SUPREME COURT OF QUEENSLAND

CITATION:	*Crouch and Lyndon (a Firm) v IPG Finance Australia Pty Ltd & Anor* [2013] QCA 220
PARTIES:	**CROUCH AND LYNDON (A FIRM)** (appellant) **v** **IPG FINANCE AUSTRALIA PTY LTD** ACN 124 131 102 (first respondent) **IPG INVESTMENTS AUSTRALIA PTY LTD** ACN 154 924 820 (second respondent)
FILE NO/S:	Appeal No 10596 of 2012 SC No 2120 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2013
JUDGES:	Holmes and Fraser JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PARTNERSHIP – ACTIONS BETWEEN THIRD PARTIES AND FIRM OR PARTNERS – ACTIONS AND PROCEEDINGS AGAINST FIRM OR PARTICULAR PARTNER – OTHER MATTERS – where the respondents entered into a number of mortgage lending transactions with a former partner of the appellant law firm – where that partner made a representation in order to induce the respondents to advance the loan monies – where the partner then misappropriated the loan monies and took money from other clients of the appellant in order to meet interest repayments on the loans – whether the trial judge erred in identifying the wrongful acts – whether the wrongful acts were committed in the ordinary course of business of the appellant or with its apparent authority pursuant to s 13(1) of the *Partnership Act* 1891 (Qld) – whether the appellant received the respondents' money in the course of its business in accordance with s 14(1)(b) of the *Partnership Act* 1891 (Qld)

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – where the respondents filed a notice of contention alleging that the trial judge erred in rejecting their argument that the appellant breached its duty of care – where the alleged duty of care related to breaches of rule 87A of the *Legal Profession (Solicitors) Rule* 2006 (Qld) – where the respondents contended that the appellant's failure to take steps to prevent it from again engaging in that conduct caused the respondents to incur losses – where the appellant argued that first, the trial judge was correct in finding that the alleged duty of care was not breached, and secondly, that it did not owe the alleged duty of care – where the alleged duty of care was a duty to take reasonable care when performing work for a client to prevent the firm from acting in transactions "that were unauthorised by law or were sham transactions" – where the alleged duty was beyond the scope of the appellant's retainer and the liability imposed by the *Partnership Act* 1891 (Qld) – whether the appellant owed a duty of care

Australian Solicitors Conduct Rules 2012, r 41.1
Legal Profession (Solicitors) Rule 2006 (Qld), r 87A
Legal Profession (Solicitors) Rule 2007 (Qld), r 38
Partnership Act 1891 (Qld), s 8, s 12, s 13, s 14
Queensland Law Society Act 1952 (Qld), s 24A
Trade Practices Act 1974 (Cth), s 52

Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441; [1971] 1 All ER 847, cited
Astley v Austrust Ltd (1999) 197 CLR 1; [1999] HCA 6, cited
Barwick v English Joint Stock Bank [1867] LR 2 Ex 259; (1867) 36 LJ Ex 147, cited
Bugge v Brown (1919) 26 CLR 110; [1919] HCA 5, cited
Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd (1985) 155 CLR 541; [1985] HCA 13, cited
Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366; [2003] 1 All ER 97; [2002] UKHL 48, considered
Hamlyn v John Houston & Co [1903] 1 KB 81, cited
Hawkins v Clayton (1988) 164 CLR 539; [1988] HCA 15, considered
Heilbut, Symons & Co v Buckleton [1913] AC 30; [1911-13] All ER 83; [1912] UKHL 2, cited
Heperu Pty Ltd v Belle (2009) 76 NSWLR 230; [2009] NSWCA 252, considered
Heydon v NRMA Ltd (2000) 51 NSWLR 1; [2000] NSWCA 374, cited
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64, cited
Hraiki v Hraiki [2011] NSWSC 656, cited
IPG Finance Australia Pty Ltd & Ors v Crouch and Lyndon & Anor [2012] QSC 312, related

JJ Coughlan Ltd v Ruparelia [2003] EWCA Civ 1057, considered
Kooragang Investments Pty Ltd v Richardson & Wrench Ltd [1982] AC 462; [1981] 3 All ER 65; [1981] UKPC 30, considered
Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262, cited
Lloyd v Grace, Smith & Co [1912] 1 AC 716; [1911-13] All ER 51; [1912] UKHL 1, cited
National Commercial Banking Corporation of Australia Ltd v Batty (1986) 160 CLR 251; [1986] HCA 21, considered
Oscar Chess Ltd v Williams [1957] 1 WLR 370; [1957] 1 All ER 325; [1956] EWCA Civ 5, cited
Seiwa Australia Pty Ltd v Beard (2009) 75 NSWLR 74; [2009] NSWCA 240, cited
United Bank of Kuwait Ltd v Hammoud [1988] 1 WLR 1051; [1988] 3 All ER 418, considered
Uxbridge Permanent Benefit Building Society v Pickard [1939] 2 KB 248; [1939] 2 All ER 344, considered
Walker v European Electronics Pty Ltd (In Liq) (1990) 23 NSWLR 1, considered

COUNSEL: B O'Donnell QC, with R Ashton, and J Meredith for the appellant
C D Coulsen, with K A M Greenwood, for the respondents

SOLICITORS: Mullins Lawyers for the appellant
Reardon & Associates Lawyers for the respondents

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the order he proposes.

[2] **FRASER JA:** From July 2005 until August 2008 the partners of the appellant law firm, Crouch & Lyndon, were Mr Wood, who practised as a commercial solicitor, and Mr Scott, who practised as a litigation solicitor. The decision-makers for the respondent companies were Mr Salameh and Mr Winder. Before the events which are relevant in this appeal Crouch & Lyndon, through Wood, provided legal services to Salameh and Winder in relation to various property dealings. Salameh also had some limited contact with Scott in a contentious matter relating to one property transaction.

[3] From the second half of 2006, Wood encouraged Salameh to embark upon a mortgage lending business. Salameh and Winder organised the incorporation of the first respondent to operate the new finance business separately from their other operations. The second respondent also became involved in some of the transactions. In reliance upon Wood's representations and other conduct, Salameh caused the respondents to pay money into Crouch & Lyndon's trust account between December 2006 and August 2007 with a view to the money subsequently being disbursed by Crouch & Lyndon to borrowers in six loan transactions. The first loan ("the Hjertquist loan" of $50,000) was duly repaid. The remaining five transactions ("the Thomas loan" of $500,000, "the Aspen loan" of $1,190,400, "the O'Reilly loan" of $40,000, "the Quaresmini loan" of $400,500, and "the Ogle loan" of $261,250) were fictions created by Wood. He misappropriated the loan monies

and he took money from other Crouch & Lyndon clients to make some purported repayments of interest. After the purported loans fell into default there was an investigation into Crouch & Lyndon's trust account. Wood's practising certificate was suspended by the Queensland Law Society in mid-2008. It was cancelled in late August 2008. The partnership was dissolved in the same month and Scott thereafter continued to trade under the name Crouch & Lyndon. Scott had no knowledge of any of Wood's wrongdoing.

[4] The respondents sued Crouch & Lyndon to recover the losses they had sustained as a result of Wood's misconduct. They claimed that the firm was liable under s 13 or s 14 of the *Partnership Act* 1891 (Qld) or by way of damages for negligence. Subsection 13(1) relevantly provides that "if, by any wrongful act or omission of any partner in a firm … acting in the ordinary course of the business of the firm, or with the authority of his or her copartners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable for the loss, injury or penalty to the same extent as the partner so acting or omitting to act". Subsection 14(1) relevantly provides that a firm is liable to make good the loss where "... (b) a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by 1 or more of the partners while it is in the custody of the firm".

[5] The trial judge rejected the negligence claim but upheld the claim under ss 13 and 14. The trial judge ordered judgments for the respondents against Crouch & Lyndon in amounts totalling more than $5,000,000. Crouch & Lyndon contend that the trial judge was wrong to find it liable pursuant to ss 13 and 14 of the *Partnership Act* 1891 (Qld). The respondents support those findings and they also contend that the trial judge erred in rejecting their negligence claim.

[6] The main issues in Crouch & Lyndon's appeal are whether the trial judge erred in identifying Wood's wrongful acts, in finding that Wood committed the wrongful acts in the ordinary course of Crouch & Lyndon's business or with its apparent authority for the purposes of s 13(1), and in finding that Crouch & Lyndon received the respondents' money in the course of its business for the purposes of s 14(1)(b). The issues arising on the respondents' notice of contention are whether the trial judge was wrong in failing to find (as Crouch & Lyndon argued in the appeal) that Crouch & Lyndon did not owe the respondents the alleged duty of care and (as the respondents argued) in finding that Crouch & Lyndon had not breached the alleged duty of care. I will discuss those issues after I have first referred to aspects of the respondents' case and the evidence and findings which were emphasised in the parties' submissions.

[7] At trial, the respondents were referred to in some cases as "IPGI" and "IPG". Which respondent did which act is not significant for the parties' arguments or for the disposition of the appeal. For convenience, albeit inaccurately in some cases, in what follows I generally refer to either or both of the respondents as "the respondents".

The representation

[8] The respondents pleaded that the following representation was made by Wood to Salameh during telephone conversations on 2 June and 11 December 2006:[1]

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1 Fourth further amended statement of claim, paragraph 6.

"In the course of providing the Initial Services, Crouch and Lyndon, by Anthony Wood, represented to IPGI and IPG, by Hani Salameh, ("***the Representation***") that:

(a) as part of its business, Crouch and Lyndon arranged finance between borrowers who approached it and lenders sourced by Crouch and Lyndon most of whom were existing clients and had done so "*for years*";

(b) loans of the type described at paragraph 6(a) above were arranged on the following basis ("***the Protocol***"):

  (i) a borrower would approach Crouch and Lyndon to arrange finance;

  (ii) Crouch and Lyndon, by Anthony Wood, would consider the viability of the proposed transaction;

  (iii) if Crouch and Lyndon, by Anthony Wood, decided that the proposed transaction was viable it would recommend it to clients of Crouch and Lyndon who had indicated previously to Crouch and Lyndon that they were interested in participating in such transactions;

  (iv) all loans were secured by security sufficient to secure the principal and interest advanced in each case in the event of default;

  (v) terms suitable to the proposed lender and borrower would be agreed with the assistance of Crouch and Lyndon, by Anthony Wood;

  (vi) Crouch and Lyndon would prepare all loan documentation for execution by the parties including:

    A. a written loan agreement;

    B. security documentation securing the repayment of the principal and interest.

  (vii) the lender would transfer funds into a trust account maintained by Crouch and Lyndon ("***the Crouch and Lyndon Trust Account***");

  (viii) the funds deposited into the Crouch and Lyndon Trust Account would only be disbursed to the borrower after the execution of the loan agreement by the parties and the provision of the appropriate security by the borrower;

(c) the borrower would make interest payments pursuant to the loan into the Crouch and Lyndon Trust Account;

(d) Crouch and Lyndon would remit interest payments received into the Crouch and Lyndon Trust Account to the lender;

(e) upon completion of the loan the borrower would repay the principal sum and any final interest payment into the Crouch and Lyndon Trust Account;

(f) Crouch and Lyndon would remit from the Crouch and Lyndon Trust Account the principal sum and any final interest payment to the lender;

(g) all legal costs of and incidental to the loan transaction were paid to Crouch and Lyndon by the borrower."

[9] The trial judge accepted the respondents' case that Wood made the representation in order to induce the respondents to advance the loan monies, that the representation was false and deceitful, that the borrowers nominated by Wood were fictitious and the documents prepared by Wood for execution by the respondents were shams, that Wood knew that the representation was false, that the respondents undertook each of the relevant lending transactions induced by and acting upon the representation, that Wood misappropriated the money paid by the respondents into Crouch & Lyndon's trust account, and that the respondents suffered their claimed loss and damage as a consequence.[2] These findings are not now in issue.

[10] The trial judge found that the respondents had engaged Crouch & Lyndon to undertake legal services for them and that pursuant to that contract Crouch & Lyndon had "warranted the truth of the representation, and that any future loan transactions to be arranged by [Crouch & Lyndon] on behalf of [the respondents] would be genuine and enforceable loan transactions and not shams."[3] The trial judge accepted the respondents' case that there were breaches of those contractual warranties. That is in issue.

The annexure A loans and paragraph (a) of the representation

[11] Crouch & Lyndon argued that the trial judge's finding that "the representation was false"[4] amounted to a finding that paragraph (a) of the representation was false. It was not the respondents' case at trial that paragraph (a) of the representation was false. Rather, the respondents alleged that Crouch & Lyndon had in fact engaged in a business of the kind described in paragraph (a) from before 2006. Particulars of the alleged business were set out in annexure A to the respondents' pleading. The respondents relied upon the "annexure A loans" as an aspect of their case under s 13 that Wood engaged in each "wrongful act" in the ordinary course of Crouch & Lyndon's business. The trial judge accepted the evidence of witnesses called in the respondents' case that, on Wood's recommendation, a Crouch & Lyndon client (Eastloch Pty Ltd) had entered into various separate lending transactions which Crouch & Lyndon had documented,[5] and found, in [59] of the reasons, that Crouch & Lyndon, through Wood, "had acted for commercial lenders for a long period in circumstances where [Wood] had identified borrowers and lenders." The evidence was that Eastloch Pty Ltd made separate loans to six different borrowers, namely, "Juhasz", "Rock Dream", "Buckby & Booth", "Epona", "Johnson", and "Lordcorp". In the case of Lordcorp, its controller, Mr Lord, directly approached Wood at Crouch & Lyndon. In the other five cases, the initial approach was made to Wood at Crouch & Lyndon by a broker ("FBI") acting on behalf of the intending borrower. Representatives of FBI and the borrowers gave evidence of dealing with Wood at Crouch & Lyndon's address to negotiate the loan with Wood in his apparent capacity as a partner of Crouch & Lyndon acting on the instructions of Eastloch Pty Ltd, to execute loan and mortgage documents prepared by Wood apparently acting in the same capacity, and to receive money from and pay money into the firm's trust account again through the agency of Wood. The broker's representatives and some of the borrowers also gave evidence that they were not asked to keep confidential the fact that Wood, purporting to act for Crouch & Lyndon, was doing such work. The annexure A loans also included the

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2 [2012] QSC 312 at [10] – [11], [68] – [70].
3 [2012] QSC 312 at [71] – [72].
4 [2012] QSC 312 at [70].
5 [2012] QSC 312 at [32].

respondents' loan to Hjertquist, three loans to a company controlled by Wood (two of which were loans by the respondents), and some additional requests for loans by FBI which were not proved to have proceeded. The annexure A loans which proceeded with Eastloch Pty Ltd as lender generated substantial legal fees which were billed to Eastloch Pty Ltd by Wood in Crouch & Lyndon's name and duly paid into the firm's trust account.

[12] In those transactions, Wood introduced borrowers to a lender client. That engaged rule 87A of the *Legal Profession (Solicitors) Rule* 2006, which regulated solicitors' conduct in relation to "excluded mortgages". An "excluded mortgage" was a mortgage other than a "direct mortgage", which was itself defined as meaning a mortgage for which the mortgagee was a financial institution or a mortgage for which the mortgagee specified the mortgagor and the mortgagor was not a person introduced to the mortgagee by a practising practitioner.[6] The fidelity fund could not be the subject of a claim because of unlawful conduct in relation to an excluded mortgage[7] and the practitioner was obliged to secure mortgage fidelity insurance providing cover (at the relevant time) of at least $950,000 for each claim arising out of an excluded mortgage.[8] Rule 87A obliged the practitioner to advise the secretary of the Law Society of the practice in excluded mortgages and to give the secretary of the Law Society details of the practitioner's mortgagee fidelity insurance as soon as practicable after the practitioner started that practice.[9]

[13] After the times which are relevant in this appeal rule 87A was repealed and replaced by a rule the effect of which was to prohibit solicitors from acting as solicitors in excluded mortgage transactions.[10]

[14] An accountant who was the manager of professional standards for the Queensland Law Society, Mr Franklin, gave evidence in Crouch & Lyndon's case that there was nothing unusual in a solicitor who was acting for a lender client in receiving interest on behalf of the lender client and sending it on to the client. Franklin explained that solicitors' mortgage loan transactions were "fairly common" in the late 1980s and 1990s.[11] In cross-examination he said that up until 1999 solicitors had an exemption from ASIC which permitted them to act in mortgage lending transactions, after which solicitors were required to have mortgage fidelity insurance to act in such transactions in which they introduced the lender to the borrower.[12] Scott gave evidence that there were firms on the Gold Coast who acted in such transactions. It also appears from the evidence that such work by solicitors was not confined to Queensland. Salameh gave evidence that lawyers in New South Wales and Victoria with whom he dealt also arranged loans in the manner described in the protocol.[13]

[15] Crouch & Lyndon did not have the mortgage liability insurance stipulated by rule 87A. Two former partners of the original firm, Mr Lyndon (who retired in 2002) and Mr Crouch (who retired in 2005) gave evidence that it had never engaged

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6 See *Queensland Law Society Act* 1952, s 24A(3) "direct mortgage" and "excluded mortgage", applied to r 87A by r 4(4) of the *Legal Profession (Solicitors) Rule* 2006.

7 *Queensland Law Society Act* 1952, s 24A(1).

8 *Legal Profession (Solicitors) Rule* 2006, r 87A(4).

9 *Legal Profession (Solicitors) Rule* 2006, r 87A(2).

10 See *Legal Profession (Solicitors) Rule* 2007, r 38 and *Australian Solicitors Conduct Rules* 2012, r 41.1.

11 Transcript 9-71.

12 Transcript 9-74.

13 Transcript 3-36.

in the business of acting for clients to lend money to other clients, they had no knowledge of Wood's conduct, and they did not authorise it.[14] Crouch also gave evidence that his firm had never conducted any form of practice involving solicitors' mortgage lending.[15] Scott gave evidence that the firm did not act in mortgage lending and matching loans for clients, Wood did not divulge his activities to Scott, to Scott's knowledge no one else in their firm was aware of those activities, and Scott would not have approved of them.[16] The trial judge accepted this evidence and found that Wood's conduct in undertaking mortgage lending transactions contrary to rule 87A was not expressly or impliedly authorised by his partners.[17]

Allegedly unusual features of the respondents' transactions

[16] Salameh gave evidence of a conversation recorded in a 12 December 2006 diary note in which Salameh asked Wood whether the entity to lend money to short-term borrowers should be a company or a trust. Wood proposed as his preferred option that the first respondent would lend investors' funds supplied to it to a company of Wood's, and Wood would then organise the loans to various borrowers. Salameh expressed a preference, which was ultimately adopted, that the first respondent be the lender.[18] On 15 December 2006 Salameh sent Wood a "process chart for the short term finance deals",[19] which Salameh discussed with Wood and refined over time.[20] Salameh and Winder subsequently incorporated the first respondent to carry on the lending business and informed Wood that they had done so. Salameh gave evidence that it was Wood who raised the idea of organising loans to borrowers sourced and introduced by Wood.[21]

[17] At the trial Crouch & Lyndon alleged that Salameh dishonestly assisted Wood to receive private commissions. In addition to Crouch & Lyndon charging legal fees to "the borrower",[22] Salameh agreed that, as part of the process which he was discussing with Wood, borrowers would pay an application fee, 50 per cent of which would be paid to Crouch & Lyndon as payment for finding the borrower.[23] (Crouch & Lyndon described this part of the application fee as a "finder's fee".) In an email from Salameh to Wood and Winder dated 19 March 2007, Salameh referred to the first respondent as the entity through which the finance deals would be conducted and said:

> "Let's have a chat about the income potential for C&L. If we introduce a … broker fee can be set by you on a deal-by-deal basis. Separately there is also a legal fee for the screening checks, searches, et cetera, and documentation."

[18] A note in Salameh's handwriting in relation to the first fictitious loan, "the Aspen loan", showed that the facility was for $1,280,000, with the first two months of interest ($89,600) to be taken by IPG out of the principal at the time of advance, leaving a net advance of $1,190,400. Of that amount, the Crouch & Lyndon

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14 [2012] QSC 312 at [52].
15 Transcript 9-17.
16 [2012] QSC 312 at [49].
17 [2012] QSC 312 at [92] – [101].
18 Transcript 3-14.
19 AB 811.
20 [2012] QSC 312 at [21].
21 Transcript 3-33, 3-35.
22 Transcript 1-68.
23 [2012] QSC 312 at [22]; Transcript 1-67 (Salameh).

finder's fee ("Appln fee to C&L") was deducted, leaving an amount to be drawn down of $1,184,000.[24] On the same day, Salameh sent an email to Wood and Winder recording that he had arranged for the transfer to Crouch & Lyndon's trust account of $1,190,400 made up of $1,184,000 and $6,400. Two days later, on 4 May 2007, Salameh made a diary note to the effect that the $6,400 fee was not to be paid into the trust account but was to be put into a nominated account; the diary note included the words "Yes okay with Phil". Salameh gave evidence in cross-examination that after the monies were paid to Crouch & Lyndon, Wood asked that the monies be paid to a different account, which was held by "Citcom"; Salameh agreed after first asking Wood, "Is that okay?", to which Wood responded, "Yes. Okay. It's okay with Phil".[25] Salameh agreed that by his question he meant to enquire whether it was acceptable to Scott and any other partners.[26] Wood sent the bank account details for Citcom to Salameh on 10 May 2007.[27] Salameh gave evidence that on or about 10 or 11 May 2007, Wood told him that the legal fees would be charged and received by Crouch & Lyndon and that the application fee would be paid to Citcom.[28] Salameh agreed that at about that time he found out from Wood that Citcom was Wood's company and he agreed that by paying the application fees to Citcom he paid those fees to Wood for his benefit.[29] Salameh denied in cross-examination that the reason he asked whether the payment to Citcom was okay with Scott was that he was concerned about it.[30] Salameh sent an email to Wood and Winder (called at trial "the mistake email") in the following terms:

> "Please accept my apologies. I have miscalculated and transferred the amount of $1,190,400.00 instead of $1,184,000.00. Can you please arrange for the excess amount $6,400.00 that was deposited into the C&L trust account to be deposited into the following account…"

The nominated account was held by one of the respondents.

[19] The effect of this evidence was, in summary, that an initial arrangement made between Wood and Salameh in March 2007 that the first respondent would pay Crouch & Lyndon a finder's fee was varied in May 2007 to provide for the payment to be made to Wood's company instead. The evidence was accepted by the trial judge in the findings that "fifty per cent of the application fee would be paid to [the first respondent], and fifty per cent paid to [Crouch & Lyndon] in recognition that it was identifying potential borrowers" and that Wood later requested that Crouch & Lyndon's share of the fee be paid to Wood's company and that he advised Salameh that this arrangement was okay with his partner Scott.[31] The trial judge also accepted Salameh's evidence that he accepted Wood's assurances that this was acceptable to Scott, and Salameh's explanation for the "mistake email".[32] Accordingly, Crouch & Lyndon did not establish the case it had advanced with reference to the fee that Salameh assisted Wood to receive private commissions. Crouch & Lyndon did not challenge the trial judge's findings on this topic.

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24 AB 1027.
25 Transcript 3-75.
26 Transcript 3-77.
27 Transcript 4-37, 4-38.
28 Transcript 4-42, 4-43.
29 Transcript 3-28, 3-29, 4-37.
30 Transcript 4-53.
31 [2012] QSC 312 at [22].
32 [2012] QSC 312 at [109].

[20] In relation to (b)(ii) of the representation, that "Crouch and Lyndon, by Anthony Wood, would consider the viability of the proposed transaction", Crouch & Lyndon referred to Salameh's evidence that Wood told him that he would conduct checks such as "[c]ompany searches, bill searches, use information brokers to do credit checks, court checks, RP data checks, agent drive-by valuations" and "obtain copies of current statements of that … first mortgage … as lodged and stamped to X value".[33]

[21] In relation to (b)(i)-(iii) of the representations, Mr Dawson, a solicitor called by the respondents, expressed the opinion that doing that work, which he described as "brokering finance between lender clients and borrower clients", was not part of the ordinary practice of solicitors; "[t]hey are lawyers, they are not mortgage brokers".[34] Crouch & Lyndon also referred to Salameh's agreement in cross-examination that a finance broker ordinarily gathered client details and presented a proposed deal for approval to the financier and that Wood was doing that for IPG "[p]lus the mortgage documents, et cetera".[35]

[22] Crouch & Lyndon referred to evidence that the respondents' first loan made pursuant to the arrangements with Wood was made to an anonymous borrower without any security first being in place. (In that respect, Salameh gave evidence that at the time of the first loan he had not intended to enter into a lending business and the protocol had not been developed.[36]) The evidence showed that some aspects of the protocol were not strictly followed in any of the subsequent transactions, and Wood also obtained a loan from the respondents.

Section 13

[23] Crouch & Lyndon argued that the trial judge found that the only wrongful acts for the purposes of s 13 were the contravention of s 52 of the *Trade Practices Act* 1974 by the misleading and deceptive representation made by Wood in the 2 June and 11 December 2006 telephone conversations with Salameh and breaches of contractual warranties. On that premise, Crouch & Lyndon argued that the trial judge's finding that s 13 applied must be set aside because:

(a) the trial judge erred in finding that Crouch & Lyndon's retainer included contractual warranties, and because a breach of contract could not in any event amount to a "wrongful act" for the purposes of s 13; and

(b) the trial judge did not find that the representation was made in the ordinary course of Crouch & Lyndon's business and that could not be the case because paragraph (a) of the representation was outside the firm's business and inseparable from the other elements of the representation.

The wrongful acts

[24] In addition to the contravention of s 52 of the *Trade Practices Act* 1974 by the making of the representation and breaches of contractual warranties, the respondents relied in their final submissions at trial[37] upon the following wrongful acts which they pleaded in relation to each purported loan.

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33 Transcript 1-59.

34 Transcript 6-41.

35 Transcript 4-62.

36 Transcript 4-63, 4-64.

37 Respondents' written submissions paragraphs 19, 280: AB 3397, 3452.

(a) Contraventions of s 52 of the *Trade Practices Act* 1974 constituted by Wood's misleading and deceptive conduct in purportedly introducing a borrower, presenting for execution by the respondents loan and mortgage documents prepared by Wood, receiving into Crouch & Lyndon's trust account and purportedly dispersing the loan money to and receiving interest payments from the named borrower, being conduct which induced the respondents to believe that the purported loan was genuine.[38]

(b) Deceit, by Wood's false representation, made with the intention that the respondents should believe and act upon it, and upon which the respondents did act and thereby suffer damage, that a borrower had approached Crouch & Lyndon to arrange finance and that Crouch & Lyndon would arrange a loan in accordance with the protocol.[39]

[25] In summary, the alleged wrongful acts included purporting to introduce borrowers to the respondents, purporting to negotiate the terms of the loan upon the respondents' instructions, the preparation and presentation for the respondents' execution of the purported loan and mortgage documents, and arranging for the payment of the respondents' loan money into Crouch & Lyndon's trust account and, in some cases, pretending that borrowers paid monies into the trust account as repayments of the loan. Salameh's evidence was to the effect that each of those acts was important to him.[40]

[26] The trial judge held that each of Wood's wrongful acts depended to an extent upon the representation,[41] that Wood's misleading and deceptive conduct in making the representation itself constituted a wrongful act within the meaning of s 13,[42] and that the breaches of the contractual warranties were also wrongful acts.[43] Contrary to the premise of Crouch & Lyndon's argument, the trial judge also held that each act described in [24] of these reasons amounted to a "wrongful act".[44] Consistently with those findings, the trial judge went on to find that Wood's deceitful and misleading conduct in all of those acts was done in the ordinary course of Crouch & Lyndon's business.[45]

Contractual warranties

[27] In holding that the contract included the alleged warranties the trial judge cited observations by Lord Diplock in *Ashington Piggeries Ltd v Christopher Hill Ltd*[46] and by Denning LJ in *Oscar Chess Ltd v Williams*.[47] I do not accept Crouch & Lyndon's argument that neither case supported the trial judge's conclusion. It is sufficient to note that in the cited passage in *Oscar Chess Ltd v Williams Ltd*,

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38 Fourth further amended statement of claim, paragraphs 82 – 83: AB 3303; Respondents' submissions paragraph 286: AB 3453.

39 Fourth further amended statement of claim, paragraphs 91 – 96.

40 See, for example, Transcript 3-36, 3-37.

41 [2012] QSC 312 at [67] – [68].

42 [2012] QSC 312 at [76].

43 [2012] QSC 312 at [73].

44 [2012] QSC 312 at [67] (particularly the reference to "deceitful application of partnership monies" and the comprehensive reference to "the first defendant's misleading and deceptive conduct"), [70] (particularly the reference to the preparation of "sham documentation"), [74], [75] (particularly the statement that Wood "undertook the sham transactions"), [76].

45 [2012] QSC 312 at [83] – [91].

46 [1972] AC 441.

47 [1957] 1 WLR 370 at 374.

Lord Denning referred to the rule approved in *Heilbut Symons & Co v Buckleton*[48] that "an affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended",[49] and Lord Denning went on to explain that, in deciding whether a representation was intended to take effect as a contractual term, it was necessary to have regard to the conduct of the parties rather than their subjective intentions.[50] The same test was adopted, for example, by Gibbs CJ in *Hospital Products Ltd v United States Surgical Corporation*.[51] Relevantly to this case, Gibbs CJ pointed out that a person who makes statements fraudulently with no intention that they should amount to contractual undertakings cannot escape contractual liability if the person's representations amount to contractual promises upon an objective analysis.

[28] Crouch & Lyndon argued that it was not an implied term of any contract for the provision of legal services that Wood's representation, made months before the contract, that Crouch & Lyndon had engaged in mortgage broking (paragraph (a) of the representation) "for years" was warranted to be true. It was submitted that there was no need for such a term to give efficacy to the contract for the provision of legal services. That may be so in relation to that aspect of the representation, but an effect of the represented arrangement was that Crouch & Lyndon, by Wood, would find and refer to the respondents a person who wished to borrow money and, in exchange for professional fees, Crouch & Lyndon would, on the respondents' instruction, negotiate and document the loan with that borrower and receive the loan money into and disperse it out of Crouch & Lyndon's trust account in accordance with the executed documents. That is readily understood as comprehending a contractual promise to introduce as borrowers to the respondents only persons who had expressed interest in borrowing from the respondents.

[29] Crouch & Lyndon also argued that the breach of that contractual warranty found by the trial judge could not be characterised as a "wrongful act" within the meaning of s 13(1). The Court was not referred to any Australian decision on point. Crouch & Lyndon's submission was based upon Lord Millett's statement in *Dubai Aluminium Co Ltd v Salaam*[52] that the similar provision in s 10 of the *Partnership Act* 1890 (UK) "is concerned only with fault-based liability…". The argument is also consistent with the scheme of the Act. In the Queensland Act, s 8(1) provides that "…the acts of every partner who does any act for carrying on in the usual way of business of the kind carried on by the firm of which the partner is a member bind the firm and his or her partners, unless—(a) the partner so acting has in fact no authority to act for the firm in the particular matter; and (b) the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe the partner to be a partner." Subsection 9(1) provides that an "act … relating to the business of a firm … and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person authorised to bind the firm, whether a partner or not, is binding on the firm and all the partners." Subsection 12(1) makes every partner jointly liable "for all debts and obligations of the firm incurred while a partner…".

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48 [1913] AC 30, 38, 50, 51.

49 [1957] 1 WLR 370 at 374.

50 [1957] 1 WLR 370 at 375.

51 (1984) 156 CLR 41 at 61, citing *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 51, *Oscar Chess Ltd v Williams Ltd* [1957] 1 WLR 370 at 375 and *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 at 996.

52 [2003] 2 AC 366 at [103].

[30] Having regard to the meaning of the expression "wrongful act", the scheme of the *Partnership Act*, and Lord Millett's reasons, I would accept that a breach of the contractual warranty was not a "wrongful act" caught by s 13(1). The respondents did not submit that Crouch & Lyndon was liable for damages for breach of the contractual warranties pursuant to ss 8, 9 and 12.

The trial judge's conclusions

[31] In deciding that Wood had engaged in wrongful acts in the ordinary course of the firm's business for the purposes of s 13(1), the trial judge applied the principles stated by Mahoney JA in *Walker v European Electronics Pty Ltd (in Liq)*:[53]

> "In considering whether the act of a person is done in the ordinary course of the business of a firm of which he is a member, it is, of course, necessary to determine what the business of the firm is. Sometimes the business of the firm is defined or described in the partnership agreement. In such a case, the court must decide, as a question of fact, whether the act in question can be and was done in the course of carrying it on. This may be decided by reference to specific evidence that an act of the kind in question is apt to be, or was, done in carrying on such a business. Or, in some cases, the court may be in a position to take notice of the fact that a business of the kind in question is apt to be carried on by doing acts of the relevant kind.
>
> In other cases, where the business is not defined or described in the partnership agreement, it is necessary to decide, on the facts of the case, what the business is and what acts are apt to be done in carrying it on."

[32] The task was expressed in similar terms by Gleeson CJ, with whose reasons Meagher JA agreed:[54]

> "However, the essential task remains one of identifying the nature and scope of the business of the firm and relating the wrongful act to the business so identified.
>
> …
>
> The nature and scope of the business of a firm will fall to be determined by reference to the agreement between the partners. In *Kirkintilloch* (at 156) the Lord President said that the criterion for the application of s 10 of the *Partnership Act* 1890 (UK) in that case was whether the auditing of accounts was one of the kinds of activities which were in contemplation of the partners when they combined together in partnership. If partners have agreed to carry on a certain kind of business and that business includes acting in a particular manner or capacity then conduct by one of them in pursuance of that agreement will attract the operation of s 10. It is their agreement to go into that kind of business which is the foundation of their joint and several liability."

[33] The trial judge also referred to the following passage in Deane J's reasons in *National Commercial Banking Corp of Australia Ltd v Batty*:[55]

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53 (1990) 23 NSWLR 1 at 11.

54 (1990) 23 NSWLR 1 at 10 – 11.

55 (1986) 160 CLR 251 at 287 – 288 per Deane J. I have omitted the citations.

> "What is decisive in determining … is the capacity in which the errant partner was acting, viewed in the context of his relationship with the person who sustained loss or injury and from the viewpoint of that person, at the time he performed the wrongful act: "the part taken by [the partner] in the transactions must be regarded as upon the surface it appeared to" the injured party: per Rich, Dixon, Evatt and McTiernan JJ. in *Polkinghorne v. Holland*. Where, as in the present case, the wrongful act takes the form of a fraudulent representation, the content of the representation and the circumstances in which it was made, rather than its fraudulent character, will determine whether, viewed in the context of that relationship and from the viewpoint of that other person, the representation was made by the partner acting in the ordinary course of the firm's business. In such a case, the essential question will commonly be whether the making of that representation in those circumstances came within the scope of a '*class*' of act which would normally be transacted in the course of a business of the relevant kind…"

[34] I note that Deane J was in dissent. Gibbs CJ (with whose reasons Wilson J agreed in substance) referred to the test expressed by Willes J in *Barwick v English Joint Stock Bank*[56] that, "…[he] has not authorized the particular act, but he has put the agent in his place to do that class of acts…" and to the statement in *Hamlyn v Houston & Co*[57] that "a principal may be liable for the fraud or other illegal act committed by his agent within the general scope of the authority given to him".[58] Brennan J referred to the affirmation of those principles in *Lloyd v Grace, Smith & Co*[59] and held that a firm was liable for a partner's fraud "when the fraudulent act belongs to a class of acts which the partner is authorized to do in the ordinary course of the firm's business".[60] Dawson J held that the partner "was acting outside the ordinary course of the firm's business, not because his acts were fraudulent, but because they were of a kind which did not ordinarily form any part of that business."[61]

[35] In this case there was no formal partnership agreement between Wood and Scott, so it was necessary for the trial judge to decide on the evidence "what the business is and what acts are apt to be done in carrying it on."[62] As to the business of Crouch & Lyndon, the effect of the trial judge's findings is that part of the firm's business managed exclusively by Wood included the provision of legal services in commercial matters, the extent and nature of which were not defined but which included the preparation of loan and security documents and the receipt and payment of funds into and out of the firm's trust account when acting for commercial lenders.[63]

[36] As to the question whether Wood's wrongful acts were done in the ordinary course of that business, the trial judge referred to the facts that the respondents were clients

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56 [1867] LR 2 Ex 259 at 266.
57 [1903] 1 KB 81 at 85.
58 (1986) 160 CLR 251 at 261.
59 [1912] 1 AC 716.
60 (1986) 160 CLR 251 at 276.
61 (1986) 160 CLR 251 at 298.
62 (1990) 23 NSWLR 1 at 11.
63 [2012] QSC 312 at [47] – [49], [87] – [88].

of Crouch & Lyndon, that each transaction was undertaken using Crouch & Lyndon's trust account, premises, facsimile and telephone facilities, and that the loan and security documentation were in the forms usual for documentation of that kind[64] and, citing *Dubai Aluminium Co Ltd v Salaam*,[65] observed that those activities "lay at the heart of" Wood's conduct and were "fairly and properly to be regarded as acts done by him while acting in the ordinary course of the first defendant's business".[66] The trial judge went on to hold that:

> "…an essential feature of the fraudulent conduct was the production of title and other searches to establish the existence of appropriate security, the preparation of the loan and security documentation, and the use of the first defendant's trust account for receipt of the loan funds and repayment of any interest and principal. Those acts were all undertaken by the second defendant in the course of his duties as a partner of the first defendant. The second defendant also rendered a fee on behalf of the first defendant for the legal services undertaken by him. The second defendant's conduct was not so extraordinary as to take it out of the ordinary course of the first defendant's business."[67]

[37] Subsection 13(1) imposes liability upon a firm, not only when the partner causing the loss acts in the ordinary course of the business of the firm, but also when the partner causing the loss acts with the authority of his or her copartners. As the respondents accepted in argument, that reference to "authority" comprehends apparent authority.[68] The requirements for apparent authority for the purposes of s 13(1) reflect the second limb of s 8(1) of the *Partnership Act* 1891:[69]

> "**8 Power of partner to bind the firm**
>
> (1) Every partner in a partnership, other than a firm that is a limited partnership or incorporated limited partnership, is an agent of the firm and his or her other partners for the purpose of the business of the partnership, **and the acts of every partner who does any act for carrying on in the usual way of business of the kind carried on by the firm of which the partner is a member bind the firm and his or her partners, unless—**
>
> **(a) the partner so acting has in fact no authority to act for the firm in the particular matter; and**
>
> **(b) the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe the partner to be a partner."**

[38] The trial judge held that Wood had apparent authority "to engage in the transactions" because the respondents had established the three conditions necessary

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64 [2012] QSC 312 at [83].

65 [2003] 2 AC 366 at [36]

66 [2012] QSC 312 at [84].

67 [2012] QSC 312 at [91].

68 See *National Commercial Banking Corp of Australia Limited v Batty* (1986) 160 CLR 251 at 260 per Gibbs CJ.

69 *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd* (1985) 155 CLR 541 at 547 – 548; *Seiwa Australia Pty Ltd v Beard* (2009) 75 NSWLR 74 at [244] – [245].

for that conclusion, namely, that (1) each of the loan transactions involved work within the scope of the kind of business carried out by Crouch & Lyndon; (2) each transaction was undertaken in the usual way; and (3) the respondents knew that the second defendant was acting as a partner of Crouch & Lyndon and were not aware that he lacked authority.[70]

Summary of the arguments

[39] Crouch & Lyndon argued that the trial judge applied the wrong tests. It submitted that the trial judge wrongly focussed upon those transactions which commonly occur in solicitors' practices, rather than upon the represented role and actual conduct of mortgage broking by Wood. In addition to its argument mentioned earlier that the trial judge did not find that the representation was made in the ordinary course of Crouch & Lyndon's business, Crouch & Lyndon argued that the aspect of Wood's representation that Crouch & Lyndon would engage in mortgage broking was of central importance in his dishonest scheme and was outside Crouch & Lyndon's business. Crouch & Lyndon referred to rule 87A of the *Legal Profession (Solicitors) Rule* 2006 as support for its argument that mortgage broking was uninsured, illegal, and was work of a kind which was usually done by mortgage brokers rather than by solicitors. It argued that reliance upon the annexure A loans was misplaced because those loans (and requests for loans) differed from the respondents' transactions; in the annexure A loans, the borrowers were not clients of Crouch & Lyndon, whereas Salameh agreed in evidence,[71] and the trial judge found, that Salameh understood that in each loan the purported borrower was a client of Crouch & Lyndon in other matters.[72] Crouch & Lyndon emphasised that in only one of the annexure A loans did a borrower (Lord) approach Crouch & Lyndon, the approach instead being made in every other case by the same finance broker. The only payments to Crouch & Lyndon were legal fees for acting for its client lender. Wood's role did not include assessing the viability of the transaction or the borrower's capacity to repay, and in those transactions Wood did not make the representation which he made to the respondents. In challenging the trial judge's finding that Wood acted within his apparent authority, Crouch & Lyndon argued that the trial judge misstated the subject matter of the alleged apparent authority and the second condition required to establish apparent authority by referring to transactions instead of wrongful acts.

[40] The respondents submitted the trial judge's reasons were correct. They argued that mortgage broking was not contended or found to be a wrongful act. The wrongful acts were the deceit, misleading and deceptive conduct, and breach of contractual warranties. They argued that Wood's conduct in acting as a solicitor in the commercial lending transactions was in the ordinary course of the firm's business and that it was unhelpful to investigate any other underlying transaction; the relevant transaction was Crouch & Lyndon acting for a money lender by documenting and administering the loans and otherwise protecting their clients' interests. They argued that the deceit practiced by Wood was not constituted by the identification of proposed borrowers but rather by solicitors' work consisting of the preparation and forwarding to the respondents of loan and security documents which were unenforceable. The respondents argued that the trial judge correctly applied the principles stated by Lord Nicholls of Birkenhead in *Dubai Aluminium*

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70 [2012] QSC 312 at [102].

71 AB 3-74, 3-75, 4-67.

72 [2012] QSC 312 at [24].

Co Ltd v Salaam.[73] In the respondents' submission, Crouch & Lyndon's argument ignored that part of the representation concerning the work to be done by Crouch & Lyndon in assisting their client in negotiating the loans, documenting the loans, and administering the loans by using Crouch & Lyndon's trust account to receive and disperse loan funds and for their repayment. The respondents emphasised that this aspect of the representation, and Wood's subsequent conduct in purporting to act in genuine loan transactions, involved work which is typically done by solicitors. They argued that their money was not lost because Wood failed to make a good assessment of the security for the loan but rather because the money was receipted to Crouch & Lyndon's trust account in a name other than the first respondent; the loss was created by the dealings in the trust account, and such dealings are central to a solicitor's practice. The respondents argued that the illegality in the scheme promoted by Wood did not take his conduct outside the ordinary course of Crouch & Lyndon's business, having regard to the principle that the relevant partner's conduct must be analysed from the perspective of the client.

Consideration

[41] Although the trial judge found that Wood's misleading and deceptive conduct in making the representation as well as his other wrongful acts (his deceit and misleading and deceptive conduct in purportedly introducing borrowers and in negotiating, documenting, and administering the loans upon the respondents' instructions) were wrongful acts for the purposes of s 13, in the sections of the reasons headed "Ordinary course of business"[74] and concerning apparent authority[75] the trial judge referred only to the latter acts. It is necessary to decide whether the making of the representation was within the ordinary course of Crouch & Lyndon's business.

Was the representation made in the ordinary course of Crouch & Lyndon's business?

[42] The respondents relied upon Lord Nicholls' holding in *Dubai Aluminium Co Ltd v Salaam* that the liability of agents is not strictly confined to acts done with the employer's authority.[76] After so holding, Lord Nicholls continued:

> "If, then, authority is not the touchstone, what is? Lord Denning MR once said that on this question the cases are baffling: see *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 724. Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. Lord Millett said as much in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 245. So did Lord Steyn, at pp 223-224 and 230. McLachlin J said, in *Bazley v Curry* (1999) 174 DLR (4th) 45, 62:
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> > 'the policy purposes underlying the imposition of vicarious liability on employers are served only

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73 [2003] 2 AC 366 at [23], [36].
74 [2012] QSC 312 at [77] – [91].
75 [2012] QSC 312 at [102] – [103].
76 [2003] 2 AC 366 at [22].

> where the wrong is so connected with the employment that it *can be said* that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimisation).' (Emphasis added.)
>
> To the same effect is Professor Atiyah's monograph *Vicarious Liability* (1967), p 171: 'The master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carried on'. (Emphasis added.)".[77]

[43] Lord Millett also held that authority was not the test and held that it was sufficient if the employee or partner was authorised to do acts of the kind in question.[78] Isaacs J had much earlier reached the same conclusion in one of the cases cited by Lord Nicholls,[79] *Bugge v Brown*.[80]

[44] Various circumstances might be thought to support a conclusion that acts done by Wood in negotiating, documenting and administering loans on behalf of lenders in mortgages in relation to which Wood also introduced the borrower to the lender, and therefore also every element of the representation, were done in Crouch & Lyndon's business when Wood made the representation. Under the arrangement between Scott and Wood, Wood was left to act on behalf of the firm in commercial matters as he saw fit without any expressed limitation or checking of his work. It is now unlawful for solicitors to act in that capacity in excluded mortgage transactions, but that was not the case when Wood made the representation. The evidence summarised in [14] of these reasons is sufficient to justify the finding that at the times relevant in this appeal acting in mortgage lending transactions in which the solicitor introduced borrowers to lender clients was within the scope of work done in Queensland and elsewhere by solicitors who, like Wood, acted in commercial matters. Some might think that the fact that solicitors conducted such activities would make Lord Ellenborough turn in his grave, but that is not a ground for finding that the ordinary course of the business of solicitors between 2002 and 2007 did not comprehend such work.[81] At the relevant times, such work was done by solicitors in Queensland with such regularity as to require specific regulation, and under that regulation such work was lawful provided that the solicitor took out the necessary insurance and complied with the other regulatory requirements. Wood had repeatedly done work of that kind purportedly on behalf of Crouch & Lyndon in the annexure A loans. The evidence of the broker's representatives and of borrowers adverted to in [11] of these reasons suggests that Crouch & Lyndon had a reputation for doing such work, at least with the mortgage broker who represented all borrowers other than Lordcorp and with Lordcorp itself. In addition, substantial fees were paid into Crouch & Lyndon's trust account for Wood's work in the annexure A loans. Furthermore, negotiating, documenting and administering loans on the instructions of lenders are examples of work which is conventionally done by solicitors acting for lenders in mortgage loans.

[45] The better view though is that those circumstances are insufficient either alone or in combination to establish that such work was part of Crouch & Lyndon's business.

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77 [2003] 2 AC 366 at [23].
78 [2003] 2 AC 366 at [122].
79 [2003] 2 AC 366 at [32].
80 (1919) 26 CLR 110 at 118.
81 See *Seiwa Australia Pty Ltd v Beard* (2009) 75 NSWLR 74 at [262] per Campbell JA.

Some of the evidence given by Scott and the former partners on that topic amounted merely to assertions of their own opinions about the scope of the firm's practice. Of more importance is the fact that such work by solicitors was illegal in the absence of compliance with rule 87A. It seems to have been common ground that Crouch & Lyndon had not obtained the insurance necessary for such work and there was no suggestion that Wood sought or obtained Scott's agreement to obtain the necessary insurance or otherwise to comply with the rule. It is therefore unsurprising that the trial judge found that such work was outside Wood's actual authority. Even allowing for some generality in the description of Crouch & Lyndon's business for the purposes of s 13(1), acting for lenders in excluded mortgages could not be regarded as being part of its business in circumstances in which both partners must have understood that it was uninsured and illegal.

[46] It follows from my conclusion that excluded mortgage work was not part of Crouch & Lyndon's business that, in terms of the test expressed by Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam*, no element of Wood's representation had such a close connection with acts which Wood was authorised to do that his wrongful conduct might "fairly and properly be regarded as done by [the partner] while acting in the ordinary course of the firm's business" for the purposes of s 13(1). That follows because paragraphs (a) and (b)(i)-(iii) of the representation described the essence of excluded mortgages and the acts described in the subsequent paragraphs were to be done to create and give effect to those excluded mortgages.

[47] In *Hraiki v Hraiki*,[82] White J referred to *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd*[83] and *Dubai Aluminium Co Ltd v Salaam*[84] for the proposition that "[i]f the partner is not pursuing the firm's business it matters not that the acts done are the kind of acts usually done in the course of the firm's ordinary business…". In the passage cited from *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd*, Lord Wilberforce, delivering the judgment of the Privy Council, observed that, to argue from the fact that the defendants carried out valuations and that valuations were a class of acts which its employee, Rathborne, could perform on its behalf "that any valuation done by Rathborne, without any authority from the defendants, not on behalf of the defendants but in his own interest, without any connection with the defendants' business, is a valuation for which the defendants must assume responsibility, is not one which principle or authority can support." That was a different case because Rathborne did the valuations for a group of companies whose relationship as clients of the defendants had earlier been terminated, he did so, not as the defendants' employee, but as an employee or associate of that group of companies, and he acted on the instructions of, at the premises of, and using the staff of, that group of companies; it was apparent from the circumstances in which Rathborne did his wrongful acts that he was acting in virtually every respect outside the course of his employers' business. However, those differences seem to me to bear more significantly upon apparent authority than upon the present question. Lord Wilberforce's observations support the conclusion that the fact that it was within Wood's actual authority to act on Crouch & Lyndon's behalf upon a lender client's instructions in negotiating, documenting, and administering mortgages other than excluded mortgages does not justify the conclusion that the same kind of acts in relation to excluded mortgages were done within the course of Crouch & Lyndon's business.

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82 [2011] NSWSC 656.

83 [1982] AC 462 at 475.

84 [2003] 2 AC 366 at [35], [130].

[48] In the first passage cited in *Hraiki v Hraiki* from *Dubai Aluminium Co Ltd v Salaam*, Lord Nicholls construed the assumed facts upon which that case fell to be decided as meaning that the solicitor "was acting for and on behalf of the firm, as distinct from acting solely in his own interests or the interests of others".[85] In the second cited passage, Lord Millett observed that the solicitor had been acting in his role as a solicitor and not "moonlighting", that drawing the relevant agreements honestly and for a proper purpose would have been in the ordinary course of the firm's business, and that it might have been held at a trial, on an overall assessment of the evidence, that, in drawing the agreements dishonestly for an improper purpose and for his own benefit or for the benefit of his confederates, the solicitor had been engaged "on a frolic of his own" and not "acting in his role as a partner in the firm". Lord Millett went on to observe that such a conclusion would not have been inevitable because deliberate and dishonest conduct by a partner for the partner's own sole benefit was legally capable of being in the ordinary course of the business of his firm.

[49] Those observations illustrate the difficulty of stating comprehensive criteria for deciding which dishonest acts of an employee or partner done solely in the employee's or partner's own interests bind and which do not bind the employer or firm. It was necessary for the trial judge to resolve that issue by applying the evaluative tests established by the authorities. Consistently with *National Commercial Banking Corp of Australia Ltd v Batty* and the other cases cited by the trial judge, Lord Millett expressed the test as being whether the employee or partner was authorised to do acts of the kind in question.[86] That test is expressed in quite general terms; as Lord Millett also observed, "[a]ll depends on the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing."[87] The trial judge adopted that approach in relation to those wrongful acts (which did not include the representation) found by his Honour to have been done in the course of Crouch & Lyndon's business. Crouch & Lyndon's argument that the wrong test was applied in that respect should be rejected but I would hold that Wood was not acting in the ordinary course of the business of Crouch & Lyndon when he made the representation.

Were the other wrongful acts done in the ordinary course of Crouch & Lyndon's business?

[50] The reasons just given explain my conclusion that the wrongful acts other than the representation were also not done in the ordinary course of the firm's business.

Was the representation made with apparent authority?

[51] The next question is whether Wood made the representation with the apparent authority of Crouch & Lyndon. There is a difference between the language in s 13(1) "the business of the firm" and the language in s 8(1), concerning apparent authority, "business of the kind carried on by the firm". In that respect, Campbell JA pointed out in *Seiwa Australia Pty Ltd v Beard*[88] both that the latter might suggest a more general description than the business actually carried on by the firm and that in *National Commercial Banking Corp of Australia Ltd v Batty*[89]

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85 [2003] 2 AC 366 at [35].
86 [2003] 2 AC 366 at [122].
87 [2003] 2 AC 366 at [129].
88 (2009) 75 NSWLR 74 at [249] – [250].
89 (1986) 160 CLR 251 at 298.

Dawson J observed that the ordinary course of the business of the firm requires an examination of the practices of the particular firm, which might be narrower than the course of business of the kind carried on by a firm.[90] The same distinction is reflected in Brennan J's analysis:

> "The general authority of a partner to bind the firm is limited. 'Each partner is an agent only in and for the business of the firm; and, therefore, his acts beyond that business will not bind the firm': *Bank of Australasia v Breillat* [(1847) 6 Moore 152, at p. 194; 13 ER 642, at p. 658]. If a partner's act is not in fact 'for the purpose of the business of the partnership' the firm is bound by his act only if it is 'an act for carrying on in the usual way business of the kind carried on by the firm' and the absence of authority is unknown to the person with whom he is dealing."[91]

[52] The applicable principles were recently stated with reference to authority in *Lederberger v Mediterranean Olives Financial Pty Ltd*[92] in the following passage:

> "In *Seiwa Australia Pty Ltd v Beard* Campbell JA formulated the test in these terms:
>
> > Thus, the 'business of the kind carried on by the firm' is what the kind of business would reasonably seem to be to someone dealing with the firm, and in particular to someone who had had the type of contacts and dealings with the firm that the [client] had had. It is in this way, by reference to the circumstances of the particular case, that one solves the question about with what degree of generality the 'business of the kind carried on by the firm' is to be described.[93]
>
> However the test is stated, the scope of the partners ostensible authority remain as stated by Baron Parke in *Brettel v Williams*:
>
> > One partner does communicate to the other [LJ Ex reports this as 'others'], simply by the creation of that relation, and as incident thereto, all the authority necessary to carry on their partnership in its ordinary course, (see *Hawtayne v Bourne*)[94] and all such authority as is usually exercised by partners in the same sort of trade, but no more. To allow one partner to bind another by contracts out of the apparent scope of the partnership dealings, because they were reasonable acts towards effecting the partnership purposes, would be attended with great danger.[95]
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> …

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90 Cf Lindley & Banks on Partnership, 17th ed., Banks Ed., p 333 at para 12-91.

91 (1986) 160 CLR 251 at 275.

92 [2012] VSCA 262 at [43] – [46] (Nettle, Redlich JJA and Beach AJA).

93 (2009) 75 NSWLR 74 at [301].

94 (1841) 7 M&W 595.

95 *Brettel v Williams* (1849) 4 Exch 623, 630. Approved by Owen CJ in Eq in *The Union Bank of Australia v Fisher* (1893) 14 NSWR Eq 241, 15; and in *Seiwa Australia Pty Ltd v Beard* (2009) 75 NSWLR 74, [283] (Campbell JA).

> Even if the act of the partner is within the scope of the partnership's business, it will not bind his co-partners where the partner's mode of conducting the business is so unusual or extraordinary as to be outside his or her authority. Hodges J in *Goldberg v Jenkins & Law*,[96] stated the principle governing a partner's power to bind his co-partners in these terms:
>
> > In my opinion, a partner can only bind his co-partners by conducting the business in a way in which businesses are ordinarily conducted, and consequently he has not, in my opinion, authority to go outside the ordinary mode of dealing and the ordinary mode of transacting business.
>
> The rationale for the rule is that the extraordinary manner of carrying out the transaction should put the other party to it on inquiry as to the authority of the partner with whom he or she is dealing."[97]

[53] Similarly, in relation to solicitors, in *Uxbridge Permanent Benefit Building Society v Pickard*[98] Sir Wilfrid Greene MR, after noting that it was not within the actual authority of a solicitor's clerk to commit a fraud but that it was within a clerk's ostensible authority (what I have called "apparent authority") to perform acts of a class which solicitors normally carry out, said that "[s]o long as he is acting within the scope of that class of act, his employer is bound whether or not the clerk is acting for his own purposes or for his employer's purposes". In *JJ Coughlan Ltd v Ruparelia*,[99] Dyson LJ (with whom Peter Gibson LJ agreed) referred to that case, to Lord Nicholls' observations in *Dubai Aluminium Co Ltd v Salaam*, and to the formulations of the test in *United Bank of Kuwait v Hammoud*[100] by Glidewell LJ ("[o]n the facts represented to the plaintiff bank, would a reasonably careful and competent bank have concluded that there was an underlying transaction of a kind which was part of the usual business of a solicitor") and by Staughton LJ (that the relevant enquiry was to ask whether the transaction reasonably appeared to be of a kind that was within the ordinary authority of a solicitor) and said:

> "What are the criteria for determining whether an act is of a class or kind which it is the ordinary business of solicitors to carry out? A useful starting point is to ask whether the *general* description of the act falls within the scope of the ordinary business of solicitors. It is a necessary condition that the act should satisfy this requirement. Thus, for example, if the solicitor enters into a contract for the sale of double-glazing, he cannot bind his firm under section 5, nor will his firm be vicariously liable for any wrongful act in relation to the transaction under section 10. It is not the ordinary business of solicitors to sell double-glazing. The transaction is of a general nature that falls outside the scope of a solicitor's ordinary business. It is unnecessary to examine the transaction further to see that this is so. Whatever the terms of the contract of sale, it is not made by the solicitor as part of the ordinary business of a solicitor.

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96 (1889) 15 VLR 36.

97 KL Fletcher, *The Law of Partnership in Australia*, (Lawbook Co, 9th Edition, 2007), 165; *Goldberg v Jenkins & Law* (1889) 15 VLR 36; *Siewa Australia Pty Ltd v Beard* (2009) 75 NSWLR 74 (Campbell JA).

98 [1939] 2 KB 248 at 254.

99 [2003] EWCA Civ 1057 at [19], [21].

100 [1988] 1 WLR 1051 at 1059C per Glidewell LJ.

> But, in my view, it is not always a sufficient condition for bringing an act within the purview of sections 5 and 10 of the 1890 Act[101] that it can properly be classified as belonging to the general category of acts which are part of the ordinary business of a solicitor. I do not consider that the issue of whether the acts of a solicitor are of the kind or class which fall within the ordinary business of a solicitor should always be determined without taking into account the nature or characteristics of those acts. There is nothing in the authorities which compels such an approach to be adopted. Indeed, in *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462, 473F, Lord Wilberforce said:
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> > 'the underlying principle remains that a servant, even while performing acts of the *class* which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts' (emphasis added).
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> I accept that the motive or purpose of the solicitor is irrelevant in this context. It is immaterial that the solicitor is acting dishonestly. That is why the solicitor who enters into a conveyancing transaction dishonestly nevertheless renders his firm liable. Conversely, it is also irrelevant that a solicitor who enters into a contract for the sale of double-glazing is acting honestly. The dishonest motive in the first example does not take the case outside the scope of sections 5 and 10; and the honesty of the solicitor in the second example does not bring it within their scope.
>
> …
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> Rather, it is necessary to examine the substance of the transaction to see whether, viewed fairly and properly, it is the kind of transaction which forms part of the ordinary business of a solicitor. This exercise requires the detail of the transaction to be taken into account. Most transactions will obviously fall on one side of the line or the other. There will be a few cases where the answer may not be plain. For the policy reasons that I have mentioned, the court should not be too ready to find that the ordinary business requirement is not satisfied."

[54] Crouch & Lyndon relied upon that analysis. It seems an uncontroversial proposition that an act which is thought to fall within the general class of acts ordinarily done by a solicitor might be found upon closer examination of the nature and characteristics of the act to fall outside the solicitor's apparent authority. I accept that it is necessary to conduct that close examination.

[55] Crouch & Lyndon also argued that *Dubai Aluminium Co Ltd v Salaam* was authority for the wider proposition that the acts of a partner will be outside the firm's ordinary course of business if they are done in furtherance of the partner's own enterprise (on a "frolic of his own") rather than in furtherance of the firm's business. Where it is or should be apparent to the client that a partner is acting solely in the partner's own interests, this wider proposition also seems uncontroversial in relation to the ordinary course of business (with reference to

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101 Those provisions were copied in ss 8 and 13 of the *Queensland Act*.

which Crouch & Lyndon framed the proposition) and also in relation to apparent authority, but otherwise the proposition is stated too broadly. For one thing, as Crouch & Lyndon acknowledged in argument, it is settled law that a firm may be liable for the frauds of one partner who perpetrated the fraud solely in that partner's own interests.

[56] The trial judge's findings summarised in [38] of these reasons satisfy the requirements for apparent authority. Contrary to Crouch & Lyndon's argument, the trial judge's reference to "transactions" rather than to "acts" was inconsequential; the findings included reference back to the earlier findings about the wrongful acts, including Wood's "production of title and other searches … the preparation of the loan and security documentation, and the use of [Crouch & Lyndon's] trust account …".[102] The finding that Wood had apparent authority to engage in "the transactions" comprehended findings that Wood's wrongful acts in the transactions were done with the apparent authority.

[57] Crouch & Lyndon did not contend that the trial judge was in error in finding that Wood purportedly acted as a partner of the firm, and there was no basis to conclude that Salameh was aware that Wood lacked actual authority.[103] Accordingly the exceptions in (a) and (b) of s 8(1) did not apply. On the basis that it is necessary to disregard Wood's dishonest state of mind, his wrongful acts, including the representation, were done "for carrying on … business of the kind carried on by the firm…", such acts being done by solicitors acting in commercial lending transactions, including those in which the solicitor introduced the borrower to a lender client. That circumstance combines with other circumstances summarised in [44] of these reasons to support the trial judge's finding, which concerned the wrongful acts other than the representation, that Wood acted within his apparent authority when he did those acts. Since the representation was apparently designed to encourage the respondents to retain Crouch & Lyndon to act for them in the proposed mortgage loans, the same circumstances support the conclusion that Wood acted within his apparent authority in making the representation; in the absence of any notice to the client of a relevant restriction upon a partner's actual authority, it must be within a partner's apparent authority to encourage the client to retain the partner's firm to do work which it is within the partner's apparent authority to do.

[58] The requirement of s 8(1) that the act be done for carrying on business of a kind carried on by the firm in the usual way was satisfied by the trial judge's finding that there was nothing in the features alleged by the respondents to be unusual "which caused Mr Salameh, or should have caused a reasonable person in his position, to question whether [Wood] was acting as a partner of [Crouch & Lyndon], or without the authority of [Scott]."[104] It will be necessary to return to this finding, but it is relevant here to note that most of the allegedly unusual features of the transactions relied upon by Crouch & Lyndon post-dated the making of the representation.

[59] In relation to allegedly unusual features of the representation, it is not significant that no broker was to act for the borrowers in the respondents' transactions, unlike in all but one of the annexure A loans. Both sets of transactions were outside Wood's actual authority only because they involved Wood introducing a borrower to a lender client so that they involved excluded mortgages. Regardless of the

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102 [2012] QSC 312 at [91], [102], [103], [113].

103 [2012] QSC 312 at [103].

104 [2012] QSC 312 at [105].

presence or absence of an independent broker, there does seem to have been a very real potential for conflicts between Crouch & Lyndon's own interest and its duty to its lender client, and between its duty to its lender client and its duty to borrowers if they were also clients. On the other hand, a client in the respondents' position might not be aware of those possible conflicts and, if aware, might reasonably assume that Crouch & Lyndon would do what was necessary to avoid or manage such conflicts.

[60] Crouch & Lyndon's further argument that, unlike in the annexure A loans, in the respondents' loans Wood purported to introduce to the respondents borrowers who were clients of the firm is also not significant in relation to apparent authority. Again, it is the perspective of a reasonable lender in the position of the respondents which is important, and the trial judge accepted Salameh's evidence that he understood that Crouch & Lyndon acted only for the lender in each transaction.[105]

[61] Crouch & Lyndon's argument that the representation was beyond Wood's apparent authority seemed to be based mainly upon the proposition that the "mortgage broking" referred in paragraphs (a) and (b)(i)-(iii) of the representation was not part of the kind of work ordinarily done by solicitors in Queensland in 2006 and 2007. In assessing that argument, it is relevant to bear in mind that the respondents were new to this form of business. A client embarking upon a new business would often be unaware of, and might reasonably assume that the solicitor advising the client had complied with, the relevant regulatory requirements, especially any regulatory requirements which were imposed upon the solicitor. With those matters in mind, and despite Dawson's opinion evidence to the contrary, the evidence discussed in [14] and [44] of these reasons requires rejection of Crouch & Lyndon's argument.

[62] A significant feature of the representation in favour of a finding of apparent authority is that Crouch & Lyndon was to earn fees for carrying out work described in the representation. The respondents ultimately did not contradict a submission by Crouch & Lyndon that the only fee which the respondents proved that Crouch & Lyndon in fact received for acting in the respondents' purported transactions was $1,176.30 in respect of the Thomas loan, but that does not detract from the significance of the fact that the represented protocol provided that Crouch & Lyndon would be paid in each matter. Furthermore, the fees were to be paid out of the loan money which the respondents paid into Crouch & Lyndon's trust account and they were to be paid for work of a kind which was then done by solicitors and which apparently fell within that part of Crouch & Lyndon's business which Scott left Wood to manage. The fees were not paid only because of Wood's dishonesty and the respondents were understandably ignorant of his dishonesty at the time when the representation was made and until after they incurred their losses.

[63] Crouch & Lyndon did not argue that the allegedly unusual features which arose in Wood's conduct of the mortgage lending transactions, severed the causal relationship between the representation and the respondents' losses. If, contrary to my understanding, such a contention was implicit in Crouch & Lyndon's argument, I would not accept it for the reasons I give under the next heading.

[64] The judgment should be sustained upon the ground that the respondents suffered their losses as a result of the misleading and deceptive representation made by Wood with Crouch & Lyndon's apparent authority.

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105 [2012] QSC 312 at [85].

Were the wrongful acts other than the representation done with apparent authority?

[65] In relation to Wood's wrongful acts other than the representation, it is necessary to take into account some events which occurred after the representation was made. The trial judge made the following findings about those matters.[106] The initial offer by Wood to establish a company to manage the loans was immediately rejected by the respondents and not pressed again. The first loan was to an anonymous borrower and without security but that occurred in circumstances of urgency against the background of the respondents' trust in Wood's professional capabilities. There was no reason for them to question Wood's statements about the circumstances surrounding that transaction, and it was in fact completed in accordance with its terms. Whilst the protocol was not strictly followed in the subsequent transactions, Wood did fulfil his representation that he would prepare the appropriate loan and security documents necessary for the transactions. The trial judge took into account the circumstances upon which Crouch & Lyndon relied and found that they did not cause Salameh, and they should not have caused a reasonable person in Salameh's position to question whether Wood was acting as a partner of Crouch & Lyndon, or without the authority of his copartner,[107] and that the unusual features relied upon by the respondents did not support a finding that the transactions were not made in the usual way.[108] Those findings were justified by the evidence accepted by the trial judge.

[66] The arrangement in May 2007 for, and Wood's conduct in, purportedly charging a fee payable for his own benefit is in a different category. In that respect Wood was apparently promoting his own rather than Crouch & Lyndon's interests. The respondents' argument downplayed the significance of that factor on the basis that *Dubai Aluminium Co Ltd v Salaam* required the focus to be confined to Wood's subsequent acts in documenting and administering the transactions. In that case the dishonest partner had the firm's authority to draft commercial agreements.[109] The only other relevant (assumed) fact was that the solicitor was acting for and on behalf of the firm as distinct from acting solely in his own interest or in the interests of others.[110] The distinguishing fact in this case is that the respondents were parties to the arrangement with the dishonest partner for this fee. It is necessary to consider the effect of Wood's acts apparently done on his own account in purporting to introduce borrowers for fees payable for his own benefit upon the proper characterisation of Wood's other wrongful acts apparently done as a partner for the firm's benefit.

[67] The mere fact that one partner conducts some activities for a firm's client upon that partner's own account does not necessarily justify a conclusion in all cases that a reasonable client should be on notice that related work purportedly done by the partner for the firm might also be done on the partner's own account. A firm may acquiesce in one partner receiving separate income from that partner's activities, even activities apparently done on behalf of the firm, with a view to the potential for those activities to generate professional fees for the firm. Conduct of that kind probably would call for an enquiry of the other partners in most cases, but each case must be judged upon its own circumstances. The trial judge, who had the benefit of

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106 [2012] QSC 312 at [105] – [110].
107 [2012] QSC 312 at [105].
108 [2012] QSC 312 at [110].
109 [2003] 2 AC 366 at [20].
110 [2003] 2 AC 366 at [35].

seeing and hearing Salameh and the other witnesses give evidence over extended periods, was not persuaded that the respondents acted dishonestly (which was Crouch & Lyndon's case) and nor did the trial judge find that the respondents acted unreasonably in being satisfied by Wood's assurance that the payment of the fee to his company was acceptable to Scott. Wood could not by his own misrepresentation enlarge the ordinary course of the firm's business.[111] Nor is that the effect of the trial judge's findings, but it was right for the trial judge to take this evidence into account in deciding whether the respondents should have been alerted to the possibility that Wood's apparently conventional conduct on behalf of the firm in negotiating, documenting and administering the respondents' loans might instead be done on his own account. Taking all of the circumstances found by the trial judge into account, the evidence of the arrangement at the time of the first fictitious transaction that Wood would earn a fee for finding borrowers and his conduct in charging such a fee does not justify overturning the trial judge's findings that Wood's wrongful acts in negotiating, documenting and administering the loans were done with apparent authority.

Section 14

[68] The expression "in the course of its business" in s 14(1)(b) bears the same meaning as the expression "in the ordinary course of the business of the firm" in s 13(1), and apparent authority must similarly be taken into account under s 14(1)(a).[112] The trial judge found that Crouch & Lyndon was liable accordingly under s 14 for the respondents' loss and damage.[113] Crouch & Lyndon's challenge to that conclusion was based upon its argument that each sum of money was paid to Crouch & Lyndon in reliance upon the representation which, as I have concluded, was not with the ordinary course of the firm's business. Otherwise Crouch & Lyndon relied upon two cases in support of its argument that s 14 was inapplicable. It cited Gibbs CJ's judgment in *National Commercial Banking Corp Ltd v Batty* as authority for the proposition that a dishonest partner's conduct in depositing to the firm's trust account cheques which the dishonest partner had obtained for the partner's own purposes and to which the firm was not entitled was necessarily conduct outside the ordinary course of the firm's business. Gibbs CJ took into account features of the cheques and the arrangements for the account into which they were paid which indicated that it was outside the apparent authority of the errant partner to deposit those cheques to the trust account.[114] My conclusion is that it was within Wood's apparent authority to accept the deposit of the respondents' payments into the firm's trust account. The second case upon which the respondents relied was *Heperu Pty Ltd v Belle*.[115] That case relevantly concerned the question whether authority given to an agent to operate a bank account conferred actual authority on the agent to deposit cheques misappropriated from third parties so as to produce the result that the principal was taken to have received the funds.[116] That is not relevant to the issue of apparent authority.

[69] Essentially for the reasons I have given in relation to s 13, I would hold that the money was not received in the ordinary course of Crouch & Lyndon's business but

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111 See Lindley & Banks on Partnerships, 17th ed., p 339 at para 12-103.

112 See *National Commercial Banking Corp of Australia Ltd v Batty* (1986) 160 CLR 251 at 264 per Gibbs CJ.

113 [2012] QSC 312 at [114].

114 (1986) 160 CLR 251 at 262 – 263.

115 (2009) 76 NSWLR 230.

116 (2009) 76 NSWLR 230 at [59] (Allsop P, Campbell JA and Handley AJA agreeing).

that it was received with the apparent authority of the firm. The judgment should also be sustained on that ground.

Notice of contention: the alleged negligence of Crouch & Lyndon

[70] The respondents pleaded that: an ordinarily competent solicitor who carried out the tasks done by Scott in relation to the "Juhasz loan" and the "Epona loan" (two of the annexure A loans) in 2004 and 2005 would have reviewed those loan files; those reviews, and consideration of various other documents of which Scott was aware at the time, would have alerted an ordinarily competent solicitor that in breach of rule 87A of the *Legal Profession (Solicitors) Rule* 2006 Crouch & Lyndon was practising in excluded mortgages without having current mortgage fidelity insurance; an ordinarily competent solicitor would then have taken steps to ensure that Crouch & Lyndon did not again engage in such conduct; Scott failed to do those things; as a consequence, Crouch & Lyndon, through Wood, continued to engage in breaches of rule 87A, including in the respondents' transactions, and the respondents thereby sustained their losses.[117]

[71] The trial judge did not decide whether Crouch & Lyndon owed any relevant duty of care to the respondents but rejected the respondents' claim of negligence on the ground that they had failed to establish any breach of the alleged duty of care. Upon the issue of breach of the alleged duty of care, the trial judge considered that the respondents' claim required a finding that Scott, exercising the reasonable care and skill of a competent solicitor in reviewing documents relating to the Juhasz loan for the purpose of a proceeding in which the lender sought possession of secured land from Juhasz, and when signing various cheque requisition forms and cheques in respect of both loans, would have discovered Wood's conduct in breach of rule 87A. The trial judge was not satisfied that, in the context of this partnership of some years involving trust between the partners, that there was anything in the documents which Scott reviewed or signed or anything in his discussions with an employee of the firm in connection with the work done by Scott, which should have placed him on notice that Wood was not to be trusted, that his work should be the subject of a detailed review, or that he should have been alerted to the possibility of a contravention of rule 87A.[118]

[72] In reply to the respondents' contention that the trial judge erred in rejecting their case that the alleged duty of care was breached, Crouch & Lyndon submitted both that the trial judge's findings were correct and that it did not owe the alleged duty of care. Crouch & Lyndon developed its argument upon the duty issue by reference to case law and it developed its argument upon the breach question by reference to trial judge's findings of fact in favour of the firm and evidence which supported those findings. The respondents made submissions upon the breach question but they advanced no argument upon the duty question. For the following reasons I would hold that the trial judge's rejection of the respondents' claim in negligence should be upheld both because Crouch & Lyndon did not owe the alleged duty of care and because the trial judge did not err in finding that Crouch & Lyndon did not breach the alleged duty of care.

[73] The alleged duty was expressed in various ways, but the essence of it was a duty to take reasonable care when performing work for a client to prevent the firm from

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117 Fourth further amended statement of claim, paragraphs 102 – 113.

118 [2012] QSC 312 at [115] – [120].

acting in transactions "that were unauthorised by law or were sham transactions".[119] At the time when Scott is alleged to have breached the alleged duty of care the respondents were not in the business of money lending and they had not sought or received any legal advice or other services from Crouch & Lyndon in relation to such a business. The respondents' case therefore required a finding that in the course of Crouch & Lyndon fulfilling its retainer to its lender clients in 2004 and 2005 it owed a duty to future money lending clients to take reasonable care to discover whether one of the partners was engaging in conduct which might in the future adversely affect their interests.

[74] The alleged duty of care is novel. In *Hawkins v Clayton*,[120] Brennan J discussed the factors to be taken into account in deciding whether a duty of care should be found in a new category of case:

> "When the existence of a duty in a new category of case is under consideration, the question for the court is whether there is some factor in addition to reasonable foreseeability of loss which is essential to the existence of the duty: see *Jaensch v. Coffey* [(1984) 155 C.L.R. 549, at pp. 575-577.]. In many of the new categories of case in which a duty has been held to exist, reasonable foreseeability of loss has not been sufficient in itself to give rise to a duty to act or to abstain from acting in order to avoid the loss. In a case where a novel category of duty is proposed and the factors which determine its existence must be identified, the court may have regard to a variety of considerations the nature of the activity which causes the loss, the nature of the loss, the relationship between the parties and contemporary community standards (especially where liability for breach of the proposed duty would be disproportionate to the risk which a person might reasonably be expected to bear as an incident of engaging in the particular activity if no limiting factor were identified). In *Sutherland Shire Council v. Heyman* [(1985) 157 C.L.R., at p. 481.] I suggested that it is preferable for the law to develop new categories of negligence incrementally and by analogy with established categories, for the established categories provide firm evidence of the kinds of factors which condition the existence of the various categories of duties. It is one thing to speak in general terms about the considerations which affect the development of the law; it is another to define the law as developed. In a novel category of case, when it appears that the proposed duty depends on some factor additional to reasonable foreseeability of loss, the additional factor must be identified. In my opinion, the identification must be sufficiently precise to permit the tribunal of fact (whether judge or jury) to ascertain the existence of the relevant factor or factors: see *San Sebastian Pty. Ltd. v. The Minister* [(1986) 162 C.L.R., at pp. 367-368.]."

[75] Apart from the undemanding requirement of foreseeability, many considerations are opposed to the duty of care propounded by the respondents. There is no evidence that Crouch & Lyndon voluntarily assumed any responsibility towards the respondents in particular or future clients in general when it acted in the annexure A loans and there is no evidence that the respondents in fact relied upon Crouch

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119 Fourth further amended statement of claim, paragraph 101.

120 (1988) 164 CLR 539 at 556.

& Lyndon in that respect. The general principle is that the scope of a solicitor's duties is ordinarily determined by the scope of the retainer.[121] Not only was the duty alleged by the respondents beyond the scope of Crouch & Lyndon's retainers by the lender client in the Juhasz loan and the Epona loan, it was also allegedly owed to persons other than the lender client in those retainers and those persons had no relevant relationship with the firm when the duty was allegedly in force; indeed, they were not then in existence. Furthermore, like the duty found in *Hawkins v Clayton*[122] (a duty owed by a solicitor entrusted with custody of a will to take reasonable steps after the death of the testatrix to find and inform the executor of the will) the alleged duty would require those subject to it to take positive steps in addition to any action required to fulfil the existing client's retainer; the alleged duty would have imposed an obligation upon each partner to take positive steps both to investigate the conduct of the other partner and, depending upon the result of the investigation, to take some further steps to prevent the other partner from acting in particular ways in the future purportedly on behalf of the firm. Unlike the duty found in *Hawkins v Clayton*, the alleged duty would cut across the general law. Most obviously, the alleged duty is postulated for the very purpose of enlarging the liability of firms for the unauthorised acts of one partner beyond the liability which is imposed by the provisions of the *Partnership Act* which codified the common law upon that subject. The alleged duty would also cut across the relationship of trust and confidence which is the foundation of a partnership in so far as it would in every case require each partner who does work in connection with a file kept by a copartner to examine the file, not with the interests of the client solely in mind, but also with a view to looking over the shoulder of the copartner. I would add that, because the alleged duty would require all partners to perform this extra work in all cases with a view to avoiding liability beyond the scope of that imposed by the *Partnership Act*, it would presumably result in a general increase in firms' operating costs.

[76] The trial judge was pressed with a submission by the respondents that the proposed duty of care was orthodox in light of the reasoning in *Hill v Van Erp*.[123] In that case a solicitor asked the husband of an intended beneficiary to attest a will prepared by the solicitor, thereby rendering the disposition to the beneficiary void under s 15(1) of the *Succession Act* 1981. The High Court held that the solicitor breached a duty of care owing to the intended beneficiary. Unlike in this case, the duty to the intended beneficiary mirrored the duty to the testatrix to take care that the disposition to the intended beneficiary would be valid, fulfilment of the duty did not impose additional expense or disadvantage upon the solicitor beyond that which required fulfilment of the solicitor's duty to the testatrix client, and the duty did not "supplant or supplement remedies available in other areas" or "disturb any general body of rules constituting a coherent body of law".[124]

[77] For these reasons I would hold that Crouch & Lyndon did not owe the alleged duty of care.

[78] As to the question of breach of duty, the respondents argued that the trial judge misunderstood their complaint as being that Scott's review of the various

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121 *Hawkins v Clayton* (1998) 164 CLR 539 at 544 – 545; *Astley v Austrust Ltd* (1999) 197 CLR 1 at 9; *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at [364] (McPherson A-JA).

122 (1988) 164 CLR 539.

123 (1997) 188 CLR 159.

124 188 CLR 159 at 180 per Dawson J, referring to *Hawkins v Clayton* (1988) 164 CLR 539 at 584.

documents was not competent, when the real complaint was that Scott did not exercise reasonable skill and care in the conduct of Crouch & Lyndon's business to fulfil the alleged duty "to stop excluded conduct in respect of which a future client such as the Respondent, later suffered loss".[125] The manner in which the trial judge expressed the findings reflected the case as it was put at trial. The respondents also argued that their case at trial was supported by expert opinion evidence given by Dawson that Scott should have performed a review of the whole of the Juhasz file in order to perform the work required in the recovery proceeding. The trial judge did not find Dawson's evidence to be persuasive on this topic, but rather that it reflected an unreasonable expectation about a solicitor in Scott's position.[126] That is hardly surprising. Dawson accepted in cross-examination that Scott's procedure in the Juhasz matter of reading documents drafted by a staff member and making enquiries of the staff member was reasonable,[127] he acknowledged that he had no experience in acting for commercial money lenders,[128] and cross-examination of him extracted many acknowledgments that he did not know whether there was anything remarkable or not about the documents which Scott reviewed.

[79] The respondents also argued that the trial judge inappropriately limited consideration to some particular documents rather than to the numerous documents on the files upon which the respondents relied. There is no basis for thinking that the trial judge did not take into account all of those documents to which the respondents referred and the reasons indicate to the contrary.[129]

[80] The respondents were given leave to file a supplementary written submission to develop an argument (which was not developed in their original outlines or at the hearing of the appeal) in support of their contention that certain documents which Scott signed or otherwise saw should have sufficiently alerted him to the prospect that Wood was acting in excluded mortgages so as to require Scott to make further investigations. In the supplementary written submission the respondents listed numerous documents under topic headings but they did not argue that any particular document made it plain that Wood was acting in excluded mortgages and they did not explain how the content and circumstances of any particular document or documents should have revealed to Scott that Wood might be acting in excluded mortgages.

[81] I am not persuaded that the trial judge erred in finding that the respondents had not established the alleged want of reasonable care by Scott in the limited activities he carried out in connection with Wood's files.

Order

[82] The appeal should be dismissed with costs.

[83] **DALTON J:** I agree with the order proposed by Fraser JA and the reasons he gives for it.

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125 Respondent's outline of argument, paragraphs 55 – 59.
126 [2012] QSC 312 at [119].
127 Transcript 6-40.
128 Transcript 6-36, 6-37.
129 [2012] QSC 312 at [115].