

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	Manny v David Lardner Lawyers (No 2)
Citation:	[2021] ACTSC 289
Hearing Dates:	26–30 July, 2–5 August, 20–24 September
Decision Date:	5 November 2021
Before:	Murrell CJ
Decision:	Verdicts for the defendants
Catchwords:	CIVIL LAW – PROFESSIONAL NEGLIGENCE – where claims made in contract, tort, and equity – alleged negligence by solicitor – where alleged solicitor acted without instructions – where alleged solicitor failed to provide proper advice to the plaintiffs – consideration of the nature and scope of the retainer – whether harm pleaded was caused by the defendants – whether defendants protected from suit by advocates’ immunity – whether claims barred by <i>Limitation Act 1985</i> (ACT) – whether claims barred by <i>Bankruptcy Act 1966</i> (Cth)
Legislation Cited:	<i>Bankruptcy Act 1966</i> (Cth) ss 58, 82, 153 <i>Civil Law (Wrongs) Act 2002</i> (ACT) ss 40, 41, 42, 43, 45, 46 <i>Evidence Act 2011</i> (ACT) s 140 <i>Land Titles Act 1925</i> (ACT) s 93(2) <i>Limitation Act 1985</i> (ACT) s 11 <i>Partnership Act 1963</i> (ACT) s 38 <i>Legal Profession (Solicitors) Rules 2007</i> (ACT) r 6.1
Cases Cited:	<i>Aliferis v Kyriacou</i> [2000] VSCA 123; 1 VR 447 <i>Attwells v Jackson Lalic Lawyers Pty Ltd</i> [2016] HCA 16; 259 CLR 1 <i>Badenach v Calvert</i> [2016] HCA 18; 257 CLR 440 <i>Coote v Kelly</i> [2016] NSWSC 1447 <i>Coventry v Charter Pacific Corporation Ltd</i> [2005] HCA 67; 227 CLR 234 <i>Cummings v Claremont Petroleum NL</i> (1996) 185 CLR 124 <i>D’Orta-Ekenaike v Victoria Legal Aid</i> [2005] HCA 12; 223 CLR 1 <i>Fox v Everingham</i> (1983) 76 FLR 170 <i>Hawkins v Clayton</i> (1988) 164 CLR 539 <i>Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd</i> [2013] HCA 10; 247 CLR 613 <i>I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd</i> [2002] HCA 41; 210 CLR 109 <i>Jack v Kipping</i> (1882) 9 QBD 113 <i>Jennings v George Harcourt Management Pty Ltd</i> [2018] ACTCA 50; 14 ACTLR 27 <i>Johnson v Powrie</i> [2018] ACTCA 46 <i>Jones v Dunkel</i> (1959) 101 CLR 298 <i>Keddie v Stacks/Goudkamp Pty Ltd</i> [2012] NSWCA 254; 293 ALR 764 <i>Kendirjian v Lepore</i> [2017] HCA 13; 259 CLR 275 <i>Lovell v Penkin (a bankrupt)</i> [2008] FCA 637; 101 ALD 335

Manny v David Lardner and Associates [2018] ACTSC 159
Manny v David Lardner and Associates (No 2) [2019] ACTSC 86
McLennan v Clapham [2019] ACTSC 1
Pawley v Pawley (No 2) [2017] FamCAFC 136
Pool (a pseudonym) v Trustees of the Marist Brothers Property Group & Anor (No 3) [2021] ACTSC 89
Read v Burns [2017] ACTSC 184
Ritchie v Woodward (as executor of the estate of the late Brian Patrick Woodward) [2016] NSWSC 1715
Rogers v Whittaker (1992) 175 CLR 479
Sykes v Midland Bank Executor & Trustee Co Ltd [1971] 1 QB 113
Wardley Australia Limited v Western Australia (1992) 175 CLR 514
Watson v Foxman (1995) 49 NSWLR 315

Parties:

Jeff Manny (First Plaintiff)
 Jeff Manny Constructions Pty Ltd (Second Plaintiff)
 JK3I Pty Ltd (Third Plaintiff)
 Lonagann Pty Ltd (in liquidation) (Fourth Plaintiff)
 Landagency Pty Ltd (Fifth Plaintiff)
 Earnest David Lardner and Kenneth William Power trading in partnership as David Lardner Lawyers (First Defendant)
 Kenneth William Power trading as a solicitor in sole practice (Second Defendant)
 David Lardner Lawyers Pty Ltd (Third Defendant)

Representation:

Counsel

E Grotte with T Boyd (Plaintiffs)
 M Walsh SC with J Larkings (Defendants)

Solicitors

Luke Clarke Solicitor (Plaintiffs)
 Boettcher Law (Defendants)

File Number:

SC 527 of 2016

MURRELL CJ:

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Overview

1. Mr Manny and four companies (the 2nd to 5th plaintiffs) claimed that, in 2010 and 2011 when acting as their solicitors, Mr Lardner and Mr Power caused them economic loss.
2. At different times, the legal practice of Mr Lardner and Mr Power was constituted in different ways. For convenience, I will refer to the various defendant entities as DLL.
3. Mr Manny was the sole director, secretary, and shareholder of each of the plaintiff companies, and he ran the companies.
4. The second, third and fourth plaintiffs were known collectively as the Jeff Manny Group (JMG).
5. In 2009/2010, Mr Manny and the JMG had a large property portfolio that was heavily geared with the ANZ Bank (ANZ). Loan facilities in the total sum of \$14,008,000 were due to expire on 17 October 2010.
6. In 2007, Ms Manny brought proceedings against Mr Manny in the Family Court of Australia (FCA). The JMG was joined.
7. Between July 2009 and July 2010, the FCA proceedings were heard by Faulks DCJ.
8. On 5 February 2010, Faulks DCJ made an order restraining Mr Manny from selling or further encumbering the real estate assets of the JMG.
9. On 13 July 2010, Faulks DCJ made final orders in the FCA proceedings, which were amended under the slip rule on 14 July 2010. Final order 13 required Mr Manny to pay to Ms Manny the sum of \$1.258M within 14 days. In default, under order 14 the JMG properties were to be sold in three groups. The first group was to be listed for sale immediately and sold within 75 days or then listed for auction, and the last group was to be listed for sale within 150 days of the final orders.
10. On 20 July 2010, Mr Manny and the JMG retained DLL in relation to the FCA proceedings. Mr Manny said that DLL also acted for another of his companies, the fifth plaintiff (Landagency). DLL denied that it acted for Landagency.
11. On 3 August 2010, DLL applied to stay the final orders pending consideration of an appeal against those orders. On 10 August 2010, DLL filed an appeal from the orders. Ms Manny filed a cross-appeal.
12. On 27 August 2010, Faulks DCJ heard the stay application and stayed the final orders, subject to a restraining order that “no property is sold”.
13. On 24 September 2010, DLL filed an appeal against the restraining order made on 27 August 2010 and an application to expedite that appeal.
14. On 8 October 2010, Mr Lardner signed an order “by consent” allowing Mr Manny to sell two of the properties the subject of the restraining order made on 27 August 2010. On 10 October 2010, the FCA (Finn J) made orders.
15. Despite numerous notifications by ANZ that the loan facilities would not be extended and must be paid in full on 17 October 2010, the facilities were not repaid.
16. In November 2010, ANZ served notices of default and notices of default and demand. On 22 December 2010, ANZ appointed rent receivers to the JMG properties. On 21 January 2011, ANZ appointed receivers for the sale of the JMG properties. On 28

February 2011, administrators were appointed. On 18 April 2011, liquidators were appointed to the JMG entities.

17. DLL ceased acting for Mr Manny and JMG on or about 24 March 2011.
18. These proceedings were commenced by Mr Manny on 25 November 2016.
19. In 2016, each of the JMG companies was deregistered. On 12 July 2018, McWilliam AsJ made orders reinstating each company: *Manny v David Lardner and Associates* [2018] ACTSC 159. On 2 April 2019, Mr Manny was given leave to commence and conduct derivative proceedings on behalf of the JMG, leave to join the JMG and Landagency on condition that the companies were represented by a solicitor (and other conditions) and leave to file an amended statement of claim: *Manny v David Lardner and Associates (No 2)* [2019] ACTSC 86. On 30 October 2019, the JMG and Landagency made claims against DLL.

Issues

20. By a second further amended statement of claim filed by leave during the hearing, the plaintiffs asserted that the stay application and the restraining orders that were made on 27 August and 10 October 2010 (by consent) had been made or obtained without instructions and in the absence of proper advice to the plaintiffs. They claimed that the orders had led to the ANZ issuing default notices, the appointment of rent receivers, and the liquidation of the companies. They alleged that DLL had failed to provide proper advice in relation to the orders made on 27 August and 10 October 2010 and in relation to the plaintiffs' relationship with ANZ, including as to the plaintiffs' capacity to refinance the ANZ facilities.
21. The plaintiffs claimed breach of contract, breach of fiduciary duty and breach of duty of care.
22. In relation to damages, the second further amended statement of claim asserted that, because of the restraining order, the plaintiffs had lost the opportunity to dispose of properties and that each had suffered a loss of income. Particulars of an earlier (but relevantly identical) statement of claim alleged that DLL had failed to properly advise in relation to the ANZ default notices and had failed to take steps to set aside the statutory demands and restrain ANZ from appointing receivers. The plaintiffs asserted that, but for the restraining order, they could have refinanced through the Bank of Queensland (BOQ).
23. DLL contested these claims. Further, DLL pleaded that, as Mr Lardner had been declared bankrupt on 7 December 2010 and discharged on 8 December 2013, by reason of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) the proceedings were not competent as against Mr Lardner.
24. DLL also said that the proceedings had been commenced outside the six-year limitation period.
25. On 29 July 2020, by consent McWilliam AsJ determined that liability issues be heard separately from the quantification of any loss.
26. The pleadings raised the following issues:
 - (a) What was the nature and scope of the plaintiffs' retainer of DLL?

- (b) Did DLL breach their retainer in relation to the orders of 27 August and/or 10 October 2010 (and the related consent agreement of 8 October 2010)?
 - (c) Was DLL negligent?
 - (d) Was there a breach of fiduciary duty?
 - (e) What were the plaintiff's financial difficulties and prospects of refinancing in 2010?
 - (f) Were the plaintiffs' claimed financial losses caused by any default of DLL?
 - (g) Is DLL protected by advocates' immunity?
 - (h) Does s 11 of the *Limitation Act 1985* (ACT) provide a complete defence to the claim?
 - (i) What is the effect of Mr Lardner's bankruptcy?
27. The evidence of Mr Manny and Mr Lardner was directly contradictory in relation to critical factual matters, including:
- (a) the instructions that Mr Manny gave when DLL was retained on 20 July 2010;
 - (b) whether Mr Lardner advised and obtained instructions from Mr Manny before making the stay application on 3 August 2010;
 - (c) the content of any instructions that Mr Manny gave to Mr Lardner during the hearing of the stay application on 27 August 2010;
 - (d) whether Mr Lardner advised and obtained instructions from Mr Manny before entering the consent agreement on 8 October 2010; and
 - (e) whether Mr Lardner advised Mr Manny that, pending the appeal from the final orders, he should not refinance the ANZ debts.

Background

- 28. Mr Lardner was an experienced family law practitioner, although he was not accredited as a family law practitioner.
- 29. From about 22 June 2007 to 7 December 2010, Mr Lardner and Mr Power carried on legal practice in partnership under the business name David Lardner Lawyers. Mr Power worked from an office in Barton and Mr Lardner worked from an office in Kingston. Mr Power did not know the details of Mr Lardner's matters.
- 30. On 7 December 2010, Mr Lardner was declared bankrupt, and the DLL partnership was dissolved by operation of s 38 of the *Partnership Act 1963* (ACT).
- 31. After he was declared bankrupt, Mr Lardner practiced as an employed solicitor under Mr Power. On 31 January 2011, David Lardner Lawyers Pty Ltd was incorporated and, thereafter, Mr Lardner was employed by that company. Mr Power was the sole director, secretary, and shareholder of the company.
- 32. From about 1988 to 2004, Mr Manny operated an air-conditioning business. He and Ms Manny built a significant property portfolio. From about 2004, most of their income was derived from the property portfolio. Property was held by the JMG, which comprised:

- (a) Jeff Manny Constructions Pty Ltd, which owned residential properties;
 - (b) JK3L Pty Ltd, a commercial property development company; and
 - (c) Lonagann Pty Ltd, the trustee of a family trust that owned houses at 3, 5 and 7 Wall Street, Page and eight units at 8–10 Wall Street, Page.
33. Mr Manny owned 37 Krichauff Street, Page in his own name.
 34. In 2007, Ms Manny commenced proceedings against Mr Manny in the FCA. Strong Law (Mr Robinson) and Ms Tonkin (barrister) acted for Ms Manny in the proceedings.
 35. During the FCA proceedings, before instructing DLL Mr Manny and JMG were represented by a succession of lawyers, including Steven Fraser (corporate counsel to JMG), Ken Cush & Associates, Elrington Boardman Allport Lawyers (Mr Powell) and Certus Law (Mr Salinas). Nelson & Co, solicitors, acted for Mr Manny and the JMG in relation to conveyancing transactions.
 36. In the FCA proceedings, ANZ was represented by Blake Dawson (Mr Roser).
 37. The FCA proceedings were strongly contested, including in relation to the value of the property portfolio. Later, during the proceedings Mr and Ms Manny agreed that their assets were worth about \$17M.

Mr Manny's credibility

38. In these proceedings, counsel for Mr Manny submitted that Mr Manny's evidence should be accepted as he had "lived and breathed" the FCA case for many years, starkly imprinting the facts in his mind.
39. I do not accept this submission. In such circumstances, it is not uncommon for facts to be misremembered. In *Watson v Foxman* (1995) 49 NSWLR 315 at 319, McLelland CJ in Eq said:

...human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said...

See also *Coote v Kelly* [2016] NSWSC 1447 at [101]–[102].
40. I am not firmly satisfied that Mr Manny was deliberately dishonest. However, at the very least, his recollection of relevant events a decade ago was fundamentally flawed, probably because of his profound disappointment at the loss of a large property portfolio and an inability to face the reality that the loss was caused by the risks that he took, and market events that were beyond his control. Mr Manny has reconstructed reality.
41. Mr Manny's evidence must be understood in the context that, despite instructing a succession of lawyers, he was "hands-on" in both directing the FCA proceedings and dealing with the ANZ. In 2010, he was focused on doing all that he could to salvage his property empire. Consistent with his personality style, he did not leave the task to others. For example, he gave Mr Lardner instructions that he wanted to approve draft letters before they were sent. Mr Manny's intransigent and assertive personality style and his general refusal to concede the possibility of error was apparent during the proceedings.

42. There are many contemporaneous documents that compel the conclusion that Mr Manny's memory of important events was fundamentally wrong. The following are significant examples.
- (a) In evidence, Mr Manny disagreed that, by June 2009, the JMG was facing a financial crisis. However, in March 2009 he told Faulks DCJ that the JMG property portfolio was a "house of cards" and on 19 June 2009 he filed an affidavit in the FCA stating that he was facing a "financial disaster", with the prospect of ANZ foreclosing.
 - (b) Mr Manny denied that he had seen a copy of an application to the FCA before 15 February 2011. However, he signed the document on 13 January 2011. He signed various pages of a related affidavit on 10 January 2011. When these matters were pointed out, he remained adamant that he did not recall signing the documents and said that he could not have looked at them before he signed.
 - (c) Mr Manny agreed that he knew that it was necessary to provide ANZ with evidence that the JMG security properties were insured. From January 2010, ANZ and Blake Dawson sent many letters to Mr Manny seeking evidence of insurance. When several letters in this series were drawn to his attention, in relation to each letter Mr Manny maintained that there had been insurance in place but, through an oversight in his office, the evidence had not been provided to ANZ; once the letter about insurance was received, the evidence had been furnished to ANZ. At other times, he suggested that the fault may have been with ANZ; the bank may have lost the material or been mistaken. The true explanation was revealed in correspondence from Mr Manny to ANZ dated 11 February, 3 May, and 14 September 2010, which showed that, despite correspondence from ANZ, properties had remained uninsured until 14 September 2010 because the JMG had not had the financial capacity to insure them.
 - (d) On 22 and 28 June 2010, ANZ obtained unfavourable valuations of the JMG security properties from CBRE. Mr Manny denied that he had seen the valuations at the time; he stated that he had not seen the 2010 CBRE valuations until 2012 or 2013. However, Blake Dawson had forwarded the valuations to him on 19 July and 10 August 2010. On 22 July 2010, Mr Manny had communicated with Ms Manny's lawyers, Mr Lardner, and others concerning the CBRE valuations.
 - (e) Mr Manny said that he had not instructed Mr Lardner to appeal. He said that, while, initially, he had wanted to appeal to obtain a longer period within which to pay Ms Manny, by 16–17 July he had changed his mind about the need to appeal. However, in evidence, he stated that, around 19–20 July 2010, he was still thinking about an appeal to change the 14 day payment period to a 90 day period. This evidence was contradicted by correspondence and contemporaneous statements showing a continuing intent to appeal. On 30 June, Mr Manny stated that he would "have my Lawyer to prepare for an appeal". On 4 July 2010, he stated that he would appeal to the Court of Appeal. He also stated that he would like ANZ "to continue with my loans until we get outcome of an appeal". At the conclusion of the primary proceedings on 12 July 2010, he told Faulks DCJ that he would be appealing. On 13 July he indicated that he may appeal. Correspondence on 17 and 18 July 2010 shows that Mr

Manny was considering an appeal. The only evidence suggesting that he was not proposing to appeal was correspondence with Mr Cush, solicitor, on 19 July in which Mr Manny stated that he was “happy with the outcome”.

- (f) Mr Manny asserted repeatedly that the BOQ had agreed to refinance the ANZ facilities. However, BOQ’s “indicative letter” clearly shows that there was no such agreement.
 - (g) In affidavit evidence, Mr Manny denied that he had told Mr Lardner that he did not want to sell his properties and would try to persuade ANZ to extend the facilities beyond 17 October 2010. In cross examination, he stated that the FCA final orders did not need to be appealed as they were “good orders” and “came out beautiful”. However, the pleaded case was that JMG had intended to retain the real estate assets indefinitely and, in cross-examination, Mr Manny confirmed that business plan and said that he had wanted to avoid a fire sale. Emails dated 17 July 2010 and 22 July 2010 indicate that he did not want to sell; if the properties were sold at that time, there would be no net equity.
43. Mr Manny alleged serious misconduct by Mr Lardner, that included lodging an appeal and making a related stay application and briefing counsel without providing proper advice and without instructions. Mr Manny alleged that, on 27 August 2010, Mr Lardner had stood by and allowed counsel to tell Faulks DCJ that he had instructions when he did not have those instructions. He alleged that Mr Lardner had directed him that, pending the appeal, he should not refinance and should “do nothing”. These serious allegations are very difficult to accept given the following considerations.
- (a) Allegations that a solicitor has acted repeatedly without giving advice to the client and in the absence of instructions are grave allegations which must be clearly established on the balance of probabilities: s 140 *Evidence Act 2011* (ACT).
 - (b) Although Mr Manny was quick to complain about other conduct with which he disagreed (including that of Faulks DCJ), at the time of the events about which he now complains he did not complain about Mr Lardner; he continued to instruct Mr Lardner and he paid all Mr Lardner’s invoices in relation to the stay application and the appeal. Mr Manny said that having glanced at the invoices, he took issue with them, but Mr Lardner told him not to worry about them. Given Mr Manny’s dire financial circumstances and heavy involvement in the conduct of his case, I do not accept that Mr Manny would have disputed invoices but paid them simply because Mr Lardner told him not to worry about it.
 - (c) Mr Lardner’s conduct of introducing Mr Manny to a financier on about 25 July 2010 is inconsistent with the assertion that he told Mr Manny that he should not pursue refinancing at that time.
 - (d) As to the allegation described as being “at the heart of the claim”—that Mr Manny was not advised to make a stay application and did not instruct Mr Lardner to do so—ultimately Mr Manny’s evidence on this vital point was equivocal; he said that he could not remember whether Mr Lardner had advised him about the need for a stay application and he could not answer whether Mr Lardner had provided advice regarding the need for a stay of the final orders to prevent enforcement.

- (e) The allegations concerning Mr Lardner's conduct are contrary to common sense. It is common sense that Mr Manny would have been unhappy with the final orders made by Faulks DCJ (requiring the payment of \$1.258M to Ms Manny within 14 days) because the practical outcome was that he must sell the JMG properties in a depressed market. The JMG's finances were in a parlous state and there was no cash with which to pay Ms Manny. An appeal was Mr Manny's only real option. By staying the final orders pending an appeal, he "bought" more time to refinance and the possibility that the market would improve.
- (f) It is also consistent with common sense that Mr Lardner would have advised Mr Manny that the slip rule was inapplicable to the circumstances and that he should lodge an appeal, apply for a stay of the final orders and seek refinancing. Indeed, in evidence, Mr Manny ultimately accepted that Mr Lardner had told him that, if he did not want to sell the JMG properties, his only option was to appeal the final orders and that he had told Mr Lardner:

[to use the] slip rule to clear my name and if it is not by slip rule, you can do it by appeal.

- 44. During the proceedings, Mr Manny's case transformed from a case that, but for Mr Lardner's conduct, he could have retained the JMG portfolio and refinanced through BOQ to a case that he had wished to sell the JMG properties in accordance with the default provision (order 14) of the final orders. The transformation followed Mr Ringuet's expert evidence to the effect that BOQ would not have approved refinancing. It was yet another self-serving reconstruction of reality by Mr Manny.

Mr Lardner's credibility

- 45. Mr Lardner was a very reliable witness. Throughout more than two days of cross-examination, he impressed as an intelligent, sensible, and composed witness. He readily agreed that he had little memory of events and that his understanding of what had occurred was informed by contemporaneous documents and his "invariable" practices. He was willing to make reasonable concessions.
- 46. "Invariable" practices are rarely invariable. However, they are more likely to be so in the case of an experienced legal practitioner who is following a frequent course of conduct. In this case, the relevant practices accorded with contemporaneous documents (including tax invoices) and common sense.
- 47. Although Mr Lardner's composure as a witness contrasted with some contemporaneous correspondence concerning the orders made on 27 August 2010, I consider that, where intemperate, the correspondence reflected the degree to which Mr Lardner was surprised and incensed by the orders because they no way reflected the outcome that Mr McGrath and he had sought or believed would occur.

Financial position of Mr Manny and JMG in 2008/2009

- 48. In September 2008, Mr Manny filed a financial statement in the FCA stating that the total value of the JMG property portfolio was \$19M.
- 49. Mr Manny gave evidence that, in 2009, the JMG property portfolio was worth about \$22.5M.

50. On 29 January 2009, Mr Manny filed an affidavit stating that the “total book value [sic] land and buildings” of JMG was approximately \$19M. The affidavit continued:
- However...I do not believe that the properties would fetch their book values if sold in the current market. I believe that they would fetch half their book value, possibly less.
51. He stated that the “total mortgage liabilities” of JMG to ANZ were \$15.35M. He also stated:
- I believe a forced sale in the present market of the properties...would cause those companies to collapse. It is desirable for the companies to continue in operation...[T]he companies may not, at the present time, have sufficient assets to cover the outstanding loans. If the companies were placed into liquidation both the Applicant and I face the loss of the houses in which we and the children presently reside ...
- If the businesses continue to operate I believe it would be possible to arrange a financial settlement with the Applicant...[B]ut it will need time for the businesses to recover from the present economic slump.
52. In March 2009, Mr Manny told Faulks DCJ that it was not feasible to sell any JMG assets as the business was a “house of cards”.
53. On 19 June 2009, Mr Manny filed an affidavit stating that only a genuine negotiation by Ms Manny’s lawyers would “save us all from a complete financial and personal disaster”. At [8], he referred to June 2009 valuations that:
- shows the respondents are all in debt and that there is no equity in either property, business or any other resources available to the respondents that the court may equitably divide.
54. At [11] he asserted:
- If the court makes orders to sell property, the business will collapse...the bank has informed me, and will confirm in writing, that any court order or forced in the financial structure of the Jeff Manny Group, will result in foreclosure, administration or receivership.
55. The affidavit concluded at [16]:
- It is therefore requested that the hearing [sic] be vacated to give time for the property market to rise and business to develop and increase revenue.
56. On 11 June 2010, Mr Manny made a director’s declaration concerning the JMG financial statements for the year ended 30 June 2009. The financial statements showed that each of the JMG companies was trading at a loss and that liabilities exceeded assets.
57. On 18 December 2009, in the FCA, Mr Manny filed an affidavit attaching valuation reports for the JMG properties. An annexed statement of liabilities on 17 December 2009 asserted that he and his companies had total liabilities of \$16.188M. The document stated that, “before sale of assets” the net asset position was \$294,930 and that, “after sale of assets”, there was a deficit of \$34,730. Mr Manny claimed, “[t]here is no equity to transfer 58 Barnard Circuit, Florey” (which he valued at \$500,000) to Ms Manny.
58. Pursuant to an order of the FCA, on 21 December 2009, the Registrar of the FCA transferred 58 Barnard Circuit, Florey from the JMG to Ms Manny and the property was released from providing security for the ANZ facilities.
59. By 30 June 2009, the property portfolio of Mr Manny and the JMG was in a dire financial state such that liabilities may have exceeded assets. Mr Manny wished to avoid the

forced sale of properties and to delay payment to Ms Manny in the hope that the property market would improve. This remained the position in December 2009.

The ANZ facilities and events in late 2009 and early 2010

60. In 2008, Mr Manny and JMG refinanced NAB loan facilities through ANZ. In June 2009, he sought to renew the ANZ facilities.
61. A letter of offer from the ANZ dated 22 June 2009 was executed on 20 July 2009 by Mr Manny, as both guarantor and sole director of each JMG company. The ANZ granted JMG five facilities in the total sum of \$14.008M, including an overdraft facility of \$300,000. All properties owned by the JMG provided securities for all facilities.
62. One of the two facilities granted to Lonagann, a loan of \$908,000, was to be reduced to \$500,000 by 17 August 2009. The second facility of \$2.6M was to terminate on 17 August 2009, in each case through the sale of units at 8–10 Wall Street, Page.
63. The remaining three facilities were to terminate on 17 October 2010.
64. It was a condition of the facilities that Mr Manny provide “financial reports” relating to himself and the JMG. There was a “loan to valuation limitation” (or ratio, LVR) requirement. The LVR was not to exceed 65 per cent of the ANZ’s estimate of the current market value of the properties, reduced to 60 per cent after the sale of units at 8–10 Wall Place, Page. It was a further requirement that all security properties be insured, and that evidence of insurance be provided within 14 days of a request by ANZ.
65. The parties were in default if they breached any of these conditions.
66. “Conditions subsequent” provided that two units at 8–10 Wall Street, Page were to be sold by 3 August 2009 (contracts exchanged and a 10 per cent deposit paid) and the remaining six units were to be sold at the rate of at least one unit every two months thereafter.
67. On 5 November 2009, ANZ issued the first “notice of event of default” to Mr Manny as director of the JMG. It referred to failures to provide unaudited financial statements, Mr Manny’s most recent tax return and a tenancy schedule.
68. On 22 January 2010, ANZ issued a second “notice of event of default” to Mr Manny as director of the JMG, referring to the failures to provide evidence of insurance, and unaudited annual financial statements for 30 June 2009, Mr Manny’s tax return and a tenancy schedule. The letter stated that ANZ did not propose to take immediate action but reserved its right to do so in the future.
69. Mr Manny gave evidence that, in both November 2009 and January 2010, the JMG properties were insured but his staff had overlooked providing evidence of insurance to ANZ. He agreed that the JMG was in default in the other respects claimed. He said that he had given the ANZ letter of January 2010 to his internal accountant, who had advised him that she was waiting on the external accountant and would send the documents to ANZ when they became available.

The February 2010 restraining order

70. On 28 January 2010 in the FCA, Mr Manny informed Faulks DCJ that he could not pay any money to Ms Manny without selling property and he did not want to sell property

because the situation was a “house of cards”; after paying capital gains tax and the ANZ there may be nothing left. He said:

this option of selling everything is absolutely not possible, and if you want to keep it – they want to be allowed to transfer anything, but it cannot be transferred, anything, because there is no equity in there. There is no equity in there.

71. When the matter resumed on 29 January 2010, Mr Manny described the plaintiffs’ financial position in similar terms, saying that if one property was sold “everything will collapse” and that the situation was a bomb waiting to explode. He said that the JMG had lost several tenants. He pleaded:

Please, do not make bank worried because the bank has got the discretion to give this to the liquidator.

72. On 5 February 2010, Faulks DCJ made the following orders:

2. The respondent, Jeff Manny, be and is hereby restrained from selling or further encumbering any of the properties in the Jeff Manny group...without the prior written consent of the lawyers for the applicant wife, Kazuko Manny.

...

4. It is further noted that the proceedings before the Court have now been completed and that I will deliver my judgment in this matter as soon as possible. The injunction imposed in these proceedings is an interim injunction only.

5. Either the respondent (Jeff Manny) or the ANZ Bank...has liberty to apply...

73. Mr Manny gave evidence that he was aware that he was restrained from selling or further encumbering property without the prior written consent of Ms Manny’s lawyers.

The FCA proceedings and dealings with ANZ between February and May 2010

74. On 5 February 2010, ANZ wrote to Mr Manny regarding the sale of 89 Somerville Crescent, Florey and informed him that sale proceeds would be applied to the reduction of debts. ANZ requested details of all relevant insurances within 14 days, and evidence that all rates, land tax and other charges against the properties had been paid. The letter continued:

We note that you have expressed an intention to refinance some (but not all) of the Jeff Manny Group facilities. This is not possible because all of the facilities and securities are cross collateralised. Accordingly they will all need to be refinanced at the same time.

...

The Bank shall be shortly issuing a fresh Letter of Offer following a review of the facilities, which shall set out the terms and conditions of the facilities and any new terms and conditions.

75. On 9 February 2010, Mr Quick of ANZ emailed Mr Manny in response to a request for further funding of \$500,000 and a request that Mr Manny receive the surplus funds from the sale of 89 Somerville Crescent, Florey (\$28,183). Mr Quick stated that ANZ would not extend additional finance, but the surplus funds could be used to reduce the ANZ debt.
76. On 10 February 2010, ANZ issued a third “notice of event of default” to JMG. ANZ noted continuing defaults in relation to the provision of evidence of insurance and the financial statements of Mr Manny.

77. In evidence, Mr Manny initially asserted that he had complied with the demands of the letter.
78. However, on 11 February 2010, Mr Manny sent an impassioned email to Mr Quick in which, among other things, he stated:

How can I pay the insurance fees? ANZ Bank has taken \$3 million of my money and has stopped my cash flow Can you please tell me know where I can bring the money to ensure my property, you have taken all of my money?

...

You have rejected to let me refinance my residential portfolio ...

...

This is my proposal ... I TAKE PROCEED SALE OF NEXT UNIT WHICH IS UNIT 5/10 WALL PLACE PAGE TO PAY MY DEBT, THEN ONWARDS I WILL PAY THE PROCEED OF OTHER 3 UNITS WHICH IS \$1 .5 MILLION, BECAUSE I AM COMMITED [sic] TO BRING JEFF MANNY GROUP'S DEBTS DOWN.

79. By mid-February 2010, ANZ had instructed Blake Dawson, solicitors.
80. On 18 February 2010 Blake Dawson wrote to Mr Manny's conveyancing solicitor, Mr Nelson, regarding the proposed sale of 5/10 Wall Street. ANZ agreed to a discharge of mortgage and said that it would apply the full net proceeds of sale to reduce the JMG debt.
81. On 19 February 2010 Mr Manny wrote to Mr Robinson, Ms Manny's solicitor, seeking consent to the sale of 2/10 Wall Street, Page. Mr Robinson asked for additional information, including confirmation that the full settlement proceeds would be applied to reduce the ANZ facilities. In response, Mr Manny agreed, but added that he felt that he should receive the full proceeds of the sale of unit 5. Mr Robinson did not agree. Mr Robinson expressed concern that, at the conclusion of the trial on 29 January 2010, units 1, 2, 3, 5 and 6 were still held by Lonagann and sought immediate confirmation as to which, if any of the properties, had since been disposed of.
82. On 3 March 2010, Mr Manny signed an affidavit in support of an application that the restraining orders made on 5 February 2010 be set aside or, alternatively, he be permitted to sell 2/10 Wall Street, Page and to apply the proceeds of the sale of 5/10 Wall Street, Page to debts. He also sought permission to sell units 1 and 6/10 Wall Street within six months "in order that I be able to refinance all of the loans of the Jeff Manny Group by the due date of October 2010". Mr Manny itemised "urgent liabilities" for which funds were required, being debts to the Australian Taxation Office (ATO) of about \$202,000, an overdraft of \$285,000 (against the overdraft limit of \$300,000) and other debts totalling approximately \$800,000. He stated:

I am very concerned that I am unable to meet normal liabilities relating to my business because of the restrictions imposed by the orders dated 5 February 2010. My creditors are becoming more vocal, some have commenced legal action against me. The liabilities are increasing as I am unable to reduce them, my overdraft limit has only \$15,000 left.

83. On 9 March 2010, Faulks DCJ granted Mr Manny permission to apply the proceeds of sale of unit 5 to debts. On 16 March, his Honour dismissed the remainder of the application, stating:

63 The ANZ Bank, on the evidence before me, will require the proceeds of the sale of any of the properties to be applied in reduction of the primary debt and, accordingly, that in

itself will not assist in the reduction of the accumulated debts or to meet the progressive debts as they arise in the course of the next period.

64. Accordingly, the application by Mr Manny fails to satisfy me that there is a basis for the continuation of his business in my granting that application and the application is refused.
84. On 10 March 2010, Blake Dawson wrote to Nelson & Co, contradicting Mr Manny's assertion that he would be paid the full net proceeds of the sale of unit 5 Wall Street, Page, and stating that the full net proceeds would be applied to the ANZ debts.
85. On 24 and 25 March 2010 and 12 April 2010, Blake Dawson wrote to Elringtons, demanding evidence of insurance, failing which they would obtain insurance and charge the JMG accounts.
86. On 3 May 2010, Elringtons responded to Blake Dawson's letters stating:
- I am instructed that insurance policies are in place for all residential properties owned by the Jeff Manny Group. I am instructed that insurance policies are not in place for the commercial properties owned by the Jeff Manny Group. The reason for this is that since our client's Family Law proceedings commenced in August 2009, ANZ has not released any money to the Jeff Manny Group. Since August 2009, our client has sold five units in a development at 10 Wall Place, Page in the Australian Capital Territory. I am instructed that ANZ has released the GST moneys payable on four of these units, however, our client is still waiting for the GST on the sale of Unit 5 to be released. Our client has also sold 3 houses in Florey in the Australian Capital Territory, the entire proceeds of which have been retained by ANZ towards reducing the debt of the Jeff Manny Group.
- As you can appreciate, if ANZ does not release any funds to our client, our client does not have the financial capacity to insure all commercial properties owned by the Jeff Manny Group.
87. On 13 May 2010, Blake Dawson again wrote to Elringtons seeking evidence of insurance.
88. On 18 May 2010 ANZ "formally" advised Mr Manny that the facilities must be paid on or before 17 October 2010 and would not be extended or varied in any manner.
89. There was no evidence that, between 18 May 2010 and 17 October 2010, Mr Manny lodged a formal application for finance with any financial institution.

Draft final orders in the FCA

90. On 21 May 2010, Faulks DCJ delivered reasons for judgment and provided draft final orders for the division of property between Mr Manny, Ms Manny and JMG. The draft final orders proposed that Ms Manny receive \$1.015M within 90 days of the date of the orders, and that properties (including 1, 2 and 6/10 Wall Street) be sold if that sum was not paid.
91. His Honour observed that the financial position was substantially agreed to be \$17.107M (including 58 Barnard Circuit, valued at \$500,000). At [37], his Honour noted that Ms Manny had put the liabilities at \$13.04M and Mr Manny had put them at \$16.188M. At [49], his Honour found that the liabilities were \$13.548M. At [50], his Honour found that the net assets were \$3.559M. His Honour made orders enabling the ANZ to be heard in relation to the proposed final orders.
92. On 31 May 2010, Blake Dawson wrote to Mr Manny noting the proposed order for payment of \$1.015M to Ms Manny within 90 days and advising that ANZ intended to undertake urgent valuations of all security properties.

93. Mr Manny gave evidence that, in June 2010, units 1 and 2/10 Wall Street had not been sold.
94. Mr Manny could not recall whether the JMG had traded at a loss up to 30 June 2010. He agreed that, on 28 July 2010, there were several vacant properties: part of 31–35 Nettlefold Street, 60–62 Oatley Court, and 4/18-20 Wollongong Street Fyshwick.
95. On 31 May, Blake Dawson wrote to Nelson & Co regarding the proposed sale of 6/10 Wall Street and the foreshadowed sale of units 1 and 2, and “repeated” that the net proceeds of sale of all security properties would be applied to the permanent reduction of the ANZ debt.
96. On 4 June 2010, Blake Dawson wrote to Mr Manny’s new solicitors, Certus Law, referring to a proposal by Mr Manny to sell units 1 and 2/10 Wall Street, Page to fund the payment of \$1.015M to Ms Manny and to sell 6/10 Wall Street and retain the net proceeds to pay non-ANZ creditors. ANZ stated that the proposal was only viable if the potential net sale proceeds of units 1, 2 and 6/10 Wall Street exceeded \$1.015M and the net equity in the remaining security properties was “more than sufficient to discharge the debts of the Jeff Manny Group of companies”. Blake Dawson continued:
 - 3.2 It is by no means clear to the Bank that either of the pre-requisites detailed above will be met.
 - 3.3 The simplest solution would be for Mr Manny to immediately refinance with another institution the entirety of his debt owed to and loan facilities with the Bank...in a manner that enables Mr Manny to fund the payment of \$1,015,000 to Ms Manny without the sale of any properties.
 - 3.4 Would you please confirm that Mr Manny is exploring the possibility of refinancing?
97. On 10 June 2010, Strong Law wrote to Certus Law regarding the proposed sale of 6/10 Wall Street, Page, stating that Ms Manny had not consented to the sale, and the sale was in contempt of the FCA orders made on 5 February 2010.
98. On 10 June 2010, Strong Law wrote to the FCA advising that ANZ wished to be heard. Further, there were two “arithmetical errors” in the proposed draft orders. They failed to include \$10,000 for a Mazda vehicle and to account for the sale of unit 5 (for \$475,000) on both sides of the ledger. It was submitted that both matters would be addressed if \$465,000 was deducted from the total liabilities, with the result that an amount of \$1.258M was paid to Ms Manny.
99. On 15 June 2010, Certus Law wrote to Strong Law proposing amendments to the draft orders and attaching a statement of non-ANZ liabilities (dated 8 June 2010) in the total sum of \$763,534. The letter was forwarded by Certus Law to Blake Dawson.
100. In evidence, Mr Manny agreed that the statement of non-ANZ liabilities reflected the true position on 8 June 2010. By mid-2010, he considered that the remaining JMG asset pool was insufficient to pay ANZ, other JMG creditors and Ms Manny.
101. On 21 June 2010, Blake Dawson wrote to Mr Manny, advising that:
 - (a) Despite five letters regarding the insurance requirement, JMG remained in default of its insurance obligations. On 3 May 2010, JMG had conceded that commercial properties were uninsured, as it could not afford insurance.

- (b) Mr Manny had failed to provide current statements of financial position, and JMG had failed to pay land tax, rates, and utilities charges (totalling \$147,270) and meet a debt to the ATO (of \$118, 569).
 - (c) There was a contingent debt to Ms Manny of \$1.015M.
 - (d) Excluding the debts to ANZ, the JMG debts were \$503,564.
 - (e) JMG and Mr Manny may be or may be about to become insolvent.
 - (f) Should proposed FCA orders become final, the LVR of the facilities would be approximately 79 per cent, breaching the requirement that it not exceed 65 per cent (reducing to 60 per cent).
 - (g) ANZ proposed to insure the uninsured properties, undertake new valuations, and terminate the facilities on 17 October 2010.
 - (h) No facility would be extended or varied, and the debts must be paid out.
102. In evidence, Mr Manny said that he did have insurance in place at that time, but his staff had failed to send the insurance documents to ANZ. Immediately after receiving the letter of 21 June and prior to 28 July 2010, he had sent the insurance documents to ANZ. He said that the statements of financial position were forwarded when they became available and that arrears of land tax, rates and charges were paid to the extent that there were funds available to do so. He had entered a payment plan with the ATO.
103. Mr Manny said that he took the letter of 21 June 2010 to be a statement that the ANZ would not extend the date of 17 October 2010 and he needed to “pull up his socks”. He concluded that he must sell properties in order to reduce the LVR or face foreclosure, and he sold 2 and 6/10 Wall Place, Page and paid the proceeds to ANZ.
104. On 21 June 2010, Blake Dawson emailed Mr Manny stating that ANZ would allow him to sell a combination of properties to fund, from the net proceeds, the payment of \$1.015M to Ms Manny, on conditions including that, after payment of Ms Manny, the net proceeds were applied to the permanent reduction of the ANZ debt. The email stated:

Accordingly, the Bank is of the view that the only viable alternative to the offer detailed above, is for you to urgently refinance with another Bank or financial institution.

FCA proceedings on 24 June 2010

105. On 24 June 2010, the plaintiffs (through Mr Salinas of Certus Law) sought orders enabling the sale of units 1, 2 and 6 Wall Place, Page. Mr Salinas submitted “my client is concerned that the business and the companies are exposed to potentially becoming insolvent”.
106. On the same day, Ms Tonkin applied to vary the proposed orders pursuant to the slip rule. She noted that 5/8–10 Wall Street, Page had been sold after the close of evidence on 29 January 2010. While unit 5 had been removed from the asset pool, there had been no reduction in the liabilities to account for the fact that ANZ had received the net proceeds of sale. She submitted that the error could be cured by adding \$470,000 (the value of unit 5) to the assets, increasing the sum payable to Ms Manny to \$1.258M. Faulks DCJ agreed to make the adjustment.

107. Faulks DCJ made an order allowing the sale of unit 6/8–10 Wall Street, Page, with the sale proceeds going to the ATO (\$73,797.54), a construction industry creditor (\$182,496.82) and the balance to be held by ANZ pending further order or agreement. The orders provided that, within 90 days, units 1 and 2/8–10 Wall Street could be sold, with any funds to be held by ANZ pending further order or agreement. Except for 18–20 Wollongong Street Wollongong and 50 Oatley Court, Belconnen, other properties could also be sold if the proceeds were held by ANZ pending further order or agreement.
108. June and August 2010 valuations of JMG’s real estate portfolio by CBRE for ANZ showed that the LVR of the JMG property portfolio substantially exceeded the 60 per cent ratio prescribed by the ANZ. The total portfolio valuation was \$11.2–\$12.855M, as compared to a 2008/2009 valuation of \$16.9M.
109. Mr Manny said that he did not see the valuations in 2010.
110. On 29 June 2010, Strong Law wrote to Mr Manny putting an offer that units 1, 2 and 6/8–10 Wall Street, Page, be sold to meet the liability to Ms Manny of \$1.258M. Further, Strong Law were instructed to agree to the sale of any properties owned by the JMG except 7 Wall Street, Page, which was to be “quarantined in the event the sale proceeds from the units are insufficient to meet the payment to Ms Manny”.
111. Mr Manny immediately responded, offering to transfer all properties in his own name to Ms Manny, and stating that if the JMG property portfolio was broken:
- then all the group come insolvent that every asset to be sold either by liquidator appointed by the bank or by the director of companies for fire sale of the properties, that will be resulted that all the properties be sold under their actual value, as the result, sale proceeds of all the properties will go to debts and ATO.
112. Alternatively, he proposed that all assets be sold with 53.5 per cent of the net proceeds going to Ms Manny and the remainder to Mr Manny; Mr Manny stated, “in this case no one gets anything either.” He stated that he needed to sell unit 6 immediately.
113. On 30 June Mr Manny emailed Strong Law, copying Mr Roser, and stated:
- I am asking all the parties to resolve this matter by negotiation otherwise I have no option than take this matter to an appeal court.
- I have my lawyer to prepare for an appeal.
114. Later that day, he emailed Mr Robinson and Mr Roser, stating:
- ...If necessary I go to an appeal court to stop [Ms Manny’s claim of \$1.2M].
- I am not prepared to released net sale proceeds of 6/10 Wall Place Page to Ms Manny before 90 days from date of final order because during this time I need to refinance my business as well, you must think about both the parties.
115. On 1 July 2010, Blake Dawson again wrote to Mr Manny regarding the insurance requirement.
116. On 4 July 2010, Mr Manny emailed Mr Roser of Blake Dawson referring to the interim order of 21 May 2010 and stating:
- In your letter to me shows the position of ANZ bank was clear that by removing \$101 5000 from Jeff Manny Group’s pool of assets the group became insolvent and LVR of the group will become 79% which is against ANZ bank lending policy.

My position in regard of interim order of 21 May 2010 that is wrong in which lots of debt and capital gains tax are not considered by the court that is why once the interim order became permanent I will appeal to the Court of Appeal to overturn the order.

I would like to ask ANZ bank to continue with my loans until we get outcome of an appeal and if successful in the appeal court, then subsequent order in this matter from an appropriate court, in the same time I will reduce my debt to ANZ bank substantially by selling some properties...

117. Mr Manny filed an application seeking one of three sets of orders relating to the proceeds of the sale of units 1, 2 and 6/10 Wall Street, Page. On 6 July 2010, Faulks DCJ ordered that Mr Manny be permitted to complete the sale of 6/10 Wall Street, Page and that the net proceeds of sale be paid to ANZ. He was permitted to renew existing leases. Mr Manny had approached the St George Bank and the NAB about refinancing. His Honour adjourned the matter to 12 July 2010 to make final orders for the sale of all properties and the division of the net proceeds as previously indicated (53.5 per cent to Ms Manny and 46.5 per cent to Mr Manny). His Honour told Mr Manny that, "unless you have told me that I have got agreement [to refinance], the orders for sale will be made".
118. On 8 July 2010, ANZ wrote to Blake Dawson stating that, as at 6 July 2010, the total sum owed by Mr Manny and the JMG was \$12.437M, excluding the net sale proceeds of 6/10 Wall Street as the amount was not known at that stage.
119. On 9 July 2010 Strong Law wrote to Mr Manny stating:

...notwithstanding the Orders made by the Family Court of Australia on 6 July 2010 you have declined to provide us with contact information of your alleged financiers.

We are instructed to reject the various proposals put by you and, in particular, to note the following:

- Our client does not accept any reduction in the amount payable to her as determined by the Court on 21 May 2010 and 24 June 2010. The question of an appeal is entirely one for you.
- Our client does not and will not accept any proposal that involves payments to her over a period of years...
- You have provided no evidence of alternative sources of finance. In view of the attitude of the ANZ Bank there is no option but to proceed with the sale of many of the properties.
- The requirement of the ANZ Bank that you refinance by 17 October 2010 requires that immediate steps be taken to place properties on the market...

120. The letter stated that Ms Manny was agreeable to the sale of certain properties (grouped as Group A, Group B and Group C) on conditions.
121. On 12 July 2010 when the matter was listed before Faulks DCJ to make final orders, Mr Manny appeared in person. He stated that his income was zero, business income was almost zero and there were unsecured creditors in the sum of \$600,000. He accepted that ANZ had "the right to come on 17 October". He disagreed that the outstanding ANZ debt was \$12.218M, a figure provided by ANZ on about 8 July. He applied to vary the proposed payment order so that he could repay Ms Manny by instalments over five years, commencing in 2011. The application stated:

There will be no benefit to break Jeff Manny Group for any parties rather should keep it as it is and its income should be used for benefit of the parties.

122. In the course of hearing the application, Faulks DCJ stated that he did not understand part of Mr Manny's claim and advised Mr Manny that:

if you believe I have made a mistake in my judgment, then you are entitled to file an appeal if you want to, within a month of the orders being made...

123. Faulks DCJ refused the application, stating that he would issue the final orders the following day. Mr Manny responded that he was "taking this to appeal". On 20 July 2010 Faulks DCJ delivered supplementary reasons for his decision of 12 July. His Honour observed:

4 I am not prepared to make an order for the payment of the Judgment sum to Ms Manny by instalments...Furthermore, Mr Manny's second order sought is really in the nature of the dispute as to what I have found in the course of the proceedings subsequent to the primary Judgment. I have already indicated to Mr Manny that the remedy in relation to that is appeal, not to change my findings and my orders.

124. On 12 July 2010 Mr Manny emailed Mr Roser saying that he had settled the sale of 6/10 Wall Street, Page and a price had been agreed for 2/10 Wall Place, Page and he expected to exchange contracts. Mr Manny proposed that non-ANZ bank debts be paid from the sale of 2/10 Wall Place.

125. On 13 July 2010, Faulks DCJ made final orders, requiring the plaintiff to pay Ms Manny \$1.258M within 14 days (by 28 July 2010), failing which the JMG properties were to be sold.

126. At 4:48PM on 13 July, Mr Manny wrote to Mr Roser, expressing concern that non-ANZ creditors would wind him up. At 4:56PM he wrote to Mr Roser saying that his only option was to appeal the order to pay within 14 days, although he did not want to engage in further litigation.

127. At 5:12PM Mr Manny emailed the associate to Faulks DCJ, asserting that the judge had forgotten to consider the impact of capital gains tax and had "not allowed" him to refinance the loans and keep his business.

128. Amended final orders were made on 14 July 2010. They noted:

2 Based on the findings of fact in my Judgment of 21 May 2010, with corrections on those facts accepted by the party since that time:

- a. the total value of the assets of the parties is \$17,580,000;
- b. the total value of the liabilities of the parties is \$13,548,460.15;
- c. the total value of the net assets of the parties is...rounded up to \$4,032,000.
- d. the value of the wife's home is \$500,000.
- e. the value of the husband's home is \$635,000.

3 If all the properties were to be sold, then in accordance with the terms of my Judgment of 21 May 2010 [Ms Manny would receive 53.5% or \$2.158M and Mr Manny would receive 46.5% or 1.875M].

...

5. Discounting the value of the wife and the husband's house, the total value of the remaining net assets is \$2,897,000. It is intended by the orders that appear under that the wife will receive 57% of this sum (a notional value of \$1,651,290) and the husband will receive 43% of this sum (a notional value of \$1,245,710).

129. The significant orders were:

- 13 The husband will pay the sum of \$1,258,000 ("the judgment sum") to the wife within 14 days of the date of these orders.
 14. In the event that the husband does not pay the judgment sum to the wife, the husband will:
 - a. List the following (Group A) properties for sale:
 [Units 1 and 2/10 Wall Place, Page and 50 Oatley Court to be listed immediately, followed by 37 Krichauff Street, followed by 3, 5 and 7 Wall Place to be sold at a price agreed by the parties through an agreed real estate agent. If not sold within 75 days of listing for sale, then to be sold by auction. Net proceeds to reduce the JMG debts, and thereafter paid 57/43% to Ms/Mr Manny]
 - b. List the following (Group B) properties for sale within 90 days:
 [18 – 20 Wollongong Street, Fyshwick and three properties in Oatley Court, Belconnen, by the method recommended by the President of the Real Estate Institute of the ACT, if not sold within 150 days of the date of orders, then to be sold by auction. Net proceeds to reduce the JMG debts and thereafter paid 57/43% to Ms/Mr Manny]
 - c. List the following (Group C) properties for sale within 150 days:
 [31–35 Nettlefold Street, Belconnen and 12 Mildura Street, Fyshwick, by the method recommended by the President of the Real Estate Institute of the ACT, if not sold within 210 days of the orders, then to be sold by auction]
 - 15 The husband be, and is hereby restrained from, borrowing further money from the ANZ Bank, or doing any act or thing which would increase the indebtedness of the Jeff Manny Group to the ANZ Bank.
 - 16 Nothing contained in the preceding orders in relation to the sale of properties precludes the ANZ Bank from exercising its powers pursuant to their current documentation between the ANZ Bank and the Jeff Manny Group to enforce their security in accordance with that documentation or to seek accelerated sale of the properties upon termination of the current arrangements on 17 October 2010. It is noted, however, that subject only to the ANZ Bank exercising those rights, the ANZ Bank has agreed to the program set out above for the sale of the properties.
130. The orders were not opposed by the ANZ.
131. At 11:34AM on 14 July 2010, Mr Manny emailed Mr Roser asking that \$270,000 be released to pay a debt of \$70,000 to the ATO and miscellaneous other debts. He stated that he had placed 1/10 Wall Street, Page and 50 Oakley Court, Belconnen on the market and that, once they were sold, he would "put two or three properties in the market".
132. At 12:07PM on 14 July 2010, Mr Manny emailed Mr Robinson seeking Ms Manny's agreement to amend order 13 to enable Mr Manny to pay Ms Manny the sum of \$1.258M within 45 days; he needed the extension because he had placed 1/10 Wall Street, Page and 50 Oatley Court, Belconnen the market and had "initiated refinancing ANZ bank loans".
133. In re-examination, Mr Manny gave evidence that he had wanted to appeal to change the 14 day payment period to 45 days. However, by 16–17 July his position regarding an appeal had changed; he had realised that he had misread the order and that, as the payment period was not 14 days, he need not appeal. He still wished to "clear his name" in relation to an allegation made by Strong Law earlier in the proceedings that he had "stolen" money.
134. Nevertheless, on 17 July, Mr Manny emailed the associate to Faulks DCJ, stating that he was appealing the decision of 13 July 2010 and noting that he had only 28 days

from for judgment within which to appeal. On 19 July, the associate advised Mr Manny that he could file a notice of appeal without a copy of the judgment.

135. On 17 July Mr Manny emailed Mr Robinson stating that he had engaged an agent to sell unit 1/8–10 Wall Place, Page and he wanted to pay Ms Manny within 90 days:

If I receive a consent to pay Mrs Manny within 90 days then I will not pursue an appeal to judgement of 13/7/2010...

I would like to pay Ms Manny's share of property settlement and refinance my loans then keep the business...

136. On 18 July, Mr Manny wrote to the associate to Faulks DCJ asking that the time to pay Ms Manny be increased from 14 days to 90 days and requesting an amendment. He complained that he had been restrained from selling properties since February 2010 and that, in that context, 14 days was an inadequate period within which to raise \$1.258M. He stated that he had "lined up refinancing lender who believes that I will be able to refinance my loans once I have paid out my wife, I also get benefit from this change of date from 14 days to 90 days that is I can keep my business going".
137. On 19 July 2010, Mr Roser sent Mr Manny five valuations recently undertaken by CBRE.
138. Mr Manny said that, at that stage, he understood that there was no general restraining order that affected him or JMG. After 14 July 2010 he listed 50 Oatley Court, Belconnen, for sale but he did not list the other properties identified in the FCA final orders as Group A properties, and he did not sell any Group A properties in 2010, although he had found a buyer for 50 Oatley Court at \$4M.
139. On 19 July Mr Manny emailed Mr Cush stating that he needed assistance with arguing costs. He also stated:
- I am happy with the outcome but I need to go back to argue about the costs...
140. On the recommendation of Mr Cush, Mr Manny made an appointment to meet with Mr Lardner on 20 July 2010.

Mr Lardner is instructed on 20 July 2010

141. On 20 July 2010, Mr Manny and JMG retained Mr Lardner of DLL to act in connection with the family law proceedings. Certus Law filed a notice of ceasing to act.

Mr Manny's evidence

142. Mr Manny said that he provided Mr Lardner with documents relating to the family law proceedings, including the draft final order, the amended orders made on 14 July, and the restraining orders of 5 February 2010. He also provided information concerning the business structure of JMG and the ANZ facilities letter of 22 June 2009.
143. In his affidavit Mr Manny said that, on 20 July 2010, he instructed Mr Lardner to:
- (a) file a slip rule in the FCA to "correct extra payments to the wife" to \$1.05M;
 - (b) extend time for payment to Ms Manny from 14 days to 90 days; and
 - (c) contest Ms Manny's costs application (although Mr Manny also said that he told Mr Lardner that he wanted to pay his wife's legal costs).

144. In evidence, Mr Manny said that the only reasons that he consulted Mr Lardner were:
- (a) to ask Mr Lardner to represent him in relation to an anticipated costs application; and
 - (b) to ask for the slip rule to be applied to “clear [his] name” in relation to the sale of 5/10 Wall Place, to show that he had not “stolen” money from the JMG.
145. In his affidavit, Mr Manny said that he had explained to Mr Lardner that an error had been made in calculating the amount to be paid to his wife because funds from the sale of 5/10 Wall Place, Page had been accounted for incorrectly.
146. In evidence, Mr Manny conceded that he knew at the time of the commencement of the DLL retainer that the slip rule was not applicable, as Faulks DCJ had told him in the supplementary reasons for judgment.
147. Mr Manny said that he may have asked Mr Lardner to negotiate a reduction in the sum of \$1.258M. However, he was not concerned about having to pay \$1.258M within 14 days; to do so, he only needed to sell three properties and he was confident that he could sell properties for a good price. Nevertheless, he wanted to choose what properties were sold and when, and to avoid a “fire sale”. He believed that values were depressed.
148. He agreed that Mr Lardner had told him that, if he did not want to sell properties, the only option was to appeal the final orders. He conceded that, around 19–20 July, he was still thinking about an appeal to change the 14 day period.
149. Mr Manny said that he received no advice about and did not instruct Mr Lardner to make a stay application, and that it was not until about October 2016 that he became aware that a stay application had been filed on 3 August 2010. Nor did he instruct Mr Lardner to appeal the decision of Faulks DCJ. He denied that Mr Lardner had advised him that his only option may be to lodge an appeal and apply for a stay and that he had responded:

Do what is necessary to get what I want.

150. He instructed Mr Lardner that he wanted to see draft letters before they were sent.

Mr Lardner’s evidence

151. Mr Lardner said that, at the meeting, Mr Manny gave him the FCA judgment of 21 May 2010, the transcripts of the FCA proceedings on 6 and 12 July 2010, and the final orders of 14 July 2010. The focus of the meeting would have been the final orders. He could not recall whether Mr Manny had furnished other documents concerning the FCA proceedings.
152. Mr Lardner could not remember whether Mr Manny had provided documents concerning the ANZ facilities. However, the involvement of ANZ was apparent from the FCA documents. He thought it unlikely that general financial documents had been provided as the initial meeting concerned the FCA proceedings.
153. He said that he did not believe that he was instructed to act in relation to costs.
154. Mr Lardner said that, on 20 July 2010, he was instructed to negotiate an arrangement whereby Mr Manny would pay to Ms Manny an amount that was less than that ordered by the FCA. Mr Manny expressed certainty that Ms Manny would accept a lower

amount. Mr Manny also wanted Mr Lardner to assist him “reclaim control of his assets” by refinancing and controlling the sale of properties (he would sell when he chose to sell).

155. I consider that it is unlikely that Mr Manny instructed Mr Lardner that he wanted to pay his wife’s legal costs or act in relation to costs. At that time, no costs application was pending. Ms Manny did not make a costs application until 11 August 2010. When the costs application was made, by an email of 13 August 2010, Mr Lardner asked Mr Manny:

In respect to the question of costs, do you wish me to act for you in relation to the matter bearing in mind that you have Zone Legal acting for you in respect of the costs levied by Blake Dawson.

156. If, on 20 July 2010, Mr Manny had instructed Mr Lardner to act for him in relation to costs, it is improbable that Mr Lardner would have communicated in those terms.
157. Mr Lardner said that Mr Manny may have asked him to “file a slip rule” to correct the judgment of \$1.258M but, if so, Mr Lardner would have told him that the “slip rule” had no application to the circumstances. Mr Lardner understood that the slip rule operated to correct a mistake or error caused by an accidental slip or omission. It did not allow reconsideration of the substance of a ruling: *Pawley v Pawley (No 2)* [2017] FamCAFC 136 at [29]–[34].
158. Mr Lardner could not recall Mr Manny saying that he wanted to extend the time for paying Ms Manny to 90 days but agreed that Mr Manny may have been concerned about the 14 day period for paying Ms Manny.
159. Mr Lardner stated that, in accordance with his invariable practice when retained to act after final orders had been made by the FCA, he would have mentioned the need to appeal within 28 days “and to seek a stay of those orders to prevent enforcement”.
160. In relation to his advice about an appeal, Mr Lardner stated that Mr Manny had responded:

I want you to negotiate with Mrs Manny’s solicitors to reach an agreement for a reduction in the payment to her under the Family Court’s orders and for it to be paid over a longer period. I want to make sure I control the sales of the properties as and when I determine.

161. In relation to lodging an appeal and applying for a stay, Mr Manny said:

Do what is necessary to get what I want.

162. Mr Lardner was adamant that he had advised Mr Manny that, unless Ms Manny readily agreed to vary the FCA orders, Mr Manny’s only choice was to appeal the orders and seek a stay to prevent enforcement of the orders.

Events after 20 July 2010

163. On 21 July 2010, Blake Dawson emailed Mr Manny, stating

...the Bank is prepared to allow you to sell any reasonable combination of security properties in order to fund, from the net sale proceeds, the payment of \$1,015,000...to your ex-wife...

The debt due in respect of each facility must be repaid in full...

164. On 22 July 2010, Mr Manny emailed Mr Robinson of Strong Law, copying Mr Lardner. Mr Manny referred to the recent CBRE valuations that had been commissioned by ANZ, observing that, since 2010, there had been a “staggering” drop in property values such

that there remained no equity in JMG; the value of \$12.5M equalled debts of \$12.5M. Mr Manny stated that “not even a Dollar will be left for Jeff Manny or Kazuko Manny”.

165. It was Mr Manny’s evidence that, on 26 July 2010, he emailed Mr Lardner at david@davidlardner, stating:

we need to come up with an agreement very soon since both of us have got no money to spend and also I need quickly fix up my business with a financier...

166. Mr Lardner did not receive the email as that was not his correct email address. However, I accept that the email was sent; it was consistent with Mr Manny’s view of his circumstances at that time, as reflected in other correspondence.

167. Mr Lardner knew that the ANZ facilities were due for repayment on 17 October 2010. On 26 July 2010 he had a telephone conversation with Mr Roser of Blake Dawson.

168. On 27 July 2010, Strong Law wrote to DLL stating:

We confirm our client does not agree to any reduction in the amount due and payable to her and will oppose any appeal that may be lodged by your client.

We are instructed that the current position of the ANZ Bank presents the greatest risk to the future viability of the Jeff Manny Group. It is apparent there is a need for your client to sell a number of properties in order to provide him with an opportunity to avoid foreclosure...

169. The letter requested details of the sale of properties at 50 Oatley Court, Belconnen, and units 1 and 2/10 Wall Place, Page (in relation to which it was understood that contracts had been exchanged).

170. Mr Manny said that, on 30 July, he spoke to Mr Lardner about the proposed auction of 1/10 Wall Place Page and Mr Lardner told him to cancel the auction as he was filing an application in the FCA. Mr Lardner did not explain the nature of the application, simply saying “I will tell you later”. Mr Lardner denied the conversation.

171. I do not accept that Mr Lardner said, “I will tell you later”. In any event, Mr Manny would not have accepted such advice without interrogating it.

172. On 3 August 2010, Blake Dawson wrote to Mr Manny asserting that, as JMG had failed to provide evidence that the security properties were insured, ANZ had obtained insurance quotations. JMG was given seven days to submit certificates of currency for each property.

173. On 3 August, Blake Dawson also wrote to Mr Lardner, stating that ANZ considered that no capital gains tax or goods and services tax was payable in relation to the sale of security properties. The letter concluded:

Accordingly...the gross proceeds of all sales will be used to pay reasonable sales expenses including agent’s fees and conveyancing costs, with the balance applied to the permanent reduction of debt.

Inquiries about refinancing

174. On about 25 July 2010, Mr Lardner introduced Mr Manny to David Friend of Tiffen and Co, finance brokers, for the purpose of exploring refinancing. Following the meeting, on about 28 July 2010, Mr Manny received an email from Mr Friend. The email sought tax returns and financial statements for all related entities and other documents, as well as identification documents.

175. Mr Manny said that, because Mr Lardner told him “don’t do anything at this stage”, he refrained from supplying the requested documents to Mr Friend. Mr Lardner denied making the statement.
176. On 26 July 2010, Mr Manny spoke to Mr Ross Liddle of BOQ regarding refinancing. Mr Manny provided Mr Liddle with some documents. Mr Manny said that Mr Liddle appeared to be eager to advance the finance and that JMG could have paid the application fee of \$45,000.
177. On 28 July 2010, BOQ sent an “indicative letter” to Mr Manny requesting further documents and outlining the financial arrangement that may be considered. The letter referred to facilities of \$9M (commercial), and \$850,000, \$1.15M and \$500,000 (all residential) (total of \$11.5M). The letter stated that there was a non-refundable application fee of \$45,000 and that the client was responsible for valuation fees. BOQ required total security of \$18.225M.
178. DLL invoiced Mr Manny for perusing correspondence from BOQ, which was probably the letter of 28 July 2010. Mr Lardner said that he told Mr Manny:
- You know this is not an offer of finance and there is still a lot of information to be provided. This is nowhere near good enough to get the ANZ to defer any action.
179. I accept that Mr Lardner probably made that statement; it was a correct summary of the impact of the letter on Mr Manny’s prospects.
180. Mr Manny said that, on 30 July, he spoke to Mr Lardner who advised him, “Don’t do anything, I will let you know”. That is why he did not proceed with the BOQ application. On about 4 or 5 August 2010, he told Mr Lardner of his enquiries with BOQ and Mr Lardner responded:
- Don’t do it. I got an application in the court to extend the payment to your wife to 90 days. Wait until my application is heard.
181. Mr Lardner denied making any such statements. Rather, he said that Mr Manny had expressed the belief that he could persuade ANZ to extend his loans. Mr Lardner stated that, in July 2010 and subsequently, there were many occasions when he told Mr Manny:
- If you cannot arrange refinancing of the ANZ Bank Facilities, then the ANZ Bank will enforce their rights by selling your properties after 17 October 2010.
182. Mr Lardner gave evidence that, in July and August 2010, he explained to Mr Manny the adverse consequences of a forced sale of his property portfolio if he did not secure refinancing. He explained that the appeal and stay of the FCA final orders would delay, and possibly alter, the obligation to pay \$1.258M to Ms Manny.
183. Mr Manny said that he didn’t continue to sell properties after 3 August because Mr Lardner had told him that he should not do anything. There was a conversation to the following effect:
- Jeff Manny: ‘Okay, I won’t proceed until you let me know when I should proceed. I got a buyer for Unit 1, 10 Wall Street, Page. You know it has to be sold. I have to pay money to the ANZ Bank.’
- David Lardner: ‘Don’t do anything at this stage.’
184. I accept Mr Lardner’s evidence that he gave no such advice. Rather, he attempted to negotiate a variation in the FCA orders with Strong Law, pursued cordial relations with

Blake Dawson and reminded Mr Manny that, if he did not refinance, the ANZ's position was that it would foreclose. I accept Mr Lardner's evidence that refinancing "was front and centre" in his discussions with Mr Manny.

The stay application

185. By 29 July, Mr McGrath of counsel had been instructed to settle a stay application and a supporting affidavit, and he settled the documents on 30 July.
186. On 3 August 2010 DLL filed an application to stay the final orders of the FCA pending the determination of any appeal, and a supporting affidavit of Mr Lardner dated 30 July 2010.
187. Mr Manny said that at no stage did he instruct Mr Lardner to make a stay application and it was not until about October 2016 that he became aware of the content of the application or Mr Lardner's supporting affidavit. Initially, he said that he did not know that Mr McGrath had been briefed on the stay application. He was not advised about the impact of a stay on order 14 (the default provision, providing for the staged sale of properties). He was not the source of the facts in the supporting affidavit.
188. However, in relation to whether, in late July, he had discussed the need for a stay application to prevent enforcement of the final orders, in evidence Mr Manny said, "I cannot answer that". He also said that, by about early August 2010, he knew that Mr McGrath had been briefed to appear on the stay application and he did not complain when he found out.
189. I accept Mr Lardner's evidence that Mr Manny instructed him to make a stay application in association with an appeal, instructed him to brief Mr McGrath on the stay application, and instructed him as to the facts to be included in his supporting affidavit of 30 July 2010. Mr Lardner's evidence was consistent with the contents of the affidavit of 30 July 2010, invoices sent to Mr Manny on 6 August 2010, and common sense. The invoices referred to:
 - 29/07/2010 Prepare documents – application and affidavit – perusing documents, telephone call with you discussing same, discussing with Counsel
 - 30/07/2010 Perusing documentations as settled by Counsel
 - 3/8/2010 Perusing correspondence being email from you re appeal
 - 5/08/2010 Letter to Counsel re appeal
 - 5/08/2010 Attending to preparation; phone calls with other solicitors, yourself, barrister and court – further preparation
 - 5/08/2010 Attending to putting together of brief for barrister
 - 12/08/2010 Telephone call with Appeals Registry, amending Notice, fax to FCA
190. In his supporting affidavit of 30 July, Mr Lardner stated that he had been instructed to advise Mr Manny and the JMG concerning an appeal. At [9]–[10], the affidavit stated:
 9. ...To the best of my information and belief...it was not possible for Mr Manny or those Respondents to refinance in time so as to be able to pay the said sum of \$1,258,000 to the Wife within [14 days]. I have formed that belief on the basis of my discussions with Tiffin & Co, financiers, of Canberra, and in light of the number of properties involved and the necessity of the time required in order to discharge existing encumbrances in favour of the ANZ Bank.

10. Further, Mr Manny and the Second, Third, and Fourth Respondents also seek to have the opportunity of obtaining advice concerning an appeal from the decision and orders of the Primary Judge (including the provisions of the said Order 13), without suffering the penalty of the default enforcement provisions in Order 21 of the Final Orders of the Primary Judge.

The appeal

191. On 9 August 2010, Mr Lardner emailed Mr McGrath, attaching a draft notice of appeal. Mr Manny was copied on the email. The email referred to the CBRE June 2010 valuations.
192. On 10 August 2010, Blake Dawson provided Mr Lardner and Mr Manny with copies of the CBRE valuation reports for 3, 5, 7, and 1, 2, 6/10 Wall Street, stating that the valuation of 50 Oatley Court had been delayed as the valuer require further information in relation to restrictions associated with a Crown lease.
193. On 10 August 2010, DLL filed a notice of appeal claiming that final order 13 (relating to the payment of \$1.258M) be set aside and in lieu Mr Manny be ordered to pay \$500,000 to Ms Manny within three months of the order. There was no express appeal against order 14. Grounds 11 and 12 of the appeal complained that Faulks DCJ had rejected current valuation evidence (the CBRE 2010 valuations). Ground 13 claimed that there had been insufficient up-to-date evidence of the value of the parties' assets. The notice of appeal had been settled by Mr McGrath.
194. Mr Manny said that he had not instructed Mr Lardner to file a notice of appeal. When he learned of the appeal on about 13 August 2010, he telephoned Mr Lardner and complained that the appeal had been filed without instructions. Mr Lardner responded, "Leave it with me. I know what I am doing". Mr Manny also stated that, as far as he recalls, he did not see the notice of appeal prior to January 2011.

Dealings with the ANZ in mid/late August 2010

195. On 13 August 2010, Mr Lardner wrote to Mr Manny regarding a meeting between himself and Mr Roser of Blake Dawson on 12 August 2010. Mr Lardner stated that, in the meeting, he had raised the matters that Mr Manny had asked him to raise, although:

In my discussion with Matt my primary aim as addressed to him was that I was your Family Court lawyer who was focusing on the Appeal, and wished to be able to concentrate on the Appeal without getting embroiled in proceedings against the ANZ Bank.
196. Mr Lardner reminded Mr Manny that:

At the moment the orders of 13/14 July 2010 apply and will continue to apply until the outcome of our Stay Application is known.
197. On 16 August 2010, Blake Dawson wrote to Mr Manny, stating that the ANZ had undertaken a further review of the facilities. Mr Manny had failed to satisfy the ANZ requirement that two units at 10 Wall Street, Page be sold prior to 3 August 2009 and thereafter the remaining six units be sold at a minimum rate of one unit every two months. The letter noted that this default had been notified on 7 August 2009 but had not been remedied.
198. Mr Manny said that, when he told Mr Lardner about the letter, Mr Lardner said, "leave it with me. I will look after it". Mr Manny said that, at that stage, he did not know about the application of 3 August. Mr Lardner denied making any such statement.

199. It was Mr Manny who, on 17 August 2010, responded to Blake Dawson's letter of 16 August 2010, copying Mr Lardner. Mr Manny stated:

...I do not accept any of Defaults conditions which was mentioned in your letter of 21 June 2010...

4. Unit 2 of 10 Wall Place also have been sold, we're just waiting for ANZ bank to proceed with the settlement...

5. ...delaying my settlement is in no ones interest, in fact it works against our interest because not even one person registered to bid for unit 1/10 wall place which was for auction on Saturday 14 of August due to people know that I have problems with bank to settle the sold units and unit 2/10 Wall place Page which is already sold, but not yet settled

Therefore as per my explanation above I am not in Default of any of my Loans so far, but I would like to work with ANZ Bank and their lawyers to eliminate any concerns if it is exists between us

200. On 18 August 2010, Blake Dawson responded, copying Mr Lardner, and repeated the claimed default of failing to sell units at 10 Wall Street in accordance with the timetable that was agreed when the facilities were granted.

201. Mr Lardner drafted a letter to Blake Dawson and forwarded the draft to Mr Manny for his instructions and to Mr McGrath to settle. On 19 August 2010, the letter was sent to Blake Dawson. It referred to the settlement of 2/10 Wall Street, Page (which was being undertaken by Nelson & Co) and to previous sales of units 3 and 6. It sought consent to the payment and retention of sale funds to meet CGT and GST liabilities.

202. On 24 August 2010, Ms Manny filed a notice of cross-appeal, seeking that the amount to be paid to her be increased to \$2.436M.

The stay application on 27 August 2010

203. On 26 August 2010, Mr Lardner emailed Mr Manny confirming that Ms Manny had lodged a cross-appeal. He anticipated that Strong Law would accede to a stay of the FCA orders. The email stated that Mr Lardner and Mr McGrath would appear by telephone. Mr Lardner recommended that Mr Manny should not attend court.

204. In evidence, Mr Lardner said that he would have advised Mr Manny that he should not attend court because he was worried that Mr Manny would say something against his interests.

205. On 27 August 2010, Faulks DCJ heard Mr Manny's application for a stay of final orders pending the appeal. Mr Lardner and Mr McGrath appeared by telephone for Mr Manny, Ms Tonkin appeared for Ms Manny and Blake Dawson was represented as "an interested party".

206. Mr McGrath informed the Court that, in the appeal and cross-appeal, the parties disputed the identity and value of assets, the quantum of payment to Ms Manny and the Court's treatment of capital gains tax and goods and services tax.

207. Mr McGrath confirmed that the only order appealed was order 13 (or, at least, that was the primary challenge). At 327–328, he stated:

...in the absence of a stay, the short time period for payment of moneys under order 13, which are the subject of the complaint in both parties' appeals, will expire and trigger the onerous default provisions under order 14 for a sale of many assets. In that event refusal of the stay is likely to render the appeal futile...

208. Mr McGrath noted that, if there was a stay, the properties could nevertheless be sold by agreement of the parties.
209. Faulks DCJ stated that, to avoid “destruction of the corpus that is to be divided between the parties” there would be “no sale of anything pending the appeal”. Mr McGrath responded that it would be sensible to allow properties to be sold by agreement between the parties or by leave of the court “to rationalise the parties’ financial circumstances and protect them”.
210. Faulks DCJ queried why then there was a need for a stay. His Honour asked whether Mr Manny agreed to the properties being sold in accordance with order 14 and Mr McGrath said that he did not. Mr McGrath then stated that the application was “to stay the whole of the orders unless the parties agree” otherwise because that would achieve a better result than a forced sale by ANZ.
211. When his Honour again stated that he could not understand why Mr Manny objected to an orderly sale (in accordance with order 14), Mr McGrath stated that he may need to get instructions.
212. Faulks DCJ pointed out that, in the final orders, he had adopted Mr Manny’s proposals about the order in which properties were to be sold. Consequently, he had difficulty understanding why there would be an objection to that course.
213. Mr McGrath responded that order 14 was a consequential order based on order 13, that the two orders “go together” and that order 14 “envisages the opportunity to retain the properties”.
214. Faulks DCJ doubted that Mr Manny could obtain \$500,000 in three months’ time “even if the property is sold in an orderly way” and asked, “if it’s going to be sold in an orderly way, why shouldn’t it be sold in an orderly way now?”.
215. When Mr McGrath raised the possibility of Mr Manny refinancing, Faulks DCJ remarked:
- He’s had – look, he had more opportunities to refinance than General Motors.
216. Just before adjourning to allow Mr McGrath to obtain instructions, Faulks DCJ stated:
- But it seems difficult to understand how it is that your client, who’s never been able to determine or to satisfactorily demonstrate that he can raise the money, should be able to pay even the amount of money which he says he can’t pay except by an orderly sale of the properties at the moment. You get your instructions.
217. The purpose of the adjournment was for Mr McGrath to seek instructions confirming that Mr Manny wished to try to refinance so that he could pay Ms Manny.
218. Following the adjournment, at 4:45PM Mr McGrath informed Faulks DCJ that he had obtained instructions and that:
- ...the relief sought by the applicant husband on the appeal is for the opportunity for Mr Manny and the companies to pay a sum of money within three months and to retain the various properties. That is to this effect: refusal to order a stay of all of the orders would render nugatory the effect of the relief sought; that is that on that payment of money within three months of the date of order of the appellate court, Mr Manny and his corporate entities would be entitled to retain the realty.
- The orders are two (sic) inter-connected [for only order 13 to be stayed]. Mr Manny’s position – in case I misled the court I want to correct that now – is that at the time of the judgment, the assets were worth less than your Honour the trial judge found, but in relation to the current

position that is indeterminate, as is the position that is likely to prevail on the hearing at the time of the hearing of the appeal...On an orderly consideration as well of the appeal it may well be that the figure is to some extent slightly amended or amended in total, but present purposes are such that it's been put on urgently to seek this relief.

219. Faulks DCJ observed:

...presumably, irrespective of any order I make, there may well be a sale of all the properties in a totally unorganised fashion and one that the bank will dictate as and from 17 October...

...I'm certainly not going to prevent the bank from taking its normal steps...

220. His Honour noted that, regardless of any order that he made, ANZ could take action on 17 October, resulting in a disorganised disposition of property rather than the "pattern of the sale process that was set out and ultimately accepted by the bank as being appropriate".

221. Ms Tonkin asked the Court to refuse a stay because the result of a stay may be foreclosure by ANZ on 17 October 2010. If the stay was refused, the properties would be sold "perhaps in the orderly manner that Mr Manny proposed was appropriate to this court". She stated that, if order 13 was stayed, then all orders would have to be stayed, effectively freezing the assets, "which would have a very detrimental impact on both of the parties".

222. Faulks DCJ stated, "if there is to be a stay it will be on condition that no property is sold". When His Honour asked Mr McGrath whether he had instructions about that, Mr McGrath responded:

Well, it's opposed, but, your Honour, I can do no more than...

223. His Honour stated, "you can appeal that too if you'd like".

224. Mr McGrath then drew attention to order 15, which restrained Mr Manny from further borrowing from ANZ or increasing indebtedness to ANZ. Mr McGrath stated, "That cannot be what your Honour meant". This statement did not find favour with Faulks DCJ, who pointed out that, in the past, Mr Manny had borrowed money and increased indebtedness.

225. In relation to the restraining order, Mr McGrath requested that there be a "rider" of "without the prior written consent of the wife or leave of the court", but Ms Tonkin opposed the rider, and the request was refused.

226. In conclusion, Faulks DCJ said to Mr McGrath:

I don't know whether you had planned to have further discussion with Mr Manny this afternoon or whether Mr Lardner does, if he's still on the phone, but I can say to you without any hesitation that this is what your client wanted. He wanted a stay. He's got the stay, and if it means in the end that the whole empire comes tumbling down, and he – or perhaps the kingdom or the principedom comes tumbling down, because the bank moves in on 17 October, then he will recognise what the situation is.

227. His Honour granted a stay of the orders made on 13 and 14 July. Order 2 stated:

Mr Manny or the Jeff Manny Group be and is hereby restrained from selling or disposing of any of the properties owned by Mr Manny or the Jeff Manny Group until further order of this Court, or of the Full Court, save only that if contracts have been exchanged in relation to one of the units at Wall Street, Page, in the Australian Capital Territory (as was in train prior to the matter being before me on 27 August 2010) that sale may be completed provided the full net proceeds are paid into the ANZ Bank account in reduction of the permanent debt.

228. By order 3, Faulks DCJ expressly stated that order 15 of the orders made on 13 July 2010 (providing that Mr Manny was restrained from borrowing further money from ANZ or doing anything that would increase the indebtedness of JMG to ANZ) was not stayed.
229. In the reasons for decision, his Honour observed:
- (a) The appeal related only to the sum of money to be paid to Ms Manny, although it was implicit that, if that order was to be stayed, then the default order governing the timetable for sale of properties, should also be stayed, at least insofar as Mr Manny might seek to implement it: at [5]–[6].
 - (b) As there was some doubt about whether Mr Manny could raise \$500,000 (as proposed in his appeal) or “any other sum of money” without selling property, it was appropriate that, pending the appeal, none of the assets should be dissipated: at [8]–[9].
 - (c) It was inappropriate for Mr Manny to sell properties (other than the one unit in relation to which contracts had been exchanged) as to do so would prevent the implementation of order 14 (the default provision setting a timetable for sale): at [14].
 - (d) The ANZ may foreclose on 17 October 2010: at [16]–[17].
 - (e) Because of her vulnerable psychological condition and a concern that she may feel overborne, Ms Manny had opposed an order that the parties might agree on the sale of properties, and that view was “not unreasonable”: at [19]–[20].
230. Mr Manny gave evidence that Mr McGrath had not been instructed to make the statements that he had made. He agreed that, after the matter was adjourned, there had been a three-way telephone conversation between himself, Mr Lardner and Mr McGrath. However, he said that it was just a friendly exchange, and it did not involve giving instructions.
231. Mr Lardner said that, during the adjournment, there was a three-way telephone call between Mr Manny, Mr McGrath and himself in which Mr Manny had conveyed instructions to Mr McGrath and Mr Lardner, and those instructions were then conveyed to Faulks DCJ. As the adjournment was short, Mr McGrath would have led the conversation.

30 August to 2 September 2010

232. At 5:33PM on 30 August 2010, Mr Lardner wrote to Mr Manny:

I also spoke again with Garry as to last Friday's outcome. We are both of the opinion that an Appeal should be lodged as to the condition imposed by his Honour – the ban on your dealing with the property – as there was quite clearly no basis for it. I note your instruction to attempt to get agreement on the sale of Unit 1; however let's prepare the ground work for an appeal should we not get agreement. Please order the transcript.

233. In a letter to Mr McGrath of 1 September (which was also sent to Mr Manny), Mr Lardner observed that, having re-read the orders of 27 August, he believed that the judge had “decreed” that Mr Manny must “await the ANZ taking over as mortgagee in possession”. Mr Lardner opined that Mr Manny's only option was to appeal as soon as possible. Mr Lardner attached the orders made on 27 August, describing them as “extreme”. He asked Mr Manny to telephone him urgently.

234. Mr Manny said that he had telephoned Mr Lardner, very upset. Mr Lardner told him that he should not “do anything” or he would contravene the FCA orders. When Mr Manny asked whether he could pursue refinancing, Mr Lardner advised him that to do so would be “the worst thing you can do”.
235. Mr Lardner denied the suggested import of the conversation. He said that any reference to “not doing anything” was a reference to being unable to sell properties. In fact, he believed that Mr Manny should have continued to seek refinancing. In Mr Lardner’s opinion, the orders did not prevent Mr Manny seeking approval for refinancing.
236. I accept Mr Lardner’s evidence. The orders made on 27 August 2010 did not prevent Mr Manny from seeking approval for refinancing. Once agreed by a financier, refinancing would have required court approval, but there was nothing to prevent Mr Manny seeking such approval.

Mr Manny’s dealings with ANZ from 30 August 2010 to 17 October 2010

237. On 30 August 2010 Mr Manny emailed Mr Quick (copying Mr Lardner and Mr McGrath) under the subject heading “continuation of our loan facilities”. He stated:

...all the parties have adopted ANZ Bank valuations that is share of Miss Manny from property pool of Jeff Manny Group to be not greater than \$500 K.

Therefore I am asking that our loan facilities with ANZ Bank stay in place until we reach to a total agreement with Ms Manny. It might take beyond 17 October 2010.

Jeff Manny Group is a viable business and its income is high and can be higher, we will pay all ANZ bank interests and other fees associated with the loans until

Either we find a new lenders whom already shown interests on set of numbers of Jeff Manny Group that is after settlement of Family Court matter or we negotiate a new term of Loans with ANZ bank, in this way everyone is happy.

238. On 1 September 2010, Blake Dawson wrote to Mr Lardner, stating that “no facility or account will be extended or varied in any manner” and each facility must be paid in full on or before 17 October 2010. The letter continued:

The Bank remains of the view that the most prudent option for your client is to endeavour to obtain refinancing prior to 17 October 2010.

...

However, the Bank is prepared to reconsider its position if, prior to 17 October 2010:

[the appeal and cross-appeal are withdrawn or resolved and the final orders reinstated]

In such a situation, the Bank is prepared to consider allowing Mr Manny to continue with the orderly sale of security properties in accordance with the orders of 13 July 2010...

However, even in such a situation...the Bank expressly reserves its right to take, at any time, any or all enforcement or other action available to it pursuant to the facilities or accounts, or generally.

239. Mr Lardner said that this conditional offer was unacceptable to Mr Manny because Mr Manny wanted to pay Ms Manny only \$500,000, rather than \$1.258M. He gave evidence that he would have advised Mr Manny that he should not accept the offer because:

- (a) it would mean that the FCA final orders were “set in stone”;
- (b) Ms Manny would be entitled to enforce the order for \$1.258M;

- (c) there would be no scope to negotiate with Ms Manny to pay her only \$500,000;
- (d) he needed to obtain refinancing or extend the ANZ facility; and
- (e) ANZ reserved its rights to do whatever it wanted.

240. On 2 September 2010, Mr Manny emailed Mr Quick of ANZ under the subject heading “continuation of our loan facilities”. He stated:

... Jeff Manny Group is a viable business, I will start paying principal and interest from first of November that is the way I would like to reduce my debt to the ANZA [sic] bank.

I’m also selling the unit 1/10 Wall Place Page by a consent from all the parties ...

...

You also know that another wave of financial disaster is heading towards us, I will appreciate if you promptly organise another term of maybe 2 years for continuation of our loans, that will allow me to concentrate in the next wave of financial down turn...

241. On 2 September 2010, Blake Dawson wrote to Mr Lardner, expressing concern that the sale of unit 1/10 Wall Place would be a breach of the FCA orders. The letter continued:

It is also evident that Mr Manny appears to consider that his relationship with the Bank will continue past 17 October 2010.

As most recently stated in our correspondence to you dated 31 August 2010, the Jeff Manny Group’s accounts and facilities will expire on 17 October 2010 (unless terminated earlier) and none of these accounts or facilities will be extended or varied in any manner.

242. On 7 September 2010 Mr Lardner emailed Mr Roser of Blake Dawson stating that he had been instructed to appeal the orders made on 27 August 2010. He also wrote to Mr McGrath attaching draft documents regarding an appeal from the stay decision. The email referred to a brief discussion with Ms Tonkin concerning possible settlement. It concluded:

Jeff’s idea is if we were to get agreement out of the other side in a full and final satisfaction that he would readily race off to get an agreement with ANZ or most probably with a new lender...

243. On 14 September 2010 Mr Manny emailed certificates of insurance currency to ANZ, stating:

My apologies if it took a bit longer than usual, because I had to start the values of replacement for insurances from the scratch.

...I have to let you now (sic) gladly that I have fixed my business accordingly that I can ensure my properties regardless of our debt reductions

I also am paying all the bank interests to ANZ bank next couple of days that is there is in no way I am in default of my covenant of my loans.

244. On 15 September 2010, DLL sent a “without prejudice” letter of offer to Strong Law, which contained a valuation schedule for the JMG property portfolio and set out JMG’s net financial position based on the “fresh valuations”. The letter stated that Mr Manny had a buyer for Unit 1 and sought consent to the sale. The schedule showed assets of \$13.55M and debts of \$14.257M (including debts to ANZ of \$12.437M). The letter stated:

Our client wishes to explore finalisation of the matter with your client.

Our client, subject to refinancing, is prepared to offer your client the sum of \$300,000.00.

The settlement would be in full and final settlement of all outstanding claims...

The parties would cooperate in seeking a discharge of HH's stay orders.

In the event that our client was unsuccessful in obtaining a refinancing then your client's rights would not be discharged and our mutual clients' rights would be maintained.

We look forward to hearing from you as soon as possible, bearing in mind the 17th October fast approaches...

245. Mr Lardner stated that the offer of \$300,000 was put in the context that Mr Manny was prepared to settle the appeal for as much as \$500,000. He said that where Mr Manny would find \$300,000 or \$500,000 "was a matter for Mr Manny".
246. On 22 September 2010, Strong Law confirmed that Ms Manny remained open to exploring settlement options. The letter noted that Mr Manny planned to travel overseas at the end of the week "and apparently has little difficulty in finding funds for this purpose".
247. On 21 September 2010, Mr Lardner affirmed an affidavit supporting an application to discharge orders 2 and 3 made on 27 August 2010 on the grounds that ANZ had confirmed "that under no circumstances will the bank consider extending the time that the facilities will expire" and "Mr Manny wishes to be able to re-organise his affairs subject to the hearing of his substantive Appeal".
248. On 24 September, a notice of appeal against orders 2 and 3 made on 27 August and application for expedition of the appeal were filed.
249. On 22 September 2010, Blake Dawson confirmed that there would be no extension or variation of the facilities and that, if the debts were not paid in full by 17 October 2010, the ANZ would "take any and all necessary enforcement and other action available to it pursuant to the facilities and generally at law".
250. On 30 September 2010, Mr Manny emailed Mr David Quick of ANZ enquiring "how are you going with the extension or continuation of our loan facilities".
251. On 5 October 2010 Blake Dawson responded to Mr Manny's email of 30 September 2010, confirming that no facility would be extended or varied in any manner and each facility must be paid in full by 17 October 2010.
252. Mr Manny said that Mr Lardner told him to go overseas. On 7 October 2010, he departed Australia to travel to Iran. He returned on 9 November 2010. Mr Lardner denied that he had encouraged Mr Manny to go overseas; he said that he was surprised that Mr Manny had chosen to do so.
253. On 7 October 2010, an application by Mr Manny for expedition of the appeal against the orders of 27 August 2010 came before Finn J. Her Honour ordered expedition of the appeal, made directions about preparation of the associated appeal book, and listed the appeal on 14 October 2010.
254. On 8 October 2010, a consent order was signed by Mr Lardner for the appellants and Mr Robinson for the respondent. The proposed orders provided that the restraining order made on 27 August 2010 be varied to permit the sale of 1/10 Wall Street, Page and 37 Krichauff Street, Page, with the sale proceeds going to debt reduction. Under the agreement, order 3 was discharged and Mr Manny and the JMG were restrained

from increasing the “combined indebtedness” of “Mr Manny or the JMG to the ANZ bank” (italicised parts differ from the order 3 made on 27 August). It was contemplated that the appeal against the orders of 27 August would be consolidated with the appeal against the final orders and that both appeals would be heard in December 2010.

255. However, by consent, on 10 October 2010 Finn J discharged order 2 made on 27 August; instead, her Honour allowed the sale of the two properties and ordered that the applicants were otherwise restrained from selling or disposing of properties “until further order of the Court”. Her Honour discharged order 3 made on 27 August 2010 and order 15 made on 13 and 14 July 2010, substituting the following order:

Each of the applicants is hereby restrained from doing any act or thing which would increase the combined indebtedness of the applicants without the written agreement of the respondent solicitor or further order of the Court.

It is noted that this Order does not prevent the applicant making inquiries in relation to further borrowings.

(emphasis in original)

256. Later on 10 October 2010, Finn J ordered that the appeal against the orders of 27 August 2010 was withdrawn and dismissed and the hearing date of 14 October 2010 was vacated. The appeal and cross-appeal against the final orders were expedited and listed in the week commencing 7 December 2010.
257. Although they had not been parties to the primary proceedings before Faulks DCJ, the one set of FCA orders made on 10 October referred to Landagency and Canwork Pty Ltd as being applicants.
258. Mr Manny said that he was out of the country and did not give instructions concerning the agreement of 8 October or the orders made on 10 October 2010.
259. I accept Mr Lardner’s evidence that, consistent with his invariable practice, he would have obtained instructions from Mr Manny before signing the consent order document on 8 October 2010. Invoices suggest that he did so. DLL invoice 5078 recorded charges for a telephone conversation with Mr Manny on 6 October 2010 (18 minutes charge), “discussions with other side and [Mr Manny]; advising” on 7 October, and then “reporting” to Mr Manny on 7 October. Mr Manny was also invoiced for a lengthy “reporting and advising” email sent by Mr Lardner on 9 October 2010.
260. On 12 October 2010, DLL wrote to Blake Dawson, noting that Mr Roser had represented ANZ in the proceedings before the FCA and concluding:
6. It is contended by Mr Manny and his associated companies that a fair construction of [the proceedings before Faulks DCJ on 12 July 2010 when ANZ was represented] is that the Deputy Chief Justice accepted that the bank was agreeable to a structured property settlement including an “orderly sale” of relevant properties ...
 7. Importantly the time frames in those property settlement orders provided for a schedule of sales extending to 22 February 2011 or further, in order to allow for orderly sales.
 8. In light of the timetable set out in the property settlement Order, it is contended that the Bank was consenting to or acquiescing in what was in effect an extension of the existing arrangements between the bank and Mr. Manny and his associated companies to at least the mid-April 2011 if not (bearing in mind that commercial properties were involved) until towards the end of the present financial year...

9. We confirm that Mr Manny and the companies associated with him have appealed to the Full Court of the Family Court from the decision of the Deputy Chief Justice. That appeal is expected to be heard in the week commencing 7 December 2010.
 10. In light of these matters our clients request that the Bank continue further the existing arrangements with Mr Manny and the companies, save for the sales of such property or properties by arrangement with Mr Manny or the companies in the interim as may reasonably be dealt with in an orderly manner with the consent of the Bank and Mrs Manny.
261. I accept Mr Lardner's evidence that this letter was sent on specific instructions from Mr Manny and, because its purpose and content were significant, it was settled by Mr McGrath. Mr Manny was invoiced accordingly. The intent of the letter was to extend the 17 October 2010 deadline.
262. On 13 October 2010, Mr Lardner emailed Mr Manny advising him of the consent orders. The court orders were attached. Mr Lardner stated:
- I spoke with Matt Roser ...I informed him quite clearly that if we did not have agreement we would seek to restrain his client from taking action against you in light of their "consent" or at very least "acquiescence" in the timetable fixed for the sale of your various properties.
- Matt Roser was of the opinion that they had rights independent of the Family Court...
- Would you please let me know whether or not there have been any activities on your part since 13th July 2010 which could be regarded as "default" or "termination event".
- Would you please let me have details of payments made since 13th July 2010 to the ANZ Bank and in respect of which of the loans each payments relates.
- ...
- I think we need to be in a position to write quite firmly to Blake Dawson indicating that if they were to take some precipitous action against you we would hold them responsible for all losses occasioned therefrom.
263. Mr Manny and JMG failed to refinance or repay the ANZ Bank prior to 17 October 2010.
264. On 27 October 2010, Blake Dawson responded to Mr Lardner's letter of 12 October 2010, noting that the facilities had expired on 17 October 2010, rejecting the request for an extension of the facilities pending the conclusion of the appeal and reserving all rights to take enforcement action.

Events after October 2010

265. On 1 November 2010, ANZ sent notices of default to the JMG entities regarding various breaches. ANZ claimed that, on 29 October 2010, the total amount outstanding under the facilities was \$10,733,090.
266. There was a delay on the part of the company preparing the appeal books relating to the appeal from the final orders. On 15 November 2010, Ainslie-Wallace J allowed an extension of time within which to file appeal books and vacated the appeal date of 8 December 2010. Her Honour requested that the hearing be listed in Sydney in February.
267. On 24 November 2010, DLL wrote to Blake Dawson, advising that the December hearing date had been vacated and the matter would be relisted in February, and asking that ANZ take no steps to foreclose until the appeal had been heard.
268. On 25 November 2010, the request was refused.

269. On 30 November 2010, Blake Dawson sent notices of default and demand to Mr Manny and JMG and provided copies to Mr Lardner.
270. Mr Manny stated that, upon receiving the notices, he telephoned Mr Lardner and instructed him to apply to the Supreme Court to set aside the demands “under section 459G of the Corporation Act 2001” and Mr Lardner agreed to do so.
271. I accept Mr Lardner’s evidence that he received no such instructions. He said that instructions to set aside a statutory demand “would have been so unusual in the circumstances that it is something [he] would remember” if it had occurred.
272. On 6 December 2010, DLL wrote to Blake Dawson, advising that the appeal against final orders was fixed for 18–19 March 2011 and repeating the request that ANZ take no action to foreclose on JMG. The letter stated:
- We are instructed that our client has, notwithstanding the issued Notices of Default, been meeting his periodic financial obligations to your client Bank.
273. On the same day, Mr Manny wrote to ANZ, requesting that the bank lift restrictions on his cheque accounts (which had been imposed on 3 June 2010) and stating that he believed that he could trade his businesses without difficulty. He sought more time to finalise his family and financial affairs.
274. On 7 December 2010, Mr Manny repeated this request, stating that he believed that it was in their mutual interests to have an orderly sale of assets rather than a forced sale. He stated:
- I have already put two residential properties on the market which I expect will sell shortly and which will reduce the indebtedness to the Bank by a sum in the order of \$1 million. I plan to shortly thereafter put two Commercial properties on the market and expect that the sales will enable me to reduce the indebtedness to the Bank by something in the order of another \$3 million by the end of March 2011. I am hopeful, however, that I may be in a position to refinance all the loan facilities before then, subject to reaching a consent settlement with my former wife.
275. On 9 December 2010, Blake Dawson advised Mr Lardner that it relied on the demands, and that the JMG was indebted to ANZ in the sum of \$10.784M.
276. On 16 December 2010, Blake Dawson rejected DLL’s request of 6 December to refrain from taking steps to foreclose until finalisation of the appeal. The letter stated:
- Your clients’ [sic] are not meeting all periodic financial obligations to the Bank.
277. In evidence, Mr Manny disagreed that financial obligations were not being met.
278. On 22 December 2010, ANZ appointed rent receivers to 13 mortgaged properties owned by JK3L Pty Ltd.
279. On 23 December 2010, Mr Manny discussed the appointment of rent receivers with Mr Lardner. Mr Lardner advised Mr Manny that he could “apply to stay the ANZ Bank from taking any further steps”. Mr Manny instructed Mr Lardner to apply to restrain the rent receivers.
280. On 13 January 2011, DLL applied to the FCA on behalf of Mr Manny and the JMG to restrain ANZ from acting on notices of demand and requiring ANZ to direct the receivers to take no further action pending the hearing of the appeal. Mr McGrath was briefed.

281. In the originating application of 13 January, Mr Manny confirmed the truth of the contents of the application. On 10 January 2011 Mr Manny affirmed an affidavit in support of the application.
282. Mr Manny' gave evidence that he had not seen and had been unaware of the application to restrain the ANZ Bank. He agreed that he had signed the affidavit in support but said that he did not read it first.
283. On 20 January 2011, Blake Dawson served notices under s 93(2) of the *Land Titles Act 1925* (ACT) on JK3L in relation to the mortgages that it held over security properties, demanding that the default be remedied within 31 days, failing which ANZ would proceed to enforcement.
284. On 21 January 2011, Stephen Parbery and Anthony Sims of PPB were appointed receivers and managers.
285. On 28 January 2011, Blake Dawson wrote to DLL, asserting the validity of the appointment of the receivers and complaining that Mr Manny had been interfering with the conduct of the receivership.
286. When the application to restrain the ANZ Bank came before Registrar Campbell on 15 February 2011, the Registrar queried the FCA's jurisdiction to deal with the application as ANZ was not a party to the proceedings. On 17 February 2011, the FCA (Ryan J) dismissed the application.
287. On 21 February 2011, by consent the final orders made by Faulks DCJ were varied to require that Mr Manny pay Ms Manny the sum of \$500,000 within 90 days of 18 February 2011.
288. On 28 February 2011, the ANZ appointed Murray Smith and Shane O'Keefe as administrators of the JMG.
289. Mr Lardner ceased acting for Mr Manny and the JMG on 25 March 2011.
290. On 8 April 2011, Master Harper dismissed an application made by Mr Manny and the JMG, claiming that the appointment of the receivers was invalid and seeking to prevent ANZ from enforcing its security. At [33] and [34] his Honour stated:
33. ...The companies are accordingly unable to pay at least their debts to the bank as they fall due and are technically insolvent. It cannot be expected that the court in such circumstances will return control of the company to its director or directors.
34. I am informed by Mr Hill for the administrators that there are unsecured creditors. Their interests must also be taken into account. The administrators speak for them and will properly reschedule the meetings of creditors which I have stayed and place the future of the companies in the hands of the creditors. If Mr Manny is, as he asserts, a creditor of each of the companies, presumably he will lodge proofs of debt and he will be entitled to attend, speak and vote at the meetings of creditors, but in that capacity rather than as a director.
291. On 18 April 2011, creditors resolved to wind up the JMG companies and appointed Murray Smith and Shane O'Keefe as liquidators of the companies.
292. Mr Manny said that, after the creditors meeting on 18 April 2011, he had spoken to Mr Lardner, who had said that he had made a mistake in Mr Manny's case and had invited Mr Manny to sue him, stating that he had insurance. Mr Manny also claimed that, in June 2011, Mr Lardner had rung and enquired as to why he had not yet been sued for

the mistake that he had made in August 2010 when he “restrained [Mr Manny] from selling the properties”.

293. I accept Mr Lardner’s evidence that he did not make such statements.

294. On 16 May 2016, the JMG entities were deregistered.

295. On 25 November 2016, Mr Manny commenced these proceedings as the sole plaintiff.

296. On 2 April 2019, the Court ordered joinder of the other plaintiffs.

The records of DLL

297. In about April 2011, Mr Power decided to close the DLL legal practice. In August/September 2011, he terminated Mr Lardner’s employment.

298. In October 2011, Mr Power commenced employment as a solicitor with Capon and Hubert. He took the hard copy active DLL files with him. He did not bring Mr Manny’s hard copy file to Capon and Hubert as the work had been concluded. It remained in a storage shed at Fyshwick with Mr Lardner’s other concluded matters. Later, the hard copy file was destroyed.

299. Some material from DLL’s computers was downloaded to a hard drive but, in 2015/2016, the hard drive was destroyed. By that stage, Mr Power had ceased to pursue unpaid costs and disbursements relating to Mr Manny’s FCA appeal.

300. In the plaintiffs’ outline of case filed on 28 June 2021 at [18], Mr Manny and the JMG complained that DLL had breached its obligation to keep documents for seven years, as required by regulation 6.1 of the *Legal Profession (Solicitors) Rules 2007* (ACT). However, ultimately, the plaintiffs did not submit that the destruction of records should have any bearing on the outcome of the case.

Mr Ringuet’s expert evidence

301. Mr Ringuet provided a report and gave oral evidence on the issue of whether BOQ’s indicative letter of 28 July 2010 “was viable and could have led to lending approval”.

302. Mr Ringuet is a finance broker with 17 years’ experience as a banker. From 2010 to 2012, he was a private banker at BOQ. He was called by Mr Manny and the JMG, but all parties accepted that Mr Ringuet was a reliable witness.

303. BOQ’s indicative letter of 28 July 2010 stated that the provision of requested facilities totalling \$11.5M by BOQ to Mr Manny and the JMG was subject to confirmation by a BOQ panel valuer that the market value of the commercial security offered was not less than \$15.1M and that of the residential security was not less than \$3.125M (a total of \$18.225M).

304. Mr Ringuet’s report was based on the following unreliable or inaccurate information:

(a) Mr Manny had valued the JMG portfolio in 2010/2011 at \$24.365M, “increased from \$20.675 on 2008”. Acting conservatively, Mr Ringuet relied on 2008 valuations of \$14.775M.

(b) He was supplied with a statement of liabilities for 8 June 2010 showing total liabilities of \$316,390, which he assumed to be the outgoings of the JMG (not merely JK3L, as was the case). In fact, the total liabilities were \$763,534.

- (c) He was provided with a schedule of income from the JMG properties that included a total sum of \$350,000 in relation to three vacant properties that were “processing to lease”. He proceeded on the assumption that the summary of leases was accurate and that leases would renew at similar values.
 - (d) He proceeded on the assumption that relevant debts totalled \$10.465M (the ANZ debt as disclosed by Mr Manny) or \$11.5M (the total facilities that were sought) rather than \$12.437M, the combined indebtedness of the JMG and Mr and Ms Manny. There was no mention of the additional liability of \$1.258M owed to Ms Manny.
305. He was not provided with the CBRE valuations undertaken between June and August 2010.
306. Mr Ringuet said that an indicative letter was “largely a sales tool”, indicating that BOQ would like to proceed to the next stage of assessing the application. This involved the consideration of further information concerning the customer’s financial history, the strength and value of the security, the business trading history, and the customer’s assets, liabilities and net financial position. This information was required to enable BOQ to assess capacity to make interest payments, capacity to repay at the end of term and whether, in the event of default, the security was adequate to cover the debt.
307. Mr Ringuet stated that, in assessing an application, BOQ would consider an applicant’s “character”. One matter that may reflect on a client’s “character” was whether the client had provided a realistic estimate of the value of their properties.
308. Mr Ringuet explained that, after considering the apparent risk associated with a loan transaction, BOQ would decide whether to further assess the application by a Low-Doc, a Mid-Doc, or a High-Doc method. A Lease-Doc assessment could be used to assess the risk associated with commercial property; it was an assessment method that fell between a Mid-doc and a Low-doc method.
309. In considering cash flow, BOQ would rely on current leases, usually registered leases; the greater the number of vacant properties, the greater would be BOQ’s concern about cash flow. Later in the application process, a BOQ valuer would sight executed or registered leases. While only verified leases would be taken into account when considering cash flow, BOQ would have regard to future income prospects.
310. Based on the assumptions provided in cross-examination (particularly a cash flow adjustment of \$350,000 to allow for the vacant properties), Mr Ringuet abandoned his initial view that, in the present case, BOQ may have considered that a Lease-Doc assessment was adequate. He said that BOQ would have taken a Full Doc approach, and, as part of that process, would have obtained current valuations of the properties that were offered as security.
311. Mr Ringuet agreed that BOQ would want to understand the facility that was to be replaced by reviewing the transaction history of that facility to determine whether there had been unexplained defaults. A default in maintaining insurance of commercial properties would require investigation. It may be relevant to know whether defaults had been remedied.
312. He agreed that it was important to obtain tax returns and to ascertain any tax liability.

313. For the purpose of considering the strength of the property security that was offered by the JMG, BOQ would have obtained current valuations (i.e. valuations performed in the preceding 90 days), usually from a BOQ panel valuer. BOQ would not have relied on 2008 valuations. Nor would BOQ have relied on the 2010 valuations obtained by ANZ.
314. Mr Ringuet said that, in 2010, BOQ generally required a loan to value ratio (LVR) of 65 per cent for commercial properties and 80 per cent for residential properties, although guidelines could be varied to secure a profitable transaction. Residential property security was regarded as less risky than commercial property security. Mr Ringuet observed that BOQ had taken “a significant hit” from the global financial crisis (GFC), creating a “bearish” (conservative) valuation environment, and resulting in a greater variation between valuation and real market value; and it was the valuation that governed whether approval was given.
315. Mr Ringuet’s evidence was consistent with the indicative letter, which referred to a LVR of about 80 per cent (security of \$15.1M) in relation to the proposed residential property facility, and a LVR of about 60 per cent (security of \$3.125M) in relation to the proposed commercial property facilities, amounting to an overall LVR of about 65 per cent (\$18.225M to secure facilities totalling \$11.5M).
316. Mr Ringuet’s report addressed two scenarios. Scenario 1 involved a JMG debt level of \$10.465M (the figure provided by Mr Manny). Scenario 2 involved a debt level of \$11.5M (the total of the facilities sought from BOQ).
317. Unfortunately, neither of the debt level scenarios accurately reflected the debts of JMG and Mr Manny as at mid-2010. On 8 July 2010, \$12.437M was owed to ANZ. As against a combined portfolio value of \$14.775M, debts of \$12.437M represented a LVR of more than 80 per cent. If one added the debt of \$1.258M owed to Ms Manny and the sum of approximately \$600,000 owed to miscellaneous creditors (which BOQ would have taken into account when calculating the LVR), the total debt was \$14.294M, representing a LVR of 96 per cent on a combined asset portfolio of \$14.775M. On an LVR that was close to 100 per cent, the loan would not be approved.
318. Mr Ringuet said that the Blake Dawson letter of 21 June 2010 listing numerous default events would have raised “red flags” to BOQ about whether the transaction was viable. Similarly, the reference to potential insolvency would have caused BOQ to look very hard at the application. If, on 8 June 2010, JMG had non-ANZ debts of \$763,534, rather than the stated amount of \$316,390, this would also be a “red flag”.
319. In cross examination, he stated that the further information that he had received concerning JMG strengthened the opinion in 5.2.13 of his report that “it is unlikely the lending process would proceed as the proposed LVR is greater than the benchmark under both scenarios”.
320. Mr Ringuet’s evidence concerning BOQ’s requirements as to LVR established that, in 2010, BOQ would not have refinanced the JMG. Further, I infer that an LVR of almost 100 per cent would have precluded refinancing by any reputable lender.
321. Additional factors that would have supported a decision by BOQ to refuse finance were Mr Manny’s failure to fully disclose relevant assets and liabilities (reflecting on “character” as well as capacity to repay), and the history of defaulting on the ANZ facilities.

Findings on important disputed facts

322. By 30 June 2009, the JMG was in a parlous financial state; liabilities may have exceeded assets. In mid-2010, the JMG could not afford to insure its commercial properties and the JMG asset pool was insufficient to meet debts to ANZ, other JMG creditors and Ms Manny.
323. From 18 May 2010, the consistent position of ANZ was that the facilities must be paid out on 17 October 2010 and would not be extended or varied.
324. On 4 and 21 June 2010, ANZ told Mr Manny that he should seek refinancing. The correspondence predated ANZ receiving unfavourable CBRE valuations dated 22 June and 28 June 2010, which could only have entrenched ANZ's uncompromising position.
325. On 17 and 26 July 2010, Mr Manny referred to the fact that he intended to refinance.
326. However, between 18 May and 17 October 2010, Mr Manny made little attempt to refinance. On 6 and 14 July 2010 he stated that he had approached the St George Bank and NAB in relation to refinancing and had "initiated refinancing ANZ bank loans". There was no further evidence concerning those approaches. At Mr Lardner's suggestion, on 25 July 2010 Mr Manny discussed refinancing with Tiffen and Co. On 26 July he spoke to Mr Liddle of BOQ. He did not pursue the BOQ application. Mr Manny called no other evidence about refinancing. I infer that there was no other evidence that could have assisted his case.
327. Had Mr Manny pursued the BOQ finance application, it would have been unsuccessful, inter alia because the JMG could come nowhere near to meeting the BOQ's LVR requirement. I am not satisfied that, on or after 20 July 2010, Mr Manny and the JMG had any real prospect of refinancing the ANZ facilities.
328. Throughout 2009 and 2010, Mr Manny did not want to sell the JMG properties. The business plan for the JMG was to continue to hold a property portfolio. The property market was depressed at that time. As Mr Manny repeatedly stated, he wanted to keep the JMG business and refinance the ANZ facilities.
329. Two matters explain why Mr Manny made very limited attempts to secure refinancing with a lender other than ANZ.
330. First, he was unrealistically optimistic that ANZ would continue to finance him past 17 October 2010 because he was well regarded by the bank. On 4 July 2010 he stated that he wanted ANZ to continue to finance him until the outcome of an appeal from the final orders. In correspondence with ANZ on 30 August and 2 September 2010, Mr Manny maintained the position that the JMG was a viable business that he wished to continue to operate and that he wanted to renew the ANZ facilities. The statement of intention to renew the existing facilities contradicts Mr Manny's statement that he was following Mr Lardner's advice to do nothing about refinancing.
331. Second, he must have realised that, given the property market in mid-2010, he could not refinance with another lender because he could not meet the LVR requirements of BOQ, which was similar to that of ANZ (and, inferentially, of other lenders). On 19 July 2010, Mr Manny received the CBRE valuations of the JMG properties, which confirmed that there was no equity in the JMG property portfolio; the assets of about \$12.5M (\$11.2–12.855M) equalled liabilities of about \$12.5M.

332. Mr Manny did not accept final order 13 or 14. He did not wish to pay \$1.258M to Ms Manny. He was unable to do so within 14 days. He did not want to sell properties, particularly in the prevailing property market. He realised that, if properties were sold at that stage, all net proceeds would go to meeting debts. He wished to retain his property portfolio and business and pay a lesser sum to Ms Manny. He knew that he needed to refinance, but for the JMG to refinance the property market needed to improve, and that would take time.
333. Consequently, Mr Manny's only option was to delay enforcement and challenge the final orders, while hoping that the property market improved and the ANZ did not foreclose.
334. Prior to 20 July 2010, Mr Manny was considering an appeal against the FCA final orders.
335. When Mr Manny consulted Mr Lardner on 20 July 2010, Mr Lardner confirmed that the "slip rule" had no application to the circumstances. If there was any discussion about the costs of the FCA proceedings, it was not an important part of the conversation; there was no FCA costs application until 11 August 2010.
336. Mr Lardner correctly understood that Mr Manny and the JMG could not afford to pay \$1.258M to Ms Manny within 14 days. He understood that Mr Manny was optimistic that Ms Manny would accept a lesser sum.
337. An appeal and associated stay of the final orders was a viable solution to an otherwise insurmountable problem. By that means, Mr Manny could challenge the amount awarded to Ms Manny (\$1.258M compared to the indicated figure of \$1.015M) and the time for payment (14 days compared to the indicated period of 90 days). A stay would prevent execution of the final orders and enable Mr Manny to negotiate a more favourable outcome with Ms Manny, failing which the appeal may yield some success. At the very least, Mr Manny would have bought time within which the property market might improve, enhancing his prospects of refinancing and/or selling properties for a net profit. As ANZ had acquiesced to the final orders, it was quite possible that ANZ would not foreclose while an appeal was pending.
338. Mr Lardner had a correct appreciation of Mr Manny's predicament. He told Mr Manny that, if negotiations were unsuccessful, the only option was to appeal the final orders within 28 days. He advised Mr Manny to seek a stay of the final orders to prevent enforcement and enable advice to be obtained about an appeal. He explained that such a course would delay, and possibly alter, the obligation to pay \$1.258M to Ms Manny.
339. Having received that advice, on 20 July 2010 Mr Manny did not instruct Mr Lardner to pursue a slip rule application or act for him on a costs application. Rather, he instructed Mr Lardner to do what was necessary to achieve payment of a lesser sum to Ms Manny over a longer period with a view to salvaging at least part of his property empire, including by filing an appeal and stay application. Mr Lardner accepted those instructions.
340. From late July 2010, Mr Lardner advised Mr Manny to pursue refinancing. He introduced Mr Manny to Tiffen and Co, financiers. He told Mr Manny that, if he failed to secure refinancing, there may be a forced sale of properties. At no time did Mr Lardner

tell Mr Manny that he should cease or defer the pursuit of refinancing. Regardless of anything that Mr Lardner said, Mr Manny was well aware of the need to refinance.

341. I accept Mr Lardner's evidence that when, on 16 August 2010, Mr Manny told him that ANZ had notified a default of failing to sell units in accordance with the facilities agreement, he did not tell Mr Manny to "leave it" with him. Such a statement would have been inconsistent with the position that Mr Lardner had articulated only three days earlier, that he did not wish to become embroiled in the relationship between Mr Manny and ANZ. In any event, Mr Manny did not "leave it" with Mr Lardner; on 17 August he responded to ANZ.
342. I accept Mr Lardner's evidence that, under no circumstances, would he have proceeded with an appeal in the absence of instructions to do so. From the date when he was retained, his instructions contemplated the filing of an appeal. As Mr Lardner explained to Mr Manny from the outset, in the absence of a negotiated settlement with Ms Manny, an appeal was the only practical option. Mr Lardner invoiced Mr Manny in relation to the appeal, and Mr Manny paid the invoices. Given the extent to which Mr Manny otherwise assumed control of the FCA proceedings it is inconceivable that, having not instructed Mr Lardner to lodge an appeal, on learning that there was an appeal he would have agreed to "leave it" with Mr Lardner.
343. Mr Manny also instructed Mr Lardner to make a stay application. It was in his interests to make the application. In the absence of a stay, he would have been liable for interest on the sum of \$1.258M, order 14 would have been triggered, security properties would have been sold under compulsion, and the JMG business would have been lost.
344. It may well be that Mr Lardner did not provide Mr Manny with detailed advice about the impact of a stay on various parts of the final orders. In the context that Mr Manny wished to dispute all substantial parts of the orders (the sum payable, the time for payment, and the default requirement to sell the JMG property portfolio), it was not necessary to do so.
345. Mr Lardner expected that Ms Manny would agree to the stay.
346. On the afternoon of Friday, 27 August 2010, when the stay application came before Faulks DCJ, Mr McGrath correctly communicated instructions that he and Mr Lardner had obtained from Mr Manny. Mr McGrath and Mr Lardner did not anticipate that Faulks DCJ would make an order restraining Mr Manny from selling properties. Mr McGrath opposed such an order and, alternatively, sought to qualify it with the words "without the prior written consent of the wife or leave of the court". Unexpectedly, Faulks DCJ declined to apply the suggested "rider". These conclusions are informed by the following considerations.
347. First, the instructions as communicated by Mr McGrath were consistent with Mr Manny's previously stated intention to seek to refinance while retaining the JMG properties, a position that had been conveyed to Faulks DCJ on many prior occasions. The outcome of the stay application reflected the extreme frustration of Faulks DCJ that Mr Manny was continuing to maintain a long-standing but untenable position that he could raise sufficient cash to pay Ms Manny while retaining the JMG property portfolio.
348. Second, Mr Manny claimed that, although Mr McGrath had told Faulks DCJ that he would obtain instructions, had spoken to Mr Manny, and had thereafter told Faulks DCJ

that he had specific instructions, he had no such instructions. The telephone call had been wasted on idle chat. The allegations that both Mr McGrath and Mr Lardner proceeded in the absence of proper instructions is a very serious allegation of professional misconduct, requiring a level of persuasion proportionate to the seriousness of the allegation.

349. Third, I infer that Mr McGrath could have given evidence and furnished documents that would not have assisted Mr Manny's case: *Jones v Dunkel* (1959) 101 CLR 298. Mr Manny refused to allow Mr Lardner to approach Mr McGrath to seek affidavit evidence from him and refused to allow Mr Lardner access to documents in the possession of Mr McGrath, relying on legal professional privilege. Mr McGrath could have elucidated whether and how he had received instructions on 27 August 2010, and the content of the instructions.
350. I reject the plaintiffs' submission that Mr Lardner had failed to appreciate that order 14 (the default provision) should not have been the subject of a stay application because Mr Manny was happy to proceed with the orderly sale of properties. Although the staged sale of properties under order 14 reflected a proposal by Mr Manny, the sale of properties was something that Mr Manny wished to avoid. His continuing objection to the 14 day payment period was consistent with his desire to retain the properties; had he wished to sell them in accordance with the timetable, then there would have been no objection to the default provision operating after 14 days. The properties would have been listed for sale within 14 days of 14 July 2010, before any appeal was lodged, or any stay application was made.
351. As he considered that the restraining order of 27 August was unreasonable, on 30 August 2010 and 1 September 2010, Mr Lardner proposed that Mr Manny appeal the order. Mr Manny accepted that advice and, on 24 September, an appeal was filed.
352. Mr Lardner did not tell Mr Manny to go overseas on 7 October 2010 and he was surprised that Mr Manny chose to do so at such a critical time. Although Mr Manny was overseas, Mr Lardner continued to communicate with him, as evidenced by invoices.
353. I accept Mr Lardner's evidence that he obtained Mr Manny's instructions before signing the agreement of 8 October and obtaining the orders of 10 October 2010.
354. Following the agreement made on 8 October 2010, on 10 October 2010 Finn J discharged the orders made on 27 August 2010 and made an order restraining the applicants from selling or disposing of properties other than the two nominated properties "until further order of the Court".
355. I do not accept Mr Manny's evidence that he gave no instructions about the consent orders proposed on 8 October and made on 10 October. Nor do I not accept his evidence that, after he returned from overseas on 9 November, he rang Mr Lardner and angrily complained that Mr Lardner had "put him on restraint" in relation to the sale of properties.
356. The October orders were advantageous to Mr Manny. Far from "putting him on restraint", the orders conditionally entitled him to do what he wanted to do. He could sell the two nominated properties and apply to the FCA to sell other properties (an entitlement that the orders made on 27 August 2010 did not expressly confer). He could

make enquiries about refinancing, although he could not increase indebtedness without FCA approval.

357. Ultimately, the appeal against the final orders was settled in a manner that was very favourable to Mr Manny.

Claim by Landagency

358. The claim by Landagency must fail. Landagency was not a party to the FCA proceedings in relation to which Mr Lardner was retained. There was no retainer between DLL and Landagency, and DLL did not act for Landagency.
359. The evidence that Landagency was named as a party in some documents relating to the appeal against the final orders falls well short of establishing that Mr Lardner was retained to act for that company.

The DLL retainer

360. The plaintiffs claimed breach of contract (the retainer), breach of duty of care in relation to the retainer, and breach of fiduciary duty in relation to the retainer.
361. A solicitor owes a duty to their client in both contract (under the retainer) and tort. The scope of the duty in tort will usually be set by the terms of the retainer (which indicates the nature of the relationship that gives rise to the tortious duty of care): *Hawkins v Clayton* (1988) 164 CLR 539 at 544–545; *Badenach v Calvert* [2016] HCA 18; 257 CLR 440 at [16] (*Badenach*).
362. The terms of the retainer also inform the fiduciary relationship between the solicitor and the client.
363. Consequently, the first question relates to the content of the retainer between the plaintiffs and DLL.
364. In their pleadings and particulars, the plaintiffs claimed that on 20 July 2010 DLL was retained in relation to a costs application, a “slip rule” application and an application to extend the time within which to pay the sum due to Ms Manny.
365. The plaintiffs have not discharged the onus to prove the terms of the retainer as pleaded.
366. Rather, I have found that, on 20 July 2010, Mr Lardner correctly advised Mr Manny that the “slip rule” was inapplicable, that an appeal was the only real option, and that, pending any appeal, Mr Manny should seek a stay of the final orders to prevent enforcement. Mr Manny accepted that advice.
367. Mr Manny instructed DLL to do what was necessary to achieve payment to Ms Manny of a sum less than \$1.258M over a longer period than 14 days with a view to salvaging at least part of the JMG property empire, including by filing an appeal and making a stay application, if necessary and appropriate. That was the basis upon which DLL was retained.

Duty to exercise reasonable care and skill

368. It is an implied term of a retainer that the solicitor will exercise reasonable care and skill in the provision of the legal services that are the subject of the retainer.

369. A solicitor's obligations in contract and tort are concurrent although not necessarily coextensive.
370. It may be arguable that, in the circumstances a particular case, the content of the duty of care extends beyond the legal services that are the subject of a retainer to providing additional advice or taking some additional or positive step beyond the scope of the retainer: *Keddie v Stacks/Goudkamp Pty Ltd* [2012] NSWCA 254; 293 ALR 764 at [86]–[105]. Doubts have been expressed concerning whether a duty of care may extend beyond the retainer: see the discussion in *Read v Burns* [2017] ACTSC 184 at [211]–[216] (*Read*).
371. The standard of reasonable care and skill required of a solicitor is that of the ordinary skilled person exercising and professing to have that special skill; in this case, the skill of an experienced family law practitioner: *Badenach* per Gageler J at [57]; *Rogers v Whittaker* (1992) 175 CLR 479 at 483.
372. A solicitor's advice should address matters of particular relevance to the client, or which may influence the client in deciding on a course of action: *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113, applied in *Fox v Everingham* (1983) 76 FLR 170 at 174.
373. These principles are to be understood in the context that, in this case, the plaintiff's claims engage the *Civil Law (Wrongs) Act 2002* (ACT) (Wrongs Act).

Negligence in relation to appeal and stay application

374. The plaintiffs alleged that DLL's failure to exercise reasonable care and skill had caused them to suffer economic loss.
375. The plaintiffs' outline of case stated at [43]:
- The primary allegation is that Mr Lardner consented to the orders made on 27 August 2010 and 10 October 2010 without instructions from the plaintiffs.
376. The plaintiffs also alleged that DLL had filed an appeal and related stay application without instructions, and had failed to give proper advice, including in relation to foreclosure by ANZ.
377. Pursuant to s 41 of the Wrongs Act, chapter 4 applies to all claims for damages for "harm" resulting from "negligence", whether the claim is brought in tort, in contract, under statute or otherwise.
378. Section 40 of the Wrongs Act provides:

40 Definitions—ch 4

In this chapter:

harm means harm of any kind, and includes—

...

(c) economic loss.

negligence means failure to exercise reasonable care and skill.

379. Section 42 provides:

42 Standard of care

For deciding whether a person (the defendant) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

380. Section 43 deals with the risks of harm against which precautions should be taken. It states:

43 Precautions against risk—general principles

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):
 - (a) the probability that the harm would happen if precautions were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity creating the risk of harm.

381. Section 43 requires the identification of the relevant risk of harm: *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 43; 234 CLR 330 at 351–355.

382. In this case, having regard to the terms of the retainer as established by the evidence, the relevant risk of harm was the maintenance and enforcement of the final orders, including by the forced sale of the JMG properties. These risks existed in the context that, to Mr Lardner's knowledge, ANZ was threatening to foreclose on the JMG properties.

383. The risk of harm was foreseeable, not insignificant, and, in the circumstances, a reasonable solicitor in Mr Lardner's position would have taken precautions.

384. The filing of a stay application (to prevent enforcement and enable consideration of the merits of an appeal) and the filing of an appeal (once it was decided that there were grounds to do so) were the appropriate precautions to take against the risk that the final orders would be maintained and enforced. Indeed, they were the only viable precautions.

385. Had no stay application been filed, the final orders could have been enforced, requiring the sale of properties. Given the state of the property market, it is likely that all sale proceeds would have been applied to repayment of the ANZ facilities and other creditors. Ms Manny may have received nothing and the prospect of Mr Manny receiving nothing was even more likely.

386. I have accepted the evidence of Mr Lardner that he obtained instructions before proceeding with the stay application and appeal.

387. Further, Mr Lardner took no significant step without consulting counsel. He agreed with and followed counsel's advice.

388. There was no negligence in connection with the filing of the stay application and notice of appeal.

Negligence and orders made on 27 August and 10 October 2010

389. The plaintiffs claimed that DLL breached their retainer and acted negligently in relation to the FCA orders made on 27 August 2010 and 10 October 2010 by acting without instructions, failing to provide proper advice, and inviting or acceding to orders that were contrary to the interests of the plaintiffs.

390. These claims are not made out. As stated above:

- (a) Mr Lardner and Mr McGrath were properly instructed in relation to the stay application on 27 August 2010. Mr McGrath made it clear to Faulks DCJ that the plaintiffs were seeking an order that would not preclude the sale of the JMG properties. When Faulks DCJ expressed frustration at Mr Manny's continuing, apparently empty assertion that he could obtain refinancing and thereby avoid the forced sale of properties, Mr McGrath and Mr Lardner sought and received specific instructions, which were then conveyed to Faulks DCJ. Mr McGrath opposed a restraining order. When his opposition was overruled, he asked for a qualified restraining order, but that request was also refused. In refusing the plaintiffs' requests, Faulks DCJ exercised judicial power.
- (b) Immediately after the restraining order was made on 27 August, Mr Lardner recommended an appeal. Mr Manny accepted this entirely reasonable recommendation.
- (c) Mr Lardner continued to negotiate to ameliorate the effect of the restraining order, and to settle the appeal and cross-appeal from the final orders.
- (d) The outcome of the negotiations concerning the restraining order was that, on 10 October 2010, by consent the FCA made orders enabling Mr Manny to sell the two properties that he wished to sell, enabling him to apply to the Court to sell other properties, and expressly permitting him to seek refinancing.

391. There was no negligence in connection with the orders of 27 August 2010 or 10 October 2010. The orders made on 10 October 2010 significantly improved the plaintiffs' position.

392. In final submissions, Mr Manny and the JMG claimed that Mr Lardner should have advised Mr Manny to appeal order 13 but not order 14 of the final orders. It was submitted that order 14 was a "roadmap" for the orderly sale of properties pursuant to which Mr Manny would have retained some control over sales and avoided foreclosure by ANZ.

393. Reasonable care is to be judged prospectively: *Jennings v George Harcourt Management Pty Ltd* [2018] ACTCA 50; 14 ACTLR 27 at [40]–[41]; *McLennan v Clapham* [2019] ACTSC 1 (*McLennan*) at [66]. The plaintiffs' final submission was the product of very belated hindsight reasoning. It was not clear from the pleadings or particulars. If, in late July 2010, Mr Manny had accepted that ANZ would foreclose, then he may have benefited from retaining some control over sale of the properties by maintaining final order 14. However, at that time, Mr Manny did not accept that ANZ would foreclose. He remained stubbornly committed to retaining his property portfolio. His strategy was to delay the sale of properties. He instructed Mr Lardner accordingly.

That is why Mr Manny did not proceed in accordance with final order 14 to list the Group A properties for sale between 14 and 28 July 2010, as required by final order 14.

Negligence in relation to ANZ

394. When advising on the appropriate course of action, a reasonable solicitor in Mr Lardner's position would have taken ANZ's threat of foreclosure on 17 October 2010 into account. Although Mr Lardner was not a financial adviser and was under no duty to provide financial advice, it was appropriate that he give some attention to the plaintiffs' relationship with ANZ because the FCA final orders and the ANZ facilities related to the same property.
395. In relation to the threatened foreclosure, there was little that Mr Lardner could do beyond repeatedly urging Mr Manny to refinance, introducing him to a financier and maintaining friendly contact with ANZ with a view to discouraging foreclosure. That is what Mr Lardner did.

Was harm caused?

396. In the second further amended statement of claim, the plaintiffs asserted:
- 42. The first plaintiff lost the opportunity of selling his asset portfolio which led to the ANZ Bank appointing receivers and causing significant losses to the first plaintiff.
 - 43. Each of the second, third, fourth and fifth plaintiffs suffered significant losses because of the restraining orders on each company restraining the company from selling or disposing of their asset portfolio.
 - 44. Each of the plaintiffs suffered losses of income because of the restraining orders.
397. Particulars of an earlier (but relevantly identical) statement of claim stated:
- The defendants failed to ensure that the second, third, fourth and fifth plaintiffs were advised to deal with the default notices issued by the ANZ Bank.
- ...
- The defendants gave no notice and took no steps to refrain the ANZ Bank from appointing receivers. There was good cause to set aside the statutory demand and again the defendants ignored Mr Manny's instructions.
- The plaintiff was in a position to refinance his loan with the Bank of Queensland.
- ...We repeat, the restraining orders led to the appointment of receivers.
- The defendants were instructed not to agree to the restraining order.
- ...The plaintiff would have been able to refinance through the Bank of Queensland.
398. This claim is not made out.
399. Even if DLL failed to exercise reasonable care and skill, the plaintiffs have not established, within the meaning of s 45 of the Wrongs Act, that any negligence "caused" them to suffer the harm of foreclosure by ANZ and the appointment of receivers.
400. Section 45 provides:

45 General principles

- (1) A decision that negligence caused particular harm comprises the following elements:

- (a) that the negligence was a necessary condition of the happening of the harm ('factual causation');
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (the **scope of liability**).
- (2) However, if a person (the **plaintiff**) has been negligently exposed to a similar risk of harm by a number of different people (the **defendants**) and it is not possible to assign responsibility for causing the harm to 1 or more of them—
- (a) the court may continue to apply the established common law principle under which responsibility may be assigned to the defendants for causing the harm; but
 - (b) the court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) In deciding the scope of liability, the court must consider (among other relevant things) whether or not, and why, responsibility for the harm should be imposed on the negligent party.

401. Pursuant to s 46 of the Wrongs Act:

46 Burden of proof

In deciding liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

402. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; 247 CLR 613, the plurality (French CJ, Hayne and Kiefel JJ) said:

- 43. The proper identification of damage should usually point the way to the acts or omissions which were its cause. Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case...
- 44. In *March v Stramare (E & MH) Pty Ltd*, it was observed that courts are no longer as constrained as they once were to find a single cause for a consequence and to adopt an "effective cause" formula...

403. It is enough to demonstrate that the conduct in question was "a cause" (rather than "the sole cause") of the loss or damage sustained: *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; 210 CLR 109 at [57]; *McLennan* at [148].

404. Applying common sense to the facts of this case, nothing that DLL did or failed to do was a "necessary condition" of the foreclosure by ANZ and the subsequent appointment of receivers.

405. In accordance with a position stated well before Mr Lardner was instructed, ANZ foreclosed because Mr Manny had failed to repay ANZ by 17 October 2010 and ANZ decided (as was its entitlement) that it would not defer foreclosure until finalisation of the plaintiffs' appeal against the final orders. The receivers were properly appointed; Master Harper found that the JMG was unable to repay its debts as and when they fell due, the JMG entities were insolvent, and the appointments of the rent receivers and administrators were valid.

406. ANZ and Mr Lardner had advised Mr Manny that, to avoid foreclosure he needed to refinance. On several occasions, Mr Manny acknowledged that the plaintiffs needed to refinance. However, although the JMG was in dire financial straits from 2009, Mr Manny remained convinced that ANZ would relent and refinance, or defer foreclosure until the conclusion of the appeal. His level of confidence was such that he chose to go overseas at the time when repayment was due. He did not pursue alternative

financing and, had he done so, he would not have obtained it. He certainly would not have obtained it from BOQ, the institution that he identified as an available source of refinancing.

407. Mr Manny also claimed loss of director's remuneration. The claim referred to tax invoices issued by Mr Manny to JK3L for director's remuneration for the financial years 1996 to 2020. The invoices were issued at various dates between 24 August 2018 and 2 October 2020.
408. There is no legitimate basis for these claims. The financial statements for JK3L Pty Ltd for the financial year ending 30 June 2009 made no reference to director's fees or remuneration for the 2008 or 2009 financial years. The JMG entities were under external administration from 28 February 2011 and Mr Manny's director's powers were suspended. He was unable to exercise functions or powers as an officer of the companies. There was no evidence in these proceedings that Mr Manny had lodged a proof of debt in the administration of the JMG. Further, many of the invoices were generated more than six years after the work the subject of the invoice and the claims are therefore statute barred.

Advocates' immunity

409. The defendants said that they were protected from suit by advocates' immunity as the plaintiffs' complaint concerned work in court or work done out-of-court that contributed to the judicial determination of proceedings in court.
410. Referring to *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16; 259 CLR 1 at [46] (*Attwells*) in *Kendirjian v Lepore* [2017] HCA 13; 259 CLR 275 (*Kendirjian*) at [31], Edelman J (with whom the majority agreed) stated:
31. ...Since the immunity attaches by the "participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power", it followed that the immunity did not extend to advice that leads to a settlement between the parties. Advice leading to a compromise of a dispute cannot lead to the possibility of collateral attack upon a non-existent exercise of judicial power to quell disputes...The test requires that the work bear upon the court's determination of the case. There must be a "functional connection" between the work of the advocate and the determination of the case.
- (citations omitted)
411. In *Attwells*, the question was whether the advocates' immunity extended not only to negligent advice that led to a final judicial determination, but also to negligent advice that led to an agreed settlement. The majority (French CJ, Kiefel, Bell, Gageler and Keane JJ) held that it did not. At [6], the majority stated:
6. In short, in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by that court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made. That conclusion is not altered by the circumstance that, in the present case, the parties' agreement was embodied in consent orders.
412. Of the decision in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 (*D'Orta*), in *Attwells* at [30] the majority said:

More importantly, the decision in D'Orta states a rule which is consistent with, and limited by, a rationale which reflects the strong value attached to the certainty and finality of the resolution of disputes by the judicial organ of the State.

413. The parties agreed that the immunity only applies to negligence within the exercise of authority; it does not apply where a solicitor has proceeded without instructions (without authority) from the client: *Kendirjian*.
414. In this case, I have found that, in the proceedings before Faulks DCJ on 27 August 2010, Mr McGrath and Mr Lardner acted in accordance with their instructions, which were set out in Mr Lardner's supporting affidavit and supplemented on the afternoon of 27 August. The restraining order was imposed by judicial determination. The advocates' immunity applies to the conduct of Mr Lardner on 27 August 2010.
415. The orders made on 10 October 2010 reflected a consent position regarding disposition of the appeal against the 27 August 2010 orders of Faulks DCJ, reached without judicial determination. Consequently, the advocates' immunity does not apply. However, this conclusion does not assist the plaintiffs as I have found that the consent orders reflected Mr Manny's instructions and, rather than harming the plaintiffs, they significantly improved the plaintiffs' position.

Limitation Act

416. DLL claimed that the right to bring any action was statute barred because the limitation period of six years had expired prior to the commencement of proceedings on 25 November 2016 (by Mr Manny) and 2 April 2019 (when the Court ordered joinder of the JMG).
417. Pursuant to s 11 of the *Limitation Act 1985* (ACT):

11 General

- (1) Subject to subsection (2), an action on any cause of action is not maintainable if brought after the end of a limitation period of 6 years running from the date when the cause of action first accrues to the plaintiff or to a person through whom he or she claims.

418. "Cause of action" is defined in the Dictionary to the Limitation Act to mean:

cause of action means the fact or combination of facts that gives rise to a right to bring a civil proceeding.

419. The issue is when any causes of action first accrued. This depends upon when the plaintiffs suffered "harm" (within the meaning of s 40 of the Wrongs Act) or damage at common law.
420. DLL said that any "harm" or damage first occurred on 27 August 2010 or 10 October 2010; that is when any loss of opportunity to sell the asset portfolio first arose.
421. The plaintiffs said that, while the breaches occurred on 27 August and 10 October, harm in the sense of "actual loss" occurred later, when rent receivers were appointed on 23 December 2010 or receivers and managers were appointed on 21 January 2011, affecting the JMG's capacity to trade.
422. The plaintiffs relied on the decision in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 (*Wardley*), especially at 527, to argue that, as with other forms of damage, with economic loss, prospective or contingent loss is not enough; the cause of action does not accrue until there is "actual loss". In *Wardley*, the claim was for loss or damage

for contravention of the *Trade Practices Act 1974* (Cth). The High Court held that, because an indemnifier who had been misled or deceived into granting an indemnity suffered no loss until the occurrence of a contingency, the cause of action did not begin to run until the contingency materialised.

423. Once some loss occurs, although the loss may be ongoing, the cause of action is complete. As Elkaim J stated in *Pool (a pseudonym) v Trustees of the Marist Brothers Property Group & Anor (No 3)* [2021] ACTSC 89 (*Pool*) at [51], once there has been “a significant and identifiable loss”, the cause of action has accrued. In *Pool*, the plaintiff sued a solicitor whom he had retained. The plaintiff claimed that the solicitor had pressured him to reach an inadequate settlement and that, as a result, he had suffered psychological injury (commencing almost immediately after the settlement) and economic loss stemming from the injury. His Honour found that the action was barred because the cause of action had accrued when the plaintiff had first experienced significant depression.
424. The circumstances of the present case are quite different from those in *Wardley*. That case highlighted the distinction between a contingent (or prospective) liability and actual loss. The circumstances of the present case are closer to those in *Pool*.
425. The plaintiffs claimed that the restraining orders made on 27 August 2010 and 10 October 2010 prevented them from selling their asset portfolio; that the loss of opportunity commenced when the orders were made. They said that, if the restraining orders had not been made on 27 August 2010, then, pursuant to order 14 of the final orders, the properties could have been sold in a controlled fashion at any time.
426. That proposition is correct. But for the fact that restraining orders were made on 27 August 2010, pursuant to final order 14 the Group A properties should have been listed for sale on 28 July 2010. The plaintiffs could have listed the Group B and Group C properties for sale at any time. Any loss of opportunity first occurred on 27 August 2010.
427. The actions are not maintainable as they were brought after the expiry of the limitation period.

Bankruptcy Act

428. DLL defended the proceedings on the basis that it was not competent for the plaintiffs to commence the proceedings against Mr Lardner in the circumstance that he was declared bankrupt on 7 December 2010. He was discharged from bankruptcy on 8 December 2013.
429. Section 58(3) of the Bankruptcy Act provides:
- 58 Vesting of property upon bankruptcy-general rule**
- (3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
- (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
- (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in a proceeding.
430. Section 82 concerns debts provable in bankruptcy. It provides:

82 Debts provable in bankruptcy

- (1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.

...

- (2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy.

431. Section 153(1) concerns the effect of discharge on provable debts. It provides:

153 Effect of discharge

- (1) Subject to this section, where a bankrupt is discharged from a bankruptcy, the discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit or creditors generally.

432. The plaintiffs pleaded causes of action in contract, breach of fiduciary duty and negligence. As noted above, any such cause of action accrued before Mr Lardner was declared bankrupt on 7 December 2010. Accordingly, if the claims are provable debts, Mr Lardner was released from them on 8 November 2013 on his discharge from bankruptcy.

433. The issue is whether the claims were debts provable in the bankruptcy of Mr Lardner.

434. The policy rationale behind the Bankruptcy Act was discussed by Hill J in *Kavich v Official Trustee in Bankruptcy* (1995) 58 FCR 82 at 85–86. His Honour identified two primary purposes:

First, it enables an insolvent debtor to be freed from all liabilities of every kind so that he or she may start again unburdened by them. Second, it enables the assets of an insolvent debtor to be collected and distributed rateably among the creditors.

435. While this is a useful description of the underlying policy rationale, it is not entirely accurate. Although s 82(1) identifies the debts and liabilities that are provable in bankruptcy in wide terms, not all debts are provable debts and s 153(1) does not release a bankrupt from all liabilities on discharge. Section 82(2) demands are not released under s 153(1).

436. Whether the present claims are provable debts turns on the construction of s 82(2) and what is meant by “a demand in the nature of unliquidated damages arising otherwise than by reason of a contract or promise or breach of trust”.

437. In *Aliferis v Kyriacou* [2000] VSCA 123; 1 VR 447, the Victorian Court of Appeal construed s 82(2) by reference to the underlying cause of action. The Court held that a claim arises by reason of a contract or promise only if a contract or promise is an “essential element” of the cause of action pleaded. Applying that test, the Court concluded that a claim in tort alleging negligent performance of a retainer was not such a claim as the pleading of the contract of retainer was not an essential element of the cause of action in negligence.

438. In *Coventry v Charter Pacific Corporation Ltd* [2005] HCA 67; 227 CLR 234 (*Coventry*), the High Court rejected that approach. Referring to the 19th century English decision of *Jack v Kipping* (1882) 9 QBD 113, at [66] the majority (Gleeson CJ, Gummow, Hayne and Callinan JJ) held that:

framing a claim as a claim in tort does not conclude the question whether the demand arises by reason of a contract or promise.

439. In *Coventry*, the majority distinguished between a claim for damages for misleading or deceptive conduct by a bankrupt that induced the claimant to make a contract with a third party (falling within the exception) and a claim for damages for misleading or deceptive conduct that induced the claimant to make a contract with the bankrupt (a provable claim in bankruptcy). The decision in *Coventry* made it clear that a demand may arise “by reason of a contract” although the contract is not an “essential element” of the pleaded cause of action.
440. In the present case, none of the plaintiffs’ claims fall within s 82(2) and each is a debt provable in the bankruptcy of Mr Lardner.
441. The first claim alleges breach of the retainer between the plaintiffs and Mr Lardner. It is clearly a claim by reason of a contract.
442. The second claim alleges breach of fiduciary duty. While it is not a claim in contract, it is a claim “by reason of” a contract or breach of trust and it is a debt provable in bankruptcy: *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124 per Brennan CJ, Gaudron and McHugh JJ at 136–7.
443. The third claim alleges breach of a tortious duty of care. As Burns J observed in *Read* at [210], “it is the nature of the task or tasks the legal practitioner is retained to undertake, which principally determines the scope and content of their duty of care to their client”. Further, the acts that are pleaded as constituting the breach of the tortious duty are also pleaded as breaches of the retainer agreement. The tort claim arises because of the existence of—“by reason of”—the retainer: see *Lovell v Penkin (a bankrupt)* [2008] FCA 637; 101 ALD 335 at [26]; *Ritchie v Woodward (as executor of the estate of the late Brian Patrick Woodward)* [2016] NSWSC 1715 at [461]–[475].
444. The claims against Mr Lardner cannot succeed because:
- (a) The proceedings were commenced without leave. This Court cannot grant leave as the federal courts have exclusive jurisdiction to do so: see 27(1) of the Bankruptcy Act and *Johnson v Powrie* [2018] ACTCA 46 at [85].
 - (b) The proceedings are precluded by s 153(1) of the Bankruptcy Act.

Summary of conclusions

445. Mr Lardner’s version of events is accepted. Mr Manny’s version of events is rejected.
446. DLL did not act negligently in relation to the filing of a stay application and appeal from the final orders, the hearing before Faulks DCJ on 27 August 2010, the agreement that resulted in consent orders on 10 October 2010, the foreclosure by ANZ and the appointment of receivers, or otherwise. Consequently, the claims in contract, tort and for breach of fiduciary duty are not made out.
447. The conduct of DLL did not cause harm (economic loss) to the plaintiffs.
448. In relation to Mr Lardner’s conduct on 27 August 2010, advocates’ immunity applies.
449. The claims are not maintainable because they were brought outside the limitation period.

450. The claims against Mr Lardner cannot succeed because the proceedings were commenced against a bankrupt without leave and they concerned debts provable in the bankruptcy of Mr Lardner, but Mr Lardner has been discharged from bankruptcy.

451. None of the plaintiffs' claims have been established.

452. There are verdicts for the defendants.

Costs

453. The parties are directed to notify the Court within 7 days if they seek an order other than the usual order as to costs. If so, I will receive written submissions on costs. If no notification is received within 7 days, the usual order as to costs applies.

I certify that the preceding four hundred and fifty-three [453] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Chief Justice Murrell.

Associate:

Date: