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Supreme Court of New South Wales

Bell v Hartnett Lawyers (No 3) [2022] NSWSC 1204 (8 September 2022)

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Supreme Court
New South Wales

Case Name:	Bell v Hartnett Lawyers (No 3)
Medium Neutral Citation:	[2022] NSWSC 1204
Hearing Date(s):	24 – 25 August 2022, further written submissions 29 August 2022
Decision Date:	8 September 2022
Jurisdiction:	Equity
Before:	Peden J
Decision:	1. In the Possession Proceedings (2014/354291): a. The Court notes the Certificate of Costs Assessment dated 24 May 2016, quantifying costs for the purposes of Davies J's Order 5.2 up to 12 February 2018 is $37,345.50. b. Order that the money in the sum of $33,792.46 held in Court be released to Mr Bell forthwith. 2. In the Equity Proceedings (2020/254590): a. Order that the defendant pay to the plaintiff: i. the sum of $251,255.53; and ii. interest on that sum in Order (2)(a)(ii) in the amount of

$50,489.98; and

iii. interest on the sum of $33,792.46 in the amount of $9610.96.

3. Order that the defendant pay Mr Bell's costs on an indemnity basis.

Catchwords:	LEGAL PRACTITIONERS — Supervisory jurisdiction — Officers of the court — Jurisdiction in relation to solicitor's charges — Where solicitor charged mortgagee client exorbitantly and was paid fees from proceeds of sale of mortgaged property — Inherent jurisdiction enlivened to regulate solicitor's charges and require solicitor to pay fixed sum to mortgagor
Legislation Cited:	Civil Procedure Act 2005 (NSW) ss 56, 57, 58, 59, 60, 98 Legal Profession Act 2004 (NSW) ss 335, 350, 358 Legal Profession Act 2007 (Qld) ss 300, 323, 335 Uniform Civil Procedure Rules 2005 (NSW) rr 7.10, 42.25
Cases Cited:	Adams v Bank of New South Wales (1984) 1 NSWLR 285 Atanaskovic & Ors v Birketu Pty Ltd – Supervisory Jurisdiction [2020] NSWSC 573 Atanaskovic Hartnell v Birketu Pty Ltd [2021] NSWCA 201 Australia and New Zealand Banking Group Ltd v Mishra [2012] NSWSC 1333 Bell v Hartnett [2022] NSWCA 42 Bell v Hartnett Lawyers (No 2) [2021] NSWSC 1270 Bell v Hartnett Lawyers [2021] NSWSC 202 Chan v Eastern Blue Pty Ltd [2021] VSCA 121 Coroneo v Australian Provincial Assurance Association Ltd [1935] NSWStRp 47; (1935) 35 SR (NSW) 391 Damm v Coastwide Site Services Pty Ltd [2017] NSWSC

1361

Deakin-Bell v NSW Trustee and Guardian [2016] NSWSC 540

Elder's Trustee & Executor Co Ltd v Eagle Star Nominees Ltd (1986) 4 BPR 9205

Electrical Trades Union v Tarlo [1964] 2 WLR 1041

Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498

GA Atkins & Ors v Probuild Constructions (Aust) Pty Ltd (2020) 148 ACSR 111

Halsted v Official Trustee in Bankruptcy (No 2) [2012] FCA 66

Harrison v Tew [1990] 1 All ER 321

Kowalski v Cole [2017] SASCFC 23

Law Society of New South Wales v Foreman [1994] NSWCA 69; (1994) 34 NSWLR 408

Liberty Funding Pty Ltd v Steele-Smith [2004] NSWSC 1100

Malouf v Constantinou [2017] NSWSC 923

Micarone v Perpetual Trustees Australia Ltd (No 2) [1999] SASC 533

New South Wales Crime Commission v Fleming (1991) 24 NSWLR 116

Overton Investments Pty Ltd v Cuzeno RVM Pty Ltd [2003] NSWCA 27

Parramatta River Lodge Pty Ltd v Sunman (1991) 5 BPR 12,038

Rajah Kishendatt Ram v Rajah Mumtaz Ali Khan (1879) LR 6 Ind App 145

	Re Solicitor's Bill of Costs; Re Shanahan (1941) 58 WN (NSW) 132 Woolf v Snipe [1933] HCA 5; (1933) 48 CLR 677
Texts Cited:	K Mason, J W Carter & G J Tolhurst, Mason and Carter's Restitution in Australia (3rd edition, 2016, LexisNexis)
Category:	Principal judgment
Parties:	2014/354291 Gwendoline Rosemary Deakin-Bell (Plaintiff) Anthony Robert Bell as legal personal representative of the Estate of Mabel Dawn Deakin-Bell (Defendant) 2020/254590 Anthony Robert Bell (Plaintiff) Beau Timothy John Hartnett trading as Hartnett Lawyers (Defendant)
Representation:	2014/354291 Counsel: No appearance (Plaintiff) S Sykes (Defendant) Solicitors: Hartnett Lawyers (Plaintiff) McVittie Legal (Defendant) 2020/254590 Counsel:

	S Sykes (Plaintiff)
	I King (Defendant)
	Solicitors:
	McVittie Legal (Plaintiff)
	Hartnett Lawyers (Defendant)
File Number(s):	2014/354291; 2020/254590
Publication Restriction:	Nil

JUDGMENT

Introduction

1. Mr Anthony Robert Bell, in the position of a mortgagor, claims that Mr Beau Timothy John Hartnett, a Queensland solicitor trading as Hartnett Lawyers, ought to be ordered to disgorge or pay back what are said to be excessively charged legal fees that were borne by Mr Bell.
2. Mr Hartnett charged his (now deceased) mortgagee client $288,601.03 for acting in uncontested possession proceedings to enforce a $30,000 mortgage.
3. Mr Hartnett sought and obtained authority from the elderly mortgagee to pay himself those fees from the $352,137.02 proceeds of sale of the mortgaged property, which left only $33,834.45 for the mortgagor.
4. For the reasons that follow, I consider this an appropriate case for the Court to exercise its inherent supervisory jurisdiction to require Mr Hartnett to pay to Mr Bell the sum of $311,356.47.
5. The long history of this dispute is set out in various judgments of this Court:

> (1) [2016] NSWSC 540 (Davies J), making orders in the uncontested Possession Proceedings (NSWSC 2014/354291).
> (2) [2021] NSWSC 202 and [2021] NSWSC 1270 (Slattery J), concerning Equity Proceedings, in which the plaintiff sought legal redress, and where his Honour reopened the Possession Proceedings and ordered the two proceedings be heard together.
>
> (3) [2022] NSWCA 42 (Basten JA), dismissing Mr Hartnett's motion to have the matter removed to the Court of Appeal.

This judgment ought to be read with those judgments.

Factual background

6. Mr Bell was the beneficiary under the will of his mother, Mabel Deakin-Bell, pursuant to which he was left, among other things, a property in West Ballina (the Property). The Property was subject to a $30,000 mortgage (the Mortgage) in the name of Gwendoline Deakin-Bell, payable on Mabel's death, which occurred in late 2013. Without intending any disrespect, this judgment will refer to the Deakin-Bells by their first names.

7. On 2 February 2014, Mr Hartnett sent a letter to Gwendoline setting out the legal work that he would do for her. That letter is not in evidence but is referred to in Mr Hartnett's costs agreement apparently sent on 12 February 2014, which gave an estimate of $3,900-$6,500 for the work. The first invoices Mr Hartnett sent in 2014 related to the preparation of Gwendoline's will.

8. There is no evidence that Mr Hartnett issued a new costs agreement, but from early 2014 acted for Gwendoline in seeking repayment of the Mortgage and exercising mortgagee rights of possession and sale in the Possession Proceedings.

9. On 6 June 2014 Mr Hartnett sent Mr Bell's lawyer a letter stating that the amount of $32,687.88 was owing to Gwendoline "including costs".

10. On 10 November 2014 Mr Hartnett indicated that costs were then $27,871.55.

11. On 2 December 2014 Mr Hartnett filed a Statement of Claim seeking possession of the property and payment of the mortgage and costs of $34,683.19.

12. On about 15 January 2015 Mr Hartnett applied for default judgment, and shortly thereafter the application was rejected because Mr Bell had been named as defendant and executor of Mabel's will, but he had not at that stage obtained a grant of probate. The NSW Trustee and Guardian was the proper defendant.

13. On 18 March 2016 an Amended Statement of Claim was filed naming the NSW Trustee and Guardian as defendant and removing Mr Bell. The delay in taking this step appears to have been because Mr Hartnett continued to agitate that Mr Bell apply for probate. The reasoning behind that course was not explained to me.

14. Mr Bell did not oppose the relief sought in the Amended Statement of Claim.

15. On 29 April 2016, Davies J made orders for possession and sale of the Property as requested by Mr Hartnett, with the following orders concerning the proceeds of sale:

> 5. After the Property has been sold, the plaintiff be entitled to apply the proceeds of sale towards payment of:
>
> > 5.1 the principal sum of $30,000 owing under the registered mortgage dated 11 November 1994 (the Mortgage);
> >
> > 5.2 pursuant to the terms of the Mortgage, and on an indemnity basis, the costs and expenses she has incurred in relation to the Mortgage and these proceedings to date, and any such costs that she incurs in the future; and
> >
> > 5.3 pre-judgement interest on the principal sum of $30,000.00 pursuant to section 100 of the Civil Procedure Act 2005 (NSW) for the period September 2013 to 29 April 2016.

6. After deduction of the amounts referred to in Order 5 above, the plaintiff pay the balance of the proceeds of sale of the Property to:

6.1 any person who has by that time been appointed as the administrator or executor of the Estate of Ms Mabel Deakin-Bell; or

6.2 if no person has been appointed administrator or executor, then to the Court.

16. On 30 September 2016, Mr Bell's lawyers wrote to Mr Hartnett indicating Mr Bell was in the process of seeking probate of Mabel's estate and asking for copies of Mr Hartnett's costs agreement and invoices to date. It was at about that time that Mr Bell became aware that Mr Hartnett had provided the NSW Trustee and Guardian with an estimate of fees of $302,000 - $330,000 without any detail justifying that estimate.

17. On 1 October 2016, the Property was sold at auction for $376,000.

18. On 13 October 2016, Mr Hartnett informed Mr Bell's lawyers of the sale, but not the sale price, and indicated he would provide an update when the sale completed.

19. On 20 October 2016, Mr Bell's lawyers informed Mr Hartnett that Mr Bell and his sister had agreed that Mr Bell would obtain probate and again asked for documents including all the documents relating to the Possession Proceedings, Mr Hartnett's itemised accounts and costs disclosure, settlement adjustment sheet for the sale of the Property and the contract for the sale of the Property. Mr Hartnett did not respond. In submissions the reason given for this failure was because Mr Bell had not yet obtained probate; Mr Hartnett did not give Mr Bell that explanation at the time.

20. On 31 October 2016, the nett proceeds of sale of the Property in the sum of $352,137.02, were paid into Mr Hartnett's trust account. Mr Hartnett did not notify Mr Bell, despite his earlier assurance.

21. From 20 October 2016, Mr Bell asked for documents with respect to the Possession Proceedings, including itemised accounts, costs disclosure, settlement adjustment sheet for the sale of the Property and the contract for the sale of the Property. Mr Hartnett did not respond.

22. Between 11 February 2014 and 11 May 2015 Mr Hartnett had issued Gwendoline invoices totalling $77,739.43.

23. On 14 November 2016, Mr Hartnett issued Gwendoline two further invoices:

(1) One for $167,828.26 that had attached to it a schedule of over 100 pages of time entries from 15 May 2015 to 14 November 2016; and
(2) One for $43,033.34 for a 25% "deferred fee" or "uplift fee" said to be payable because Mr Hartnett was being paid either when his retainer was terminated or when Gwendoline recovered monies pursuant to the mortgage.

24. Mr Hartnett has consistently justified his fees on the basis of his costs agreement and the relevant costs clause, clause 5 in Memorandum of Mortgage Q860000, which provided:

> In addition to all costs and expenses which the mortgagor may be liable at law or in equity to pay in respect of this security, or otherwise in relation thereto, the mortgagor will upon demand pay all costs and expenses, including costs as between solicitor and client, incurred by the mortgagee in consequence or on account of any default on the part of the mortgagor hereunder or incurred by the mortgagee for the preservation of or in any manner in reference to this security, all of which costs and expenses shall from the time of payment or expenditure thereof respectively until repaid to the mortgagee by the mortgagor be deemed principal moneys covered by this security, and shall carry interest at such higher rate as may be shown in the schedule to the mortgage.

25. On 17 November 2016, Mr Hartnett provided Gwendoline a document entitled "Specific Trust Account Authority" and it can be inferred he asked her to sign it. It stated:

> The Clients [Gwendoline] instruct and authorise Hartnett Lawyers to deal with monies in the Hartnett Lawyers Law Practice Trust Account received on my behalf in the above matter/s as follows:
> 1. Ms Gwendoline Deakin-Bell $39,089.57.
>
> 2. Hartnett Lawyers (payment of legal costs as per schedule) $288,601.03.
>
> 3. New South Wales Supreme Court $33,834.45.

She signed that document.

26. On 18 November 2016, Mr Hartnett transferred the sum of $288,601.03 from his trust account to his office account. He also paid Gwendoline in accordance with that authority. However, despite preparing the authority document and asking Gwendoline to sign it, he did not make the transfer to the Court as "instructed and authorised". Mr Hartnett only paid that money into Court in May 2021 after Slattery J made a further order that he do so.

27. On 29 November 2016, Mr Bell obtained probate of Mabel's estate. From that point on he stood in the shoes of the mortgagor.

28. At no time before Mr Bell commenced litigation against Mr Hartnett in 2020 did Mr Hartnett provide *any* invoices or details of amounts charged and allegedly recoverable by Gwendoline under the mortgage and Davies J's order. This was despite years of requests for that information. No cogent explanation was given as to why Mr Hartnett would not provide that information to the mortgagor's legal practitioner.

29. Instead, Mr Hartnett's attitude to those requests as documented in correspondence included:

> (1) Promising updates and never providing them;
> (2) Suggesting he did not have information;
>
> (3) Suggesting that he needed instructions but never demonstrating that he sought them nor that they were refused;
>
> (4) Seeking extensions of time for no apparent reason;

> (5) Using the grant of probate to Mr Bell as an issue, first, agitating for Mr Bell to seek a grant and then alleging the grant was invalid. No legal steps were ever taken to challenge probate. No explanation was given why it was in Gwendoline's interests for Mr Hartnett to take such an attitude.

The inference is that Mr Hartnett did not want to provide any information about the quantum of his invoices.

30. Some of this disappointing conduct of Mr Hartnett is summarised below.
31. On 12 December 2016, Mr Bell's lawyer provided Mr Hartnett a copy of the Court's order to grant probate to Mr Bell and again requested documentation including costs agreement and invoices, with an indication that if there was no response a complaint to the Legal Services Commissioner would be made. Mr Hartnett did not accede to the request.
32. On 11 January 2017, Mr Bell's lawyers wrote to Mr Hartnett enclosing a copy of the grant of probate and again asking for the same documentation, failing which the complaint to the Legal Services Commissioner would be made.
33. On 2 March 2017, Mr Bell's lawyers wrote a complaint to the Legal Services Commissioner of Queensland (LSCQ) asking for assistance to have the "excessive fees assessed" and complaining of Mr Hartnett's failure to provide documentation as requested.
34. On 12 June 2017, the LSCQ responded to Mr Bell's solicitors noting:

> Mr Hartnett has indicated that... he considers the appropriate course is for Mr Bell to make a further request for an itemised bill under section 335 of the Legal Profession Act 2007 ...
>
> It appears Mr Hartnett has now conceded that Mr Bell has the 'necessary standing' to request an itemised bill. In the circumstances ... you may consider it appropriate to forward a further request for an itemised bill to Mr Hartnett.

35. Mr Hartnett's submission in relation to this letter from the LSCQ was that it cannot be read too precisely as Mr Hartnett's communications with LSCQ were not in evidence. Obviously, Mr Hartnett had the ability to go into evidence about this and many other matters and chose not to. I do not accept there is any basis for a suggestion that the LSCQ misrepresented what Mr Hartnett had told them.
36. On 14 June 2017, Mr Bell's lawyers followed the recorded advice of Mr Hartnett and the LSCQ and requested an itemised bill from Mr Hartnett with reference to section 335 of the *Legal Profession Act* 2007 (Qld) (LPAQ).
37. On 10 July 2017, Mr Bell's lawyers again complained to the LSCQ that Mr Hartnett had not responded to the request for documentation and that they wished to proceed with a complaint against Mr Hartnett.
38. On 12 July 2017, Mr Hartnett responded:

> We acknowledge that Mr Bell, in his capacity as executor, is a non-associated third party payer within the meaning of s301(3).
>
> Section 335(7) of the LPA provides that a law practice is to provide a non-associated third party payer, with **sufficient information** to allow the third party

payer to consider making a costs application (emphasis added).

> In this regard, your client has requested "copies of all itemised accounts issued" in respect of (our firm's) representation for Mrs Gwendoline Deakin-Bell against the estate.
>
> We advise that we have not issued itemised bills in a form and including such detail as to how the legal costs are made up in a way that would allow the legal costs to be assessed.
>
> We have written to [Gwendoline] requesting that she attend an appointment at our office, so that we may advise her in person in relation to Mr Bell's request and the implications for [Gwendoline] including from a legal costs perspective.
>
> In the meantime, we will be grateful if you would respond to this letter and advise whether Mr Bell might accept "other information" to allow your client to give this matter his further consideration.
>
> Whilst our standard processing time for information requests is 28 days, we respectfully submit that by its nature, this matter will clearly require additional time to respond to your client's request.

39. That letter has the following notable features:

(1) It does not disclose that Mr Hartnett had sought and received Gwendoline's instructions and authority to pay himself $288,601.03 from the proceeds of sale.
(2) It did not refer to the two invoices Mr Hartnett issued on 14 November 2016, which contained hundreds of pages of time entries, or offer them as "itemised accounts issued", or even un-itemised accounts or "sufficient information".

(3) Mr Hartnett's refusal to provide the documentation was not consistent with the representation that he had provided to the LSCQ that a "request" should be made for documentation to be provided.

(4) Mr Hartnett's suggestion that this request for information "will clearly require additional time" beyond 28 days is astonishing. He had acted for a mortgagee, who was obliged to act in good faith and account to the mortgagor. He also had "information" in his possession in the form of his invoices and schedules of time entries, which he could and should have provided immediately.

(5) It is not apparent why Mr Hartnett needed to seek instructions from Gwendoline to provide documentation that was sought from Mr Hartnett personally, and again appears another tactic of deflecting and delaying.

40. On the same day Mr Hartnett sent a second letter to Mr Bell alleging various matters and that he would seek instructions to have Mr Bell's grant of probate set aside (which never occurred) and that:

> There is no question that our files support those costs.
>
> ...
>
> In light of the recent steps taken by your client, and as our client may apply to the court for an order that the grant of probate be revoked, it is likely that our client will now incur further legal costs. In accordance with [Davies J's Order 5] our client is entitled to recover such costs from the proceeds of sale.
>
> In the circumstances, our client is not able to pay the balance of the proceeds of sale in accordance with [Davies J's orders].

41. It is difficult to see why Mr Hartnett would threaten that costs of an application to revoke Mr Bell's grant of probate would entitle Gwendoline to recover those costs from the proceeds of sale.
42. On 31 July 2017, Mr Bell's lawyers replied to Mr Hartnett again requesting Davies J's judgment, all invoices issued, whether itemised or not, and other documents, and responding the allegations about probate.
43. On 2 August 2017, Mr Hartnett did not provide documentation but responded by threatening that he had instructions to make an application to revoke the grant of probate.
44. On 20 September 2017, Mr Bell's lawyers wrote to the QLSC indicating that they had not received Mr Hartnett's response with documentation and indicating that Mr Bell wanted to have Mr Hartnett's costs in the Possession Proceedings assessed. Mr Bell's application for costs assessment was included in the letter with an indication it would be filed on 12 October 2017.
45. On 11 October 2017, Mr Hartnett responded in a 5-page letter (for which he appears to have charged Gwendoline $3,410) with further threats about Mr Bell's grant of probate and stating "we maintain that your client lacks standing to make such Application [for costs assessment]. Further, we consider that until the above issues [concerning probate] are resolved... then no steps should be taken by your client". The letter went on to state that should a costs assessment be filed that "we hereby place you on notice that ... our client will object to such application", effectively asserting that he held instructions to resist such application.
46. From October 2017 through to 12 February 2018, Mr Hartnett continued to write to Mr Bell challenging his grant of probate. No application was ever made by Mr Hartnett or Gwendoline to revoke Mr Bell's grant of probate. Mr Hartnett issued invoices to Gwendoline for researching these challenges to probate and writing long letters to Mr Bell in circumstances where it is entirely unclear how such conduct was of any assistance or relevance to Gwendoline. None of Mr Hartnett's advice to Gwendoline is in evidence. Examples of charging include:

> (1) $231 to apply for a transcript (presumably of the probate hearing);
> (2) $1608.75 for "researching notice to apply for Probate and consequences if not complied with" and $1278.75 to write a letter to Mr Bell's solicitors detailing that research;

(3) $1760 to prepare a letter to the NSW Supreme Court Registry to "raise the issue of Mr Bell's legal incapacity".

Mr Hartnett did not explain how any work to do with challenging Mr Bell's grant of probate fell within the mortgage costs clause.

Mr Wall's assessment

47. On 10 January 2018, Mr Bell's lawyers wrote to Mr Hartnett with the following:

> In accordance with Regulation 35(1)(a) and (2)(a) of the Legal Profession Uniform Law Application Regulation 2015 and Regulation 125(1)(a) and (2)(a) of the Legal Profession Regulation 2005 (NSW) (whichever applies) we hereby enclose a copy of the application we intend filing with the NSW Supreme Court on 31 January 2018.
> Any objection by you must be provided in writing within 21 days from today.

48. The letter:

(1) indicated that Mr Bell's lawyers were not sure what regulation or provision applied to the costs assessment being sought; and
(2) included copy of the application so Mr Hartnett was aware of it and was provided with ample time to "object".

49. Mr Hartnett did not respond at all. Thus, he did not suggest that his earlier instructions to resist the costs assessment had been withdrawn, nor that the costs assessor would lack jurisdiction. Such a response would be expected of a legal practitioner if applicable.
50. Mr Bell filed the costs assessment application on 12 February 2018, and it was assigned by the Supreme Court Manager Costs Assessment to Mr Wall.
51. In his first letter to the parties on 26 February 2018, Mr Wall indicated:

(1) The costs order being assessed was the relevant part of the order of Davies J dated 29 April 2016 (at 4.8).
(2) The applicable law was the *LPA* 2004 and *LPR* 2005, not the Uniform Law (at 5.2 and 5.3).

(3) He noted Hartnett Lawyers had acknowledged in a letter of 12 July 2017 that Mr Bell was a "non-associated third party payer" with a reference to Queensland legislation. Mr Wall indicated that "I will take that to be a reference to the relevant section of the LPA 2004 in NSW" (at 6.6).

(4) He did not consider there was any basis for Gwendoline not to provide particulars of the costs ordered by the Court, and he made a direction that such material be provided (at 7.5).

(5) That, while Mr Hartnett had acknowledged that Mr Bell was a non-associated third party payer, and that sufficient information must be provided to allow the

making of a costs application, Mr Wall considered "these are costs ordered by a Court and no issue as to whether [Mr Bell] is a "non-associated third party payer" arises, but [Mr Bell]... is the party liable to pay the costs pursuant to the order, and thus can seek assessment of costs" (at 8.3).

(6) It was Gwendoline's obligation to provide "sufficient particulars" of the costs and, if insufficient particulars were provided, he would "reduce or disallow the costs claimed. If no particulars are provided, then I will quantify costs at nil."

(7) He invited the parties to "make submissions on, or draw my attention to anything in this letter which that party believes to be inaccurate or incomplete. An assessor must set out the issues that appear to arise as there is no formal method of identifying those issues, and the purpose of setting things out in this letter is to enable a party to make submissions or send further information or documents about those matters" (at 10.3).

52. Mr Hartnett did not respond. There is no evidence he contacted Gwendoline and gave her advice, but he did charge her for reading the letter.
53. On 1 March 2018, Mr Wall contacted the parties, including Mr Hartnett for Gwendoline, acknowledging receipt of Davies J's judgment but requesting a copy of orders 5 and 6 and reminding the parties of the timetable for documents and submissions.
54. On 6 March 2018, Mr Wall contacted the parties, including Mr Hartnett for Gwendoline, and required Gwendoline to provide details of the claims for costs pursuant to Davies' J's order by 12 April 2018. Mr Hartnett charged Gwendoline for reading the letter and for a conference with her.
55. On 20 April 2018, Mr Wall extended the time for Gwendoline's compliance to 3 May 2018 and indicated "if the details required are not provided by then, then I will complete costs at that time on the basis of the information I have at that time", and "with the costs order having been made so long ago, it is unlikely I will allow any extension of time beyond 3 May 2018, particularly having regard to the history of this assessment so far". Mr Hartnett charged Gwendoline for reading the letter.
56. In that letter, Mr Wall also indicated his preliminary view based on "looking at the statement of claim, the amended statement of claim, the Probate, [Davies J's judgment], the nature of the costs order as an indemnity costs order in respect of those proceedings and the mortgage, the amount of the mortgage in question, and the other information before me". He further indicated that:

(1) There were some complications due to the involvement of the NSW Trustee and Guardian before Mr Bell became the executor.
(2) The proceedings were undefended.

(3) "There is no information about the basis on which the various estimates of costs referred to by Hartnett lawyers for Gwendoline were made. Thus I cannot put much weight on those estimates."

(4) There was no information about to what the “3 years of legal costs” referred to in Mr Hartnett’s correspondence related.

57. He concluded:

> The costs that I have to assess are the costs of the Supreme Court proceedings and the mortgage on an indemnity basis. Normally that would mean I resolve any doubt in favour of the party receiving those costs. However, where there are no particulars provided, then there is, in effect, no claim for any particular amount of costs, and I have to do the best I can on the basis of the material that I have.
> I have to look at whether the legal costs were proportionately and reasonably incurred, and proportionate and reasonable in amount, and allow an amount of costs that is no more than fair and reasonable in all the circumstances, in connection with the court proceedings and mortgage, on the basis of the material that I have at the time I make that determination.
>
> I acknowledge that the material is woefully inadequate, but I must nevertheless complete my task.
>
> On the basis of the material I have at present, I would award the amount of costs of $40,000 as a global amount given the above information.

Mr Hartnett charged Gwendoline for reading the letter.

58. On 3 May 2018, being the date of the extended deadline for Gwendoline to provide particulars, Mr Hartnett responded to Mr Wall requesting a direction for an extension of time so that that particulars be provided “within 28 days” and:

> ... we now formally confirm that we have received instructions to act for Ms Gwendoline Rosemary Deakin-Bell, the respondent, in relation to the Costs Assessment proceedings.
> ...
>
> Ms Deakin-Bell wishes to respond to your letter requesting information and otherwise, participate in the Costs Assessment proceeding.

59. However, Mr Hartnett’s invoices demonstrate that he was charging Gwendoline for reading each piece of correspondence received from Mr Wall and Mr Bell. He also charged for a telephone call in March 2018 with Gwendoline. The only basis upon which Mr Hartnett would be entitled to charge Gwendoline for these time entries was if he had instructions to carry out that work. It can be assumed that in the phone call he advised Gwendoline of the serious consequences if she did not engage in the assessment process:

> (1) she could be liable for a civil penalty (section 358(2) *LPA*), and
> (2) if the assessment was as low as Mr Wall had indicated, including because she did not justify the invoices paid, Mr Bell could claim a refund from her, and

then she from him.

Mr Hartnett did not give evidence on this or any issue relevant to the hearing before me. His evidence was limited to reading his affidavit in support of the motion for default judgment dated 27 April 2016.

60. In his 3 May 2018 letter, Mr Hartnett sought until 31 May 2018 to provide information asserting various reasons including Gwendoline's age of 81, failing health, and limited financial means, the complexity of the matter, a solicitor had been on leave, and the Commonwealth Games taking place on the Gold Coast where his law practice is based. However, no explanation was provided about how those facts had impacted on collating the information, which Mr Bell had been seeking for over 18 months and was available to Mr Hartnett. There was no explanation as to why it would take a further 4 weeks.

61. Mr Hartnett also finally acknowledged "that until such time as there is further or other order of the Court" the grant of probate to Mr Bell was valid.

62. Mr Hartnett also indicated without explaining or providing any detail or reference or basis:

> (1) "we note that there are matters of law that may require a determination before the matter may proceed";
>
> (2) "there are issues that arise regarding your jurisdiction insofar as the assessment of costs is concerned" including:
>
>> (a) The effect of the order of Davies J.
>>
>> (b) The effect of the indemnity contained within the mortgage.
>>
>> (c) The existence of the various court proceedings above.
>>
>> (d) Gwendoline's costs after the filing of the application, and
>>
>> (e) The relevant law and procedures that apply to an assessment.
>
> (3) "We envisage that it may also be necessary to seek the assistance of the court to resolve some of these issues".

63. The next day, on 4 May 2018, Mr Wall wrote to the parties noting the receipt of Mr Hartnett's letter and proposing to grant a short extension of time to Gwendoline for the provision of documents, but allowing Mr Bell an opportunity to make submissions in relation to the proposed extension of time. Mr Wall also dealt with some of Mr Hartnett's unexplained issues:

> (1) He considered that as the costs order was made in the NSW Supreme Court and related to the possession of land in NSW and at least some legal work was carried out in NSW, and without information from Gwendoline, "it seems to me I have jurisdiction to assess the costs."
>
> (2) In terms of the effect of the order, he said "Gwendoline has had ample opportunity to 'seek the assistance of the Court to resolve some of these issues'.

> The order was made in 2016. The application for assessment was served in January 2018."

Mr Hartnett charged Gwendoline for reading the letter.

64. On 10 May 2018, Mr Bell's lawyers wrote to Mr Wall submitting no further extension of time should be allowed, including because Mr Bell had been seeking documentation since 2016. Mr Hartnett charged Gwendoline for reading the letter.
65. On 15 May 2018, Mr Wall wrote to the parties indicating that Gwendoline would only be given until 24 May 2018 to provide the information sought by Mr Wall.
66. Mr Hartnett never wrote to Mr Wall again. There is no evidence that his instructions to respond to the costs assessment had been withdrawn. Instead, he continued to record time and invoice. He never assisted Gwendoline comply with Mr Wall's direction for particulars.
67. Mr Hartnett provided no explanation why he did not take *any* steps to assist his client obtain the highest costs assessment possible.
68. On 24 May 2018, not having received any information or communication at all from Gwendoline or Mr Hartnett, Mr Wall proceeded to finalise his costs assessment at an amount of $40,000 less the costs assessment filing fee of $2,654.50 paid by Mr Bell. Therefore, Mr Wall issued a certificate that the total amount payable by Mr Bell pursuant to Davies J's order "up to the date of the costs assessment application" was $37,345.50.
69. On 31 May 2018, Gwendoline died.
70. No further claim has been made by Gwendoline or her estate pursuant to Davies J's order for "future costs" or pursuant to the mortgage. However, Mr Hartnett has issued further invoices to Gwendoline's estate.
71. On 3 July 2018, Mr Bell's lawyers wrote to Mr Hartnett requesting that $287,551.30 be transferred to their trust account.
72. On 24 July 2018, Mr Hartnett wrote to Mr Bell's lawyers indicating that he had instructions from Gwendoline's executor to "lodge an application for a review of the determination of the costs assessor" and to notify Mr Bell of that intention to apply for a review.
73. No review or review was ever lodged. Mr Hartnett did not write to Mr Bell's solicitors again until 2020.
74. As noted above, Mr Hartnett recognised Mr Bell as a "non-associated third party", who was entitled to seek information from Mr Hartnett and apply for a costs assessment that would bind him (see the definition of "non-associated third party payer" in s 302A *Legal Profession Act 2004* (NSW)).
75. Mr Wall considered that it did not matter if Mr Bell was a "non-associated third party payer", because he was assessing the costs referable to Davies J's order and the mortgage, which he described as "party-party costs" but on an indemnity basis in accordance with the mortgage. Mr Wall did not refer to a particular section of the *LPA* that he was applying.
76. Mr Hartnett submitted there was a critical difference between a party-party assessment and a third-party payer assessment because of differences in the wording of sections 361 and 365 of the *Legal Profession Act 2004* (NSW):

> (1) if the assessment is on a "party-party" basis then the costs assessor may have regard to the relevant costs agreement, but is not bound by it; whereas
> (2) if the assessment is on a third-party payer basis, then the costs assessor *must* have regard to the relevant costs agreement and apply its terms.

77. The submission appears to be that Mr Walls' assessment cannot bind Mr Hartnett, even though it binds Gwendoline, because it did not assess the costs on the correct basis and with regard to Mr Hartnett's costs agreement with Gwendoline. It is said that to be relevant to Mr Hartnett, the third party payer assessment had to be carried out, which it was not.

78. Because Mr Wall's assessment was never challenged by review or appeal, it operated to bind Gwendoline and she was only entitled to retain $37,345.50 (up to the date of the assessment) from the proceeds of sale towards her legal costs in accordance with Davies J's orders. Further in accordance with those orders, the residue was to be paid into Court (or to Mabel's estate).

The present proceedings

79. On 22 July 2020, Mr Bell's lawyers wrote a 12 page letter to Mr Hartnett setting out the history of the matter and relying on Mr Wall's assessment to demand $287,551.30 be paid to Mr Bell's trust account or alternatively the Court (in accordance with Davies J's orders) by 24 July 2020, failing which proceedings would be commenced. The letter acknowledged that Gwendoline was entitled to retain from the proceeds of sale costs on an indemnity basis, however, it also noted that complaint had repeatedly been made that Mr Hartnett's costs were "extortionate".

80. On 31 July 2020, Mr Hartnett responded seeking an extension of time until 28 August 2020 to respond because inter alia "our client intends to address your client's correspondence".

81. On 4 August 2020, Mr Bell's lawyers required confirmation by 7 August 2020 that the money had been paid to the Court.

82. On 5 August 2020, Mr Hartnett indicated "we will not be in a position by ... 7 August 2020 to confirm that monies in the sum of $287,551.30 have been paid into Court." The email complained that the timeframe for a response was "onerous upon our client".

83. On 6 August 2020, Mr Bell's lawyers rejected the request for an extension of time and sought by 7 August 2020 confirmation from Mr Hartnett that he held the monies in his trust account or that Mr Hartnett provide a list of his assets or undertakings to preserve that sum of money.

84. On 7 August 2020, Mr Hartnett responded again seeking further time and complaining that "Hartnett Lawyers is a small firm and like many other small firms we have encountered substantial issues in the day-to-day management of the law firm complying with and responding to government directions as a result of the coronavirus ... We advise that we are taking positive steps to schedule an appointment with our client to attend our office so that we may seek further instructions in relation to the matters raised in your correspondence". No further response was sent from Mr Hartnett.

85. On 31 August 2020, Mr Bell filed a summons (Equity Proceedings 2020/254590) and then, on 26 October 2021, Mr Bell filed an amended statement of claim seeking relief in the form of an order that Mr Hartnett pay to Mr Bell $285,047.00, "being money payable by [Mr Hartnett] to [Mr Bell] for money had and received by [Mr Hartnett] for the use of [Mr Bell]", with interest and costs. Effectively, Mr Bell claimed that Mr Hartnett is liable to pay to him, as the person entitled to the residue of the proceeds of sale, after the proper quantum of costs had been retained by Gwendoline.

86. On 21 September 2020 Mr Hartnett complained about the service of the summons but did not engage with the substance of the complaint.

87. On 26 February 2021, Slattery J ordered that the Possession Proceedings be re-listed with the Equity Proceedings.

88. On 19 March 2021, Slattery J ordered Mr Hartnett to produce a copy of Gwendoline's will and all invoices issued to Gwendoline between 2014 and 2016. Mr Hartnett complied with that order on 7 April 2021.

89. On 26 April 2021, Slattery J made further orders inter alia to the effect:

> (1) that under rule 7.10(2)(a) of the Uniform Civil Procedure Rules 2005 (NSW) until further order the Possession Proceedings may continue in the absence of a representative of Gwendoline's estate, however, Mr Hartnett was not excused from being the solicitor on the record;
> (2) noted Mr Bell had obtained probate of Mabel's estate and the proceedings shall continue against Mr Bell as executor of Mabel's estate rather than the NSW Trustee and Guardian;
>
> (3) that Mr Hartnett pay the balance of money held in Mr Hartnett's trust account be paid into Court to abide the Court's determination in the Possession Proceedings.

90. In their judgments in the matter, Slattery J and Basten JA provided other comments about the possible resolution of the substance of the claim.

91. In his judgment [2021] NSWSC 202 at [21] Slattery J indicated that the circumstances:

> raise a number of questions for the objective observer. One of those questions is how the defendant solicitor was able to issue a memorandum of fees... to authorise the transfer of $288,601.03 out of his client's trust account to his firm on 18 November 2016, so soon after the sale of the Ballina property. So large a bill... calls for explanation.

92. In [2021] NSWSC 1270 at [40], Slattery J indicated to the parties that:

> The Court has not decided whether to exercise its supervisory jurisdiction in this case and could not do so on the existing material. Hartnett Lawyers decided to sit out Mr Wall's cost assessment, because it was without instructions and no indication had been given to the firm that the Court's supervisory jurisdiction might be engaged. It would be unfair now for the Court to act upon Mr Wall's cost

> assessment against Hartnett Lawyers, as is urged by Anthony, for that reason alone. It would also be unfair because, as Mr Wall himself acknowledged, the limited material given to Mr Wall makes his conclusions somewhat speculative and based more on the ordinary case rather than on specific evidence of what Hartnett Lawyers did in this case.

That interlocutory determination by Slattery J was without the benefit of all the evidence before me. In fact, Mr Hartnett's invoices indicate he did hold instructions throughout the costs assessment process and there is no credible reason why he had not provided the information sought.

93. Slattery J continued at [41]-[43]:

> [41] *The Supervisory Jurisdiction*. Hammerschlag J concisely described the essential features of the Court's inherent supervisory jurisdiction in a recent case, John Ljubomir Atanaskovic and the persons named in Schedule A trading as Atanaskovic Hartnell v Birketu Pty Ltd – Supervisory Jurisdiction [2020] NSWSC 573 at [29] – [31]. In a passage approved on appeal by the Court of Appeal in Atanaskovic Hartnell v Birketu Pty Ltd (2021) 392 ALR 154; [2021] NSWCA 201 at [130] (per Gleeson JA), Hammerschlag J said:
>
>> "[29] The Court has a well-established inherent supervisory jurisdiction, to which solicitors are amenable, which is designed to impose on them higher standards than the law applies generally: United Mining & Finance Corporation Limited v Becher [1910] UKLawRpKQB 70; [1910] 2 KB 296 at 304; Wade v Licardy (1993) 33 NSWLR 1 at 6-9. A solicitor is expected to act honourably and ethically. A solicitor is expected to keep her or his word.
>>
>> [30] This jurisdiction is disciplinary and compensatory. It is not exercised for the purposes of enforcing legal rights, but for the purpose of ensuring honourable conduct on the part of the Court's own officers. It is distinct from any legal rights or remedies of the parties, it is unaffected by anything which affects the strict legal rights of the parties, and it is not limited to technical principles: Re Gray [1892] UKLawRpKQB 164; [1892] 2 QB 440 at 443 per Lord Esher MR; R & T Thew Limited v Reeves (No 2) [1982] 1 QB 1283 at 1285; Countrywide Banking Corporation Limited v Kingston [1990] 1 NZLR 629 at 637; Australian Guarantee Corporation (NZ) Ltd v East Brewster Urquhart & Partners [1990] 2 NZLR 167 at 173; McIlriath v Ilkin [2007] NSWSC 911 at [10].
>>
>> [31] The jurisdiction extends to ensuring that a solicitor honours an undertaking given by her or him in that capacity. The fact that the solicitor may have a defence to an action at law on the undertaking

> > does not preclude the Court from exercising the jurisdiction, but it is a factor which the Court may take into account in deciding whether or not to exercise its discretion and, if so, how: Udall v Capri Lighting Limited [1987] 3 All ER 262 at 269; Countrywide Banking Corporation Limited v Kingston [1990] 1 NZLR 629 at 637. It is no answer to a complaint that a solicitor acted in breach of an undertaking given by her or him that there was no consideration for it: United Mining & Finance Corporation Limited v Becher [1910] UKLawRpKQB 70; [1910] 2 KB 296 at 303-4; John Fox v Bannister, King & Rigbeys [1988] QB 925 at 928, 931; Wade v Licardy (1993) 33 NSWLR 1 at 9."

> [42] An important relevant feature of the jurisdiction identified in this passage is that the jurisdiction may be engaged whether or not a solicitor has a defence to an action at law. Here, Hartnett Lawyers indicate that LPA 2004, s 350(8)(d) is an answer to any costs differential brought about by a successful non-associated third party payer costs assessment initiated by Anthony. Authorities are clear that the supervisory jurisdiction is available notwithstanding provisions such as LPA 2004, s 350(8)(d).
> [43] The Court's supervisory jurisdiction includes the Court's capacity to scrutinise the conduct of solicitors to ensure that they do not charge exorbitant fees or otherwise take improper advantage of their clients: NSW Crime Commissioner v Fleming (1991) 24 NSWLR 116; (1991) 54 A Crim R 401; [1992] ANZ ConvR 344 at [123] (per Gleeson CJ) recently affirmed by the Court of Appeal in Atanaskovic Hartnell v Birketu Pty Ltd at [145]. And such general jurisdiction is exercisable against an Australian lawyer from interstate providing legal services in NSW: Council of the NSW Bar Association v Siggens [2021] NSWCA 40.

Slattery J also indicated that the Court may decide to fix the costs pursuant to s 98 of the *Civil Procedure Act* (2005) NSW.

94. His Honour required Mr Bell to identify how he said Mr Hartnett's fees were excessive and provided Mr Hartnett an opportunity to respond justifying his fees.
95. His Honour also indicated that the parties both had an equitable interest in the proceeds of the sale, namely Mr Bell's equity of redemption or beneficial interest in the residue of the proceeds of sale and Mr Hartnett's equitable lien for payment (at [85]-[89]) and directed the parties to prepare points of claim and a defence and submissions on that issue at this hearing.
96. Justice Slattery also did not accept the parties' joint submission that the appropriate way forward was for the costs to be subject to a third-party payer costs assessment.
97. When Mr Hartnett unsuccessfully sought to have the proceedings removed to the NSW Court of Appeal, Basten JA also made reference to the Court's inherent jurisdiction in [2022] NSWCA 42 at [13]- [14], [17], [19], [21]-[22]:

> [13] ... It appears that a straightforward claim that Mr Hartnett appropriated moneys from his trust account without authority or in an excessive amount has been complicated by successive attempts to plead the claim on different bases. ... it is an action that Mr Hartnett disgorge an amount in excess of the costs to which he was entitled.
> [14] ... The plaintiff's argument appears to be that Mr Hartnett was not entitled to the moneys he retained; not that he should be deprived of moneys to which he was entitled.
>
> [17] As explained above, this case involves a dispute as to the costs to which Mr Hartnett is entitled as a result of acting for Gwendoline Deakin-Bell in the possession proceedings and in enforcing the mortgage.
>
> [19] It is not clear why, if the Court is entitled (as the judge accepted) to fix the costs recoverable by the mortgagee from the mortgagor, it would not be able to make an order for disgorgement of any additional costs obtained from the mortgagee by her solicitor, being an amount which she was obliged to pay to the mortgagor out of the proceeds of sale. Any such remedy would involve the inherent jurisdiction with respect to legal practitioners, or simply a form of equitable relief by tracing the proceeds of sale into the solicitor's hands.
>
> [21] It appears from judgments already delivered, that the current intention of the primary judge is to make a gross sum costs assessment under s98 of the Civil Procedure Act the balance of any fees after deduction of that amount to be payable to Mr Bell, as executor of Mabel Deakin-Bell's estate.
>
> [22] Given the straightforward nature of the proceedings in which the costs were incurred, that may well be the appropriate course. However, it may also be necessary to consider whether due account should be given to the assessment made by the costs assessor. Although the matter has now proceeded to a stage where it should be finally determined as soon as possible, without further complication or interlocutory steps, there might have been good reason to order that the solicitor pay into court a sum which constituted the balance taken from the trust account over and above the costs assessment of some $40,000.

98. The parties provided an agreed list of issues said to require determination which can be summarised:

> **In relation to the Possession Proceedings**:
> (a) Whether any orders were necessary in light of the Equity Proceedings;
>
> (b) Whether what was being sort was a "variation" of Davies J's "costs order" and whether the Court has power to vary it;
>
> (c) Whether the costs ought to be fixed between the mortgagor (Mr Bell) and the mortgagee (Gwendoline's estate) and if so the amount.

> **In relation to the Equity Proceedings**:
>
> (d) Whether Mr Hartnett has been unjustly enriched by the "Costs Differential" (being the difference between $37,345.50 and $288,601.03) and whether Mr Hartnett can defend such a claim on the basis that he was not a volunteer;
>
> (e) Whether Mr Hartnett should be ordered to disgorge any excessively charged fees.

Inherent jurisdiction

99. The circumstances in which Mr Bell finds himself are very unfortunate. Mr Bell did not obtain probate promptly it seems because of delay by his former solicitors, whom I was informed he is now suing. Had he obtained probate earlier and been provided with information from Mr Hartnett earlier, he may have been able to take steps to prevent Mr Hartnett obtaining Gwendoline's instructions to pay himself from the proceeds of sale before his invoices were assessed.

100. It was not disputed that Gwendoline was entitled to retain only those "reasonable" costs which were incurred in the enforcement of the mortgage, including obtaining possession and the proceeds of the sale: see eg *Elder's Trustee & Executor Co Ltd v Eagle Star Nominees Ltd* (1986) 4 BPR 9205 at 9209 (McLelland J); *Micarone v Perpetual Trustees Australia Ltd (No 2)* [1999] SASC 533 at [32]- [34] (Olsson, Debelle and Wicks JJ).

101. It was accepted by Mr Hartnett that as a proposition of law, Gwendoline, as mortgagee, was required to hold the residue of the proceeds of sale on trust for Mr Bell: *Rajah Kishendatt Ram v Rajah Mumtaz Ali Khan* (1879) LR 6 Ind App 145 at 160 (PC); *Coroneo v Australian Provincial Assurance Association Ltd* [1935] NSWStRp 47; (1935) 35 SR (NSW) 391 at 394-395 (Jordan CJ); *Weld-Blundell v Synott* [1940] 2 KB 107 at 115 (Asquith J); *Adams v Bank of New South Wales* (1984) 1 NSWLR 285 at 299 (Hutley JA). Gwendoline was also required to comply with the Court's order to pay the residue into Court or Mr Bell.

102. The basis for the relief sought by Mr Bell was described by Justices Basten and Slattery as either the Court's inherent jurisdiction or equity. As noted by Parker J, "there is an overlap between the Court's general jurisdiction to review solicitors' remuneration and the doctrines of undue influence, unconscionable transaction and fiduciary conflict as they apply to solicitors and clients": *Malouf v Constantinou* [2017] NSWSC 923 at [136].

103. Slattery J noted that:

> [34] First, the Court retains jurisdiction to fix costs as between mortgagee and mortgagor notwithstanding the costs provision in a mortgage. The Court's discretion to fix costs is not ousted by the mortgage costs indemnity provisions: Bank of Western Australia Ltd v Marsh [2000] WASC 2008 at [4], (per Sanderson M) and Watson Wyatt Superannuation Pty Ltd v Oberlechner & 2 ors (2008) ASC 155-091; [2008] NSWSC 272 at [36] (per Brereton J, as his Honour then was).
>
> [35] There are multiple sources of authority identifying the Court's power to adjust the costs as between the mortgagor and the mortgagee, and to have them quantified independently. It is sufficient to refer to UCPR, r 42.25, which

> expressly authorises the Court not to allow payment to a mortgagee, who has acted unreasonably. The ordinary equitable principal is that the mortgagee would be unable to recover costs which are the result of misconduct or where the mortgagee has acted unreasonably: Road Chalets Pty Ltd v Thornton Motors Pty Ltd (1986) 47 SASR 532. There is nothing in the indemnity clause in the mortgage in this case that would displace this ordinary rule.
>
> [36] Anthony's submissions point to the Court's inherent supervisory jurisdiction over legal practitioners as officers of the Court as a basis to order Hartnett Lawyers to pay any costs differential to Anthony: Council of the NSW Bar Association v Siggens [2021] NSWCA 40 at [9]. These submissions are correct.

104. Mr Hartnett accepted that this Court has jurisdiction to supervise his conduct in relation to these proceedings even though he practises primarily in Queensland.

105. The court's inherent jurisdiction encompasses supervisory power in relation to costs that solicitors charge which has not been ousted by statute. Various judgments have explained this inherent jurisdiction, which can be traced to English cases and to the court's jurisdiction "to secure that the solicitor, as an officer of the court, is remunerated properly, *and no more,* for work he does as a solicitor ... it is a jurisdiction to control the remuneration" (emphasis added): *Electrical Trades Union v Tarlo* [1964] 2 WLR 1041 at 1050 (Wilberforce J).

106. In *Atanaskovic & Ors v Birketu Pty Ltd – Supervisory Jurisdiction* [2020] NSWSC 573, Hammerschlag J stated in obiter at [36]-[37]:

> [36] The Court will not permit a solicitor to enforce an agreement with a client which requires the client to pay to the solicitor for services rendered an amount which represents an overcharge beyond the bounds of professional propriety: Law Society of New South Wales v Foreman [1994] NSWCA 69; (1994) 34 NSWLR 408 at 422. Such an amount would, of course, be excessive as being unfair and unreasonable.
>
> [37] The Court has jurisdiction to ascertain by taxation, moderation or fixation, the costs, charges and disbursements of a solicitor from the client: Athanasiou v Ward Keller (6) Pty Ltd [1998] NTSC 27; (1998) 8 NTLR 23 at 28; Baalman (JS & JH) v Dare Reed (1984) 52 ACTR 3 at 17.

I note that *Foreman* concerned an appeal from disciplinary proceedings and these proceedings are not disciplinary.

107. On appeal, in *Atanaskovic Hartnell v Birketu Pty Ltd* [2021] NSWCA 201 at [145], Gleeson JA (with whom Basten JA and McCallum JA agreed) impliedly accepted that exorbitant overcharging is at least one basis for the exercise of the Court's supervisory jurisdiction.

108. In *Woolf v Snipe* [1933] HCA 5; (1933) 48 CLR 677, Dixon J at 678 explained:

> The superior Courts of law and equity possess a jurisdiction to ascertain, by taxation, moderation, or fixation, the costs, charges, and disbursements claimed

> by an attorney or solicitor from his client, and that jurisdiction is derived from three sources and falls under three corresponding heads.
>
> First, a jurisdiction exists founded upon the relation to the Court of attorneys and solicitors considered as its officers. This jurisdiction, commonly called the general jurisdiction of the Court, enables it to regulate the charges made for work done by attorneys and solicitors of the Court in that capacity, and to prevent exorbitant demands. That such a jurisdiction was exercised by the Court of Chancery was never doubted [citations omitted].

109. In *Kowalski v Cole* [2017] SASCFC 23 at [25], Blue J (with whom Nicholson and Hinton JJ agreed) explained that the Court's inherent jurisdiction to regulate the costs charged by a solicitor and set aside a costs agreement if it is not fair and reasonable finds a rationale in the special relationship of confidence between solicitor and client which gives rise to a presumption of undue influence.

110. It has been suggested that the supervisory jurisdiction has empowered orders for repayment by solicitors of amounts overcharged to and paid by a client as part of solicitor-own client costs to ensure such costs are "fair and reasonable and no more": *Harrison v Tew* [1990] 1 All ER 321 at 330, 332 (Lord Lowry, with whom Lords Ackner, Oliver and Jauncy agreed). The effect of this aspect of the inherent jurisdiction could be likened to disgorgement: see *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323 at [335] (Murphy J); and was so described by Basten JA in [2022] NSWCA 42.

111. The difference between the above-mentioned cases and this case is that Mr Bell was not Mr Hartnett's client. I was not taken to any authority where the inherent jurisdiction has been engaged to order a solicitor to pay monies to a person other than the solicitor's client. However, that difference was not raised by Mr Hartnett, and I do not consider it an impediment for at least the following reasons.

112. First, as Garling J stated in *Damm v Coastwide Site Services Pty Ltd* [2017] NSWSC 1361 at [131]- [132] in the context of the Court's power to set aside a judgment:

> [131] ...the inherent jurisdiction of the Court has long been acknowledged to be incapable of being confined to defined categories: see Tringali v Stewardson Stubbs & Collett Pty Ltd [1966] 1 NSWR 354 at 361; Reid v Howard [1995] HCA 40; (1995) 184 CLR 1 at 16.
>
> [132] As McClelland J said in Dwyer v National Companies & Securities Commission (1988) 15 NSWLR 285 at 287:
>
>> "Since it rests on necessity for the purpose of preventing injustice, the extent of the power is commensurate with the requirements of the necessity which calls it into existence."

113. Secondly, the Court's jurisdiction to regulate the quantum of professional charges is a general one which is not bounded by technicalities. As Hammerschlag J noted in *Atanoskovic v Atanaskovic & Ors v Birketu Pty Ltd – Supervisory Jurisdiction* [2020] NSWSC 573 at [80-[81]:

> [80] It is apt to emphasise that in exercising supervisory jurisdiction, the Court does not engage in a final determination of legal rights but determines whether one of its officers should be held to ethical and honourable behaviour.
>
> [81] In exercising its discretion, the Court will have regard to all the circumstances, which, in this case, includes the state of the legal relationship and rights and duties between the parties. But the Court is concerned not with strict legal rights and duties or matters of technicality.

114. I consider an appropriate exercise of the Court's inherent jurisdiction is to make an order requiring a solicitor pay the amount of exorbitantly charged costs to a person who bore those costs.

Issues relating to quantum

115. I have already indicated that Mr Walls' costs assessment bound Gwendoline and that I am prepared to exercise the Court's inherent jurisdiction in supervising Mr Hartnett and to order that he pay Mr Bell a sum of money. The question is the appropriate quantum.

Future costs of mortgagee?

116. Mr Hartnett's counsel submitted that Gwendoline's rights under Davies J's order and the mortgage continue to operate into the future and that the mortgage clause required the mortgagor to "indemnify the mortgagees in respect of any expenditure they may incur in their capacity as mortgagees and in relation to the secured debt": *Halsted v Official Trustee in Bankruptcy (No 2)* [2012] FCA 66 at [16] (Logan J). However, even that would not extend to "unjustifiable or vexatiously incurred costs": *Re Solicitor's Bill of Costs; Re Shanahan* (1941) 58 WN (NSW) 132 at 136 (Street J).

117. I was referred by Mr Hartnett's counsel to *Australia and New Zealand Banking Group Ltd v Mishra* [2012] NSWSC 1333 for the proposition that a mortgagee is entitled to require security for potential future costs of defending a threatened claim against it and where the mortgagor had not provided a release of future claims against the bank. In that case Davies J quoted from *Overton Investments Pty Ltd v Cuzeno RVM Pty Ltd* [2003] NSWCA 27 at [63] where Hodgson JA (with whom Handley and Stein JJA agreed) stated:

> Where a dispute has arisen or is reasonably anticipated, a mortgagee is entitled to require not merely payment of the amount secured by the mortgage but also payment or security for the probable costs of any contest ... If the mortgagee does not specify a payout figure which bears some reasonable relationship to the amount truly owing and anticipated costs, then this may amount to unreasonable conduct or misconduct which disentitles the mortgagee to costs subsequently incurred in determining the rights of the parties...Furthermore, where the mortgagee does not require payment or security for the probably costs of any contest, and a question later arises as to whether the mortgagor's tender was sufficient to entitle the mortgagor to redemption, the mortgagee cannot then claim that the tender was insufficient because it did not include provision for

> those costs: I know of no direct authority for that proposition, but in my opinion it follows from the principles I have discussed.

What was necessary was for the mortgagee to stipulate the requirement for an additional payment to what was otherwise needed to redeem the mortgage.

118. Here, there was no redemption of the mortgage; instead, Gwendoline exercised her mortgagee's power of sale. Nevertheless, it can be accepted that it remains open to the mortgagee to seek payment of "whatever is necessary to protect and preserve the mortgagee's rights when their validity is challenged or their exercise is sought to be prevented or impeded": *Liberty Funding Pty Ltd v Steele-Smith* [2004] NSWSC 1100 at [21] (Palmer J).

119. However, I was not taken to any evidence that Mr Bell was seeking to challenge the exercise of Gwendoline's rights as mortgagee after the Possession Proceedings. I do not consider an application for a costs assessment under the *LPA* amounted to an attempt to "prevent or impede" the exercise of the mortgagee's rights. I note that in *Parramatta River Lodge Pty Ltd v Sunman* (1991) 5 BPR 12,038 at 12,048, Young J did not consider that a mortgagor was liable under the same mortgage clause to pay for the costs of preparation of the mortgagee's bill of costs suitable for taxation.

120. I do not consider that Gwendoline had any entitlement to retain sums for likely future costs, where no such order had been sought from Davies J (as was sought in *Mishra*). I therefore make no allowance for possible future costs in the assessment of quantum here.

Determination of quantum

121. I note that in 2021 the parties agreed that the matter could progress by way of a third-party payer costs assessment. However, Slattery J rejected that approach and ordered progress of the matter to be determined in a final hearing by the Court.

122. Nevertheless, Mr Hartnett submitted that I ought to dismiss Mr Bell's proceedings, but Mr Bell could recommence seeking a remedy against Mr Hartnett by way of third-party costs assessment. I do not consider such an approach is efficacious nor accords with the requirements of "just, quick and cheap" in ss 56-60 of the *Civil Procedure Act 2005* (NSW) in circumstances where the parties have already provided the Court with volumes of material concerning the costs and there has been a 2 day hearing.

123. In accordance with Slattery J's orders the parties have provided detailed analysis of every time entry charged by Mr Hartnett to Gwendoline. Mr Hartnett provided responses to Mr Bell's criticisms and a concession of a mere $13,316 for amounts charged for:

> (1) the preparation of file notes;
> (2) administrative work;
>
> (3) research or what he described as "appears to be research"; or
>
> (4) file review.

Despite having made that paltry concession, I was not informed that Mr Hartnett had paid that money to Mr Bell.

124. Mr Hartnett did not submit that I was required to deal with each line item. I accept counsel for Mr Bell's submissions that a "broad brush" approach can be taken to the assessment of Mr Hartnett's fees.

125. Below are some examples of what I consider to be exorbitant overcharging that sufficiently demonstrates the reasons why the Court ought to exercise its supervisory jurisdiction in this matter.

> (1) Mr Hartnett charged approximately $36,201 to file and serve the Statement of Claim for possession, an amount approximately 27 times greater than the $1,321 allowed by Schedule 2 of the *Legal Profession Regulation 2005* (NSW) (the LPR Schedule). The Statement of Claim was 4 pages long and without complexity. Mr Hartnett provided no justification in his response for this sum.
>
> (2) Mr Hartnett charged approximately $23,031.53 to apply for Default Judgment, an amount approximately 11 times greater than the $2,105 allowed by the LPR Schedule. Many time entries concern "internal meetings" and "internal emails", "perusing memo regarding matter status". The purpose of these charges is not disclosed and there is no evidence of how such tasks progressed the simple uncontested matter. Mr Hartnett's response was simply that his costs agreement provided for internal communications to be charged.
>
> (3) Mr Hartnett charged approximately $95,000.00 over a fifteen-month period to:
>
> > (a) request that the plaintiff obtain a grant of probate;
> >
> > (b) to amend the Statement of Claim to name the NSW Trustee and Guardian, instead of Mr Bell, who did not hold a grant of probate;
> >
> > (c) to enter consent judgment.
>
> (4) It is not clear why Mr Hartnett took such an interest in the grant of probate for Mabel's estate, when his client Gwendoline simply wanted to enforce her security in the $30,000 mortgage. It did not matter to her whether Mr Bell or the NSW Trustee and Guardian was the appropriate defendant. I do not consider Mr Hartnett's persistent challenges to Mr Bell's grant of probate fell within the operation of the mortgage as a necessary consequence of the mortgagor's default or its preservation.
>
> (5) Mr Hartnett charged approximately $59,484.00 for possession and a conveyance after Davies J's Judgment in April 2016. There is no explanation about how those uncontested activities could attract such a fee.
>
> (6) Mr Hartnett included in his schedule of fees to be paid from the sale proceeds invoices for taking instructions and preparing Gwendoline's will in 2014. Mr Hartnett provided no explanation or concession.

(7) Mr Hartnett charged "care and consideration" of 25%, being approximately $44,000, where I have not seen anything that demonstrates the matter of enforcing a $30,000 mortgage was complex or difficult and the proceedings were undefended. Mr Hartnett's response to this complaint was simply that the extra 25% was payable according to his costs agreement.

(8) Mr Hartnett also charged an uplift or "deferred" fee of 25% which totalled $43,033.34, which was explained in the costs agreement as payable because fees would not be payable until the earlier of termination of the retainer or "you recover monies pursuant to the mortgage". Counsel for Mr Bell contended that this uplift fee was not valid in accordance with Queensland law. Whether or not that is the case, I consider such an uplift fee of such a large amount was unreasonable.

126. Mr Hartnett primarily justified his invoices on the basis that his costs agreement entitled him to charge these exorbitant amounts. The circumstances in which Gwendoline came to agree to those terms are unknown, but Mr Hartnett complained to Mr Wall that in May 2018 she was 81, in ill-health and without financial means. In that regard, I note the relevant comments of Young J about mortgagees agreeing to "pay more for a service than one otherwise would because it is going to be paid out of someone else's money" in *Parramatta River Lodge Pty Ltd v Sunman* (1991) 5 BPR 12,038 at 12,046.

127. These invoices might also be seen as part of a wider issue with time-based charging going beyond the bounds of professional propriety that has been the subject of criticism in the authorities: *New South Wales Crime Commission v Fleming* (1991) 24 NSWLR 116 at 126 (Gleeson CJ, with whom Hope JA agreed); *Law Society of New South Wales v Foreman* [1994] NSWCA 69; (1994) 34 NSWLR 408, 422-423 (Kirby P).

128. I consider the amount assessed by Mr Wall is an appropriate figure, having regard to the issues identified above and Mr Hartnett's lack of cogent explanation, or an explanation at all, for many of the categories of charges and the quantum.

129. As Mr Bell was only obliged to pay $37,345.50 towards Gwendoline's legal costs pursuant to Justice Davies' order, I consider the inherent jurisdiction is engaged to do justice between the parties and Mr Hartnett must pay the sum he was paid over and above that sum from the proceeds of sale to Mr Bell.

130. For completeness, I note that the order I am making is not a variation of Justice Davies' order, which did not quantify costs and assumed compliance with the mortgage terms. Instead, the order is in the exercise of the Court's inherent supervisory jurisdiction in the Equity Proceedings.

Other arguments

131. For the reasons above, it is not strictly necessary for me to consider any other arguments of the parties and I outline them only briefly below.

Priorities

132. Justice Slattery required the parties to address the issue of competing equities. Mr Hartnett pleaded he retained a "fruits of the litigation lien" or possessory lien in relation to the proceeds of sale, and that it trumped Mr Bell's "equity of redemption". Mr Bell submitted that his equity of redemption was first in time or Mr Hartnett's entitlement would not be prioritised because of disentitling conduct.

133. Mr Bell's equity of redemption was created at the time of the creation of the mortgage on 11 November 1994. However, that equity of redemption was lost when the power of sale was exercised. What remained was a beneficial interest in the surplus proceeds of sale held on trust by Gwendoline. Any equitable lien of Mr Hartnett could not override Gwendoline's trust obligation; Mr Hartnett's lien does not extend to money to which Gwendoline is not entitled. Pursuant to Davies J's orders and the mortgage, Gwendoline was only entitled to the repayment of the sum secured by the mortgage and that only included "reasonable" legal costs.

134. Further, the Court will not enforce a fruits of the litigation lien if to do so would be unjust. In *GA Atkins & Ors v Probuild Constructions (Aust) Pty Ltd* (2020) 148 ACSR 111 Hammerschlag J stated at [52]-[53]:

> [52] The Court has flexible powers to protect and to enforce the lien: *Cade Pty Ltd v Thomson Simmons (No 2)* [2000] SASC 369 (*Cade*) at [15].
> [53] The Court will not lend its assistance to enforce the solicitor's rights where to do so would be inequitable by, for example, making an order which would give the solicitor an inequitable advantage when considered in the light of the provisions of the respective parties to litigation out of which the claim to the lien arose. An example of such a situation may be where the effect would be to extend to the solicitor rights beyond those to which the client would be entitled: *Akki* at 483.

135. I consider that to enforce a lien for Mr Hartnett's benefit ahead of Mr Bell's equitable entitlement would be unjust in the circumstances where he has charged his client more than is reasonable, and persistently avoided and obfuscated in relation to Mr Bell's attempts to obtain information for any costs assessment process.

Money had and received

136. Mr Bell submitted that Mr Hartnett had been "unjustly enriched" through his retention of money for his invoices above the amount assessed by Mr Wall.

137. He relied on the principles of restitution set out in *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516, [30] by French CJ, Crennan and Kiefel JJ as follows (footnotes omitted):

> In *David Securities Pty Ltd v Commonwealth Bank of Australia*, this Court explained the part played by unjust enrichment in a claim for money had and received (in that case for recovery of a payment made under mistake of law). That explanation may be expressed, at a fairly high level of abstraction, as an approach to determining such claims. In summary:

> > recovery depends upon enrichment of the defendant by reason of one or more recognised classes of "qualifying or vitiating" factors;
> >
> > the category of case must involve a qualifying or vitiating factor such as mistake, duress, illegality or failure of consideration, by reason of which the enrichment of the defendant is treated by the law as unjust;
> >
> > unjust enrichment so identified gives rise to a prima facie obligation to make restitution;
> >
> > the prima facie liability can be displaced by circumstances which the law recognises would make an order for restitution unjust.
>
> Unjust enrichment therefore has a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another. In that aspect, it does not found or reflect any "all-embracing theory of restitutionary rights and remedies". It does not, however, exclude the emergence of novel occasions of unjust enrichment supporting claims for restitutionary relief. It has been said of Lord Mansfield's judgment in *Moses v Macferlan* that it was his view that "the grounds for obtaining relief in money had and received were not to be considered static and the remedy could be made available in any case in which money had been paid in circumstances where it was unjust for the defendant to retain it".

See also *Chan v Eastern Blue Pty Ltd* [2021] VSCA 121 at [70] (Kyrou and Niall JJA); Mason, Carter & Tolhurst, *Mason and Carter's Restitution in Australia* (3rd edition, 2016, LexisNexis) [140]-[175].

138. As Mr Bell's counsel accepted when challenged, it is not immediately apparent into which of the accepted categories of "unjust factors" Mr Bell's retention of the benefit would be allocated. Gwendoline may have been mistaken that she was obliged to pay Mr Hartnett from the proceeds of sale she held on trust, however, the mistake was not Mr Bell's as the claimant in these proceedings. However, I was not taken to any authorities where the mistake of a trustee/payer of trust funds can be used by a plaintiff/beneficiary for the purposes of a restitutionary claim. In any case, the Court is not precluded from exercising its inherent jurisdiction.

Conclusion

139. Exercising the Court's inherent jurisdiction, I consider that Mr Hartnett must pay Mr Bell:

> (1) $251,255.53, being the difference between the $288,601.03 Mr Hartnett obtained from the proceeds of sale and the $37,345.50 certified by Mr Wall; and

(2) Interest on that sum above, noting that Mr Hartnett did not make any submissions concerning interest or its quantification prepared by Mr Bell;

(3) Interest on the $33,792.46, which Gwendoline instructed Mr Hartnett to pay into Court on 18 November 2016, from that date until he did so on 4 May 2021, again noting Mr Hartnett did not challenge Mr Bell's calculation of interest;

(4) His costs on an indemnity basis for the same reasons it is appropriate to exercise the Court's inherent jurisdiction concerning the payment to Mr Bell of the above.

Orders

140. I make the following orders:

(1) In the Possession Proceedings (2014/354291):

(a) The Court notes the Certificate of Costs Assessment dated 24 May 2016, quantifying costs for the purposes of Davies J's Order 5.2 up to 12 February 2018 is $37,345.50.
(b) Order that the money in the sum of $33,792.46 held in Court be released to Mr Bell forthwith.

(2) In the Equity Proceedings (2020/254590):

(a) Order that the defendant pay to the plaintiff:

(i) the sum of $251,255.53; and
(ii) interest on that sum in Order (2)(a)(ii) in the amount of $50,489.98; and

(iii) interest on the sum of $33,792.46 in the amount of $9610.96.

(3) Order that the defendant pay Mr Bell's costs on an indemnity basis.

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