DISTRICT COURT OF QUEENSLAND

CITATION:	*Burrows v A.W. Bale & Son Solicitors & Anor* [2022] QDC 117
PARTIES:	**KENNETH PATRICK BURROWS** (plaintiff) **v** **A.W. BALE & SON SOLICITORS** (first defendant) **and** **ANDREW BALE** (second defendant)
FILE NO:	1872 of 2017
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane District Court
DELIVERED ON:	6 June 2022
DELIVERED AT:	Brisbane District Court
HEARING DATE:	1, 2 and 3 December 2021
JUDGE:	Byrne QC DCJ

ORDERS:

1. **The plaintiff's claims are dismissed against both the first defendant and the second defendant.**
2. **If the parties are unable to agree as to costs, the parties are to serve written submissions on each other as to costs, limited to five pages together with any necessary attachments, no later than 4.00pm on 13 June 2022.**
3. **The parties are each to file those written submissions as to costs and file and serve any written submissions in reply, limited to three pages together with any necessary attachments, no later than 4.00pm on 17 June 2022, with a view to the issue being determined on the papers, unless otherwise determined.**
4. **Liberty to apply.**

CATCHWORDS: TORTS – NEGLIGENCE – PROFESSIONAL NEGLIGENCE – BREACH OF RETAINER - CRIMINAL PROCEEDS – FORFEITURE OR CONFISCATIONS - where the plaintiff was convicted of serious drug offences – where the plaintiff had real property and a sum of cash restrained – where the plaintiff retained the first and second defendant to act on his behalf in an appeal against sentence and to resist forfeiture proceedings – where the plaintiff alleges the first and second defendant breached the retainer and breached a duty of care – where the plaintiff alleges the first and second defendants failed to understand the statutory provisions concerning automatic forfeiture – where material was not filed during the automatic forfeiture period – where the applicant contributed to confusion about the date of automatic forfeiture.

TORTS – NEGLIGENCE – PROFESSIONAL NEGLIGENCE – BREACH OF RETAINER - CRIMINAL PROCEEDS – LIMITATION OF ACTIONS – where the plaintiff was serving a period of imprisonment and actually incarcerated at the time the causes of action arose – where the plaintiff was later released on parole – where s. 5(2) of the *Limitations of Actions Act 1974* then provided that a convict who, after conviction, is undergoing a sentence of imprisonment is under a disability – where s. 29 of the *Limitation of Actions Act 1974* provided that a limitation period of 6 years applies from when the person ceases to be under a disability – meaning of the phrase "a convict who, after conviction, is undergoing a sentence of imprisonment" – whether a person is a convict undergoing a sentence of imprisonment once released on parole – whether the plaintiff's actions were commenced after the expiration of the limitation period.

TORTS – NEGLIGENCE – PROFESSIONAL NEGLIGENCE – BREACH OF RETAINER – CAUSATION – DAMAGES – where liability is notionally established – whether causation is established and damages are to be calculated on a loss of chance basis – whether it must be shown on the balance of probabilities that the breach caused actual loss of something of value.

LEGISLATION: *Civil Liability Act 2003* (Qld)

Criminal Proceeds Confiscation Act 2002 (Qld)

Corrective Services and Other Legislation Amendment Act 2008 (Qld)

Drugs Misuse Act 1986 (Qld)

Limitation of Actions Act 1974 (Qld)

Penalties and Sentences Act 1992 (Qld)

Uniform Civil Procedure Rules 1999 (Qld)

CASES: *Adeels Palace Pty Ltd v Moubarack* (2009) 239 CLR 420.

Capital Brake Service Pty Ltd v Meagher [2003] NSWCA 225.

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384.

Commonwealth of Australia v Verwayen (1990) 170 CLR 394.

Grahame Allen & Sons Pty Ltd v Water Resources Commission [2000] 1 Qd R 523.

Heydon v NRMA Ltd [2000] 51 NSWLR 1.

Lewis v Hillhouse & Ors [2004] QSC 311.

Lewis v Hillhouse & Ors [2005] QCA 316.

Logan v GBR Helicopters & Ors (No. 2) [2021] QDC 239.

Maxwell v The Queen [1996] 184 CLR 501.

Midland Bank Trust Co. Ltd v Hett, Stubbs & Kemp [1979] Ch 384.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

R v Shillingsworth [1985] 1 Qd.R. 537.

R v Verrall [2013] 1 Qd.R. 587.

Trust Co. of Australia v Perpetual Trustees WA Ltd & Ors [1997] 42 NSWLR 237.

COUNSEL: Mr. M. Donovan for the plaintiff.
Mr P. McCafferty QC for the defendants.

SOLICITORS: Brisbane Criminal Lawyers for the plaintiff.
McInnes Wilson for the defendants.

Introduction

[1] The first defendant is a firm of solicitors which at all relevant times practised in criminal law, and the second defendant was, for part of the material time, an employee of the first defendant, and then became the principal of the firm on 1 July 2007. The plaintiff engaged the second defendant to represent him in certain proceedings after his conviction and sentencing on drug and other offences in 2004. The second defendant had carriage of the matter whilst employed by the first

defendant, and retained carriage of the matter when he became the principal of that firm.

[2] On 16 September 2016 the plaintiff commenced proceedings in this Court which, by his Further Amended Statement of Claim ("FASOC"), he claims damages "*for negligence and/or breach of duty and/or breach of contract*" together with interest and costs.

[3] The defendants resist the claim asserting that the proceedings were brought outside of the limitation period and hence are statute barred, and further deny any breach of duty, negligence or breach of contract, and deny that any conduct caused loss.

[4] For the reasons that follow, the defendants must succeed on the limitation point. Had it been necessary to consider, I would have also found for the defendants on the causation point.

Some factual background

[5] The plaintiff had been charged with a number of serious drug offences, including trafficking in a dangerous drug (which was methylamphetamine) between September 1998 and September 2001. He was arraigned and pleaded guilty in the Supreme Court on 30 March 2004 to various charges including trafficking in methylamphetamine,[1] receiving money obtained from trafficking believing it to have been so obtained[2] and possessing of a sum of money and a set of scales used in connection with the commission of a crime defined in Part 2 of the *Drugs Misuse Act 1986*.[3] The allocutus was administered on that day.[4]

[6] On 13 May 2004 the plaintiff pleaded guilty to a number of other charges, including possession of property reasonably suspected of having been the proceeds an offence defined in Part 2 of the *Drugs Misuse Act 1986*.[5]

[7] Sentencing for all charges occurred on that day. Atkinson J sentenced the plaintiff to an effective term of nine years' imprisonment with a period of 787 days declared as time already served under the sentences imposed, and the trafficking offence was declared to be a Serious Violent Offence.

[8] On the same day the State of Queensland successfully applied for a restraining order over real property located at Moorina, and a sum of cash totalling $106,355.00. The application was made pursuant to ss 117 and 122 of the *Criminal Proceeds Confiscation Act 2002* ("CPCA"). At the same time an application for forfeiture of both the Moorina property and the cash was made pursuant to ss 146 and 151 of the CPCA. That latter application was adjourned to a date to be fixed. The plaintiff did not oppose the restraint or the adjournment of the forfeiture application.

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1 Section 5(1)(b) of the *Drugs Misuse Act 1984*; Trial Bundle ("TB"), pp 119 and 91.
2 Section 7(1)(a) of the *Drugs Misuse Act 1984*; TB, pp 119 and 91.
3 Section 10(1)(a) of the *Drugs Misuse Act 1984*; TB, pp 117 and 93.
4 Ts 2-54.
5 Section 10A(1)(d) of the *Drugs Misuse Act 1984*; TB, p 94.

[9] Although the first defendant had apparently acted for the plaintiff at an earlier time in the criminal proceedings, neither it nor the second defendant were involved in March 2004 or May 2004.

[10] Section 163 of the CPCA[6] provided for the automatic forfeiture of restrained property when the "*forfeiture period*" expired. It applied only because of the existence of the restraining order. In that sense, it operated separately to the forfeiture order sought under ss 146 and 151 of the CPCA. The forfeiture period was defined at s 161 as the later of a period of six months starting on the day of the plaintiff's conviction or a period as extended under s 163. The only means by which the plaintiff could avoid automatic forfeiture was to bring an application under s 139 to amend the restraining order to exclude particular property (an "exclusion application"). In the circumstances of this matter, it may also have been open for an application to be made by the plaintiff's wife for a third party order or a buy-back order under ss 165 and 166. In either case, the applicant bore the burden of proving that the property should be the subject of a favourable exercise of discretion.

[11] In or about July 2004, the plaintiff engaged the defendants to act on his behalf in relation to an appeal against the severity of the sentence imposed, and to also act in relation to the pending application for forfeiture.[7] There is nothing before me to suggest that the terms of any retainer had been reduced to writing, and there is a dispute on the evidence about what was done and when it was done.

[12] On 3 August 2004 directions were made concerning the freestanding forfeiture application, and by consent Holmes J (as her Honour then was) ordered that the plaintiff file and serve any affidavit material in support of his application for exclusion under s 139 of the CPCA by 24 September 2004, with the State to respond by 15 October 2004.[8] Correspondence subsequent to that date between the State and the second defendant makes it clear that the order was intended to also require the filing of the exclusion application itself on or before 24 September 2004.[9]

[13] On 24 September 2004 the second defendant sought the State's consent to an extension of two weeks due to difficulty in obtaining "material" from the plaintiff while he was incarcerated.[10] The State consented to that request, and erroneously noted that automatic forfeiture was due to occur on 13 November 2004.[11] It is common ground that no variation of Holmes J's order was sought from, nor granted by, the Court.

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6 The applicable reprint is reprint 2A in force from 8 December 2003.
7 FASOC at para 6, Second Further Amended Defence ("SFAD") at para 6.
8 TB, p 82.
9 TB, pp 83 and 84.
10 TB, p 84.
11 TB, p 85.

[14] On 15 November 2004 (the first working day after 13 November 2004, a Saturday), the defendants filed an application, on behalf of the plaintiff, pursuant to s. 163(4) of the CPCA for an extension of the forfeiture period by one month, returnable on 19 November 2004. On 16 November 2004 the State wrote to the first defendant indicating it would, on the return of that application, consent to an extension of the forfeiture period to 29 November 2004. On this occasion the State erroneously stated that the plaintiff had pleaded guilty on 27 March 2004 and that the six-month forfeiture period commenced that day.[12] That was corrected by the State two days later to the correct date of 30 March 2004.[13]

[15] On 19 November Atkinson J purported to extend the forfeiture period to 13 December 2004.[14]

[16] On 13 December 2004 the defendants filed an exclusion application on behalf of the plaintiff seeking an order under s 139 of the CPCA and, further and in the alternative, a declaration that the restrained property is not subject to automatic forfeiture under s 141 of the CPCA.[15]

[17] On 22 December 2004 the State emailed the defendants and therein questioned the validity of the orders of 19 November 2004 and asserted that the forfeiture period had expired and that the restrained property had already been forfeited.[16]

[18] On 23 December 2004 directions were given by Byrne J (as his Honour then was) for the parties to file submissions and supporting material by certain specified dates.[17]

[19] On 27 April 2005 the State filed an application seeking orders that the applications by each of the plaintiff and his wife, both filed 13 December 2004 seeking exclusion of property from forfeiture,[18] be dismissed and a declaration that under s 163 of the CPCA the restrained property was automatically forfeited to the State on 30 December 2004.[19]

[20] On 13 May 2005 Moynihan SJA extended the restraining order made on 13 May 2004 "*until further order*" and made what were in effect guillotine orders requiring the plaintiff and his wife to file and serve outlines of argument and supporting material concerning the exclusion application filed on 13 December 2004 by 24 June 2005.[20] On 23 June 2005 the plaintiff's material was filed,

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12 TB, p 99. The error I refer to was in the date.
13 TB, p 108.
14 TB, p 121.
15 TB, p 123.
16 TB, p 125.
17 TB, p 127.
18 The parties have not placed before me evidence of the application by the wife, other than inferentially from the terms of this order. Nonetheless it is clear enough that such an application was filed on 13 December 2004.
19 TB, p 130.
20 TB, p 134.

including his own affidavit sworn 9 March 2005.[21] On 5 August 2005 the State filed material in response.[22]

[21] There were then no further steps taken until 10 November 2015 when the State filed an application to strike out the plaintiff's application of 13 December 2004.[23]

[22] On 10 February 2016 the plaintiff, by his new solicitors, filed an application seeking orders that the State's application to strike out the dismissed and that the confiscation proceedings be dismissed for want of prosecution.[24] On 16 February 2016 the applications were heard by Ann Lyons J who struck out the plaintiff's application, considered that the orders made by Atkinson J and Moynihan SJA extending periods of time were without jurisdiction, and determined that the State's application was unnecessary because the property had been automatically forfeited under the regime provided for in the CPCA on 30 September 2004.[25]

The plaintiff's pleaded case

[23] Broadly speaking, the plaintiff pleaded by his FASOC that the defendants were negligent towards him and breached an implied term of the retainer that existed between them by:

(a) failing to properly understand the effect of the automatic forfeiture provisions of the CPCA, and

(b) filing applications to extend the forfeiture period and to exclude the property from automatic forfeiture only after the forfeiture period had expired.

[24] Further, and in the alternative, the plaintiff pleaded that the defendants had a duty to inform the plaintiff of their failure to make timely applications to resist automatic forfeiture of the property and of the plaintiff's right of action against the defendants arising from that failure. He pleads that the defendants wilfully concealed these matters from him following automatic forfeiture, and thereby caused him harm.

[25] The plaintiff also pleads that the same wilful concealment engages s 38 of the *Limitation of Actions Act 1974* ("LAA"),[26] so that the proceedings were not commenced out of time. Alternatively, it is asserted that the underlying proceedings were still on foot at the time of the judgment delivered by Ann Lyons J on 16 February 2016 and so the present proceedings were commenced within time.

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21 TB, pp 142, 195 and 209. There is no material before me to determine whether any material was filed by the plaintiff's wife.
22 TB, pp 217 and 250.
23 TB, p 245.
24 TB, pp 250, 259, 263, 267, 279, 283, 288.
25 TB, pp 306-317.
26 The applicable reprint is Reprint 1B, in force on 16 August 2002.

[26] The damages pleaded were for half the asserted value of the Moorina property,[27] the whole value of the cost of improvements to the property since forfeiture in the sum of $30,000.00, the whole value of the cash forfeited, and an estimate of rates and taxes paid on the real property, estimated at $1,000.00 per annum over 16 years.

[27] In relation to the wilful concealment allegation and the asserted breach of duty to inform the plaintiff that they had not made timely applications to resist automatic forfeiture, damages were sought for an unspecified amount for legal fees for work done after the forfeiture, as well as for improvements, rates and taxes paid in relation to the Moorina property.

The oral evidence

Kenneth Burrows

[28] The plaintiff received two personal injury payments totalling in excess of $400,000.00. The first was received in December 1993.[28] The date of the second payment is not in evidence, but it was after that.

[29] The Moorina property was purchased on 5 April 1994 with what the plaintiff said was the proceeds of the first payout.[29] It was purchased in the name of both the plaintiff and his then wife, or perhaps de facto partner, as joint tenants.[30]

[30] The plaintiff testified that the second payment was banked on 8 December 1998 and then withdrawn as roughly $298,000.00 in cash which, he says, he put under his bed.[31]

[31] After being sentenced to imprisonment in 2004, he had his father contact the defendants to appeal against his sentence "*and get the caveat lifted off the property*".[32] He said he first saw the second defendant at Borallon Correctional Centre towards the end of 2004. He said that the second defendant said he was in a hurry and told him to sign a Legal Aid form that had to be lodged. Regarding the forfeiture, he said that the second defendant told him that there was a fair chance the State would keep the money and he would keep the land. He said he would be happy with that. He said he had not heard anything earlier because he had been "*locked up*" and didn't like using phones too much.[33]

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27 Half of the value is sought because the plaintiff's wife was a joint tenant of the property – TB, p 114. Proceedings by her were discontinued prior to trial.
28 TB, p 150.
29 TB, p 143.
30 TB, pp 114 and 142.
31 Ts 1-16 to 1-17.
32 Ts 1-14.
33 Ts 1-18 to 1-19; 1-40.

[32] He denied having been shown, or signing, an instructions document dated 15 November 2004,[34] although in cross-examination he accepted that he might have signed it.[35]

[33] He applied for parole in 2009. It was initially refused as the Moorina property was considered to be unsuitable as a residence. That later changed after, he understood, the second defendant wrote to the Parole Board on his behalf.[36]

[34] The plaintiff testified he was again arrested in 2015 and that it was on 1 December 2015 that police told him he had lost his house. He said that was the first he knew of that. To the date of his testimony, he said he has never received a letter from the defendants saying he had lost the property.[37]

[35] He said in the intervening period he had made improvements to the property. He testified that his sons paid about $30,000.00 for materials but he was doing the renovations with his son and that there was no price you could put on that, because he was bonding with his son.[38]

[36] In cross-examination he accepted that he stated in an affidavit dated 7 February 2016 that after his appeal was dismissed, he felt depression and despair and that his recall of those years was limited, although he now asserted that he remembered "*every day in gaol*".[39]

[37] He accepted that at sentence a psychiatric report was tendered on his behalf in which the author observed that the plaintiff had then presented with antisocial and manipulative behaviours to achieve personal gain.[40]

[38] In 2004 the plaintiff also owned another property, in Beachmere.[41]

[39] He accepted that he may have received correspondence from the defendants dated 18 October 2004[42] and 25 October 2004,[43] but he had no recollection of it.[44] He also denied receiving a document referred to as a file note dated 9 November 2004,[45] although the plaintiff also conceded it was possible, he did.[46] He also

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34 Ts 1-19.
35 Ts 1-41 to 1-42.
36 Ts 1-20.
37 Ts 1-20 and 1-22.
38 Ts 1-21.
39 Ts 1-23 to 1-24.
40 Ts 1-31.
41 Ts 1-33.
42 TB, p 86.
43 TB, p 90.
44 Ts 1-36 to 1-37.
45 That document was authored by the second defendant and outlined the fact that the State asserted that automatic forfeiture had already occurred. It eventually became exhibit 5 on the trial.
46 Ts 1-39

recalled he had been told there was a "*loophole*" in the forfeiture because his wife had not been served with the papers.[47]

[40] He accepted that, by reference to an affidavit affirmed 9 March 2005, the second defendant must have visited him in gaol a second time, but he could only recall one visit.[48]

[41] He accepted that he was sentenced on the basis that the real property was used in the trafficking business, and that the money was the proceeds of that business, but denied the latter part was true.[49]

[42] He denied having been sent a copy of the second defendant's affidavit dated 23 June 2005 in preparation for the exclusion application.[50]

Luke Burrows

[43] Luke Burrows, although there was no express evidence to this effect, was the son of the plaintiff. He testified that sometime after his father was imprisoned, he moved to the Moorina property and started renovating and improving it. He initially did that under the guidance of his grandfather and then eventually his father, after his release from gaol. He was surprised when it was taken away as he expected it to be handed down to him. He spent about $40,000.00 on the property, in addition to paying bills such as power, rates and electricity.

Glen Vile

[44] Mr Vile testified to an unspecified occasion in 2009 when he and the plaintiff saw the second defendant's father. As the case progressed, this evidence became irrelevant, and so need not be further considered.

Andrew William Bale

[45] Mr Bale was first admitted as Counsel in 1996 and then as a solicitor in 2000. He has practiced predominantly in the criminal jurisdiction.

[46] He recalled being retained to represent the plaintiff in the sentence appeal and the forfeiture proceedings. He believed that occurred in late July 2004.[51] At the time

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47 Ts 1-39
48 Ts 1-42 and 1-44
49 Ts 1-43
50 Ts 1-44
51 He thought the date of the document at TB p 81 confirmed that belief – Ts 2-17. That approximate date is not in issue in the trial.

he could not phone the plaintiff at gaol. He had to rely on the plaintiff phoning him. Otherwise, he could only communicate by sending a letter, or occasionally a fax.[52]

[47] Based on a letter sent by the State dated 24 September 2004, he initially understood that forfeiture of the property was to occur on 13 November 2004.[53] He sent letters to the plaintiff to facilitate Legal Aid funding on 18 October 2004 and 25 October 2004. He does not recall getting a response.[54]

[48] On 9 November 2004 he prepared a file note outlining an approach to be taken to the State's application for forfeiture and the lapsing of the forfeiture period. A copy of the note was, he said, sent to the plaintiff.[55]

[49] He recalled attending on the plaintiff in prison on 15 November 2004. At that time, he had the plaintiff sign an instructions document[56] which, he said, he explained to him. He did that so he could proceed with the application for extension of the forfeiture period.[57]

[50] He understood that by its letter dated 16 November 2004, the State was consenting to an extension of the restraining orders.[58]

[51] He recalled telling the plaintiff about the State's change of position concerning when the forfeiture period expired, as expressed in the State's letter of 22 December 2004. He did not recall visiting the plaintiff at Christmas time, so he thought he told him by phone.[59]

[52] The second defendant took no steps on the plaintiff's behalf after filing documents on 24 June 2005 because, he said, it was the State's application for forfeiture, and it was a matter for them if they wanted to further the proceedings or not.[60]

[53] He accepted he sent the letter to the Parole Board on behalf of the plaintiff on 3 March 2009. He referred to the subject property as "*our client's property*" because he considered that to be the case at the time.[61]

[54] On 22 June 2009 the plaintiff attended upon the second defendant at his office and requested his file. The second defendant did not supply it at that time, but thinks the plaintiff may have later obtained it.[62]

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52 Ts 2-18
53 Ts 2-18
54 Ts 2-19
55 Ts 2-20; exhibit 5
56 TB, p 96
57 Ts 2-21 to 2-22
58 Ts 2-23
59 TB, pp 125 to 126; Ts 2-27 to 2-28
60 Ts 2-30
61 Ts 2-31 and 2-59
62 Ts 2-31 to 2-32

[55] In cross examination, he accepted that he had "*no doubt*" read the plaintiff's file from the previous solicitors once he was engaged.[63] He did not file any material by 24 September 2004, pursuant to the order of Holmes J because he did not hold any instructions from the plaintiff at that time.[64] He said he continually sought information from the plaintiff.[65] Although he obtained the consent of the State to extend the date for filing,[66] he could not recall if a consent order was filed with the Court.[67] He did not know why he did not file any such consent order.[68] He accepted that he did not file any application by the agreed extended date of 8 October 2004. He wrote asking for instructions on 18 October 2004. By that date he was frustrated by the plaintiff's lack of communication of any instructions.[69]

[56] The second defendant said he was not in possession of a signed copy of the instructions dated 15 November 2004. He assumed it was on the file when it was returned to the plaintiff. He cannot recall if his practice then was to scan the whole of the file before returning it to a client. He was adamant the instructions were explained by him to the plaintiff before the plaintiff signed the document.[70]

[57] The second defendant filed exclusion applications on behalf of the plaintiff and his wife on 13 December 2004. He was now unsure whether he first spoke with Ms Burrows in 2004 or 2005.[71]

[58] He did not accept that the failure to file a consent order to the extension of the times ordered by Holmes J caused the property to be forfeited because, he said, the orders were for filing dates and not orders extending the forfeiture period.[72]

[59] He thought it was correct that as at late September 2004 he did not know that the plaintiff had pleaded guilty on 30 March 2004.[73] Apart from enquiring of the State, he could not recall making other enquiries about when the forfeiture period ended. At that time, he had no concerns he might have been told incorrect information by the State.[74] He did not see any risk in relying on that information.[75]

[60] Notwithstanding the subsequent determination by Ann Lyons J in 2016, the second defendant had been of the opinion that automatic forfeiture could not be achieved because the plaintiff's wife had not been served with a copy of the restraining order. The application for exclusion had been filed which, he believed, operated to stay the

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63 Ts 2-33
64 Ts 2-34
65 Ts 2-36
66 TB, p 85
67 Ts 2-35
68 Ts 2-46
69 Ts 2-36 to 2-37
70 Ts 2-40 to 2-41
71 Ts 2-41
72 Ts 2-42
73 Ts 2-44
74 Ts 2-46 to 2-47
75 Ts 2-47

automatic forfeiture.[76] By the time he received the State's letter of 22 December 2004[77] he had been in "*constant dialogue*" with them about the fairness of the change in their position about the date of automatic forfeiture.[78]

[61] He accepted that he applied for Legal Aid for the forfeiture application on 18 January 2005. While he knew that the State by that time asserted that the automatic forfeiture had occurred, he did not agree and had instructions to resist forfeiture.[79]

[62] He denied that he only visited the plaintiff in gaol once. He said he used to visit him regularly.[80] He denied that he had sent the plaintiff the affidavit dated 9 March 2005 for his signature and for its return in a paid envelope. He said the fact that he had witnessed the affidavit showed he was present when it was signed.[81]

[63] He denied the letter to the Parole Board was misleading. However, he accepted that he had told the plaintiff that the State said his property had been forfeited.[82]

[64] He denied the instructions bearing the date 15 November 2004 were in fact produced by him on 18 November 2004, after the State wrote suggesting that the plaintiff had in fact pleaded guilty on 30 March 2004.[83]

Findings

[65] The relevant events in this matter occurred many years ago. It is only natural that memories will fade. There are some broadly contemporaneous documents in evidence which can assist with an understanding of the events at the time. But they do not provide a full picture, and they are only partly supplemented by the pleadings and facts deemed to have been admitted.

[66] Caution must be exercised when assessing the plaintiff's evidence. That is not only because he has been previously assessed by an expert as presenting with antisocial and manipulative behaviours, but also because he has previously affirmed an affidavit for use in curial proceedings that his recall of the years after his appeal was dismissed was limited. Whether he asserted that because it was the truth or because it suited him at the time, it means that close consideration of his evidence is required before it can be accepted.

[67] Although only limited weight can be given to an assessment of his demeanour, he did not appear forthcoming with his account and, in particular, was overly guarded and combative in cross examination. The first four answers in cross examination evidence that. So too does a passage where the cross examiner inadvertently took

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76 Ts 2-49 to 2-50
77 TB, p 125
78 Ts 2-51
79 Ts 2-53 and 2-64
80 Ts 2-55 to 2-57
81 Ts 2-58
82 Ts 2-59 to 2-61
83 Ts 2-71

him to a wrong part of the trial bundle,[84] but the transcript does not fully capture the plaintiff's apparently triumphant reaction when the error was accepted.

[68] I do not accept the plaintiff's evidence that he remembered every day he spent in gaol. Bearing in mind the caution with which I must approach his evidence, it flies in the face of common human experience and cannot be accepted literally. It appeared to me to be a deliberate mistruth told in an effort to cut off a line of attack on his memory.

[69] On the other hand, it is clear that, understandably, the second defendant also has a far from perfect recollection of events. It was obvious in the course of his evidence that while he could independently recall some, albeit few, events, the majority of his testimony was based on a recollection refreshed by contemporaneous documents, or an acceptance that certain events must have occurred because of the existence of those documents and an extrapolation based on his usual custom and experience. However, the comparative lack of diary notes, file notes and the like means that some of the facts he asserts are unsupported by contemporaneous documents. Accordingly, his evidence must too be approached with some caution, but I hold no concerns about his honesty.

[70] The dates of the criminal proceedings are uncontentious and need not be recited. It is also common ground that the plea of guilty was entered on the basis that the Moorina property was used in the course of conducting the trafficking business.

[71] Of the cash the subject of the restraining order, $84,950.00 was the subject of the offence of receiving the proceeds of trafficking knowing it to be so,[85] $18,000.00 was the subject of the offence of the charge of possession of property used in connection with a crime[86] and the balance was the subject of the offence of possession of property reasonably suspected of being the proceeds of an offence.[87] Therefore, the elements of those offences concerning the whole of the cash were admitted by the pleas of guilty, although the plaintiff denies in this Court that the cash was tainted. The plaintiff's present contention that that money had earlier been withdrawn in cash and placed under his bed, and hence that it was not tainted property, is farcical. More pertinently, the plaintiff's current assertion is contrary to the voluntarily entered pleas of guilty, which in themselves admit the elements of the offences, and cannot sit with the accepted fact that some of the cash in the plaintiff's possession had been used by covert police officers to pay for drugs sourced from the plaintiff.[88]

[72] It is also uncontentious that the defendants were retained in late July 2004 for the purposes of the sentence appeal and to resist the forfeiture of the restrained property. There is no written agreement in evidence, and so the terms of the

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84 Ts 1-31
85 Exhibit 4, sentencing remarks page 8; TB, p 91.
86 Exhibit 4, sentencing remarks pages 9-10; TB, p 93.
87 Exhibit 4, sentencing remarks pages 11-12; TB, p 94.
88 Exhibit 4, sentencing remarks pages 4-6.

retainer must be implied. Those implied terms are closely aligned with the duty of care which was owed, and a breach of one will establish a breach of the other.

[73] I accept the uncontested evidence that at or shortly after being retained, the second defendant obtained and considered the plaintiff's original file from the previous solicitors. I also find that he acted, as solicitor, in the sentence appeal which was determined in August 2004.

[74] The second defendant was aware of the order made by Holmes J on 3 August 2004 setting certain dates for filing. Although the wording of the order may suggest otherwise, there had not at that time been an exclusion application filed.

[75] I find that the second defendant accepted, without independently checking until sometime after 30 September 2004, the erroneous assertion by the State in its letter of 24 September 2004 that automatic forfeiture was due to occur on 13 November 2004.

[76] I accept that the second defendant sent the plaintiff the letters and attachments of 18 October 2004 and 25 October 2004. It accords with common sense that a Legal Aid application would need to be completed and some broad instructions obtained as time moved closer to the presumed deadline of 13 November 2004. The documents are not of such as nature as to require personal delivery. Further, the terms of the second letter are strongly suggestive that the documents from the first letter had been completed and returned, notwithstanding the second defendant's now lack of recollection. The plaintiff's denials of the receipt of those letters and completion of forms cannot be accepted.

[77] I accept that exhibit 5, the file note which bears the dates 9 November 2004 and 18 August 2017 was in fact created on 9 November 2004, as exhibit 7 evidences. Given the nature of the document and the importance of its contents to the litigation, I have no reason to doubt it was sent to Counsel and to the plaintiff.

[78] I accept that on various occasions around this time there were discussions between the State and the second defendant which are not reflected in documentary evidence. Although the second defendant's evidence about this is an act of a reconstruction,[89] the documents themselves support this finding. Exhibit 5 refers to the "*Crown*" position that automatic forfeiture may have occurred on 27 September 2004. On the whole of the evidence before me, that is the first such occasion that the date is mentioned. The first occasion it appears in the written material before me, was in a letter from the State some seven days later.[90] I therefore accept that the forementioned discussions had occurred.

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89 Ts 2-69 to 2-70

90 TB, p 99

[79] I accept that the instructions document dated 15 November 2004[91] was explained to the plaintiff and that he gave those instructions, including by signing the document, probably on 15 November 2004.

[80] It is unclear to me whether that occurred before or after the filing of the extension application[92] on the same date, but that is of no consequence in the circumstances. That the document was created on 15 November 2004 is supported by the supporting entry in exhibit 7, showing its creation at 12:48pm that day. That would leave little time to drive it out to the Borallon Correctional Centre from the City, explain it in detail and return in time to file the application before the Registry shut at 4:30pm. But it is not impossible, and would be consistent with the plaintiff's evidence that the second defendant said he was in a rush.

[81] The second defendant's evidence that the process occurred on 15 November 2004 at the gaol was obviously based on the date on the unsigned version of the document. The original has not been produced in evidence and may have an amended date, but if it did that would not, in my view, have involved any impropriety on the part of the second defendant in filing the extension application before the instructions document was executed. The second defendant clearly had sufficient instructions to apply for an extension of the forfeiture period, which was a necessary step in resisting forfeiture, regardless of the approach to be taken, and hence regardless of the execution of that document.

[82] The only other document that the plaintiff thought he had signed around that time was a Legal Aid application and that had earlier been signed and returned, according to my findings. His evidence to that effect must be rejected.

[83] I accept that, given the importance of the contents of the instructions, the second defendant explained the document to him as he testified, although I accept it might have also been done in somewhat rushed circumstances. Further, the fact that the plaintiff acknowledged he had been told of a "*loophole*" because his wife had not been served with the papers provides some support for the fact that the issues had been explained to the plaintiff when he signed the document.

[84] The extension application was filed on 15 November 2004, the last permitted date for filing.

[85] There then followed a series of orders to designed to bring the proceedings to finality, ultimately resulting in material being filed on behalf of the plaintiff on 23 June 2005 and the following day, and the State's material in response on 5 August 2005. No steps were then taken in the proceedings for over 10 years.

[86] It is common ground that the second defendant wrote to the Parole Board on 3 March 2009.[93] The terms of the letter are obvious on its face. I accept that the

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91 TB, p 96
92 TB, p 97
93 TB, p 242.

letter, strictly, reflected the second defendant's understanding as to the ownership of the property at law. The fact that automatic forfeiture was in dispute was not, in my view, a fact that the second defendant had to disclose. That issue remained unresolved by the Court at the time the letter was written. That the order of Ann Lyons J seven years later determined otherwise does not alter the fact of an honestly held belief as to ownership at the earlier time. I accept the second defendant did not act dishonestly or deceitfully when he wrote that letter.

[87] The events concerning the State's application filed 10 November 2015 and culminating with Ann Lyons J's orders and reasons of 16 February 2016 are not contentious and I act on that basis. The effect of her Honour's ruling is that automatic forfeiture occurred on 30 September 2004, regardless of any misunderstanding by the parties at the time.

Consideration

The limitation issue

[88] The plaintiff has brought the present actions in both tort and contract. The cause of each action arose on 30 September 2004.

[89] Pursuant to s 10(1)(a) of the LAA, the limitation period is one of six years commencing from when the cause of action arose. If at the time that the cause of action arose the plaintiff is under a disability, s 29 of the LAA allows a period of six years to bring proceedings from when the person ceases to be under the disability.

[90] Section 5(2) of the LAA then provides that "*a person shall be taken to be under a disability while the person is … a convict who, after conviction, is undergoing a sentence of imprisonment*". That definition was amended on and from 7 November 2008 such that "*convicts*" were no longer under a disability, but the transitional provision operates to apply the amended provision only to causes of action arising after amendment.[94]

[91] Given that the plaintiff was serving a term of imprisonment as at 30 September 2004, he was then under a disability, and remained under that disability while he was a convict undergoing a sentence of imprisonment. The issue to be considered is whether he ceased to be under that disability when he was released from actual incarceration to parole, or whether it ceased only once the full term of the period of imprisonment had been reached. His fulltime release from the overall sentence of imprisonment was on or about 18 March 2011.[95] The parties are agreed that the he was released to parole on 29 May 2009.[96] The present proceeding was commenced on 16 September 2016, and so the question bears on the application of the disqualifying provision in the LAA.

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94 Section 19 *Corrective Services Act and Other Legislation Amendment Act 2008*.

95 Nine years imprisonment imposed on 13 May 2004 with 787 days on remand declared as time already served under the sentence.

96 SFAD, para 24(2); Reply, para 13.

[92] This issue was raised by me at the hearing. The plaintiff submits it must be taken to be the latter date. Alternatively, he argues that the time will also be extended by the application of s 38 of the LAA. The defendants submit that given the plaintiff admitted, or is taken to have admitted, in the pleadings the defendants' express assertion that the plaintiff remained under a disability only until 29 May 2009, and given that the plaintiff has not sought leave to withdraw the admission, the plaintiff is bound by the admission and the issue does not arise. Alternatively, they submit that, on the construction point, it is the earlier date in any event.

[93] There is some merit in the defendants' primary argument. However, insofar as the admission or deemed admission is to a matter of law and not of fact, r 166 of the UCPR does not apply. It may be that leave to withdraw an admission is nonetheless required under r 188,[97] but it is unclear to me, given the style of drafting employed in the reply, that an admission of that nature has in fact been made. In any event, the issue goes to the fundamental matter of jurisdiction of this Court to determine the proceedings on the merits and it should be examined in the interests of justice. Both parties were given notice of the issue.

[94] The term "*convict*" is not separately defined in the LAA. Its meaning must therefore be taken in the sense it is used, namely a person undergoing a sentence of imprisonment. But what does that mean?

[95] The only authority I, and seemingly the parties, could locate on the topic is an *ex tempore* decision of Fryberg J in *Lewis v Hillhouse & Ors*.[98] His Honour in effect held that a person is "*undergoing a sentence of imprisonment*" for the duration of their sentence, regardless of the physical conditions under which the person is serving that sentence. His Honour made that finding while recognising there were some consequences which were not easy to reconcile, and which were described by one of the parties before him as "*absurdities*". Nonetheless, he preferred a construction that applied the "*plain words of the section*" to a purposive approach to construction, considering that any anomalies should be taken up with the legislature.

[96] As the defendants submit, it appears that his Honour was not taken to relevant authority to consider the proper approach to the construction of the statute, which authority remains relevant today.

[97] In *CIC Insurance Ltd v Bankstown Football Club Ltd*[99] a plurality of the High Court observed that the modern approach to statutory interpretation requires consideration of the context of the impugned passage, even before any ambiguity may be said to have arisen. They observed that when apparently plain words are read in light of the objects of the legislation, they may bear a different appearance. They continued:

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97 *Logan v GBR Helicopters & Ors* (No. 2) [2021] QDC 239, [27]-[29].

98 [2004] QSC 311. The appellate decision in the same proceedings, referred to later in these reasons, does not touch on the issue.

99 (1997) 187 CLR 384, 408.

> "*Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.*"[100]

[98] The LAA did not at the relevant time, and still does not, contain a provision expressly stating the purpose of the legislation, but it is not difficult to deduce. Broadly, and as is relevant for present purposes, it seeks to give effect to the desirable object of finality of litigation while also protecting the rights of those who are unable to properly access resources in order to commence proceedings and take proper advice within stipulated timeframes.

[99] In my view, and with respect, his Honour's interpretation gives more rights, and potentially significantly more rights, to a plaintiff than is necessary to provide the protection of those rights. In so doing, that interpretation fails to sufficiently advance the object of finality of litigation. In my view, a construction which understands a "*convict*" to be a person actually incarcerated while undergoing the sentence of imprisonment is preferable. While I accept that, as Fryberg J observed, there is not much difference between serving a sentence of imprisonment and undergoing a sentence of imprisonment, I consider the construction I favour better accommodates the word "*undergoing*".

[100] Fryberg J noted some anomalies that flow from the interpretation he favoured. There are others that bear highlighting.

[101] Under that interpretation, a person sentenced in 2007 to a 12 month intensive correction order, which is expressly stated to be a sentence of imprisonment served in the community,[101] may, depending on the circumstances, be able to extend the limitation period but another person sentenced on the same day to a combination of three years' probation and 240 hours community service could not.

[102] Similarly, a person sentenced in 2007 to three years' imprisonment with immediate parole may, depending on the circumstances, be able to extend a limitation period but a person sentenced to a three year wholly suspended term of imprisonment could not. This is because his Honour assimilated the terms "*serving*" and "*undergoing*", and it is expressly provided that a person does not serve a suspended term of imprisonment until ordered to do so as a result of the breach of the order.[102]

[103] In my view, the construction I prefer sits more comfortably with the overall context of the legislation, underlining its purpose, and is reasonably open. Reference to the otherwise anomalous outcomes provides further justification for that construction.

[104] Although I do not do so lightly, I decline to follow Fryberg J's ruling in *Lewis v Hillhouse & Ors*, a decision which is not binding on me.

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100 See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69].
101 Section 113(1) of the *Penalties and Sentences Act 1992.*
102 Section 145 of the *Penalties and Sentences Act 1992.*

[105] The plaintiff bears the onus of establishing that the proceedings were commenced within the limitation period.[103] My conclusion is consistent with the plaintiff not taking the point.

[106] Accordingly, the plaintiff was no longer under a disability on and from 29 May 2009 and, subject to the determination of the s 38 issue, the limitation period expired on 28 May 2015.

[107] Section 38 of the *LAA* requires, in the circumstances of this case, proof that the right of action by the plaintiff against the defendants was concealed by the fraud of the second defendant. In that event the period of limitation does not begin until the plaintiff discovers the fraud.

[108] Not a lot of attention was paid in the trial to the identification of the date when the plaintiff says he first discovered the asserted fraud. In an ambiguous answer in his oral testimony, he seemed to suggest it was 1 December 2015. No specific date or even timeframe is pleaded in the FASOC. In any event, while the defendants deny fraudulent concealment, they do not suggest that, if I find there was that fraudulent concealment, it was discovered more than six years prior to the commencement of proceedings.

[109] The meaning of the term "*fraud*" in the context of s 38 of the LLA, and its equivalents, has attracted considerable judicial comment. It is sufficient to say that what must be demonstrated is deliberate conduct in concealing the right of action, which was known to have existed, or perhaps with at least reckless indifference to the issue.[104] I accept the defendants' submission that what must be shown is something more than mere negligence. What must be proven is deliberation.[105] As the defendants submit, it would by necessity be automatically engaged in any action alleging negligence by a solicitor if the position were otherwise, and there is no authority to support that proposition.

[110] There is a difference between the plaintiff's case on the fraudulent concealment issue as pleaded and that orally opened. The oral opening provided clearer allegations as to the nature of the asserted fraudulent concealment, although they do seem to have differed to what was pleaded. However there does not seem to be any allegation pleaded which has not been consumed by the broader case as opened by the plaintiff's counsel. Accordingly, it is appropriate to consider the case as opened at trial, given the defendants have been able to respond to it. As I understand that case, the plaintiff asserts that fraudulent concealment is established because:

1. The State's letter of 22 December 2004 informed the second defendant that automatic forfeiture had occurred on 30 September 2004. It was contended

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103 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.

104 *Grahame Allen & Sons Pty Ltd v Water Resources Commission* [2000] 1 Qd R 523 especially at [19] and cases cited in the decision.

105 Dal Pont, "*Law of Limitation*", LexisNexis, 1st Ed., 2016 at [15.19] and [15.30].

that the second defendant "*cannot deny knowledge of irrevocable forfeiture*" at least after receipt of that letter;

2. The second defendant engaged in a "*coverup*", including by filing affidavits, including his own, and by making a false assertion to the Parole Board;

3. Although not clearly stated, I understand the submission to also include asserted fraudulent conduct in obtaining grants of Legal Aid after the receipt of the letter of 22 December 2004; and

4. The second defendant at no stage told the plaintiff the property had been "*irrevocably forfeited*".

[111] Consistent with my earlier findings, the second defendant was aware of the State's assertion about earlier automatic forfeiture by 9 November 2004, the date he drafted Exhibit 5. A copy of that document was supplied to the plaintiff. The instructions signed by the plaintiff on or about 15 November 2004, and which were explained to him, refer to a possibility that the time for automatic forfeiture had already expired.

[112] The plaintiff's arguments are predicated on the proposition that the second defendant had to accept the State's last assertion as to the date of automatic forfeiture. It is not explained why that assertion had to be accepted as being correct, but not the State's earlier, contrary, assertions. In any event, the proposition that one party to litigation must necessarily accept the assertion of another can be rejected without further detailed explanation. That parties to litigation will often, if not almost always, disagree is an integral feature of litigation.

[113] In this case, the second defendant did not become aware of the State's latest position and ignore it. He developed a tactical response to the allegation of automatic forfeiture based on his instructions that the plaintiff's wife had not, as a joint tenant of the Moorina property, been served with a copy of the restraining order, as required by s 120 of the CPCA ("the s 120 argument").[106] In essence, the argument was that non-service of the restraining order nullified its effect, and hence there cannot be automatic forfeiture. The plaintiff signed instructions to pursue the s 120 argument. The possibility of automatic forfeiture already having occurred was not concealed from him.

[114] Bearing in mind that the State originally sought both a restraining order and a forfeiture order of the same property (that is, a forfeiture order separate to any automatic forfeiture by dint of the legislation), the second defendant drafted and filed material, including affidavits, to answer that forfeiture application on its merits and to seek exclusion orders on behalf of both the plaintiff and his wife.

[115] The various directions hearings were in relation to the freestanding forfeiture application. Those directions were given while unaware that automatic forfeiture

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106 It might also be noted that s 135 of the CPCA was also applicable, however this does not detract from the argument as formulated.

had already occurred. In the absence of that awareness, it was thought that there was an unresolved issue about the status of the purported automatic forfeiture and the freestanding application at the time the last documents were filed in 2005.

[116] For those reasons, the applications for grants of Legal Aid were not fraudulent.

[117] Further, the letter to the Parole Board was accurate, as a matter of law. There had been no determination at that time to the contrary. The fact that seven years later Ann Lyons J determined that there had been an earlier automatic forfeiture does not make the representation retrospectively fraudulent or dishonest. It was, as it turned out, wrong, but I am not satisfied that it was deliberately so.

[118] It can be accepted that the second defendant did not tell the plaintiff that the Moorina property and the cash had been forfeited, but there was no requirement to do so. Those issues were still pending when he ceased acting for the plaintiff in about June 2009.

[119] Finally, the plaintiff alternatively pleaded[107] that "*the limitation of time period had not begun*" by the time of Ann Lyons J's ruling on 16 February 2016. This argument was, properly, not pressed in submissions at trial. Her Honour's ruling was a determination that an event had occurred at earlier point in time. It did not create a cause of action, but merely determined that one had previously arisen.

[120] As earlier noted, the causes of action in both tort and contract arose on 30 September 2004. By force of s 29 of the LAA, they were deemed not to have arisen until the plaintiff's release on parole on 29 May 2009. The limitation period therefore expired on 28 May 2015. The present proceedings were commenced after the limitation period had expired and so judgment must be given for the defendants on that basis.

[121] I will however consider the merits of the action in the event that I am wrong in that conclusion.

The liability issue

[122] Although the plaintiff pleaded a case of breach of contract as an alternative to the allegations of a breach of duty and negligence, the fact that it was a breach of contract case gained little prominence in submissions overall. It does not matter. Those allegations are subsumed into the breach of duty/negligence case.

[123] Curiously, the plaintiff has not expressly addressed the breach of duty/negligence case in terms of the *Civil Liability Act 2003* ("CLA"). Nonetheless, submissions were made that can be referred back to that statutory framework, which applies to this trial.[108]

The standard of the duty of care

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107 FASOC, para 34.

108 Section 4(1) of the CLA.

[124] A solicitor owes a duty to a client to exercise the reasonable care, diligence and skill of a reasonably competent solicitor.[109] The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in the profession.[110] Not every mistake by a solicitor establishes negligence.[111]

[125] In the context of this case where so much time has passed and so many events have occurred, it is important to remember that one cannot engage in hindsight reasoning. As best I can, I need to assess the issues from the point in time they occurred.[112]

Was there a breach of the duty

[126] In considering this issue I remain cognisant of the criteria in s 9 of the CLA.

[127] There is no issue in this trial that the risk of harm to the plaintiff was foreseeable and that the risk was not insignificant.[113] The issue for determination is whether, in the circumstances, a reasonable person in the position of the second defendant would have taken precautions against the risk of harm that were not taken.[114]

[128] The plaintiff asserts there were "*three incidents of negligence*". First, the plaintiff points to the failure to vary Holmes J's order once consent to that effect was obtained from the State on 24 September 2004. Secondly, the plaintiff points the failure to seek an order for third party protection from forfeiture in the name of the plaintiff's wife pursuant to s 165 of the CPCA. Thirdly, the plaintiff points to the failure to independently ascertain the forfeiture period.

[129] The first basis cannot be accepted. The State agreed to an extension of the date for filing of material relating to an exclusion application – which must be taken to include the exclusion application itself – to 8 October 2004. But even had a consent order been made it would not have stopped the forfeiture period from expiring on 30 September 2004. The only means of extending the forfeiture period was to file the application for extension.[115] The failure to do this was, in my view, linked to the failure to properly understand when the forfeiture period expired.

[130] The second basis also cannot be accepted. Any successful application under s 165 of the CPCA can only have benefited the plaintiff's wife. Counsel argued that it would have benefited the plaintiff because the property would have gone into the matrimonial pool. Leaving to one side there is no evidence before me to assess whether there were realistic prospects of succeeding on an application of that nature, there is also no evidence that she would have been so benevolently inclined towards the plaintiff, and even if she was, there is no evidence that the second

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109 *Heydon v NRMA Ltd* [2000] 51 NSWLR 1, [146].
110 *Midland Bank Trust Co. Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, 402-403.
111 *Trust Co. of Australia v Perpetual Trustees WA Ltd & Ors* [1997] 42 NSWLR 237, 247.
112 *Adeels Palace Pty Ltd v Moubarack* (2009) 239 CLR 420, [30]-[31]; *Capital Brake Service Pty Ltd v Meagher* [2003] NSWCA 225, [30].
113 Section 9(1)(a) & (b) of the CLA.
114 Section 9(1)(c) of the CLA.
115 Section 163 of the CPCA.

defendant was aware of that. In those circumstances, I do not accept that a reasonable person in the position of the second defendant would have made an application under s 165 in order to satisfy his duty to the plaintiff.

[131] It is also relevant to note, again, that it is not as though the second defendant did nothing. He had settled on a tactical approach in terms of the s 120 argument which, in my view, was fairly arguable. It cannot even be said that it ultimately failed; it was not pursued by the new legal representatives before Ann Lyons J. That is not to say that the s 120 argument would have necessarily succeeded, but it appears to me to have been fairly arguable.

[132] The advantage of the s 120 argument over any application under s 165 was that it applied to both the cash and the real property. On the limited material before me it is very hard to understand how the plaintiff's wife could have made a claim on the cash.

[133] I do however accept that there has been a breach of the duty owed by the second defendant to the plaintiff in not independently verifying when the forfeiture period commenced, and hence when it expired.

[134] The second defendant was obviously aware of the significance of the forfeiture period; the steps he took were guided by the timeframe that he was initially informed of. It is submitted on his behalf he was entitled to rely on what he was told by the initiating party. I cannot agree.

[135] While ascertaining the other party's view was both appropriate and prudent, a solicitor exercising reasonable care, diligence and skill would have independently verified the date of the conviction and hence the date from which the forfeiture period ran. This was a basic step, and one I consider was required by the standards normally adopted by the profession. I accept that the second defendant was entitled to put some stock in what he was told by a model litigant, as to opposed to one who is not, but given the self-executing nature of automatic forfeiture it was incumbent on him to independently discover when the period commenced and thereby to at least check if what he was told was correct.

[136] The second defendant accepted there was no doubt that he perused the plaintiff's file when he was again engaged in July 2004. There is nothing before me as to what was in that file. However, he was also the instructing solicitor for the purposes of the sentence appeal. The appeal record book inevitably recorded the date of conviction, and hence the date from which the forfeiture period ran. Even if he didn't actually see that date in the record book, it was not hard to ascertain.

[137] I accept there are authorities that suggest that a "*conviction*" may not occur until the sentence is imposed, as opposed to the time of the administration of the *allocutus*.[116]

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[116] See for example *Maxwell v The Queen* [1996] 184 CLR 501, 509 for the position at common law. Compare *R v Shillingsworth* [1985] 1 Qd.R. 537, 543 and *R v Verrall* [2013] 1 Qd.R. 587, [3]-[5] for observations as to the usual position under the *Criminal Code*.

However, the definition of "*convicted*" at s 106 of the CPCA strongly favours that the plaintiff was convicted on his entry to the plea of guilty on 30 March 2004. Although the second defendant tended to suggest at certain parts of his oral testimony that he did not agree the plaintiff was convicted on 30 March 2004, the contrary argument at no stage formed a part of the tactical approach he devised at the time, and is not otherwise mentioned in any of the material before me, thus suggesting it was not part of his considered approach at the time. What is mentioned in the material is the asserted unfairness – phrased as an issue estoppel – in the State changing its position. That is different to a belief that the forfeiture period in fact continued to run regardless of the State's altered position. I do not accept that the second defendant did not breach his duty to the plaintiff because he reasonably believed at the time that the forfeiture period did not expire on 30 September 2004.

[138] Accordingly, I accept that a breach of duty owed to the plaintiff, and therefore negligence, is proven against the second defendant. It was not suggested that in the event I made such a finding the first defendant was not also to be held responsible on the same basis. I therefore accept that liability on that basis has been established against the first defendant also.

[139] The plaintiff also argued a duty was owed to inform him that automatic forfeiture had already occurred. Assuming, without deciding, that such a duty arose, the foregoing reasons show that the time for disclosure of that outcome did not arise before the plaintiff was otherwise aware of the fact. The plaintiff had been told of the possibility of that having occurred by the second defendant, at least by way of the signed instruction document dated 15 November 2004 and the discussions that accompanied that, and most likely in other conversations between the plaintiff and the second defendant. The fact of automatic forfeiture had not been resolved by the Court until after the defendants no longer acted for the plaintiff, and so there was no requirement on them to inform him of a fact that he inevitably knew after resolution by the Court.

[140] While accepting there has been a breach of duty, I make no criticism of the decision not to take any further step in the proceeding after the filing of documents in June 2005. The UCPRs place the onus on the initiating party to progress the litigation. On the honestly held understanding that there had not been automatic forfeiture, in the absence of a Court determination, it was a legitimate tactic to allow the matter to sit and see if the State would progress the application. The later ruling as to automatic forfeiture does not deny the legitimacy of the approach at the time. As it transpires, taking a step between 2005 and 2016 would not have prevented automatic forfeiture anyway.

Causation

[141] I am cognisant that ss 11 & 12 of the CLA provide the framework for the consideration of this issue. Of course, the plaintiff holds the onus of proving causation, on the balance of probabilities. The plaintiff's case on causation was

opened on a loss of chance basis, but was pleaded on the basis that if an exclusion application had been made within time "*it was likely to have been made*".[117] That pleaded position accurately focuses the issue as being one of factual causation.

[142] The appropriate test to establish causation depends on the nature of the cause of action. In my view, the correct approach in a case such as the present was stated by Keane JA (as his Honour then was) in *Lewis v Hillhouse & Ors*:[118]

> "*In order to establish a claim for the recovery of substantial damages for breach of duty in tort or contract, it must be shown on the balance of probabilities that the breach caused actual loss of something of value. It seems to me that in this case this means that the appellant must accept and discharge the burden of showing that if the evidence admission point was persisted in, it would have led to the quashing of the convictions and the appellant's acquittal. If the appellant cannot show that it is more probable than not that he would have had his convictions quashed and a verdict of acquittal had the point been taken, he cannot show that he suffered loss of anything of value flowing from the failure of his lawyers to persist with the evidence admission point.*
>
> *The appellant relied upon decisions such as Malec v J C Hutton Pty Ltd. These cases are concerned with claims for damages where what has been lost as the result of a breach of duty is an opportunity to receive a valuable benefit. The value of the chance which has been lost represents the quantification of the claimant's loss.*
>
> *In the present case, unless the appellant is able to show that the evidence admission point was a good point, ie that it would have been accepted and acted upon by the Court, he will have failed to show that he has lost anything of value. An opportunity to litigate, considered in the abstract and without regard for the prospects of a favourable outcome, is not something of value. Rather, it is an occasion of confrontation, conflict and expense. No litigant suffers any real loss by losing the opportunity to run up dry gullies. It cannot sensibly be said that the loss of "a right to an appeal" or "a right to a trial", without more, is a loss of something valuable. In the context of a claim for substantial damages, the loss of a right to an appeal or trial of criminal charges is, of itself, nothing more than the loss of the opportunity to be in peril of a conviction and to spend money to avoid that peril. It is only if the result of the appeal or trial was likely to be favourable in some sense that anything of value has been lost by the litigant. ...*" (footnote omitted, emphasis added)

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117 FASOC, para 21(c).

118 [2005] QCA 316, [22]-[24].

[143] Accordingly, the plaintiff must show more than that the negligence of the second defendant deprived him of the opportunity to apply for an exclusion order. What must be demonstrated, on the balance of probabilities, is that any such application would have succeeded, in whole or in part.

[144] The plaintiff elected not to promote in this trial a positive case to show his prospects of success on any exclusion application brought in 2004. He argues that to now promote such a case would amount to an abuse of process because it would amount to relitigating a matter that is now final.[119] That cannot be accepted, if only for the reason demonstrated by the quoted passage from *Lewis v Hillhouse & Ors*; it goes to proof of causation itself.

[145] Section 139 of the CPCA provided two bases for exclusion. The first[120] permitted the discretionary granting of an exclusion order only if the property was not "*tainted property*"[121] and if the relevant offence is not a "*serious criminal offence*",[122] as well as a further requirement that need not be considered. Both of those matters needed to be satisfied in order for the discretion to arise.

[146] The basis on which the plaintiff was prosecuted, and any issue taken by him with those allegations, would have been relevant on an exclusion application. Those matters deserve consideration against the criteria in the CPCA to assess the prospects of success on the first pathway to an exclusion order.

[147] Each of the offences of trafficking, possession of proceeds of trafficking and possession of a thing used in the commission of a crime are serious criminal offences, as defined, as each carries a maximum penalty of more than 5 years imprisonment.[123] Accordingly, each are also a "confiscation offence", as defined.[124]

[148] The offence of possession of a thing reasonably suspected of being the proceeds of an offence is not as serious criminal offence, but it is a confiscation offence.[125]

[149] The plaintiff was prosecuted on the basis that the Moorina property was used in the course of the trafficking offence, and the plaintiff does not deny that. Therefore, the Moorina property is tainted property.[126]

[150] Similarly, all of the cash is tainted property. The different amounts are attributable to different offences, but each were used in the commission of the respective offences and therefore the whole of the cash is tainted property.[127] Further, the amount of $84,950.00 was derived from the commission of trafficking, and that

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119 Plaintiff's Closing Submissions at para 32.
120 Section 139(2) of the CPCA.
121 See definitions at ss 17, 99, 100 and 104 of the CPCA.
122 See definitions at ss 17 and 100 of the CPCA.
123 Section 17(1)(a) of the CPCA.
124 Section 99(a) of the CPCA.
125 Section 99(d) of the CPCA.
126 Section 104(1)(a) of the CPCA.
127 Section 104(1)(a) of the CPCA.

provides a stand-alone basis for the conclusion that it is tainted property.[128] I find that, as a matter of law, the plaintiff was precluded by the terms of the statute from availing himself of the first pathway to gaining an order for exclusion of any of the property.

[151] The second avenue to a discretionary exclusion order[129] required satisfaction that it was in the public interest to make an exclusion order, including by an assessment against considerations of financial hardship and the seriousness of the offence. That assessment necessarily had to be made in the context of the stated objects of the legislation.[130]

[152] The offending is undoubtedly serious; one needs only to look at the sentences imposed (including the serious violent offence declaration for trafficking) to gauge that, but recourse to the transcript of the sentence hearing and the Atkinson J's sentencing remarks[131] provides considerable support for that conclusion.

[153] There is no evidence of financial hardship to the plaintiff, in the relevant sense, if the property was not excluded at that time. In fact, in 2004 he owned other real property in Beachmere. This strongly tends against a finding favourable to him. The enquiry as to public interest is not limited to those specific criteria, but on the meagre material before me I cannot accept that it is more probable than not that he would have succeeded on an exclusion application on this basis either.

[154] As I have reached the same conclusion about the first pathway to an exclusion order, it follows the plaintiff has failed to prove that the breach of duty or negligence, and also the breach of any implied term in the retainer, caused loss.

Advocate's immunity

[155] The defendants made submissions about the principles of advocates immunity, and its applicability to the present matter. Given I have found against the plaintiff on two separate bases, I do not consider it necessary to consider these submissions.

Notional damages

[156] Consistent with usual practice, I will notionally assess the damages I would have awarded had I found in favour of the plaintiff.

[157] In the FASOC, the plaintiff pleaded a component of damages of $237,500.00, being half the value of the Moorina property.[132] The last filed defence did not directly take issue with the valuation of the property, but denied the facts in the relevant paragraph of the FASOC insofar as it alleged causation. There has been no evidence adduced as to the value of the property, and the defendants contend they should not

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128 Section 104(1)(c) of the CPCA.
129 Section 139(3) of the CPCA.
130 Section 4 of the CPCA.
131 Exhibit 4.
132 FASOC at para 22(a).

be taken to have admitted the value of the property. They contend that proof of the value of the property is always a matter of expert evidence.

[158] The manner in which this was pleaded by the plaintiff was in the form a compound allegation as to both the value of the property and the causation of loss. The defendants only replied to the latter aspect. I see no reason in principle why the value of the property is not a fact which can be admitted, and therefore a fact which can deemed to have been admitted under r 166 of the UCPR. I would have allowed this amount.

[159] The plaintiff's pleadings also claimed $30,000.00 for improvements to the property since it was forfeited. The plaintiff's own evidence, however, was that this was paid by his sons, and that was broadly supported by Luke Burrows' testimony. Assuming the money was paid, it was not a loss suffered by the plaintiff. This component cannot be allowed.

[160] A claim was also made for $16,000.00 as an estimate for rates and taxes paid on the property over 16 years since it was forfeited. The nature of the taxes are not particularised, and it has not been explained why a period of 16 years is relied upon when it was clear in 2016 that the property had been forfeited in 2004.

[161] Although this allegation of fact was not denied by the defendants in their last filed defence, the direct evidence of the plaintiff was that monies of this nature were paid for a time by his father,[133] and his son also testified that he himself made those style of payments.[134] Notwithstanding the deemed admission, I am not satisfied that the plaintiff made any payments, and if he did as to what the value of them was. I would not allow this component.

[162] Finally, I would have allowed the total value of the cash forfeited, namely $106,355.00.

[163] In so far as damages were based on a breach of duty to inform the plaintiff that timely applications to resist automatic forfeiture had not been made, and included legal fees for work performed after automatic forfeiture, there was no evidence whatsoever as to the nature of that work, nor the amount paid. No allowance could be made for that.

[164] In the end result, I would have awarded total damages of $343,855.00, together with interest pursuant to s 58 of the *Civil Proceedings Act 2011* from 30 September 2004 to the date of judgment, amounting to $457,031.25.

Costs

[165] I will hear the parties as to costs.

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133 Ts 1-22.
134 Ts 1-51.