SUPREME COURT OF QUEENSLAND

CITATION:	*Surefire Holdings P/L v Oxley Sportsdrome P/L* [2001] QSC 085
PARTIES:	**SUREFIRE HOLDINGS PTY LTD (as Trustee for the MFE Trust T/A ROUNDHOUSE FEEDS 'N' NEEDS) (ABN 80783167309)** (applicant) **v** **OXLEY SPORTS DROME PTY LTD** (respondent)
FILE NO:	1639/01
DIVISION:	Trial
DELIVERED ON:	Order delivered 21 February 2001 Reasons for Judgment delivered 21 March 2001
DELIVERED AT:	Brisbane
HEARING DATE:	16 February and 21 February 2001
JUDGE:	Atkinson J
ORDER:	**Injunction granted on 16 February 2001 dissolved.** **Application filed on 20 February 2001 dismissed.** **Respondent's costs to be paid by solicitor for applicant personally on an indemnity basis.** **Papers to be referred to the Attorney-General and the Queensland Law Society.**
CATCHWORDS:	INJUNCTIONS – INTERLOCUTORY – EX PARTE – circumstances in which relief granted ex parte – whether applicant discharged 'substantial burden' and complied with duty to make full and frank disclosure to the court. PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – MISLEADING THE COURT – whether solicitor breached her duty to the court – whether solicitor knowingly misled or lied to the court on material matters – whether appropriate to refer papers to Attorney-General and Queensland Law Society. *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350, considered *Coomber v Howard* (1845) 1 CB 440, considered *Re Griffiths* [1991] 2 Qd R 29, followed *Re South Downs Packers Pty Ltd* [1984] 2 Qd R 559, considered *The Council of the Queensland Law Society Inc v Wendy Ann Wright* [2001] QCA 58, CA No 349 of 2000, 27 February

2001, followed

COUNSEL: R Perry for the respondent

SOLICITORS: Darvall Rynne Ebbett & Associates for the applicant
Hopgood Ganim Lawyers for the respondent

[1] **ATKINSON J:** On 16 February 2001 at 3.45 pm, the Court granted an interim injunction as the result of an application made ex parte by Debera Anne Ebbett, who appeared as solicitor for the applicant. The Court ordered:

> "1. until 4 p.m on Wednesday 21 February 2001 or earlier order the respondent be restrained from taking any action to terminate the tenancy made between the parties commencing in or about May 2000;
>
> 2. the respondent forthwith remove any restraints placed upon the property known as Roundhouse Feeds 'N' Needs and take no further action to restrain the tenant's free and clear access to the property until 4 p.m on Wednesday 21 February 2001 or earlier order;
>
> 3. the further determination of the remaining issues in this application be adjourned till Wednesday 21 February 2001 at 10 am;
>
> 4. the applicant file and serve its application and any affidavits in support on or before 4 p.m on Monday 19 February 2001."

[2] An undertaking as to damages was given by the applicant.

[3] On the return date, 21 February 2001, the Court made the following Orders:

1. the injunction granted on 16 February 2001 was dissolved;
2. the application filed on 20 February 2001 was dismissed;
3. the solicitor for the applicant was ordered to pay the respondent's costs personally on an indemnity basis.

I also indicated that I would refer the papers to the Attorney-General and the Queensland Law Society and deliver reasons for my decision.

[4] These are the reasons for those Orders.

[5] The Application made by Ms Ebbett on behalf of the applicant on 16 February 2001, was made without filing a written application or affidavits and was made ex parte. The applicant relied on four documents which had been sent by facsimile transmission to the Court on that morning. These documents show that they were sent between 11.37 am and 11.46 am from the offices of Darvall Rynne Ebbett & Associates in Beaudesert. Ms Ebbett is the principal of that firm of solicitors. It appears that she was also a director of the applicant.

[6] The first document relied upon was a letter from Darvall Rynne Ebbett & Associates marked to the attention of the Associate of Justice White, who was the senior Judge in the applications jurisdiction on that day. The letter says:

> "Further to my discussion this morning, we confirm the request for an ex parte oral application under Section 124 Property Law Act, seeking an injunction stopping the landlord from denying access to a retail store.
>
> The landlord has claimed a failure to pay rent, however such is denied by the applicant Tennant [sic] and copies of correspondence are attached confirming payment of rent and discussions in this regard.
>
> The landlord has refused to remove padlocks inserted after closing last night and does not accept the rent has been payed [sic].
>
> We therefore seek an interim injunction restraining the landlords [sic] action until payment can be clarified and so as to allow the Tennant [sic] to continue trade in the mean time.
>
> We would expect confirmation could be obtained by Tuesday or Wednesday and would therefore also seek an adjournment of the application to Friday 23 February when we expect that we should be able to withdraw our application or proceed if the landlord still refuses to comply.
>
> We undertake to file and serve the application and supporting material by Monday 19 February 2001."

The letter was signed although not, as it subsequently transpired, by Ms Ebbett but by her secretary.

[7] Correspondence was attached as evidence "confirming payment of rent and discussions in this regard". The first letter was a letter from the applicant, Surefire Holdings Pty Ltd as trustee for the MFE Trust trading as "Roundhouse Feeds 'N' Needs", to the Wanless Group dated 9 February 2001 saying:

> "Unfortunately I did not get back to the office until late yesterday, however as you can see from the attached deposit slip, the rent was deposited to your NAB account 68565255 as required.

> If I am coming back from Court before 5.00 pm I will call in to see you. You may wish to check again with the bank."

[8] On the photocopy of this letter which was faxed to the Court was what appeared to be part only of a deposit slip to the National Australia Bank. The details filled in on the deposit slip are therefore obscured. The part of the date which can be seen is "2"; the Bank is shown only as "B"; the account name, "Oxley Spor"; the account number as "6856525"; and the deposit amount as "$1,500.00".

[9] The second letter faxed to the Court was a facsimile header sheet from the applicant to the Wanless Group dated 14 February 2001 saying:

> "As I have heard nothing further from you I presume you have now confirmed the deposit of rent to your account as indicated and attached to our facsimile of 9 February 2001."

[10] On 15 February 2001, the applicant sent another letter to the Wanless Group saying:

> "We attended at the store at 10.00 pm to effect a delivery. Despite previous correspondence you have attempted to exclude our entry to the building. We advise that the locks will be cut from the door and any attempt to exclude entry will be meet [sic] with an immediate court injunction.
>
> You have no right what so ever to exclude our entry.
>
> The rent was paid in cash directly to your account and we again enclose the letter of 9 February attaching the deposit slip. While it appears that the deposit slip has slipped on the scanner plate, the amount, name, date and bank stamp are clear.
>
> Under the Retail Shop Leases Act you have no basis for excluding our entry.
>
> I did not want to have the matter come to this, that choice was yours."

[11] All of the letters to the respondent were signed by the same person, although the signature itself is sufficiently indecipherable so as not to reveal the identity of the signatory whose name is not printed underneath. An affidavit filed by Ms Ebbett on 20 February 2001 shows that it is her signature. The letter to the Associate of Justice White was signed by another person, who, as I have said, according to Ms Ebbett's subsequent evidence, must have been her secretary.

[12] The ex parte application for an interim injunction commenced at 3.15 pm on 16 February 2001. A transcript was made of most of the hearing. The applicant was

successful in gaining an interim injunction in the terms set out in paragraph 1 of these reasons. This order was made at 3.45 pm. The order to file and serve the application and supporting affidavits on or before 4 pm on Monday 19 February 2001 was made in accordance with the undertaking offered in the letter from the applicant's solicitors on 16 February 2001. The application and a supporting affidavit sworn by Ms Ebbett were not filed and served until 20 February 2001.

[13] On 21 February 2001, the application was relisted and heard in accordance with the order made on 16 February 2001. Mr Perry, counsel instructed by Hopgood Ganim Lawyers, appeared on behalf of the respondent. Ms Ebbett again appeared on behalf of the applicant. A transcript was taken of oral evidence given by Ms Ebbett and of the submissions made subsequent to that evidence. In the course of that hearing, it became clear that Ms Ebbett, who is a solicitor admitted to practice by this Court, had failed to comply with the duty of candour and fairness expected of a legal practitioner and the duty on an applicant making an application ex parte.

[14] An injunction may be granted on an ex parte application in circumstances of urgency which require immediate action, where service on the respondent or even notice of the application is impossible or impractical. In such circumstances, an applicant bears what was referred to by Byrne J in *Re Griffiths*[1] as a "substantial burden". In that case, His Honour held:[2]

> "An applicant who proceeds ex parte bears a substantial burden. In *South Downs Packers*,[3] Connolly J., Campbell C.J. agreeing, said at 565-566:
>
> > "it is the duty of a party asking for an injunction or indeed for any order ex parte to bring under the notice of the Court all facts material to the determination of his right to that relief. . . 'Uberrima fides is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the court acts informing its judgment is unfulfilled and the order so obtained must almost invariably fall. . ."
>
> This is a demanding responsibility. An applicant may be unwilling to accept a duty to make full and frank disclosure of the material facts. The duty is not restricted merely to facts actually known. In

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1 [1991] 2 Qd R 29 at 35

2 (supra) at 35 - 36

3 *Re South Downs Packers Pty Ltd* [1984] 2 Qd R 559

> *Brink's Mat Ltd v. Elcombe* [1998] 1 W.L.R. 1350, Ralph Gibson L.J. said at 1356:
>
> > 'The applicant must make proper enquiries. . . the duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries.'"

[15] In all but exceptional circumstances, an undertaking as to damages should also be given by the applicant for an interim or interlocutory injunction.[4]

[16] The reason for the dissolution of the interim injunction in this case was because of the applicant's failure to comply with the duty imposed upon an applicant for an ex parte injunction to make a full and frank disclosure to the Court.

[17] The applicant failed to disclose a number of material facts of which it knew. A fuller history of the dealings between the parties which was revealed on the return date of the application demonstrates the extent to which this was so.

[18] On 23 May 2000, the respondent, which is part of the Wanless Group, purchased a property situated at the corner of Mt Lindsay Highway and Wearing Road, North Maclean ("the property"). The applicant was an existing tenant at the time the respondent purchased the property. The applicant was a tenant of a building on the property known as Roundhouse Feeds 'N' Needs which is a produce store. The applicant was due to pay rent of $2,800.00 for June 2000 to the respondent on 1 June 2000. That rent had still not been paid in mid-June 2000. Allan Abrams, the group financial controller for the respondent, deposed in an affidavit on behalf of the respondent that he telephoned Ms Ebbett on behalf of the applicant and told her that Ron Wanless (a director of the respondent) would like to meet with her to discuss the rental situation.

[19] A meeting occurred between Ms Ebbett, Mr Wanless and Mr Abrams in June 2000 to discuss the applicant's failure to pay the rent. Mr Wanless said that the monthly rental of $2,800.00 seemed high and he did not want unhappy tenants. He asked her what she believed would be a fair rental and she responded by saying that she thought a monthly rental of $1,500.00 would be reasonable. Mr Wanless said that he had a higher figure in mind, but on the basis that the tenancy would be from month to month and rental would be paid strictly when due so that the respondent would not have to chase payment continually month after month, the respondent would agree to a reduced monthly rental of $1,500.00. Ms Ebbett agreed to that and indicated that the rent of $1,500.00 for June 2000 would be paid by the end of that month.

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4 *Re Griffiths* (supra) at 37

[20] On 26 June 2000, the applicant paid the rent for June 2000. The payment was made by cheque but the cheque was dishonoured. Mr Abrams discussed that matter with Ms Ebbett by telephone and on her authority the respondent represented the cheque and it was paid on 3 July 2000. The rent of $1,500.00 due on 1 July 2000 was paid on 17 July 2000. The August rent due on 1 August 2000 was paid on that date. The rent due on 1 September 2000 was paid on 5 September 2000 and the rent due on 1 October 2000 was paid on 2 November 2000. Only the rent for August 2000 was paid on the due date. With that exception, Mr Abrams telephoned Ms Ebbett on a regular basis between July and December 2000 to seek payment of late rent.

[21] On 5 December 2000, the rent for November 2000 which had been due on 1 November 2000 as well as the rent for December 2000, due on 1 December 2000, was still outstanding despite numerous telephone calls made by Mr Abrams to Ms Ebbett. Accordingly on 5 December 2000, Mr Abrams sent a facsimile on behalf of the respondent to Ms Ebbett on behalf of the applicant. That letter referred to the current monthly tenancy arrangement and advised that the respondent wished to terminate the monthly arrangement and gave the applicant one month's notice to vacate the premises. The respondent required vacant possession on 5 January 2001. A further request was made for the rent in arrears for November and December 2000 to be paid or legal action would be taken.

[22] Between 5 December 2000 and 8 December 2000, Ms Ebbett spoke to Mr Wanless and informed him that she had approached the bank to arrange finance and would pay the outstanding rent as soon as finance was approved. On 8 December 2000, Mr Abrams sent a letter to Ms Ebbett for the applicant confirming that they required vacant possession by 5 January 2001 and payment of the rent still in arrears. On about 12 December 2000, Mr Abrams received a facsimile transmission from the applicant signed by Ms Ebbett saying she had been in court every day since receiving his letter and had not returned to the office to finalise matters with the bank. After giving various reasons as to why she had not been able to speak to the manager she said that "one of the girls told me she was pretty sure it had been approved." Ms Ebbett said she should be able to deposit the rent on the following day. She gave excuses for not having returned various telephone calls from Mr Abrams and said that she had other possible tenants for the building which she would discuss with the respondent.

[23] No payment had been made by 15 December 2000, so Mr Abrams wrote to Ms Ebbett saying that the respondent had not changed its position and required vacant possession on 5 January 2001.

[24] On 19 December 2000, in response to the facsimile transmission of 15 December 2000, Ms Ebbett sent a letter to the Wanless Group, this time on the letterhead of Darvall Rynne Ebbett & Associates saying she could not find any previous correspondence from the Wanless Group with regard to its intention to gain vacant possession. She requested an appointment to see Mr Wanless as a matter of urgency.

[25] On 20 December 2000, Mr Abrams sent a letter by facsimile transmission to Ms Ebbett saying that Mr Wanless was prepared to meet with her on a "without prejudice" basis and that they were awaiting her telephone call to arrange an appointment. He expressed surprise that she claimed she had not received any of the previous correspondence, particularly as she had contacted Mr Wanless shortly after receiving a letter faxed to her by Mr Wanless on 5 December 2000. Mr Abrams enclosed copies of all correspondence faxed to her office including facsimile confirmation reports of the sending of those letters.

[26] Later that same day, Ms Ebbett sent a discursive letter to the Wanless Group on Darvall Rynne Ebbett & Associates letterhead about her many court commitments and recurring problems with her mobile phone. She asserted that she had never seen the previous correspondence which was sent to her by facsimile transmission on that day. She said her secretary was not in the office when she returned and would check with her the next day as to receipt of the other facsimiles. She said however that she had looked in all the usual places for it. She advised on her availability for an appointment.

[27] That meeting took place on 21 December 2000 at 11.00 am. Ms Ebbett told Mr Wanless and Mr Abrams that she had been unable to arrange bank finance but that she was going to borrow money from her father and that he would be providing her money from a term deposit. Mr Wanless said that, although the respondent had been more than fair and had dropped the rent, the situation was no longer viable. He asked when the outstanding two months rent would be paid. Ms Ebbett said that she desperately needed to sell the business and that she owed creditors some $35,000.00. Mr Wanless told her that he did not want to have to chase rent every month. Mr Wanless said, if the applicant sold its business, the respondent would have to approve of the purchaser and the length of any lease which the respondent would be prepared to enter into with the purchaser. He did not commit to a lease of any duration, but indicated that, if there was a suitable tenant and the applicant was not in default, the absolute maximum length of the lease which the respondent would contemplate would be 12 months. No rental or other terms of such a lease were discussed.

[28] Ms Ebbett said that the applicant would pay the rent for November, December and January by 5 January 2001. Mr Wanless agreed to that and said that if the outstanding rent (which by then would be $4,500.00) was paid on 5 January 2001, the monthly tenancy would continue from month to month. He said that if the applicant did not pay the outstanding rent at that time, the monthly tenancy would be terminated. He also said that, in the event that the applicant gave the respondent vacant possession of the building on 5 January 2001, the respondent would not pursue the applicant for the outstanding rent. Ms Ebbett agreed to Mr Wanless' proposal.

[29] Mr Abrams said that he would send a letter to her confirming the agreement which had been reached. That letter was sent on 21 December 2000. It provided as follows:

> "We confirm that we are prepared to withdraw our requirement for vacant possession of 5 January 2001 on the following terms:-
>
> 1. Rents outstanding for November 2000 and December 2000 and the rent due for January 2001 of $4,500 will be deposited (in the form of cleared funds) to our account on 5 January 2001.
>
>   If the monies are not paid by 5 January 2001, we will require vacant possession on that date and will make no claim to the outstanding rents, subject to vacant possession being provided.
>
> 2. Ongoing monthly rent payments are to be deposited to our account on 1st each month or following business day. If rents are not received on the due dates, we will be entitled to terminate your tenancy and will require vacant possession within seven (7) days.
>
> 3. The agreement is a month to month arrangement for which either party may give one (1) months written notice, although as mentioned above, if the rent is not paid on the due date paragraph 2 applies.
>
> Please sign and return this letter to confirm our arrangement by 4 pm 22 December 2000. If such confirmation is not received, our previous correspondence applies and vacant possession is required by 5 January 2001."

[30] On 22 December 2000, Ms Ebbett replied, on her letterhead as a solicitor, with reference to the correspondence of 21 December 2000 "confirming our discussions". She signed the letter from the Wanless Group Company dated 22 December 2000 for and on behalf of Surefire Holdings Pty Ltd and faxed it to the respondent. She confirmed that it was her intention to pay the rent and continue until the business was sold. She then said:

> "If however, something unforeseen should happen and we are unable to pay such by 5 January 2001, I would request that we have a further week to provide vacant possession as trying to organise storage at this time is somewhat difficult."

She asked for, and received, confirmation that that was acceptable.

[31] Contrary to the agreement, the applicant failed to pay the outstanding rent of $4,500.00 to the respondent on 5 January 2001. Accordingly on 8 January 2001, Mr Abrams on behalf of the respondent wrote to Ms Ebbett on behalf of the applicant saying that, as the $4,500.00 had not been deposited into their account on 5 January 2001, they required vacant possession on 12 January 2001. On

11 January 2001, Ms Ebbett, on Roundhouse Feeds 'N' Needs letterhead, wrote another discursive letter which was sent by facsimile transmission giving various excuses and then saying:

> "The rent money due was transferred to my account late today and will be deposited into your account tomorrow and as usual I will fax a copy of the deposit slip for your records. In accordance with our recent agreement all future rent will be paid on time while we continue to pursue a sale of the business."

The applicant paid the outstanding rent of $4,500.00 on 12 January 2001 and sent a copy of the deposit slip by facsimile transmission. The deposit slip showed that it was paid into the respondent's Bank of New Zealand ("BNZ") account number 685652529. It was deposited at the National Australia Bank ("NAB") branch apparently at Beaudesert.

[32] On 2 February 2001, the respondent received a blank facsimile transmission from Ms Ebbett. Mr Abrams instructed his secretary to telephone Ms Ebbett's office to advise them that the respondent had received a blank facsimile. On 5 February 2001, Mr Abrams received a facsimile transmission of a letter from Ms Ebbett dated 2 February 2001 on Roundhouse Feeds 'N' Needs letterhead saying:

> "I have been in court all week and have kept missing the bank.
>
> Have given rent to secretary to deposit today and she will fax deposit slip."

In handwriting on the bottom was:

> "Sorry didn't get your message until the weekend, anyway should have received copy of deposit slip by now."

On 16 February 2001, she told the court that her secretary had deposited the rent on 2 February 2001.

[33] Later on 5 February 2001, Mr Abrams instructed his secretary to send a facsimile transmission on behalf of the respondent to Ms Ebbett advising her that the respondent had not received payment to the bank account nor received a copy of the deposit slip. She was asked to contact Mr Abrams. That facsimile transmission was sent on 5 February 2001.

[34] On 7 February 2001, Mr Abrams had not heard from Ms Ebbett. He therefore sent a letter on behalf of the respondent by facsimile transmission to Ms Ebbett saying that rent for the month of February 2001 had not been deposited in the respondent's account by the due date. The respondent therefore terminated the applicant's tenancy in respect of the premises and required vacant possession on 15 February 2001.

[35] On 8 February 2001, Ms Ebbett sent a facsimile transmission, on Roundhouse Feeds 'N' Needs letterhead, to the respondent saying:

> "What is going on.
>
> The rent was paid, you even left a message on Tuesday confirming rent received and requesting I contact you when I can.
>
> When I called in to the shop yesterday on the way home there was a letter from you terminating the tenancy.
>
> I have meetings until midday, I will call you when I return to the office."

Mr Abrams said, and I accept, that he never left any message for Ms Ebbett saying that the rent had been received.

[36] None of the information which I have just related was given to the Court by Ms Ebbett when she appeared in her ex parte application on 16 February 2001 except for a brief summary of the respondent's letter of 7 February 2001. This document was not produced to the Court. The applicant patently failed to disclose material information to the Court with regard to the application.

[37] The first document that was produced to the Court on 16 February 2001 was the facsimile transmission from Roundhouse Feeds 'N' Needs to the Wanless Group of 9 February 2001. She admitted in cross-examination on 21 February 2001 that the deposit slip which is partly reproduced on the copy of the letter of 9 February 2001 was in her handwriting. The copy of the letter which is exhibited to Ms Ebbett's affidavit filed 20 February 2001 reveals slightly more details than those revealed in the copy of the letter that was faxed to the Court on 16 February 2001. Slightly more of the deposit slip can be seen in the copy of the letter which is exhibited to the affidavit. Of particular interest is the fact that the number for the account which is shown in part appears to be "68565252". Any number appearing after that, if there was one, is obscured. The letter which was faxed to the Court did not show the "2" at the end of the account number on the deposit slip. The omission is significant. The letter purports to say that the rent was deposited to the respondent's NAB account 68565255. With the "2" at the end obscured on the deposit slip the fact that the information contained in the applicant's facsimile is incorrect cannot be seen.

[38] There are further problems with the letter of 9 February 2001 which were not revealed to the Court on the ex parte application. As can be seen from the facsimile transmission of 12 January 2001 from Ms Ebbett to the respondent, Ms Ebbett well knew that the correct bank account number of the respondent was "685652529" and that the respondent's bank was the BNZ and not the NAB. She admitted in cross-examination on 21 February 2001 that she had copied the information on one deposit slip from the previous deposit slip. None of that information was revealed to the Court by Ms Ebbett when she appeared on the applicant's ex parte

application. Her attempted explanation for these discrepancies given in oral evidence on 21 February 2001 was most unsatisfactory. She gave the appearance of a person caught out lying, unsuccessfully trying to give some plausible story.

[39] Ms Ebbett told the Court on 16 February 2001 that the deposit slip, a partial copy of which had been faxed on 9 February 2001, was posted to the respondent. That was not true. The whereabouts of the original deposit slip, if there ever was one, are unknown. She wrote to the respondent's solicitors on 19 February 2001 saying that the original deposit slip had been inadvertently sent to the respondent with the original of the letter of 9 February 2001. In cross-examination on 21 February 2001 she agreed that the original of this letter was in fact in her office. After lunch on the same day she again told the Court that the original was at her office. She then retreated from that saying she was not sure whether the original or a copy would be on her file at the office. The explanation for her prevarication is simple. In my view, there never was a deposit slip which evidenced an actual payment of $1,500.00 into any account of the respondent on 2 February 2001.

[40] Mr Abrams confirmed that he received the facsimile transmission dated 14 February 2001 from the applicant to the respondent which had been produced to the Court on 16 February 2001. However, Ms Ebbett did not reveal to the Court that on the same day, 14 February 2001, she received a letter by facsimile transmission from the respondent advising her that rent for the month of February 2001 had not been deposited into their account and that their position was as was set out in their letter dated 7 February 2001, that is, that they terminated the tenancy and required vacant possession. On the contrary, she told the Court that there was no response to her letter of 14 February 2001.

[41] Further, Ms Ebbett did not reveal to the Court on 16 February 2001 that she had sent another facsimile transmission to the respondent on 14 February 2001 on Darvall Rynne Ebbett & Associates letterhead. This letter says:

> "I refer to your correspondence of 14 February 2001.
>
> It is suggested you make enquiries with your bank as we have provided to you a copy of the deposit slip attached to our previous facsimile of 9 February 2001 confirming deposit to your account on 2 February 2001.
>
> As the rent was paid as required your stated intention to maintain your position is untenable.
>
> Please confirm by return facsimile to 5543 8854 that you have confirmed payment and withdrawal [sic] your position as set [sic] in your letter of 7 February 2001.
>
> We do not wish to get into a dispute about this, however the rent was paid and we require you to confirm the continuation of the tenancy.

> Contact has been maintained so that we have always kept you advised. Future rent until sold should also be easier as the mechanic from next door has sublet a part of the shed and is paying us towards the rent as well as another subtennant [sic] in the rear of the shed who is also contributing. Recent advertisements for the store have brought in more than 20 enquiries, several of which have progressed beyond enquiries.
>
> All prospective purchasers have been advised that there is currently only a twelve month lease which is in accordance with Ron's previous advices.
>
> All negotiations and terms will be left for you to determine.
>
> We will advise you in due course if any of the current enquiries result in a contract."

[42] Failure to disclose this letter was more than a mere oversight. It would have alerted the Court to the correspondence from the respondent of 14 February 2001 and that payment was disputed.

[43] Mr Abrams says, and I accept, that her statement that there was a 12 month lease was not "in accordance with [Mr Wanless'] previous advices" and is plainly incorrect. In her affidavit filed on 20 February 2001, Ms Ebbett swore that Mr Wanless had initially told her that "the purchaser would be provided with a new three year lease." She said he had subsequently changed his mind and Mr Wanless "was only prepared to provide a 12 month lease." She asked the court in her application filed on 20 February 2001, to direct the respondent, provided the tenancy was current, "to provide to any purchaser of the business of the applicant presented by the applicant and acceptable to the respondent (such acceptance not to be unreasonable [sic] withheld), a 12 month lease in respect of the premises currently occupied by the applicant". Whatever other difficulties there might be in making such an order, the essential reason that no such order should be made is that I do not accept that the respondent ever made a representation that it would enter into a lease of a particular duration with a purchaser.

[44] Mr Abrams deposes that he has been informed by Jonathan Roper, one of the analysts employed by BNZ responsible for the respondent's accounts, that account number 68565255 is not a recognised NAB account number. He has further informed Mr Abrams that since 1 February 2001, the amount of $1,500.00 had not been deposited into the respondent's BNZ bank account number 685652529.

[45] The respondent produced bank statements for its BNZ account number 685652529. There was no credit to it for $1,500.00 between 30 January 2001 and 15 February 2001.

[46] Furthermore, the NAB branch at Beaudesert has no unallocated deposits for 2 February 2001. Ms Ebbett told the Court on 16 February 2001 that she had paid the rent due on 2 February 2001. She swore in an affidavit filed on 20 February 2001 that the rent for February 2001 had been paid on 2 February 2001. In my view, the only finding open is that no payment was made by Ms Ebbett or anyone else on behalf of the applicant. She did not tell the court the truth about this and many other matters.

[47] On the return date of the injunction application, Ms Ebbett asserted that the lease in this case was governed by the common law rule that rent is paid in arrears at the end of each period specified for payment.[5] She asserted that there was no "special condition in the agreement between the parties requiring payment of rent in advance". However she knew that this assertion was not true. On the ex parte application, she failed to disclose the agreement made between the parties which she signed on 22 December 2000 which expressly provided that monthly rental payment was to be made on the first of the month. Ms Ebbett knew that she was obliged to make payments on the first of the month. The transcript of the hearing on 16 February records that she told the court that the rent was due on the first of the month and that she had paid it on the second. In her affidavit filed on 20 February 2001, Ms Ebbett swore that there was no written agreement evidencing any terms of the tenancy. She was cross-examined about this matter on 21 February 2001 and I am satisfied that she knew that what was said in her affidavit was not true.

[48] On 15 February 2001, Mr Abrams gave instructions to the manager of the respondent's BP Service Station at the property to lock up the building. Ms Ebbett swore in her affidavit filed on 20 February 2001 that the applicant's produce store closed for trading at 6.00 p.m. on 15 February 2001. She said that at 10.00 p.m the applicant attempted to make a delivery of hay and found the store padlocked closed. She further swore that a "facsimile was forwarded to the respondent that night although it was known that it would not be read until the morning."

[49] At 8.44 am on 16 February 2001, Ms Ebbett rang Mr Abrams. She wanted to know what was going on in relation to the tenancy and once again told him that the rent for February had been paid and the deposit slip had been sent to the respondent's office by facsimile transmission. He told her that no money had been deposited into the respondent's account by or on behalf of the applicant. She said to him that she hoped that she would not have to go to Court to get an injunction. At no time did she tell Mr Abrams that she intended to go to Court on that day to seek an injunction.

[50] On 16 February 2001, the applicant at first informed the Court that she had informed the respondent that the applicant would be coming to Court on that day. However she admitted later during the hearing that she had not so informed the respondent.

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5 *Coomber v Howard* (1845) 1 CB 440

[51] Ms Ebbett's version of her conversation with Mr Abrams was given to the court on 16 February 2001. She said that she could not categorically state that she indicated that the application would be brought on the same day. She said, "I certainly felt, your Honour, that the implication was it would be brought today, there would be an application in the court today." Ms Ebbett said, in paragraph 9 of her affidavit filed on 20 February 2001, that she then spoke to her secretary about the deposit slip so that enquiries could be made at the bank and her secretary advised that she believed that she had sent it to the respondent. It was only then that Ms Ebbett determined as she said, "that the only possible action was an urgent application to reopen the shop and to allow time to sought [sic] out the payment dispute."

[52] Ms Ebbett gave an explanation to the Court on 16 February as to why she was able to have a draft order but no written application or affidavit in support. She said:

> "I did attend at the office this morning, your Honour. Unfortunately my secretary had called in ill. I had intended to attempt to draft a very urgent application and a short form affidavit, however in noting the time and that it's an hour-and-a-half to travel from Beaudesert to here I had time to complete a quick draft order to assist your Honour but because of the lack of a secretary, was unable to prepare documentation."

[53] However as I have noted, in paragraph 9 of her affidavit filed on 20 February 2001, Ms Ebbett said that she spoke to her secretary on the morning of 16 February after she had spoken to Mr Abrams by telephone at about 8.44 a.m. I shall return to the account she gave of her secretary's whereabouts on 16 February 2001.

[54] There was no justification for bringing such an application without any notice to the other party. That this is so is even more obvious when it was revealed that the respondent had solicitors acting for them. Ms Ebbett took care not to reveal this important matter to the Court in her ex parte application nor to reveal it in her affidavit filed on 20 February 2001, when she had received correspondence from the respondent's solicitors.

[55] The reference in her affidavit to a facsimile being forwarded "to the respondent" on the night of 15 February 2001, "although it was known that it would not be read until the morning", can only sensibly be read as referring to the letter sent by the respondent's solicitors, Hopgood Ganim Lawyers, to the applicant by facsimile transmission at 6.13 pm on 15 February 2001. This letter said:

> "We act for Oxley Sports Drome Pty Ltd, the lessor of the above premises.
>
> We communicate with you as agent for and on behalf of Surefire Holdings Pty Ltd as Trustee for M F E Trust trading as Roundhouse Feeds 'N' Needs.

> Your communication of 14 February 2001 to our client is factually incorrect. There is no 12 month Lease. If you are informing prospective purchasers of that then, respectfully, you are misleading them.
>
> There was a Lease for a fixed term on the premises but that no longer applies and the premises has been leased on a month to month tenancy basis for some time, which agreement is documented in writing dated 22 December 2000 and signed by both parties.
>
> The tenant has been continually in arrears in rent and the month to month tenancy has been properly terminated in accordance with the agreement dated 22 December 2000. Consequently our client has today retaken possession of the premises and has secured it with locks.
>
> You are at liberty to arrange with our client to remove the contents of the shop that properly belong to the lessee. This would of course include stock. If you wish to make appropriate arrangements to do so we would suggest you telephone Mr Allan Abrams of our client company on 3274 5600 and he will cooperate.
>
> If you do not make appropriate arrangements forthwith for the contents to be removed and put into your care, same will be delivered, at your expense, to your residence and no responsibility will be accepted. You will of course be informed as to when that will occur so that you can arrange for the material to be stored safely.
>
> Our client has made enquiries with its bank, as suggested by you in your letter under reply and no funds have been received into our client's account as you suggest on 2 February 2001 or since."

[56] The contents of that letter appear to be entirely true. The letter was not revealed to the Court on 16 February 2001. In an attempt to explain why she did not do so, she asserted that she had not received the letter which had been sent to her office by facsimile transmission on the evening of 15 February 2001. She also failed to reveal that she received on the morning of 16 February 2001 at about 9.14 am another letter from Hopgood Ganim Lawyers as solicitors for the respondent referring to her communication of that morning with the respondent.

[57] Shortly after the interim injunction was granted at 3.45 pm, a letter was sent from Darvall Rynne Ebbett & Associates by facsimile transmission to the respondent setting out the Orders made in detail. That letter was faxed at 4.22 pm. It was signed, but not of course by Ms Ebbett who would not have had time to return to Beaudesert from Brisbane. It was signed by the same person who signed the letter sent by facsimile transmission to the Court between 11.37 am and 11.46 am on the morning of 16 February 2001.

[58] Mr Ganim of Hopgood Ganim Lawyers responded almost immediately at 4.45 pm on 16 February 2001 making it clear that the Orders would be obeyed.

[59] On 19 February 2001, Ms Ebbett wrote to Hopgood Ganim Lawyers apologising for not contacting them earlier. She said that she had not received their facsimile transmissions until that day because her office was closed when they were sent on 15 February 2001 and "our Debera Ebbett was in Court on Friday 16 February and did not attend at the office." This is in direct contradiction to her statement to the Court on 16 February 2001: "I did attend at the office this morning". As already mentioned, she also said in her letter of 19 February 2001 that:

> "It is understood that the original deposit slip was inadvertently forwarded to your client attached to the original of the facsimile."

Again that statement was untrue. I have ignored that part of the letter which was genuinely 'without prejudice'.

[60] When Ms Ebbett gave evidence on affirmation in Court on 21 February 2001, she said she did not know on 16 February 2001 that the respondent had solicitors acting for them. She said she did not find out until the weekend when she went into the office. Curiously, she swore an affidavit on 20 February 2001 but gave her oral evidence in Court on 21 February 2001 by affirmation. No explanation was given for this.

[61] Ms Ebbett said in cross-examination that she sent the facsimile transmissions to the Court on 16 February 2001 from her office. She was then cross-examined about how, if she sent those letters by facsimile, she failed to receive the letter from Hopgood Ganim Lawyers which had been sent to the same facsimile number earlier. She then said her secretary had been in the office before Ms Ebbett had got there but had gone home ill. This of course contradicted her earlier statement that her secretary "had called in ill". Ms Ebbett said she presumed that the facsimile transmission from Hopgood Ganim Lawyers was collected from the fax machine, date stamped (to explain why it was stamped 16 February 2001) and put into an in-tray for faxes. Ms Ebbett said she did not check any of that material, simply attended at her office, prepared the letter to Justice White, faxed it on the machine and "immediately raced into Court". She said that by the time she got into the office her secretary had gone home sick.

[62] She was then confronted with the fact that her secretary had signed both the letter to the Court sent by Ms Ebbett on the morning of 16 February 2001 and the letter to the respondent with the Court Orders on the afternoon of 16 February 2001. At first she said incorrectly that the signature was her own, but then admitted that it was her secretary's. Of course, this meant that her story that her secretary was not there was untrue. The purpose of the lie was to explain why she had not revealed to the Court on 16 February 2001 what she well knew: that the respondent had solicitors acting for them to whom she could easily have given notice of the application for an interim injunction. She chose not to do so.

[63] As a result of her evidence, I gave her a warning about self-incrimination and thought it appropriate that she should obtain legal representation if she were to continue. Her evidence had revealed that she had not been honest to the Court. She was cool, unflustered and loquacious when not telling the truth. Legal practitioners have a heavy responsibility to the public and to the Court to conduct themselves with professionalism and rectitude.[6] As the Court of Appeal recently held in *The Council of the Queensland Law Society Inc v Wendy Ann Wright*:

> "A practitioner's duty to the court arises out of the practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others: see *Giannarelli v Wraith* [(1988) 165 CLR 543]. . . The lawyer's duty to the court includes candour, honesty and fairness. The appellant abused her role as an officer of the court in relying on material she knew to be false and in deliberately and recklessly misleading the court in an attempt to further the interests of her clients and family. Her conduct was made more serious by its repetition. The effective administration of the justice system and public confidence in it substantially depend on the honesty and reliability of practitioners' submissions to the court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the court; the court and the public expect and rely upon it. . ."

[64] The failure by the practitioner to comply with her duty in this case is a most serious matter which warrants further investigation. It is appropriate that the papers be referred to the Queensland Law Society and the Attorney-General.

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6 *The Council of the Queensland Law Society Inc v Wendy Ann Wright* (2001) QCA 58; 27 February 2001 at [67] and [75]