 at 548; *Monitronix Ltd v Michael* (supra) at 200). However in order to make out a serious dereliction of duty it is likely that gross negligence or misconduct will need to be established: *Myers v Elman* at 304, 319; *Re Bendeich (No 2)* at 427. More recently in *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* at 548, French J regarded a "serious failure to give reasonable attention to the relevant law and facts" as amounting to a serious dereliction of duty."

[17] A legal practitioner's duty to the court and therefore to the public administration of justice imposes duties of honesty, candour and integrity. A legal practitioner may not intentionally mislead the court. If it comes to the legal practitioner's attention that the he or she has unintentionally misled the court then the duty of the legal practitioner is to inform the court to correct the error. As Viscount Maugham said in *Myers v Elman*:[4]

> "A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes to the court to put the matter right at the earliest date, if he continues to act as solicitor upon the record."

[18] The *Legal Profession (Solicitors) Rule* 2007 ("Solicitors Rule") sets out the duties of persons who engage in legal practice in Queensland as a solicitor. The *Legal Profession (Solicitors Rules) Notice* 2007 (the "Notice") is subordinate legislation made under the *Legal Profession Act* 2007 (Qld). Rule 3 of the Notice refers to the Solicitors Rule having been made as solicitors' rules. The Solicitors Rule applies to the practice of legal practitioners as solicitors pursuant to Part 3.2 of the *Legal Profession Act* 2007.

[19] The statement of general principles in the Solicitors Rule with regard to advocacy and litigation says:

> "Solicitors, in all dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Solicitors should be frank in their responses and disclosures to the court, and diligent in their observance of undertakings which they give to the court or their opponents."

[20] Rule 12 of the Solicitors Rule deals with the duty to a client. Rule 13 deals with the solicitor's independence and the avoidance of personal bias. For example Rule 13.1 provides:

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[4] [1940] AC 282 at 294.

> "A solicitor must not act as the mere mouthpiece of the client … and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's … wishes, where practicable."

[21] Rule 13.3 provides:

> "Except where otherwise required by law or a court, a solicitor must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue."

[22] Rule 14 deals with the solicitor's duty of frankness in court. Relevantly it provides:

> "14.1 A solicitor must not knowingly make a misleading statement to a court.
>
> 14.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading."

[23] Rule 15 deals with a solicitor's duty once he or she becomes aware that the solicitor's client has lied to the court or falsified a document. Rule 15.1 provides:

> "A solicitor whose client informs the solicitor, before judgment or decision that the client has lied in the material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:
>
> 15.1.1 must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court;
>
> 15.1.2 must refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification;
>
> 15.1.3 must promptly inform the court of the lie or falsification upon the client authorising the solicitor to do so; but
>
> 15.1.4 must not otherwise inform the court of the lie or falsification."

[24] It follows from the rules governing the behaviour of solicitors and the authorities herein referred to that the relevant principles to be applied by the court on the present application for costs against the solicitors for the unsuccessful party are:-

(1) the court has an unfettered discretion, which must be exercised judicially, to award costs against a party or a non-party to litigation;

(2) costs should not be awarded against a person, including a non-party, unless that person be given an opportunity to be heard on the question;

(3) costs usually follow the event but the court may depart from that in whole or in part;

(4) costs are usually awarded on a standard basis but the court may award costs in appropriate circumstances on an indemnity basis;

(5) costs may be awarded against a party's legal advisers;

(6) parties are entitled to have their claims commenced, continued or defended by legal practitioners even if the lawyers have formed the view that their client's case has little or no prospect of success;

(7) however, a legal practitioner may not **unreasonably** commence, continue or defend an action that has no chance of success;

(8) the practitioner's behaviour will be unreasonable if it involves a serious dereliction of duty, such as an abuse of process of the court, obstructing or defeating the administration of justice or making an allegation of fraud when there is no factual basis for making such an allegation;

(9) a legal practitioner for one party may be ordered to pay another party's costs if that party incurs the costs because of the other party's lawyer's delay, misconduct or negligence;

(10) a legal practitioner may be ordered to pay the other party's costs if the litigation is unreasonably commenced, continued or defended because of a lawyer's serious failure to give reasonable attention to the relevant law and the facts where, if such attention had been given, it would have been apparent that there was no worthwhile cause of action or possible defence;

(11) legal practitioners are expected by courts to act with integrity and honesty and, except where it conflicts with those duties, in the interests of their clients;

(12) a legal practitioner may not intentionally mislead the court;

(13) if a legal practitioner becomes aware that he or she has unintentionally misled the court, the legal practitioner must inform the court and correct the misinformation as soon as reasonably practicable. If the legal practitioner fails to do so and thereby causes costs to be incurred by the other party to the litigation, the legal practitioner may be ordered to pay the costs so incurred.

[25] In *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*, Goldberg J ordered Flower & Hart, who acted for the unsuccessful party, to pay the costs of the successful party to the litigation on an indemnity basis because the firm unreasonably initiated the proceeding when there were no prospects or substantially no prospects of success in circumstances where the ulterior purpose in instituting the process was to effect an object beyond that which the legal process offers. In that case, the firm initiated the proceeding simply to delay and defer moneys due and owing under a contract and also pleaded fraud when there was no factual basis for the pleading.

The liability of the solicitors for the defendants in this case

[26] The question in this case involves a consideration of whether or not the legal practitioner for the defendants unreasonably continued to act in litigation for his clients once he realised or should have realised that the documents provided to him by his clients had been falsified. Such documents had been presented to the court as true and relied upon by the court in making an order which was subsequently set aside because the court had been misled. His conduct will, *ipso facto*, be unreasonable if he failed to

inform the court once he realised or ought to have realised that he had misled the court. An examination of this question requires a detailed consideration of the litigation and the role of the clients and the legal practitioners in that litigation.

[27] This claim commenced on 5 February 2009 when Perpetual Trustee claimed recovery of possession of the property at 27 Palmerston Drive, Oxenford described as Lot 106 on Survey Plan 100103 in the County of Ward, Parish of Barrow, with title reference number 50221841 pursuant to s 78 of the *Land Title Act* 1994 (Qld) ("the property"). The solicitor on the record for the plaintiff was Charles Young of Bennett & Philp.

[28] The statement of claim alleged that the defendants Darren John Cowley (the first defendant) and Kylie Jane Cowley (the second defendant) were the registered proprietors as joint tenants of the property and that Perpetual Trustee was the mortgagee of the property under a registered mortgage signed by the defendants as mortgagors. On 20 June 2008 the defendants entered into a written agreement with the plaintiff for the plaintiff to provide a home loan to the defendants which was entitled "Fox Symes Home Loan". The home loan for $389,000 was secured by the mortgage over the property. The statement of claim alleged that the defendants had defaulted under the home loan and, were in arrears to the plaintiff and were now liable to pay the whole of the amount due under the home loan. Default notices were issued on or about 11 December 2008. The plaintiff alleged it was entitled to obtain possession of the property pursuant to s 78(2)(c) of the *Land Title Act* 1994 and under the terms of the mortgage.

[29] The plaintiff effected personal service on the second defendant on 7 February 2009 and obtained default judgment against her on 16 March 2009. On 10 March 2009 the plaintiff obtained an order for substituted service against the first defendant. He was served pursuant to that order and on 24 April 2009 the plaintiffs obtained default judgment against him. An enforcement warrant for possession of the property was applied for on 29 May 2009 and issued on 11 June 2009. According to Mrs Cowley's affidavit filed on 3 July 2009 Mr Cowley was informed on 17 June 2009 by Mr Young of Bennett & Philp that a bailiff would be sent to evict them from the property.

[30] On Friday 19 June 2009, Mrs Cowley gave instructions to a firm of solicitors, Platinum Lawyers, that there was an enforcement warrant to evict them from the property which was the defendants' family home and that they were not in fact in arrears in their mortgage payments. Bank statements were provided by Mrs Cowley to support this assertion. Instructions were urgently sent by Platinum Lawyers to Susan Anderson of counsel with regard to advice as to setting aside the judgment and preventing the execution of the warrant for possession pending the outcome of an application to set aside the judgment.

[31] On Monday 23 June 2009 Mr McClelland, the principal of Platinum Lawyers, took over the file and sent a further letter of instructions to counsel enclosing *inter alia*, "copies of bank statements showing Mortgage repayments being made and a brief reconciliation of the amounts having been paid under the Mortgage".[5] Platinum Lawyers also sent a letter to the plaintiff's solicitors inviting them to consent to the setting aside of the judgment. They said their clients' instructions were that they had been making regular repayments under the mortgage since 3 September 2008 and were not in default and had never received any default notices.

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[5] Affidavit of Mr McClelland filed 3 November 2009.

[32] An application to set aside the default judgment and the enforcement warrant was filed on 3 July 2009. It was supported by an affidavit of Mrs Cowley also filed on 3 July 2009, an affidavit of Mr Cowley filed on 6 July 2009 and two affidavits of Mr McClelland which were filed by leave at the hearing of the application. The defendants provided the plaintiff with unsealed copies of the application and an affidavit of the second defendant on 26 June 2009 and an affidavit of the first defendant on 3 July. The defendants served a sealed copy of the application and incomplete copies of the affidavits of the first and second defendants by facsimile transmission on 7 July 2009.

[33] Mrs Cowley swore to a number of conversations she had with Fox Symes on behalf of the plaintiff in October 2008 about payments made on the mortgage. She also deposed to conversations she had with Mr Young of Bennett & Philp disputing that the defendants had received documents and disputing the assertion by the plaintiff that the defendants had not made various payments on their mortgage. She also deposed to conversations with an employee at Fox Symes about the enforcement warrant. She swore in paragraph 32 of the affidavit "Between 3 October and 25 March 2009 we have paid approximately $38,000 in repayments under the terms of the mortgage. Annexed hereto and marked 'KJC2' are true copies of my bank statements from where the direct debits have been being made."

[34] The bank statements which were attached to the affidavit are a one page statement from the New England Credit Union ("NECU") with regard to payments said to have been made in March 2009. All of the entries on that statement apart from the following have been obliterated.

POSTED	DESCRIPTION	DEBIT	CREDIT	BALANCE
23 MAR 09	DIRECT CREDIT ING DIRECT	5,000		[obliterated]
25 MAR 09	BILL PAYMENT FOX SYMES HOME LOANS Ref -2006062	4,931.00 Card 4434720 0001803 08		6,533.21 1,580.84

[35] She also attached what purported to be copies of electronic statements from her account with the Westpac Banking Corporation ("Westpac") between 3 October 2008 and 5 May 2009. All of the entries on that statement apart from the following have been obliterated or substantially obliterated. The obliterations to the Westpac and the NECU statements were made by Mr McClelland.

Date	**Description**	**Withdrawal**	**Deposit**	**Balance**
03 OCT	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	2758.68		[obliterated]

03 OCT	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	919.56		[obliterated]
03 OCT	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	2758.68		[obliterated]

10 OCT	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	919.56		[obliterated]
13 OCT	Deposit-Salary Ozcare		1310.41	[obliterated]

30 OCT	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	2960.27		– 2958.38
31 OCT	Direct Debit Dishonoured 0317571		2960.27	

03 NOV	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	2960.27		1591.71

01 DEC	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	4010.10		– 4013.31

03 DEC	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	4010.10		364.97

30 DEC	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	3856.34		– 1191.83

31 DEC	Direct Debit Dishonoured 0317571		3856.34	1812.51

03 JAN	Payment by authority to PNL ACF Fox Syme TRN to: 200606	3856.34		1596.12

30 JAN	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	3636.06		– 1596.00
02 FEB	Direct Debit Dishonoured 0317571		3636.06	1040.06
03 FEB	Payment by authority to PNL ACF Fox Syme TRN to: 200606	3636.06		1192.23
02 MAR	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	3636.06		984.59
30 MAR	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	3636.06		– 3243.23
31 MAR	Direct Debit Dishonoured 0317571	3636.06		248.83
03 APR	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	3636.06		744.08
30 APR	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	3636.06		– 1717.43
01 MAY	Direct Debit Dishonoured 0317571		3636.06	1918.63
03 MAY	Payment by authority to PNL ACF Fox Syme TRN to: 200606	3636.06		2596.00

[36] Mr Cowley deposed that he was an interstate truck driver and that as a result his wife, the second defendant, was primarily responsible for the home finances. He exhibited, *inter alia*, a copy of the direct debit request and a copy of the records of the plaintiff with regard to the defendants' loan account including interest, payments made and

payments dishonoured. Those records show that as at 3 June 2009 the defendants owed $428,559.96 on their home loan.

[37] The supporting affidavits from Mr McClelland commenced with a copy of the letter sent by Platinum Lawyers to Bennett & Philp on 23 June 2009. That letter contained the defendants' instructions that they had been making regular payments under the terms of the mortgage since its inception on 3 September 2008 and that they had not been served with the documents including default notices and a copy of the claim and statement of claim until judgment was entered. On the same day Mr McClelland sent further instructions to counsel setting out the summary of the payments made by the defendants on their home loan in addition to the documents already provided to counsel said to show that, not counting dishonoured cheques, $35,386.31 had been paid between 3 October 2008 and 25 March 2009. That summary was said to be:

3 October 2008	$2,758.68	
3 October 2008	$919.56	
3 October 2008	$2,758.68	
10 October 2008	$919.56	
30 October 2008	$2,960.27	Dishonoured cheque
3 November 2008	$2,960.27	
1 December 2008	$4,010.10	
2 December 2008	$4,010.10	Dishonoured cheque
3 December 2008	$4,010.10	
30 December 2008	$3,856.34	Dishonoured cheque
31 December 2008	$3,856.34	
3 January 2009	$3,856.34	
30 January 2009	$3,636.06	Dishonoured cheque
3 February 2009	$3,636.06	
2 March 2009	$3,636.06	
23 March 2009	$5,000.00	Made to the solicitors
25 March 2009	$4,931.00	

In fact, the payments do not add up to $35,386.31.

[38] It is possible to set out what then occurred from the affidavits relied upon at the hearing of the application to set aside the judgment and the affidavits filed at the hearing of the subsequent applications before me.

[39] Mr McClelland exhibited to his affidavit filed on 9 July 2009 a copy of his letter to counsel of 23 June 2009 setting out the payments referred to in his letter of 23 June 2009 to Bennett & Philp which the defendants asserted had been made to the plaintiff.

[40] Mr Young from Bennett & Philp replied by email on 25 June 2009 to Mr McClelland's letter of 23 June 2009 saying that contrary to Mr McClelland's letter about "dishonoured cheque payments" no payments were made by cheque, but that payments were made by the defendants to the plaintiff by a direct debit facility set up with their Westpac account. While direct debits were automatically taken from that account, because there were insufficient funds, the transactions were reversed. He enclosed a copy of the statement from the plaintiff showing that the defendants' account was in arrears by $36,593.98 as at 17 June 2009. He also enclosed the statement of the loan account by the plaintiff which was later exhibited to Mr Cowley's affidavit.

[41] Mr Young provided Mr McClelland with a list of what the plaintiff alleged were the only debits made from his clients' account or payments received from his clients, as follows:

- 3 October 2008 $2,758.68
- 3 October 2008 $919.56
- 10 October 2008 $919.56
- 30 October 2008 $2,960.27 (dishonoured – insuff funds – reversed on same day)
- 2 December 2008 $4,010.10 (dishonoured – insuff funds – reversed on same day)
- 30 December 2008 $3,856.34 (dishonoured – insuff funds – reversed on same day)
- 30 January 2009 $3,636.06 (dishonoured – insuff funds – reversed on same day)
- 28 February 2009 $3,636.06 (dishonoured – insuff funds – reversed on same day)
- 30 March 2009 $3,636.06 (dishonoured – insuff funds – reversed on same day)
- 30 April 2009 $3,636.06 (dishonoured – insuff funds – reversed on same day)
- 30 May 2009 $3,636.06 (dishonoured – insuff funds – reversed on same day)

The list showed that only $4,597.80 had been paid and that no payments had been made by the defendants since 10 October 2008. Mr Young also advised in his email that the plaintiff asserted that it had always told the defendants that it was not receiving the payments.

[42] Mr McClelland said that he responded to Mr Young's email of 25 June 2009 by sending a copy of the application and his client's affidavit to the plaintiff's solicitor and saying "it is clear from our client's bank statement that there is something clearly wrong with your client's accounting system." He asked for confirmation that there would be no activity in respect of the enforcement warrant over the weekend.

[43] On 26 June 2009 Platinum Lawyers again wrote to the plaintiff's solicitors asking for an undertaking that the plaintiff would not take any action in respect of the enforcement warrant or the defendants would seek urgent relief by way of injunction. Mr McClelland said that he sent that letter after receiving instructions from the second defendant who was concerned that the enforcement warrant might be exercised over the weekend.

[44] At 4.56 on that Friday afternoon, 26 June 2009, Mr McClelland received an email from the plaintiff's solicitor, Mr Young, saying that he had discussed the transaction listings

attached to Mrs Cowley's affidavit on the telephone with the plaintiff. He said "so as to assist us in resolving this matter, can you please ask your clients to obtain a detailed bank statement from Westpac which shows exactly which accounts the monies was [*sic*] being moved into? I think detailed bank statement really would clear things up for everyone as the current transaction listing is lacking in detail."

[45] He confirmed that the plaintiff's records showed no payments had been received and that the defendants had been told this on several occasions. He undertook not to take any steps to enforce the warrant for possession without three business days' prior notice.

[46] At 6.40pm on that same day Mr Young sent another email to Mr McClelland saying that on the basis of the transaction listing attached to his client's affidavit something was "amiss somewhere". He reiterated his request for bank statements from the defendants showing the account numbers of the accounts the monies went into. He asked Mr McClelland to put the application on hold for the time being to see if the matter could be sorted out.

[47] On 29 June 2009, Mr McClelland wrote to the plaintiff's solicitors with reference to the payments said to have been made by the defendants saying that his clients' instructions were that all direct debits in relation to their mortgage were to take place on the third day of each month not the thirtieth and it was clear that all debits on the third of the month were honoured.

[48] On 30 June 2009 Mr Young wrote to Mr McClelland referring to what appeared to be a discrepancy between the payments purportedly made by the defendants and the payments actually received by the plaintiff. He said that his client had on several occasions since November 2008 advised the defendants that it had not been receiving any payments from the defendants pursuant to the home loan. He asked for traces to be made by the defendants on the payments purportedly made by them to the plaintiff on 3 October 2008, 3 November 2008, 3 December 2008, 3 January 2009, 3 February 2009, 2 March 2009, 3 April 2009 and 3 May 2009 and for a trace to be performed on the NECU payment made on 25 March 2009. He also advised that whilst payments were initially to take place on the third day of each month Mrs Cowley had requested of the mortgagee that payments be made on a monthly basis starting 30 October 2008.

[49] Mr McClelland responded to Mr Young's letter of 30 June 2009 by a letter dated "25 June 2009". The date on that letter is clearly in error as the letter refers on its face to Mr Young's letter of 30 June 2009. He said that his client had instructed that the defendants had not received any advices from the plaintiff that they had not been receiving payments since November 2008 and that the debits taken from the defendants' bank account clearly showed that payments had been made. He said "we are currently requesting traces be conducted on payments to your client via Westpac and a copy of that report will be provided." He also referred to the personal toll that this matter was taking on the defendants. He requested a copy of the direct debit request signed by the defendants. That was provided by Mr Young on 2 July 2009.

[50] On 2 July 2009, Mr Young replied to Mr McClelland's letter that was mistakenly dated 25 June 2009 saying that his client recognised there was a problem that needed to be resolved in respect of the payments allegedly made by the defendants which were not received by the plaintiff but nevertheless they were instructed not to withdraw their client's enforcement warrant or consent to the judgment being set aside. Mr Young

said he was instructed to advise that the plaintiff would be willing to give an undertaking that it would not take any steps to enforce the judgment obtained so as to allow the defendants reasonable time in which to have traces carried out on the "missing payments". An alternative suggestion was that the plaintiff might provide its consent to an application by the defendants for the enforcement warrant to be stayed until traces had been performed on the alleged payments and the defendants had taken all reasonable steps necessary to have those traces carried out.

[51] The defendants' lawyers responded by saying they would file the application which had been proposed by the defendants in court on the following day and would seek to have the matter heard as early as possible. Mr Young responded by email on 3 July saying they awaited service of the defendants' application and affidavits.

[52] The defendants' solicitor then sent the application to the Supreme Court Registry and on the same day sent a letter to the secretary for the senior judge sitting in the applications jurisdiction asking that the matter which had been set down for 14 July 2009 be brought forward to a date between 8 and 10 July 2009 when the defendants' counsel was available. The letter referred to the defendants' personal circumstances and asserted that "it would be a tragedy for this young family for the Bailiff to exercise the warrant against the defendants in their circumstances." A copy of this letter was sent by Platinum Lawyers to the plaintiff's solicitor under cover of a letter where they said, *inter alia*, that their clients were apprehensive that the bailiff might attempt to execute the warrant before the hearing date.

[53] On 3 July 2009 Mr McClelland sent a letter by facsimile transmission to Mr Young saying:

> "We advise that Wesptac has advised our client that because a trace request has been placed on our client's account your client, Fox Symes will no longer be able to appropriate money from that account for at least three (3) years.
>
> Under the terms of the Mortgage this month's repayment is due today.
>
> Would you kindly advise on an appropriate account co-ordinate so that our client may pay this month's Mortgage repayment manually."

[54] On 7 July 2009 the defendants' solicitor sent a letter, mistakenly dated 29 June 2009, by facsimile transmission to the plaintiff's solicitor enclosing a sealed copy of the application and the affidavits of Mr and Mrs Cowley which had been filed and saying that the matter had been relisted to Thursday 9 July in the applications jurisdiction.

[55] On 7 July 2009 Mr McClelland also wrote to Mr and Mrs Cowley saying, *inter alia*, that, based on their instructions, he was of the opinion that Mr and Mrs Cowley had good prospects for overturning the judgment and defending the matter. Mr McClelland said it was clear from their instructions that the lender had breached many of its obligations under the Consumer Credit Code as well as s 84 of the *Property Law Act* which states that the mortgagee shall not exercise power of sale until default notice had been issued and 30 days had elapsed. He noted their instructions that they had not received any default notices. He asked them to sign the disclosure notice provided to them as required by the *Legal Profession Act* and their costs agreement. Mr McClelland then delivered a brief to counsel.

[56] On 8 July 2009 Mr McClelland wrote to the plaintiff's solicitors saying, *inter alia*, that "we anticipate that it will take at least a month for Westpac to perform the tracing on your client's direct debits." Mr McClelland deposed that he then received an email from the plaintiff's solicitors requesting that the application be adjourned until after those traces had been performed. He said that his clients instructed him not to agree.

[57] Mr McClelland swore in an affidavit filed by leave on 9 July 2009, that he had been shown the bank statements of the defendants which were exhibited to Mrs Cowley's affidavit "and say that all of those repayments have been made." In doing so, he expressed a personal opinion which appeared to provide independent confirmation that the payments had in fact been made. By making that positive statement he came under a duty to the court pursuant to clause 14.2 of the Solicitors Rule to correct the statement made by him in that affidavit if he became aware that it was untrue.

[58] Mr Young filed an affidavit in response to the defendants' affidavits by leave on the hearing of the matter on 9 July 2009. He exhibited copies of the default notices issued by the plaintiff to the defendants on 11 December 2008 and various other documents referred to in these reasons. The plaintiff also relied on an affidavit of Rosina Sheppard, an employee of the plaintiff.

[59] On the hearing of the application to set aside the judgment and enforcement warrant, on 9 July 2009, the plaintiff contested the application on the basis that it had only received three payments from the defendants under the home loan totalling $4,597.80 and had notified the defendants that they were in default under the home loan by serving default notices on or about 13 December 2008. The plaintiff contended that the default was not rectified and the judgments were entered regularly. Outside court, the defendants' legal representatives showed the plaintiff's legal representative unmarked copies of the Westpac statements which were exhibited to Mrs Cowley's affidavit but they did not provide the plaintiff's legal representative with copies.

[60] The applications judge set aside the judgment and the enforcement warrant. Her Honour observed in her reasons:

> "So far as the Plaintiff was concerned, no payment has been made to reduce the loan in accordance with the agreement from October 2008, although there were some isolated payments. There were many dishonoured payments. As far as the Defendants were concerned, payments were coming out on the third of the month. These were not received by the Plaintiff ...
>
> ... It is a matter of great mystery as to what happened to the monies which have certainly been taken out of the Defendants' account under the loan agreement. The Plaintiff has only been notified of dishonoured payments. There is a clear conflict of accounts. There have been a number of conversations in regards to this matter with varying accounts which cannot be resolved today and in any event don't go to the heart of the matter ...
>
> It is a matter of whether there is a good defence to the claim and, on that basis, the Judgments should be set aside. A draft Defence was exhibited to the Cowleys' solicitor's Affidavit. Material was sworn which supports the Defence ...

> On the issue of costs, the Defendants alleged that they ought to be paid by the Plaintiff on an indemnity basis, as a result of the high-handed way they were dealt with by the Plaintiff ... There is insufficient material to make that kind of conclusion ... Once the issue of the missing funds have been resolved, this may tell a different story. In any event, costs should be in the cause or costs reserved. I favour the latter ..."

[61] After the hearing of the application on 9 July 2009, further investigations by the plaintiff showed that the payments which the defendants and their solicitor deposed had been made to the plaintiff had not in fact been made and that the purported bank and credit union statements had been falsified.

[62] On 13 July 2009, Mr Young of Bennett & Philp sent an email to Mr McClelland confirming that Mr and Mrs Cowley could make payments in respect of their home loan by BPay, cheque or direct debit from a new account. He asked Mr McClelland to let him know what suited his clients. He also asked Mr McClelland to ensure that the Cowleys requested a trace on the NECU payment and advise Bennett & Philp as soon as the various tracing results came in. He followed that up on 14 and 16 July with emails asking what was their preferred method of payment.

[63] On 14 July 2009, Bennett & Philp wrote to Platinum Lawyers referring to the fact that prior to the hearing on 9 July 2009, they had been shown a "clean" copy of the defendants' Westpac bank statement and had requested a copy of that statement. They repeated their request for a copy of the Westpac bank statement to be provided as soon as possible and pursuant to r 211 of the UCPR. They also asked by what method the defendants intended to make further payments under the home loan.

[64] Mr McClelland deposed, in an affidavit filed on 3 November 2009, that on 15 July 2009, Mrs Cowley arrived at his office with documents which she instructed were received from Westpac at Oxenford purporting to be traces conducted on payments made to Perpetual Trustee. Those documents were exhibited to his affidavit and purported to be from Andrew Castledine, Operations Manager from Westpac in Sydney showing that the following payments had been made into the account of Perpetual Nominees Limited, at Martin Place in Sydney:

03/10/2008	$919.56
03/10/2008	$2,578.68
03/10/2008	$2,578.68
10/10/2008	$919.56
03/11/2008	$2,960.27
03/12/2008	$4,010.10
03/01/2008	$3,856.34
03/02/2009	$3,636.06
02/03/2009	$3,636.06

03/04/2009	$3,636.06
03/05/2009	$3,636.06
03/06/2008	$3,636.06

[65] On 17 July 2009 Platinum Lawyers replied to Bennett & Philp saying:

> "We note that the results from the traces performed on our clients Westpac account were provided to you by email yesterday. It clearly shows that our client's monthly repayments and obligations under the terms of the Mortgage were being honoured and that the Plaintiff, Perpetual Trustee Limited received the monthly payments."

Various complaints were made about the plaintiff and it was said that due to economic hardship caused to the defendants by the plaintiff they were not in a position to make the current repayments.

[66] Bennett & Philp replied on 22 July 2009 saying they were investigating the tracing result and asking the defendants' solicitor to contact the telephone number on the tracing results to "see if you are able to obtain further information as to the particular account number of the account into which payments were purportedly made and the time of payment, method of payment, etc." They also again requested a clean copy of the bank statements so that they could check their veracity. On the following day, they repeated that request and said that the plaintiff might take steps to subpoena Westpac in respect of their account systems.

[67] On 27 July 2009 Platinum Lawyers replied saying, *inter alia*, that the traces performed "clearly show" that monies pursuant to the direct debit authority held by the plaintiff had been deducted from the defendants' Westpac account. They said that further tracing was being undertaken to ascertain the exact account number into which those monies were placed. They said that their clients had already established that the payments had been made and that it was not up to their clients to investigate the destination of their repayments once the payments left their account. With regard to clean copies of the bank statements they asserted that they had been produced to the plaintiff's legal representative in court on 9 July 2009 and that their client objected to producing clean copies of the bank statements.

[68] Further correspondence ensued between the parties about the failure by the defendants to pay the current monthly home loan payments. Mr Young deposed, in his affidavit filed on 3 November 2009, that he had advised Mrs Cowley to cease making payments on the mortgage as she had lost her employment (as a result of taking too much time off) and they were now a single income family.

[69] Mr McClelland deposed that on 29 July 2009, Mrs Cowley delivered to his office what purported to be a trace performed on the NECU addressed to Mr Cowley dated 20 July 2009. He enclosed that with a letter to Bennett & Philp which included Mr McClelland's calculations as to the amounts owing by his clients.

[70] In the meantime, PH Legal, Business and Commercial Lawyers from Sydney, gave notice of default dated 5 August 2009 to the defendants under s 84 of the *Property Law Act* 1974 (Qld) and s 80 of the Uniform Consumer Credit Code.

[71] On 6 August 2009, Platinum Lawyers provided Bennett & Philp with a copy of a letter apparently under the hand of Sue Young, Finance Manager, on NECU letterhead to Mr Cowley dated 20 July 2009. That letter says:

> "On the 30th June 2009 you requested that a trace be performed on a self service B Pay, paid to 'Fox Symes Home Loans' on the 25th March 2009 for the amount of $4931.00, paid out of your S1 account 638436, as there is a dispute regarding this transaction.
>
> I am pleased to inform you that the B pay transaction has been debited from your account on the 25th march 2009 to an account 'Perpetual Nominees limited'.
>
> Should you have any further questions, please contact us on 132067 and one of our friendly staff will be happy to assist you."[6]

[72] On 7 August 2009 Platinum Lawyers again wrote to Bennett & Philp saying:

> "As requested by your office our clients have re-approached Westpac to perform further traces on your client's direct debit authority with a view to obtaining account numbers. Westpac have responded that they will not disclosure third party account numbers to our client. The direct debit authority was arranged by your clients accordingly the account number in which the monies have been deposited should be able to be sourced through your client or through Westpac via a notice on non-party disclosure."

[73] On 11 August 2009, a defence and counterclaim which had been served on the previous day, was filed. Mr McClelland was contacted by another solicitor from Bennett & Philp, Andrew Lambros, on behalf of the plaintiff, who told him that he had "discovered that the monies had gone missing because the payments did not exist and the defendants simply had not paid."

[74] Mr McClelland deposed that on 11 August 2009, Mrs Cowley delivered to him stamped copies of bank statements from Westpac. He said that they appeared to contain "the same identical transactions as to those exhibited to the Affidavit of Kylie Cowley sworn 3 July 2007." Mr McClelland said that he "did not perform any accounting work whatsoever on those statements and they appear on their face to be legitimate." However, even a cursory examination of these statements without the obliterations shows anomalies that at least call for explanation. They do not appear even at face value to be true bank statements. The payments purportedly made on 3 October 2008 have been previously set out. Once the previously obliterated transactions are revealed one can see that the balance before the first payment to Fox Symes on that date is $4,851.29, and the balance after the purported payment of $2,758.68 is $4,824.39. Such a result is not possible. One simply cannot pay $2,758.68 from $4,851.29 and be left with a balance of $4,824.39.

[75] The next payment to Fox Symes was on 10 October 2008. The balance before the payment of $919.56 was said to be $815.78. After the payment of $919.56, the balance was said to be $103.78. The following three transactions also show a balance of the account which cannot be correct if the transactions are correctly recorded.

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[6] Any spelling or grammatical errors appearing in direct quotations from material supplied by Mr McClelland are to be attributed to Mr McClelland.

[76] The bank statement without the obliterations shows the following dishonoured payment whereas the statement with the obliteration showed the payment without the dishonour.

1 Dec 2008	Payment to Fox Syme	$4,010.10
2 Dec 2008	Direct debit dishonoured	$4,010.10

[77] It should have become clear to anyone perusing the bank statements without the obliterations that there was some real doubt as to their authenticity. Mr McClelland had the alleged bank statements from 19 June 2009 which, if he had carefully perused them, would have put him on notice that they had been falsified.

[78] The defendants' solicitor had seen them in their unobliterated form before putting them before the court on 9 July 2009 as an exhibit to his client's affidavit. Moreover he had sworn in an affidavit filed on 9 July that he had been shown those bank statements and himself asserted that "all of those repayments had been made." He did not reveal at that time, as must have been the truth, that he had not carefully perused the bank statements and that he was relying on his client for the truth of the positive statement he made. In an affidavit filed by leave on 26 October 2009, he deposed that the facts and circumstances upon which that statement was based were the oral and written instructions of Mrs Cowley and the bank statements provided by her. He has never filed any affidavit withdrawing his assertion that "all of those repayments have been made." Even if he failed to realise the anomalies with the bank statements when he was given them, he should have carefully perused them when he obliterated most of the entries. There was nothing improper in obliterating irrelevant entries but a solicitor who does so must ensure that by doing so, the solicitor is not assisting the client in covering a fraud, even if inadvertently.

[79] On the same day, 11 August 2009, Bennett & Philp wrote to Platinum Lawyers enclosing a copy of traces carried out by the plaintiff. Those traces clearly showed that while there initially were credits from the defendants' account into the plaintiff's account in fact those amounts were later dishonoured a few days later because there were insufficient funds in the defendants' account to pay the plaintiff. Those traces were attached. The letter continued: "Our client is gravely concerned that the bank statements you previously provided with blacked out information on those statements which your clients swore in affidavits by your clients will in fact show these dishonours and accordingly the judgment was set aside through a deliberate failure by your clients to properly disclose all relevant information to the court." They attached a fax from Westpac to the plaintiff dated 30 July 2009 showing that information.

[80] The traces from the plaintiff's account attached to that letter show receipt of direct debits of $2,758.68 and $919.56 on 3 October 2008 and $919.56 on 10 October. Thereafter every direct debit payment was dishonoured.

[81] Mr McClelland deposed that he received from Mrs Cowley correspondence from Westpac to Mr Cowley of 10 August 2009 which showed, he said, that a direct debit (to the plaintiff) in the sum of $36,636.49 had been made and honoured. In fact that correspondence was a letter from Westpac to Mr Cowley referring to his direct debit claim for $36,636.49, informing him that:

> "We have been advised by PERPETUAL NOMINEES LIMITED that they dispute your claim as they hold an authority from you to

> debit your account. We attach a copy of their authority to debit your account, which we have received from them."[7]

Westpac told him to direct any further enquiries to Perpetual Nominees Ltd. This is not, without more, proof that a sum of $36,636.49 had been paid from the Cowleys' account to the plaintiff's account.

[82] On 13 August 2009, Mr McClelland served a sealed copy of the Notice of Intention to Defend and Defence and Counterclaim as well as a copy of the bank statements provided to him by Mrs Cowley on 4 August 2009. This was the first time the plaintiff had been provided with a clean copy of the bank statements, apart from being shown a copy on 9 July 2009. This was the plaintiff's first real opportunity to examine the discrepancies in the NECU statement and the Westpac statements.

[83] Mr McClelland saw his client, who was emotionally distressed, for an hour on 17 August 2009 and later that month wrote a letter to a psychologist seeking a report on Mrs Cowley and to a psychiatrist for a report on the Cowleys' eight year old son.

[84] On 28 August 2009 in response to a notice of non-party disclosure, NECU disclosed documents to Perpetual Trustee relating to the NECU account and the purported payment by NECU. These documents were a letter from NECU with regard to the Cowleys' account together with a print out of the relevant transaction period showing no payment from the NECU account as alleged by the defendants. The letter to Bennett & Philp from NECU was in the following terms:

> "1. A search has been completed of account Number 638436 and 638436S1 (on your documentation 63843681) in the name of Darren & Kylie Cowley for the amount of $4931.00 we advise that there was no BPay transaction done in this amount on or after 25th March 2009. There is also no record of any correspondence from Sue Young regarding a BPay transaction of $4931.00
>
> 2. There has been no correspondence between New England Credit Union Ltd and Mr DJ Cowley or Mrs KJ Cowley since June 2009. We have completed a trace on all BPay transactions around 25th March 2009 and advise that there were No BPay transactions made for that amount or from the account of Darren & Kyle Cowley
>
> 3. As the BPay payment was not made we were unable to do any traces for the amount of $4931.00
>
> 4. Please find enclosed printout of account No 638436 in the name of Darren & Kylie Cowley account from the period 1 March 2009 to 30 April 2009."

[85] Mr Young was informed on 7 September 2009 by Ms Hardman from NECU's head office that Ms Young, an NECU branch manager, had been shown the letter purportedly from her of 20 July 2009 and asserted that she did not write that letter and that it was "fraudulent."

[86] The print out of the account that had been exhibited to Mrs Cowley's affidavit had all of the transactions obliterated except for those from 23 March 2009. They have been set out in [33] hereof. When one looks carefully at the exhibit, it is apparent that the

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[7] No copy was attached to Mr McClelland's affidavit.

font style of these entries is different from the font style used for the entries above and below them. Even though the description and amounts of the earlier and later entries have been obliterated, the dates have not been obliterated which enables one to observe the differences in font styles. Further the NECU entries have two other anomalies: an arithmetical mistake and another entry error. They purport to show a debit of $4,931.00 from a balance of $6,533.21 leaving a balance of $1,580.84 on 25 March 2009, which is incorrect and bizarre in a computer generated document. Secondly, what is described as a direct credit from ING Credit of $5,000 on 23 March 2009 is entered in the debit column.

[87] The transactions for those dates in the printout provided by NECU to Bennett & Philp show the following, very different, entries:

POSTED	**DESCRIPTION**	**DEBIT**	**CREDIT**
23MAR09	POS W/D COLES QLD HEL-10:0	214.87	1,533.21
	Ref-121471, Card-4434720000180308		
27MAR09	DIRECT CREDIT	69.98	1,603.19
27MAR09	From: AUS GOV FAMILIES Ref: 841R5787203792968X		

[88] It is apparent from this that the entry, which suggested that a BPay payment of $4,931 was made to Fox Symes Home Loans on 25 March 2009, does not reflect a transaction that occurred and has been interpolated by someone who had an interest in misleading the court by suggesting that such a payment had been made.

[89] In a letter dated 1 September 2009, pursuant to its notice of non-party disclosure, Westpac disclosed documents including bank statements to the plaintiff relating to the defendant's Westpac account and the payments purported to be made from it. Those documents included statements for the Westpac account covering the same period as the Westpac statements which had previously been exhibited to Mrs Cowley's affidavit. The relevant entries in the statements exhibited to Mrs Cowley's affidavit are set out in [34] hereof. The statements provided by Westpac to the plaintiff for the relevant dates are entirely different. The first example is found in the correct bank statements for 3 October 2009 which show:

Date	Description	Withdrawal	Deposit	Balance
03 OCT	Withdrawal by EFTPOS 0062243 Gaven Express Gaven Qld 03/10	26.90		4824.39
03 OCT	Payment by Authority to PNL ACF Fox Syme TRN to: 200606	919.56		3904.83
03 OCT	Payment by authority to PNL ACF Fox Syme TRN to: 200606	2758.68		1146.15

[90] It can be seen that the first withdrawal in the bank statements produced by Mrs Cowley which was said to have taken place on 3 October of $2,758.68 to Fox Symes was not made and the entry was false.

[91] The next payment said to have been made was on 10 October 2008. The correct bank statement shows that this payment was made.

[92] The next relevant payment was said to have been made on 3 November 2008. The Westpac bank statement shows that no such payment was made.

Date	Description	Withdrawal	Deposit	Balance
31 OCT	Payment by authority to Westpac Life Ins DM485101 732-607	53.92		-88.79
03 NOV	Direct Debit Dishonoured 0002631		53.92	-34.87
03 NOV	Package Fee	5.00		-39.87
03 NOV	Direct Entry Debit Dishonoured Fee 0002631	35.00		-74.87
03 NOV	Payment by Authority to Calliden Ins Ltd0020047708	110.70		-185.57
04 NOV	Direct Debit Dishonoured 0125353		110.70	-74.87
04 NOV	Direct Entry Debit Dishonoured fee 0125353	35.00		-109.87

[93] The next relevant payment was made on 1 December 2008. The correct statement shows that this was dishonoured on 2 December 2008.

Date	Description	Withdrawal	Deposit	Balance
01 DEC	Payment by authority to PNL ACF Fox Syme TRN to 200606	4010.10		-4013.31
01 DEC	Withdrawal at CBA ATM MBL Gaven Qld 447499 126730 291108	300.00		-4313.31
01 DEC	Fee – withdrawal at CBA ATM MBL Gaven Qld 447499 126730 291108	2.00		-4315.31
02 DEC	Direct Debit Dishonoured 0002631		107.84	-4207.47
02 DEC	Direct Debit Dishonoured 0125353		221.40	-3986.07
02 DEC	Direct Debit Dishonoured 0317571		4010.10	24.03

[94] The next payment is said to have been made on 3 December 2008. There was no such payment on that date. The same is true for the payments alleged to have been made on 3 January and 3 February 2009.

[95] The next alleged payment was 2 March 2009. The true bank statement showed that that was dishonoured on the following day and that the balance in the false bank statement had been altered to make it appear that the payment would have been allowed.

[96] The next payment alleged to have been made was said to have been made on 3 April 2009. The correct bank statements show no relevant payment made on that date. The same is true of the payment alleged to have been made on 3 May 2009.

[97] The correct bank statements provided by Westpac to the plaintiff show that the plaintiff's original assertion as to having received only three payments: $2,758.68 and $919.56, on 3 October 2008 and $919.56 on 10 October 2008, was correct.

[98] Westpac also disclosed to the plaintiff in response to its notice of non-party disclosure true copies of the facsimiles from Andrew Castledine which confirmed two payments having been made from the Cowleys' account to Perpetual Nominees Limited on 3 October 2008. This has the same reference number as a purported fax with quite a different text which had been disclosed by the Cowleys to support their assertion that they had made the various payments on their home loan which they swore they had made. Despite an affidavit swearing to the contrary filed by Mrs Cowley by leave on 5 November 2009 together with a number of other assertions made by her in that affidavit, it is apparent that the Westpac statements provided by her to Mr McClelland were not in fact true statements from Westpac and the transactions alleged to have been made in them from the Cowleys' account to the plaintiff or another entity on behalf of the plaintiff either did not occur or if they occurred were dishonoured apart from the three payments which the plaintiff alleged were made pursuant to the home loan and the mortgage.

[99] On 4 September 2009, Mr McClelland wrote to Mr and Mrs Cowley setting out that, against his advice, unless the matter was able to be settled by 7 September 2009, they wished to abandon their claim. He received written advice from the plaintiff's solicitor on that day that his clients' offer was refused. Bennett & Philp reiterated to Mr McClelland that Perpetual Trustee wanted possession of the property as soon as possible and that the proceeds of sale would be used to pay off the monies owing under the home loan plus interest, fees and Perpetual Trustee's legal costs. Mr McClelland advised Mrs Cowley that a "further Application to the court would be necessary to place the Defendant in a better position before withdrawing." It is unclear what application could possibly have been made by the defendants which would have put them in a better position.

[100] On 7 September 2009, Mr Young emailed to Mr McClelland a copy of Perpetual Trustee's reply and answer and asked him to contact him at his earliest convenience "so that the parties to this matter can avoid any further unnecessary costs."

[101] Mr McClelland telephoned Mr Young and said his counsel was currently preparing an application. Mr McClelland told Mr Young he could not understand why Perpetual Trustee was denying that the payments had been made. Mr Young took Mr McClelland through the unmarked Westpac statements referring specifically to various transactions where the balances did not add up and even an instance where a

withdrawal was alleged to have been made and a figure appeared in the deposit column. He noted that they had serious concerns about the unmarked Westpac statements however he said in a file note that he was careful not to make any allegations as to impropriety by him or his clients. Mr Young also told Mr McClelland that they had obtained copies of documents directly from NECU and Westpac which did not match the statements provided to them by the defendants. He particularly noted that the transactions on the third of every month did not match at all.

[102] Mr McClelland referred Mr Young to a letter from Westpac telling the defendants that $36,000 had been paid to Perpetual Trustee. Mr Young told Mr McClelland that Westpac had told the plaintiff that no such letter went out.

[103] On the same day, 7 September 2009, Mr Young sent an email to Mr McClelland enclosing two letters. The first was a letter provided to Mr Young by Mr McClelland purportedly from NECU alleging that a payment of $3,931 had been made from the Cowleys' NECU account. He also attached a facsimile from NECU which denied any correspondence had gone out to the Cowleys since June 2009 and which confirmed that no payment was made. Mr Young pointed out that a true copy of the NECU statement showed that four of the relevant dates were completely different from the statement provided by Mr and Mrs Cowley which was said to have been from NECU.

[104] Mr Young sent another email to Mr McClelland on the same date regarding the Westpac tracing results. He attached a copy of the facsimiles disclosed by the Cowleys which purported to be Westpac tracing results. He then attached the actual correspondence sent by Westpac to the Cowleys. Mr Young also attached copies of Westpac's statements as provided to Perpetual Trustee by Westpac which showed that the transactions alleged to have been made which were in dispute did not appear in the statements.

[105] By this time, any reasonable solicitor in the position of Mr McClelland must have realised that his clients had not told him the truth about making repayments and that the statements purportedly from Westpac and NECU by his clients had been falsified.

[106] It appears that he at least became suspicious. Mr McClelland deposed:

> "Notwithstanding the Defendants continual denial of any fraudulent activity, on 7 September 2009 I contacted Sue Young of the New England Credit Union. This is concerning the alleged trace obtained from the New England Credit Union on 20 July 2009."

[107] He sent Ms Young by email a scanned copy of the letter which appeared to be from her to Mr Cowley dated 20 July 2009. He asked her to confirm that her signature was affixed thereto and that she was the author of the letter. Ms Young replied by email a few minutes later saying, "No, definitely not my signature and I did not send this letter." Mr McClelland asked her to send something with her original signature. She replied in the following terms:

> "Doug, this doesn't even look like our letterhead. It looks like it could have had the top half of a statement used as the letterhead. It doesn't even line up with the letter. Obviously someone has forged my signature – this is apparently in the hands of our finance department. They have informed me that they are looking into this – have also advised me not to worry about sending anything – they are taking care of it."

[108] Mr McClelland's evidence as to what he did following that email tends to show that he had lost his professional objectivity. He deposed:

> "On receiving that information the Second Defendant was unable to explain how the alleged trace with Sue Young's signature apparently affixed thereto came into their possession, other than it was posted and at their request. The Second Defendant informed me that Sue Young had performed some banking type tasks for them (for example the transfer of monies between Accounts on their behalf) in the past and she as an old family friend from Armidale, New South Wales. The actions performed by Sue Young and the Cowley Family in the past were apparently against the New England Credit Union's operational policies.
>
> On 3 September 2009 I questioned the Second Defendant about the authenticity or otherwise of the Westpac Bank Statements that she delivered to our office bearing the date 11 August 2009 with Westpac's stamp. I also asked her if she was telling me the truth or had anything to hide. She confirmed that she had not been involved in any fraudulent activity whatsoever. As Defendants' Solicitor I believed my instructions. One explanation was that the Bank Statements were authentic however in the light of evidence provided by the Plaintiff the only logical conclusion I could reach was that of identity theft by a person or persons unknown."

His justification is difficult to comprehend. His reasoning was that he believed his client. Nevertheless, given the positive statement he made in 2009 to the court in his affidavit of 7 July, if Mrs Crowley had in fact lied to him and falsified documents, he had misled the court. In those circumstances he owed a duty to the court which could not be satisfied merely by believing his instructions, whatever they were. The explanation of identity theft is quite implausible given that the only persons who stood to gain from falsifying the documents from NECU and from Westpac were his clients. The bank statements provided by Westpac showed that the defendants were often in financial difficulties and the payments alleged to have been made by them were either not made or were dishonoured.

[109] From this time at the very latest, Mr McClelland failed to undertake the steps required of him to correct the misleading statement he had made to the court. He also failed to advise his clients as to their liabilities once they had put falsified documents before the court. His failures meant that the plaintiff incurred further costs.

[110] Bennett & Philp wrote to Mr McClelland on 7 September 2009 saying that they assumed that, having seen documents disclosed to Bennett & Philp by Westpac and NECU, he would fully appreciate their concerns. The letter continued:

> "In our view, the discrepancies on the unmarked Westpac 'statements' as provided to us by our firm are glaringly obvious. The documents disclosed by Westpac and NECU have merely reinforced what our client has alleged all along – the 'payments' that are in dispute were *never* made by the Cowleys."

[111] On 8 September 2009, Mr Young telephoned Mr McClelland. Mr McClelland was with Mrs Cowley and he asserted that Mrs Cowley was not responsible for "doctoring the documents."

[112] Further correspondence ensued. Mr and Mrs Cowley entered into a contract to sell the property for $445,000 with a settlement date of 9 October 2009. Events then took a tragic turn when the second defendant attempted suicide on 11 September 2009. Fortunately she recovered.

[113] Bennett & Philp asserted in a letter to Platinum Lawyers of 14 September 2009, that Perpetual Trustee was prepared to let the sale of the property go ahead but required that it receive all the proceeds of the sale after the deduction of reasonable expenses. Perpetual Trustee asserted that the sale price of $445,000 obtained by the Cowleys was well below the valuation when the loan was approved. Bennett & Philp repeated this by letter of 22 September 2009.

[114] On 22 September 2009, Mr McClelland finally accompanied her to the Westpac branch at Oxenford and obtained bank statements. He deposed that these bank statements were "totally different" from the bank statements provided to him by the second defendant in June 2009 and on 11 August 2009.

[115] Mr McClelland said that Mrs Cowley was unable to explain why the bank statements differed. She gave him instructions that she had not altered any documents, the plaintiff had been paid all relevant repayments and she refused to allow the plaintiff to get any further advantage from her and her family as in her view the plaintiff had acted wrongly throughout her dealings with them. The authentic bank statements are, as previously set out, instructive. If one compares, for example, the entries of 3 October 2008 one can see that the transaction which was shown in the previous incorrect versions of the statements as a payment to Fox Symes of $2758.68 is in fact a withdrawal by EFTPOS in the amount of $26.90. This explains why the balance in the account before the payment was $4,851.29 and after the payment was $4,824.39. That makes it clear that the purported payment to Fox Symes was inserted in place of a true payment made on that day on the bank statements previously provided to Mr McClelland by Mrs Cowley.

[116] If one goes to the payment to Fox Symes of $919.56 on 10 October 2008, one can see that after that payment was made, there was a balance of minus $103.78. The minus sign was removed on the versions previously provided by Mrs Crowley. The genuine bank statements show that all the payments, apart from those that the plaintiff admitted were made, were not made or were dishonoured by Westpac.

[117] On 22 September 2009, the plaintiff filed an application seeking the following orders:

> "1. That the Orders entered by the Court in these proceedings on 9 July 2009 be set aside pursuant to Rule 667(2)(b) of the *Uniform Civil Procedure Rules* (UCPR).
>
> 2. In the alternative, that the Orders entered by the Court in these proceedings on 9 July 2009 be set aside pursuant to Rule 668 of the UCPR.
>
> 3. In the alternative, that Summary Judgment be awarded against the First and Second Defendants pursuant to Rule 292 of the UCPR.
>
> 4. That the Affidavit of Kylie Jane Cowley sworn 25 June 2009, the Affidavit of Darren John Cowley sworn 3 July 2009 and the Affidavit of Douglas Laing McClelland sworn 9 July 2009 be struck out pursuant to Rule 440 to the UCPR.

5. That the Defendants pay the Plaintiff's costs (including any reserved costs) on an indemnity basis to be assessed and which assessment is to be paid by the Defendants.
6. Any other Orders as the Court shall see fit to make."

[118] By letters dated 23 and 28 September 2009, Mr McClelland asked Bennett & Philp for the payout figure for Perpetual Trustee on the sale of the property. In the second letter he asserted that the purchaser was ready, willing and able to settle by 1 October 2009. Bennett & Philp replied on 28 September 2009 that the payout figure was $464,345.75 (excluding certain legal costs) and that all of the proceeds apart from an amount to the Gold Coast City Council was to be paid to Perpetual Trustee, and that the balance of the deposit paid to the agent, less the agent's commission, was to be paid to Perpetual Trustee after settlement.

[119] On 29 September 2009 Mr McClelland wrote to Mr and Mrs Cowley confirming their instructions that his firm was to withdraw its services in relation to its matter before the Supreme Court on the basis that the Cowleys had surrendered the property to Perpetual Trustee and had filed a debtor's petition for bankruptcy. Mr McClelland's affidavit relates that this action was taken because he was not going to be paid for any further work done. There is no suggestion by him that he was withdrawing from acting for the defendants because they had disclosed documents to him which were not genuine and he had caused those to be placed before the court.

[120] On 29 September 2009 Bennett & Philp wrote to Mr McClelland with regard to the application it had filed. They advised that if settlement of the property was not effected at the scheduled time prior to the hearing of the application their client would proceed with its application and they would be seeking indemnity costs not only from the defendants but also from Platinum Lawyers. They pointed out that the settlement of the sale of the property would still leave about $40,000 - $50,000 owing to the plaintiff by the defendants.

[121] On 29 September 2009, Mr McClelland wrote to Bennett & Philp suggesting that they take over as the vendors' solicitors in place of Platinum Lawyers. On 30 September 2009, Mrs Cowley rang Bennett & Philp saying she was handing over possession of the property.

[122] On 2 October 2009, the defendants filed a notice that they were acting in person which was dated 30 September 2009. Bennett & Philp wrote to Mr and Mrs Cowley confirming that Mrs Cowley had informed them that the Cowleys did not intend to complete the contract for sale of the property. On 5 October 2009, Bennett & Philp informed Mr and Mrs Cowley of the conditions on the settlement of the sale of the property. Both Mr and Mrs Cowley became bankrupt on 5 October 2009. The Official Trustee determined not to adopt the contract for the sale of the property which became void upon the Cowleys' bankruptcy.

[123] On 14 October 2009 Bennett & Philp informed Platinum Lawyers that the contract of sale entered into by the Cowleys to sell the property did not settle and so Perpetual Trustee now had possession of the property and would take steps to sell it.

[124] On 16 October 2009, the plaintiff amended its application to seek, *inter alia*, that Platinum Lawyers pay the plaintiff's costs in these proceedings (including any reserved costs) to be assessed on an indemnity basis rather than the costs being paid by the defendants.

[125] On 26 October 2009, the court ordered that the order made by this court on 9 July 2009 be set aside on the basis of fraud and that Mr McClelland file an affidavit setting out all details in relation to the application heard on 9 July 2009. The plaintiff's legal representatives were ordered to provide full submissions as to the fraud perpetrated by the defendants by 3 November 2009. The matter was adjourned for further hearing on 5 November 2009.

[126] Mr McClelland received advice from the Queensland Law Society that he was able to disclose information which would otherwise be confidential or covered by legal professional privilege because of the exception to the duty and privilege for fraud by the client.

[127] On 27 October 2009, Mr McClelland interviewed his client with a view to obtaining her instructions on waiving legal professional privilege so that he could, to use his words, fully defend himself against the claim for costs by the plaintiff against him personally. In the course of that interview Mrs Cowley agreed with the following statement made by Mr McClelland:

> "Kylie is happy for me to waive legal professional privilege and confidentiality in defending this wild allegation that either Kylie Cowley, Darren Cowley or the writer have conspired or in any way perpetrated fraud against the court or any other person."

[128] He asked her leading questions about the bank statements such as:[8]

> "Doug: You say you've never doctored any of these documents at all.
> Kylie: never
> Doug: have you always told the truth
> Kylie: I have, yes
> Doug: Have you had any reason to lie?
> Kylie: No
> Doug: there is no real point in lying is there?
> Kylie: no
> Doug: is there any point in trying to doctor these payments up that you've made.
> Kylie: no
> Doug: Did you get someone to do it for you
> Kylie: no
> Doug: um, ok, so you got no reason to lie have you
> Kylie: no
> Doug: ok, righteo, so these are true copies of Bank Statements that you have downloaded and all of that sort of stuff
> Kylie: yep."
>
> …
>
> "Doug: ok, so there is no way you can alter those Bank Statements is there
> Kylie: no

[8] The spelling and punctuation are taken from the original.

Doug: you don't have the opportunity and you wouldn't know how would you
Kylie: no"

…

"Doug: have you doctored any documents
Kylie: no I have not
Doug: have you got someone to doctor them
Kylie: no I have not
Doug: do you believe that you have told the truth, cross your heart hope to die
Kylie: I do
Doug: you haven't told me any lies
Kylie: no I have not. I have been extremely upfront and honest with you from day dot.
Doug: have you told the Court any lies through me
Kylie: no I have not. No
Doug: so you believe that through out this whole scheme of things you are an innocent party you and your family
Kylie: yes
Doug: and because I have done work for you and tried to protect you that I am also a victim of this so called fraud, you no
Kylie: yes
Doug: fair enough
Kylie: yes"

[129] With regard to Platinum Lawyers no longer acting for the defendants, Mr McClelland had the following exchange with Mrs Cowley:

"Doug: then so what happened is I said to you ok, um, we got this letter from Charlie Young
Kylie: uh huh
Doug: which we showed you I think you got a bit of a copy to it, we note your clients have refused to make any payment to our client under the home loan since October 2008, refused to hand over, ladiladilah, we're going to do all sorts of things were are also going to seek costs from Platinum Lawyers.
Kylie: un huh
Doug: any I responded by saying thank you for your long and threatening letter and piss off.
Kylie: yep
Doug: yep. Um we said go to buggery, the following day you filed a Notice of Party Acting in Person which meant you were no longer represented by us.
Kylie: uh huh
Doug: the basis of that was that we new you were going Bankrupt, we weren't going to get paid and we weren't even going to get aid for doing the sale of the house.

Kylie:	yep
Doug:	so we said well bugger this
Kylie:	yep
Doug:	so we wrote to them and said do it yourself. But if they didn't seem to get that picture and then they proceeding with this Application."

Conclusion

[130] Mr McClelland had robustly represented his clients as was his duty to them. However, a solicitor is not merely a passionate and gullible mouthpiece for his or her client. A solicitor's primary duty is to the court. If the solicitor discovers that his or her client has lied to the court or falsified a document which has been made an exhibit then the solicitor must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court. The solicitor must refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification, and must promptly inform the court of the lie or falsification upon the client authorising the solicitor to do so.

[131] In this case where it appears that Mr McClelland's client swore an affidavit which was false and exhibited documents which had been falsified, he was obliged to advise his client in the manner herein set out. It appears that he did not do so.

[132] However Mr McClelland came under another duty because of the positive statement in his affidavit that the repayments had been made. That was a misleading statement. I accept for the purposes of this application that he did not knowingly make a misleading statement but as soon as he realised or must have realised that the statement was misleading he was under an obligation to the court to take all necessary steps to correct such misleading statement as soon as possible. He did not do so and further expense was incurred by the plaintiff because of Mr McClelland's failure to comply with his duty of frankness to the court.

[133] Mr McClelland, and his firm, Platinum Lawyers, are responsible for the costs incurred by the plaintiff from at least 7 September 2009 when he was sent two emails by Mr Young attaching original documents form NECU and Westpac which showed that, not only were the credit union and bank statements provided by the defendants falsified, the tracing results purportedly provided by NECU and Westpac to the defendants were also forgeries.

[134] Mr McClelland and Platinum Lawyers should be ordered to pay the plaintiff's costs from that date on an indemnity basis. The costs are to be paid on an indemnity basis because of Mr McClelland's obstinate and egregious refusal to comply with his duties to the court. As foreshadowed during the hearing, I refer this matter to the Legal Services Commissioner for further investigation and any disciplinary action that appears warranted.