SUPREME COURT OF QUEENSLAND

CITATION:	*McClelland & Anor v Perpetual Trustee Co. Ltd* [2010] QCA 281
PARTIES:	**PERPETUAL TRUSTEE COMPANY LIMITED** ABN 42 000 002 007 (plaintiff/respondent) **DARREN JOHN COWLEY** (first defendant/not a party to the appeal) **KYLIE JANE COWLEY** (second defendant/not a party to the appeal) **v** **DOUGLAS LAING MCCLELLAND** (first appellant) **PLATINUM LAWYERS** (second appellant)
FILE NO/S:	Appeal No 3665 of 2010 SC No 1257 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2010
JUDGES:	Holmes and White JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed;** **2. The order for indemnity costs is set aside;** **3. The respondent, Perpetual Trustee Company Ltd, is ordered to pay the appellants' costs of this appeal**
CATCHWORDS:	PROCEDURE – COSTS – APPEALS AS TO COSTS – WRONG EXERCISE OF DISCRETION – where respondent was the mortgagee of the defendants' property – where respondent obtained default judgment against the defendants for recovery of possession of the mortgaged property – where appellants retained by the first and second defendants – where defendants swore that mortgage repayments had properly been made – where, on the strength of bank statement provided by the first defendant, the first appellant swore that the repayments had been made – where appellants successful in setting aside the default judgment – where

success on the application to set aside the default judgment based on bank statements which had been falsified – where the learned primary judge found that, by a specified date, any reasonable solicitor in the first appellant's position would have realised his clients were not telling the truth and that the statements had been falsified – where the learned primary judge found that, having discovered the falsification, the first appellant had a duty to seek authority from his clients to remedy the falsification or withdraw his services in the event that such authority was not forthcoming – where the learned primary judge found that, having discovered the falsification, the first appellant had a duty to remedy his misleading sworn statement – where the learned primary judge ordered that the appellants pay the respondent's costs as incurred from the specified date, on an indemnity basis – whether the first appellant breached his duty of frankness to the court – whether any breaches committed by the first appellant were causative of the further expenses incurred by the respondent

Legal Profession (Solicitors) Rule 2007 (Qld), r 14.2, r 15.1

Emanuel Management Pty Ltd (in liq) v Fosters Brewing Group Ltd [2004] 2 Qd R 11; [2003] QCA 516, cited
Harley v McDonald [2001] 2 AC 678; [2001] UKPC 18, cited
Myers v Elman [1940] AC 282, cited
Steindl Nominees Pty Ltd v Laghaifar [2003] 2 Qd R 683; [2003] QCA 157, cited

COUNSEL: T J Bradley for the appellants
D Thomae, with W Kilian, for the respondent

SOLICITORS: Brian Bartley & Associates for the appellants
Bennett & Philp for the respondent

[1] **HOLMES JA**: The appellants are, respectively, a solicitor and the firm of which he is principal. They were ordered to pay on an indemnity basis the costs of the respondent, Perpetual Trustee Company Limited, incurred after 7 September 2009 in proceedings against their former clients, the second and third defendants Darren Cowley and Kylie Cowley. They appeal on the grounds that there was no breach of their respective duties to the court which would warrant such an order and that even if there were any such breach, it had not caused the incurring of the respondent's costs.

The appellants' role in the litigation

[2] In September 2008, the Cowleys borrowed money from Perpetual Trustee on the security of their home at Helensvale. In the first half of 2009, Perpetual Trustee obtained default judgments against them for recovery of possession of the property, on the basis that they had failed to make loan repayments, and, subsequently, an enforcement warrant for possession of the property. In June 2009, Mrs Cowley instructed the first appellant, Mr McClelland, that payments had, in fact, been made and provided bank statements purportedly from Westpac and New England Credit

Union Limited to support her claim. The supposed Westpac statements showed a series of 17 direct debits most for between $3,000.00 and $4000.00 from the Cowleys' account between 3 October 2008 and the end of May 2009. Of them, six were shown as dishonoured, but the rest were not. The Credit Union statement showed a single BPay payment of about $5,000.00 at the end of March 2009.

[3] A close examination of the statements, however, would have revealed that eight of the eleven entries purporting to show payments in that period could not be genuine, because the difference between the balance before each debit and that after it did not equal the debit's amount. (The exceptions were three payments on 3 and 10 October 2008.) However, Mr McClelland appears not to have noticed this fact. He proceeded with an application to set aside the default judgment and enforcement warrants, supported by a lengthy affidavit from Mrs Cowley in which she deposed that the payments had been made. The statements were exhibited to Mrs Cowley's affidavit. She and Mr McClelland blacked out the entries on them, other than those showing the debits, and also obliterated most of the balances. Mr Cowley also swore an affidavit, to the effect that his wife was principally responsible for the management of the loan. It was, he deposed, clear from the bank statements that all "regular payments as demanded by the lender" had been made.

[4] On the same day on which the Mrs Cowley's affidavit was prepared, the solicitors for Perpetual Trustee provided a summary of the moneys paid under the loan, which detailed eight direct debits taken from the Cowleys' accounts between 30 October 2008 and 30 May 2009 and promptly reversed for insufficient funds, so that no payments, in fact, had been made. On receiving Mrs Cowley's affidavit, the solicitors for Perpetual Trustee reiterated that the payments she alleged had not been received. Nonetheless, Mr McClelland maintained that the payments had been made and that the error appeared to be in Perpetual Trustee's accounting system.

[5] On 9 July 2009, the day that the Cowleys' application to set aside the default judgment and enforcement warrant was set down for hearing, Mr McClelland swore an affidavit exhibiting a proposed defence, in which he deposed,

> "I have been shown the bank statements of the Defendants which are [Exhibit] KJC-2 to the affidavit of Mrs Kylie Cowley and say that all of those repayments have been made."

That statement was to assume a great deal of significance in the primary judge's consideration of Perpetual Trustee's application for indemnity costs against the appellants.

[6] White J (as her Honour then was) heard the Cowleys' application.[1] She recorded the conflict between the Cowleys and Perpetual Trustee as to whether payments were made. It was, she observed, "a matter of great mystery" as to what had happened to the moneys which had "certainly been taken out of the Cowleys' account". She noted,

> "There is a draft defence exhibited to Mr and Mrs Cowley's solicitor's affidavit. The material is sworn to by Mr and Mrs Cowley which supports their defence."

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[1] Prior to the hearing of this appeal, the parties were contacted by the court to ascertain if they had any submission in relation to White JA's sitting on it. Unsurprisingly, since her Honour's decision was significant only as part of the narrative, they did not raise any objection.

Her Honour made no other reference to Mr McClelland's affidavit. She expressed herself persuaded that there was a good defence to the claim. Consistently with those conclusions, White J set aside the default judgment and enforcement warrant.

[7] About a week later, Mrs Cowley gave Mr McClelland documents which she said were bank traces from Westpac, confirming that monthly payments had been credited to Perpetual Trustee's account, and about a fortnight later, a similar document from New England Credit Union. The Credit Union trace bore the signature, "Sue Young". Mr McClelland sent the traces on to Perpetual Trustee's solicitors, which, meanwhile, obtained its own traces from Westpac and the Credit Union. Their Westpac traces elicited only dishonoured debits from the Cowleys' accounts. Perpetual Trustee's solicitors provided Mr McClelland with a copy of them and expressed their client's concern that the judgment had been obtained through a deliberate failure to disclose relevant information.

[8] On 11 August 2009, Mrs Cowley provided Mr McClelland with bank statements supposedly obtained from a Westpac branch, which replicated the false entries of the earlier statements. Again, an examination would have shown the inconsistencies in the balances on the statements. Again, Mr McClelland did not check the statements but provided them, this time without any obliteration, to Perpetual Trustee's solicitors. Meanwhile, he had counsel settle a notice of intention to defend and defence, and a counter-claim which sought damages from Perpetual Trustee for alleged unconscionable conduct in "enforcing" the loan, knowing that the payments had been made.

[9] At the end of August, Perpetual Trustee obtained documents from the New England Credit Union which confirmed that no payment had been made from that account. The Credit Union also advised Perpetual Trustee that it had no record of any correspondence sent by Sue Young, who was one of its branch managers. Subsequently, Perpetual Trustee's solicitor was informed that Ms Young, shown the document bearing her apparent signature, had said that she did not write it and that it was "fraudulent".

[10] On 4 September 2009, Perpetual Trustee's solicitors sent a facsimile to Mr McClelland, pointing out that the supposed Westpac statements which he had provided revealed discrepancies in the figures in respect of eight payments. No unmarked copy of the New England Credit Union Limited statement had been provided, but the blacked out version which they already possessed also bore some sign of inconsistent entries. It was a matter of concern that the statements had been sworn to as true copies and that Mr McClelland himself had deposed to the payments having been made.

[11] On 7 September 2009, Perpetual Trustee's solicitors, in a telephone conversation with Mr McClelland, pointed out the transactions in the supposed Westpac statements which resulted in incongruent balances. They forwarded the New England Credit Union letter advising that there was no BPay transaction as claimed by the Cowleys, with a Credit Union statement showing no entry for the purported payment at the end of March 2009, as well as authentic Westpac statements showing the transactions which had, in reality, occurred on that account and which accorded with Perpetual Trustee's record of dishonoured payments. The solicitors also provided a copy of the traces which Westpac had in fact provided to the Cowleys; they related only to the two genuine payments of 3 October 2008.

[12] On the same day, Mr McClelland sent the trace provided to him by Mrs Cowley to Ms Young, asking her to confirm that her signature was on it. Ms Young answered that it was not her signature; she had not sent the letter; and the letterhead on the document did not resemble the Credit Union's. Mr McClelland questioned Mrs Cowley about Ms Young's response. She informed him that Sue Young was a family friend who had provided the trace contrary to the Credit Union's policies (the inference being that this was the reason for her assertion that the signature was a forgery). Mr McClelland had previously asked Mrs Cowley about whether the last set of Westpac statements she had given him was authentic. She had assured him that she had not been engaged in any fraudulent activity and (he subsequently deposed) he believed his instructions. At this point, Mr McClelland, whose capacity for belief brings to mind the White Queen in *Through the Looking Glass*, reached the conclusion that his clients had been the victim of identity theft.

[13] On 11 September 2009, Mrs Cowley attempted suicide and was admitted to hospital, but discharged shortly after. The Cowleys entered a contract for sale of their property; Perpetual Trustee indicated its preparedness to allow the contract to proceed. The Cowleys instructed Mr McClelland that they wanted to extricate themselves from the litigation and Mr McClelland, accordingly, made a series of offers to settle to Perpetual Trustee on the basis that the action be discontinued with payment to his client of some small part of the sale proceeds of the property, none of which was accepted.

[14] On 22 September 2009, Mr McClelland went with Mrs Cowley to Westpac Bank and obtained bank statements which, he realised, were different from those previously provided by Mrs Cowley. He questioned her about this discrepancy; her response was that she had not altered any documents and that all payments had been made. The next day Mr McClelland was served with Perpetual Trustee's application to have the orders of 9 July 2009 set aside, the affidavits of the Cowleys and Mr McClelland struck out and costs awarded on an indemnity basis against the Cowleys. On 28 September 2009, Mr McClelland received a letter from Perpetual Trustee's solicitors which said all proceeds of the sale of the property were to be paid to Perpetual Trustee. The following day, he wrote to the Cowleys and, according to his affidavit, advised that the firm was no longer able to act for them; although the letter, in fact, purports to confirm the Cowleys' instructions that the firm was to "withdraw its services".

[15] On the same day, Perpetual Trustee's solicitors advised Mr McClelland it would be seeking costs against him and the firm on an indemnity basis; about a fortnight later, an amended application seeking that order was served on him. On 30 September 2009, the Cowleys surrendered possession of the property to Perpetual Trustee. On 5 October 2009, Mr and Mrs Cowley presented debtors' petitions and became bankrupt. As a result, the contract for the sale of the property did not proceed.

[16] On 26 October 2009, Perpetual Trustee's application proceeded before the primary judge. The Cowleys did not appear. The orders of 9 July 2009 were set aside on the basis of fraud and Mr McClelland was directed to file an affidavit setting out in full the circumstances relating to the application. The matter was adjourned to 5 November 2009. In the interim, for a reason which is not explained, Mr McClelland engaged in a recorded interview with Mrs Cowley in which he went through each of the disputed entries in the bank statements. Remarkably, he put to her propositions such as,

> "There is no way you can alter these bank statements, is there?"

and

> "You don't have the opportunity and you wouldn't know how, would you?"

[17] Mr McClelland assisted Mrs Cowley in preparing an affidavit which was put before the court on the adjourned hearing, maintaining that all the documents she had produced were authentic; that the mortgage repayments had been made regularly; and that she and her husband must have been the victims of identity fraud. Mrs Cowley also appeared in person at the November hearing and asserted that the allegations of Perpetual Trustee were untrue.

The reasons for judgment

[18] In her judgment, the learned primary judge set out, at length, the history of the matter. She found that the purported Westpac statements provided by Mrs Cowley were not authentic; that Perpetual Trustee had, in fact, only received three payments; and that the remaining payments shown as made in the statements were either non-existent or dishonoured. By stating in his affidavit that all of the repayments had been made, Mr McClelland had

> "expressed a personal opinion which appeared to provide independent confirmation that the payments had in fact been made".

By making that statement in positive terms, her Honour said, Mr McClelland came under a duty pursuant to r 14.2 of the *Legal Profession (Solicitors) Rule* 2007 (Qld) to correct it if he became aware that it was untrue. Rule 14.2 is in these terms:

> "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."

[19] The learned judge also described a solicitor's duty as extending to an obligation, on discovering that a client had lied to the court or falsified an exhibit, to advise the client that the court should be informed of the lie or falsification and to request authority to inform the court. Unless that authority was given, the solicitor was obliged to refuse to take any further part in the case; if it was given, the solicitor was required, promptly, to inform the court of the lie or falsification. That formulation of duty seems to be derived from r 15 of the *Solicitors Rule* the relevant part of which is in the following terms:

> "15.1 A solicitor whose client informs the solicitor, before judgment or decision, that the client has lied in a 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:
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> 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;
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> 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."

[20] By 7 September 2009, having received the information provided by Perpetual Trustee's solicitors, her Honour found, any reasonable solicitor in Mr McClelland's position would have realised that his clients had not told him the truth about the alleged payments and that the Westpac and New England Credit Union bank statements had been falsified. Mr McClelland's conclusion after speaking to his client, that identify theft must have been involved, was difficult to comprehend, given that the only ones who stood to gain from falsifying the statements were his clients. Having deposed in his affidavit supporting their application that the statement showed the payments to have been made, Mr McClelland owed a duty to the court which could not be satisfied merely by believing his instructions.

[21] Mr McClelland was under two obligations. The first, having discovered the falsification of documents, was to advise his clients that the court should be informed of the falsity and to request authority to do so. If such authority was not forthcoming, he was obliged to refuse to take any further part in the case. If the authority was given, he was required to promptly inform the court of the falsity. The second obligation on him was to take all necessary steps to correct the misleading statement in his affidavit.

[22] Mr McClelland did not correct the misleading statement he had made or advise his clients as to their position, having put falsified documents before the court; the failure meant that Perpetual Trustee had incurred further costs. The learned judge held that Mr McClelland and the firm, Platinum Lawyers, were responsible for the costs incurred by Perpetual Trustee from 7 September 2009 and ordered them to pay those costs on an indemnity basis,

> "because of Mr McClelland's obstinate and egregious refusal to comply with his duties to the court".

Were there breaches of duty?

[23] The appellants did not dispute the court's power to order costs against them in the exercise of its disciplinary jurisdiction in respect of legal practitioners. That power may be exercised against a practitioner where the Court is satisfied that there has been a serious dereliction in the performance of the practitioner's duty to the court.[2] The relevant jurisdiction is compensatory, although it may also be punitive in its effect.

[24] Counsel for the appellants submitted that r 14.2 of the *Solicitors Rule* was limited in its application to the circumstance where a solicitor made a statement as advocate in a court proceeding. The point is arguable; and it may also be that r 15.1 does not extend to a situation where a solicitor forms the view that his client has lied or produced a false document, not from what his client has told him but from other information. However, neither question is of any moment, because counsel for the appellants did not argue against the existence of such duties more generally. That seems consistent with the statement of general principle in the *Solicitors Rule* requiring frankness in responses and disclosures to the court. It also accords with

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[2] *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2004] 2 Qd R 11 at 16; *Myers v Elman* [1940] AC 282 at 292; *Steindl Nominees P/L v Laghaifar* [2003] QCA 157 at [41] and [44]; *Harley v McDonald* [2001] 2 AC 678 at 702-703.

the view of Viscount Maugham in *Myers v Elman*: that where a solicitor became aware that his client's affidavit was untrue or false, he owed a duty to inform the client that he must correct the matter, and if the client did not assent, he must cease to act for him.[3]

[25] Counsel for the appellants argued that the learned judge erred in holding that Mr McClelland in his affidavit had expressed a personal opinion or made a positive statement that the payments had, in fact, been made, when, in context, it was evident that he was making the statement on the basis of instructions and the bank statements provided to him by Mrs Cowley. White J, in making the orders of 9 July 2009, had expressly relied on the Cowleys' affidavits and had made no reference to Mr McClelland's statement as supporting their proposed defence.

[26] There is some force in the submission that although Mr McClelland neglected to say that he was making it on information and belief, the offending statement was unlikely, in the circumstances, to amount to an expression of personal opinion, let alone direct knowledge. But I do not think that necessarily obviated Mr McClelland's obligation, once it became evident that the bank statements did not evidence the payments to which he had deposed, to advise the court accordingly. As the learned judge found, by 7 September 2009, any reasonable solicitor in Mr McClelland's position must have realised that the statements had been falsified and that his clients had not told him the truth about making repayments.[4] Although White J did not express any reliance on the assertion in Mr McClelland's affidavit, whether the payments had been made was a matter crucial to the decision in his clients' favour, and it was a matter on which he, albeit unnecessarily, had chosen to depose. He had done so on the strength of the entries in the statements; by 7 September it was clear that those very statements did not add up, much less reflect the statements Perpetual Trustee had obtained. It should then have been obvious to McClelland that what he had said as to the repayments having been made was misleading, and that at the least he should advise the Court of the irregularities which appeared on the face of the statements on which he had relied, and which he had overlooked.

[27] Mr McClelland was also then obliged to take the matter up with his client and request instructions to correct the falsehood, causing Platinum Lawyers to withdraw as solicitors if those instructions were not forthcoming. Counsel for the appellants suggested that there was no opportunity for Mr McClelland to seek to obtain such instructions until 22 September 2009, but I do not think the evidence supports that submission. Mr McClelland had the necessary documentation on 7 September 2009 supplied by Perpetual Trustee's solicitors, with the discrepancies pointed out; he had on that day Ms Young's confirmation that she was not the source of the supposed trace from the Credit Union; all in a context in which Perpetual Trustee's solicitors have been raising their clients concerns for some time. There was nothing to prevent his insisting on an immediate conference with his client for that purpose, and it seems that he did at about that time confront her about Ms Young's denial of her signature on the trace. What he did not do was to apply any rational judgment to the information he had, or take the necessary steps to remedy the results of his credulity and carelessness.

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3 At 493.

4 Perpetual Trustee argued that the learned judge should have found that Mr McClelland had breached his obligations to the Court as at 9 July 2009, because of his failure to exercise proper forensic judgement; but in the absence of any cross-appeal, there is no occasion to review that aspect of her Honour's findings.

Were the breaches causative?

[28] The appellants' second point, that neither the failure of Mr McClelland to advise the court that his earlier statement was now shown to be wrong or that of the firm, Platinum Lawyers, to withdraw as the solicitors on the record, caused Perpetual Trustee to incur any costs, is stronger. Although the Cowleys had surrendered possession of the property, Perpetual Trustee, nonetheless, sought the setting aside of the July 2009 orders and the consequent reinstatement of the order for possession and the enforcement warrant as a matter of prudence. Given the Cowleys' conduct, it was reasonable for Perpetual Trustee to seek the reinstatement of those orders; but to do so it had to make the application.

[29] The learned judge did not make any finding on the point, but one can reasonably start from the premise that Mrs Cowley, who was still asserting her innocence and claiming to be the victim of others' wrongdoing as at November 2009, would not have agreed to advising the court that the statements were not genuine. Had Mr McClelland filed an affidavit deposing to his changed understanding of the bank statements put before the court, it would still have been necessary for Perpetual Trustee to put on its affidavit material as to what it had established through its investigations with the financial institutions concerned. And the earlier withdrawal of Platinum Lawyers as solicitors on the record would not have made it any easier for Perpetual Trustee to get the orders set aside, nor made the costs it incurred any the less.

Conclusion

[30] In my respectful view, the learned judge erred in concluding that,

> "… further expense was incurred by the plaintiff because of Mr McClelland's failure to comply with his duty of frankness to the court",

that further expense being constituted by the costs incurred after 7 September 2009. In the absence of any causal connection between Mr McClelland's and the firm's conduct from 7 September and the incurring of costs, the order for indemnity costs was not properly made against them.

[31] I would allow the appeal, set the order for indemnity costs aside, and order that the respondent, Perpetual Trustee Company Limited, pay the costs of the appellants on this appeal. The appellants also sought their costs of the hearing before the learned primary judge. There were two first instance hearings to which they were parties, in October and November 2009 respectively. At the first, the July orders were set aside, and at the second, the indemnity costs order was made. Mr McClelland's failure to approach the material being proffered by his client with any rigour contributed significantly to the need for Perpetual Trustee to incur the costs of the first, and also gave rise to a real question about whether he and his firm ought to be ordered to pay indemnity costs, resulting in the second. Consequently, it seems to me that the proper course is to make no order for costs in the appellants' favour in relation to those hearings.

[32] **WHITE JA:** Holmes JA has set out the history of the proceedings which gives rise to this appeal. I agree with her Honour's reasons for disposing of the appeal as she has indicated.

[33] The appeal raises issues about the scope of r 14.2 and r 15 of the *Legal Professional (Solicitors) Rule* 2007 (Qld) but because of the acceptance by the appellants of the existence of a general duty to the court broadly encompassed by these rules it is, as noted by her Honour, unnecessary to determine their precise parameters. Irrespective of the exact nature of the duty owed by the appellants, unless any breach can be shown to have caused loss to the respondent the appellants are not liable to pay the costs of the application to set aside the order made on 9 July 2009.

[34] As her Honour has concluded, the respondent wanted, prudently, to have the original default judgment orders reinstated. But Mr McClelland's failure to advise the court that the statement in his affidavit in support of Mr and Mrs Cowley's application to set aside the default judgment was incorrect, and his firm's failure to withdraw as Mr and Mrs Cowley's solicitor were irrelevant to that application.

[35] **MULLINS J:** I agree with Holmes JA.