SUPREME COURT OF QUEENSLAND

CITATION:	*Taylor v Gould & Ors* [2011] QSC 203
PARTIES:	**SYLVIA PAMELA TAYLOR** (plaintiff) v **ROBERT JOHN GOULD** (first defendant) and **MARK LEONARD SEABROOK** (second defendant) and **ANTHONY JAMES TAYLOR** (third defendant)
FILE NO/S:	5838/09
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	19 and 20 May 2011
JUDGE:	Dalton J
ORDER:	**1. Judgment for the first defendant against the plaintiff.** **2. Proceeding against the second defendant dismissed.** **3. Judgment for the plaintiff against the third defendant in the sum of $250,000, together with simple interest at 10 per cent per annum from 18 July 2004.**
CATCHWORDS:	NEGLIGENCE – CONTRACT – SOLICITOR'S RETAINER – VICARIOUS LIABILITY – OSTENSIBLE AGENCY Dal Pont, *Law of Agency* (2nd ed, 2008) P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) Salmond, *Law of Torts* (1st ed, 1907) *Uniform Civil Procedure Rules* 1999 (Qld) r 8(1), r 371(2)(f) *Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 *Deveigne & Anor v Askar* [2007] NSWCA 45 *Dubai Aluminium v Salaam & Ors* [2002] UKHL 48, 28 *Ingot Capital Investments Pty Ltd v Macquarie Equity*

Capital Market Ltd [2008] NSWCA 206
Jones v Dunkel (1959) 101 CLR 298
Lloyd v Grace, Smith & Co [1911] 2 KB 489
Macquarie Bank Limited v Lin [2002] 2 Qd R 188, 192
New South Wales v Lepore (2002-2003) 212 CLR 511, 536
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451
Pegang Mining Co Limited v Choong Sam [1969] 2 MLJ 52, 56
Perpetual Trustees Australia Limited v Schmidt & Anor [2010] VSC 67
Scott v Davis (2000) 204 CLR 333
Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161

COUNSEL: S Gerber for the plaintiff
S Shearer for the first defendant
No appearance for the second defendant
No appearance for the third defendant

SOLICITORS: Lillas & Loel for the plaintiff
Compass Legal Solutions for the first defendant

[1] **DALTON J:** The plaintiff sought to make the following case. Until 18 July 2003, she owned one significant asset, an unencumbered home in Kennedy Drive, Tweed Heads. She agreed to sell it to her brother, the third defendant, for $930,000. She was to receive $680,000 on settlement, and later, when her brother had constructed units on Kennedy Drive, the balance, $250,000. On 15 July 2003, the plaintiff contracted to buy another home, at Staatz Court, Tallebudgera, for $490,000. She intended to pay all that price from the initial proceeds ($680,000) of the sale of Kennedy Drive. At her brother's suggestion, Compass Legal Solutions, a legal practice run by the first defendant, was nominated as her solicitor on the contract to buy Staatz Court. On 18 July 2003, her brother introduced her to Mark Seabrook, the second defendant. Her brother told her Mr Seabrook was a solicitor. He was not. The plaintiff's case was that he was held out as a solicitor by Compass Legal Solutions. Mr Seabrook told the plaintiff she did not need a solicitor to act for her in selling Kennedy Drive. He advised her to incorporate a trustee to buy Staatz Court.

[2] The plaintiff did not engage a solicitor to sell Kennedy Drive. She signed a contract prepared by Compass Legal Solutions and handed to her by Mr Seabrook on 18 July 2003. Compass Legal Solutions was acting for her brother as purchaser. She agreed that Mr Seabrook could incorporate a trustee company called SPL Investments Pty Ltd (SPL) to buy Staatz Court, saying that she wanted her daughter to be the director of the company and her children to be beneficiaries of the trust. The letters SPL were the plaintiff's initials; at the time her surname was Lawson. On 23 July 2003 the plaintiff gave the title deed to Kennedy Drive to Ms Lynne Morrissey, the conveyancing manager of Compass Legal Solutions, and her case was that she signed a blank transfer form, and another blank piece of paper. She left for an overseas holiday. When she arrived back two weeks later, Kennedy Drive had been transferred to her brother and was subject to a mortgage to his bank. SPL had been incorporated with Mr Seabrook as its director. The remaining proceeds

from the sale of Kennedy Drive were not under the plaintiff's control. There was nothing registered to show the plaintiff's right to receive a further $250,000 from the sale of Kennedy Drive. Later SPL purchased Staatz Court using some funds from the sale of Kennedy Drive together with $250,000 of borrowed funds, secured by mortgage.

[3] In time both Kennedy Drive and Staatz Court were sold by their respective mortgagees; the plaintiff received nothing on either sale. Save for an amount of $69,000 which she concedes was paid to her from the proceeds of sale from Kennedy Drive, she had lost everything.

The Second and Third Defendants

[4] In 2009, the plaintiff issued this proceeding. She named Mark Seabrook as second defendant but has never served him with the proceeding. It was argued by counsel for the first defendant that the trial could not commence because the second defendant had not been served. That was plainly incorrect. He is not a necessary party in terms of the rules.[1] Had the first defendant wanted him to attend and give evidence, there were options available to Mr Gould – such as issuing a subpoena – and no evidence that he had tried to exercise any of them. Pursuant to r 8(1) a proceeding begins when a claim is issued. The Court has no jurisdiction over the second defendant until the proceeding is served, because the action is *in personam*, but the proceeding against him is not a nullity, even though it is not served.[2] The plaintiff has chosen not to pursue the proceeding against Mark Seabrook. In the interests of finality, I dismiss the proceeding against him. I have power to do so pursuant to r 371(2)(f) given the plaintiff's failure to serve the second defendant, and in my inherent jurisdiction.

[5] The plaintiff sued her brother, the third defendant, in contract for the balance ($250,000) owing on the purchase of Kennedy Drive. The third defendant did not appear at the trial. The plaintiff sought judgment against him, and on the basis of the evidence led at the trial, I am satisfied she should have it. I have awarded interest on that sum from a date one year after the date of the contract to sell Kennedy Drive, doing my best to fix a date when that sum might reasonably have fallen due had the third defendant not breached the agreement he made with the plaintiff.

The Case against the First Defendant

[6] The trial was occupied with the plaintiff's claim against John Gould, the first defendant. He is a solicitor, the principal of Compass Legal Solutions. The suit against him is in negligence and contract. As to the contract case, again by reason of Mr Gould's allegedly holding out Mr Seabrook as a solicitor, it is pleaded that the plaintiff retained Mr Seabrook, and therefore John Gould, to act for her on the sale of Kennedy Drive and the purchase of Staatz Court, and that Mr Seabrook was negligent in performing those retainers. It is not alleged that Mr Gould is directly liable to the plaintiff in tort; the only liability asserted against him is vicarious liability for the acts and omissions of Mr Seabrook. That vicarious liability is said to attach to Mr Gould because he held out Mr Seabrook as a solicitor.

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1 *Macquarie Bank Limited v Lin* [2002] 2 Qd R 188, 192, citing *Pegang Mining Co Limited v Choong Sam* [1969] 2 MLJ 52, 56.

2 *Deveigne & Anor v Askar* [2007] NSWCA 45 [98] ff.

[7] It is pleaded that Mr Gould is liable for what are said to be the negligent acts and omissions of Mr Seabrook in: (a) not telling the plaintiff he was not a solicitor; (b) not telling the plaintiff that she needed independent legal advice and an independent solicitor to act for her; (c) advising the plaintiff to incorporate a trustee to buy Staatz Court, and (d) failing to advise the plaintiff to take security over Kennedy Drive to secure payment of the balance of the purchase price not payable on settlement. If one took a generous view of the pleading, one might allow that it also alleged that Mr Gould was vicariously liable for the acts and omissions of Mr Seabrook in: (e) telling the plaintiff that she did not need an independent solicitor to act for her; (f) acting contrary to the plaintiff's instructions in appointing himself director of SPL; (g) causing SPL to borrow $250,000 against the security of Staatz Court to purchase that property, and (h) paying away the proceeds of sale of Kennedy Drive (except as to $69,000) other than in accordance with the plaintiff's instructions.

[8] As to causation, the plaintiff's case proceeds on the basis that with proper legal advice the sale of Kennedy Drive would have proceeded; the plaintiff would have been paid the entire purchase price for Kennedy Drive, and would own Staatz Court unencumbered.

Structure of this Decision

[9] I deal first with the plaintiff's case that the second defendant was the ostensible agent of the first defendant, and that through the actions of the second defendant, the first defendant was retained by the plaintiff as her solicitor. My conclusion is that the plaintiff failed to prove this case at a factual level. I find that the first defendant was not retained by the plaintiff and owed no duty to her, either pursuant to contract or pursuant to the general law of negligence. I go on to note some legal issues as to the difficulties of finding the first defendant vicariously liable in tort, even if the case of ostensible authority had been proved.

[10] That is sufficient to dispose of the plaintiff's pleaded case. However, I go on to consider causation of loss. It appears to me that, independently of my findings as to duty, the plaintiff failed to establish this part of her case. A determination as to what was the commercial arrangement between the plaintiff and her brother as to the development of units on Kennedy Drive is a necessary precursor to my decision as to causation. Therefore, after having dealt with the issues of retainer, ostensible authority and vicarious liability, I deal with that commercial arrangement and then with causation.

Retainer of Compass Legal Solutions by the Plaintiff

[11] The first defendant admitted he acted for the plaintiff as buyer on the contract for the purchase of Staatz Court dated 15 July 2003. However, that contract was terminated and on 30 July 2003 a contract to purchase Staatz Court was signed by Mark Seabrook as director of SPL. Compass Legal Solutions then acted for SPL as purchaser, taking instructions from Mr Seabrook as director of SPL. There was no pleading or case made at trial that John Gould had a duty to satisfy himself as to the propriety of the arrangements whereby SPL was substituted as purchaser of Staatz Court.

[12] As to Kennedy Drive, the plaintiff's brother asked her to meet him on 18 July 2003, at James Street, Beenleigh to see his solicitors, Compass Legal Solutions. Her

brother told her Mr Seabrook was a solicitor. She believed him and, naturally enough, believed Mr Seabrook was a solicitor employed by Compass Legal Solutions. The plaintiff says that Mark Seabrook gave her a contract for the sale of Kennedy Drive and asked her to sign it. Her evidence is that she said to him:

> "'Don't I have to have a solicitor, my own solicitor?' and he said, 'No. No you don't. You don't need it.' He said, 'You own your own house, don't you?' and I said, 'Yes,' and he said, 'Well, why waste money? Save money, it's all straightforward.'"

[13] The plaintiff said she understood from this exchange that, "… he was going to handle everything to do obviously with the sale of Kennedy Drive and the purchase of Staatz Court." That statement is ambiguous as to her understanding, and her understanding is, strictly speaking, irrelevant. Her evidence falls short of establishing that anything was said which objectively amounted to a retainer by her of Mr Seabrook or Compass Legal Solutions to act for her on the sale of Kennedy Drive. The contract she signed to sell Kennedy Drive recorded Compass Legal Solutions as acting for her brother and that she was "self-acting". In cross-examination the plaintiff said that she did not have a solicitor acting for her in relation to the sale of the Kennedy Drive property and described Compass Legal Solutions as "his [her brother's] solicitor." Her evidence viewed as a whole is that she knew she did not have a solicitor acting for her on the sale of Kennedy Drive, but had been reassured in that respect by Mr Seabrook. The pleaded case that the plaintiff agreed with Mark Seabrook to retain Compass Legal Solutions to act for her in selling Kennedy Drive fails.

[14] The plaintiff says that on 18 July 2003, after she had signed the contract to sell Kennedy Drive, her brother began discussing her marital problems with Mark Seabrook, which led Mark Seabrook to suggest that she buy the house at Staatz Court in the name of a company so that her husband could not "get it". At this stage, the plaintiff was separated from her husband, but they were not divorced. The plaintiff says that after some discussion and explanation from Mr Seabrook, she agreed that he would incorporate a company called SPL; one of her daughters would be the director, and the house at Staatz Court would be bought and held by SPL on trust for her children. The plaintiff was to take two weeks overseas holiday commencing 24 July 2003. By reason of these conversations she had with her brother and with Mark Seabrook, the plaintiff believed she had retained Compass Legal Solutions to attend to these matters for her – see her letter to her son Matthew written on or about 23 July 2003. There had not in fact been such a retainer – see my findings as to ostensible authority below.

[15] The plaintiff's only pleading was of a retainer made on 18 July 2003 through Mr Seabrook on behalf of the first defendant. Some of the evidence led in the case suggests that there was a direct retainer of Compass Legal Solutions by the plaintiff. While it is not revealed in the evidence who attended the settlement of Kennedy Drive on behalf of the plaintiff, presumably Ms Morrissey made arrangements to receive the purchase price for Kennedy Drive into the firm's trust account, and on 23 July 2003 she did obtain a written authority from the plaintiff as to how part of it should be disbursed. However, neither side explored the possibility of a direct retainer in evidence and it was not pleaded. The evidence is also suggestive of the possibility that the plaintiff may have had a proprietary claim against the first defendant in relation to the sale proceeds of Kennedy Drive. No such claim is pleaded and I do not consider that these matters were canvassed sufficiently in

evidence to allow the conclusion the case was run on any basis other than that pleaded. Lastly, I note that Mr Gould signed the transfer of Kennedy Drive correct for the purpose of registration when it showed, wrongly, that the purchase price of $930,000 had been received by the plaintiff. However, counsel for the plaintiff did not seek to make anything of this.

Ostensible Agency of Mr Seabrook

[16] The plaintiff pleaded that Mark Seabrook was held out by John Gould as a solicitor employed by him because John Gould: (a) employed Seabrook as practice manager of Compass Legal Solutions; (b) named Seabrook on his letterhead as mediator, and (c) supplied Seabrook with business cards which identified him as the practice manager of Compass Legal Solutions. As well, there was considerable evidence as to the physical proximity of the offices of Compass Legal Solutions to the offices used by Mark Seabrook. While counsel for the plaintiff was granted leave to amend his client's pleading after all the evidence had been led, he did not seek to amend it to add reliance on this evidence to support his client's case of ostensible agency. Nonetheless, I am satisfied that the case was conducted on the basis that this evidence was relevant to the holding out issues: no objection was taken to it, to the contrary, counsel for the defendant led evidence on the topic and cross-examined on the topic. The evidence was not relevant to any other issue. Written submissions from both counsel addressed the evidence. I am therefore satisfied that there has been an acquiescence in the running of the case so that it is fair to determine the matter on the evidence in this respect rather than on the pleadings.[3]

[17] "The doctrine of ostensible authority dictates that a principal may be liable for the actions of a person who possesses no actual authority but upon whom the principal has, by his or her words or actions, conferred apparent or ostensible authority to carry out those actions."[4] It is not enough that the representation of authority comes from the purported agent, it must come from the principal.[5] As well, the party making the assertion of ostensible authority must prove that he or she reasonably relied upon the representation made.[6] I turn to consider each of the four matters relied upon by the plaintiff to establish ostensible authority.

Employment as Practice Manager

[18] The plaintiff called no direct evidence that the first defendant employed Mr Seabrook as practice manager. There was indirect evidence in the form of a business card and letterhead used by John Gould, both of which were capable of giving rise to the inference that Mark Seabrook was an employee of Compass Legal Solutions (see below). John Gould denied that he employed Mark Seabrook. He said he had in the past entered into a service agreement with a company run by Mr Seabrook which provided Mr Seabrook's services (essentially) as practice manager, but this arrangement had ceased by March 2003. It seems to me that there must have been documents which would have put the matter beyond doubt, but

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3 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Market Ltd* [2008] NSWCA 206 [424].

4 Dal Pont, *Law of Agency* (2 ed, 2008) cited in *Perpetual Trustees Australia Limited v Schmidt & Anor* [2010] VSC 67, [134].

5 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [36], cited in *Perpetual Trustees* (above), [135].

6 *Perpetual Trustees*, above, [139], and the authority cited there.

neither party produced them. In these circumstances, in accordance with the rule in *Jones v Dunkel*, I might feel more confident in drawing available inferences against him, but I cannot use John Gould's failure to produce relevant documents to make up a deficiency in the plaintiff's evidence. I am not prepared to draw the inference that Mark Seabrook was actually employed as practice manager or mediator from the business card and letterhead. Whether those documents amount to a holding out is another question. They do not prove actual employment, and in view of the evidence of John Gould, I am not prepared to find actual employment only on the basis of what they represent.

[19] There was an argument that John Gould admitted the employment alleged at paragraph 4(b)(ii) of his defence, but having regard to John Gould's evidence, and paragraphs 4(a) and 6(a) of that defence, I am not prepared to act on that basis. I therefore find that the plaintiff has failed to prove that Mark Seabrook was employed by John Gould as practice manager.

Letterhead

[20] The first defendant did name Mr Seabrook on his letterhead as mediator. That is evident because letters on Compass Legal Solutions' letterhead to various persons other than the plaintiff were tendered. The left hand margin of the letterhead is as follows:

"LEGAL SERVICES
John Gould

Joanne Brooks
LLB. Grad Dip Leg Prac

LAW CLERK
Natalie Roest
LLB(Hons).B.IntBus

MEDIATION
Mark Seabrook
CTB. B.Bus.FAICD.FAIM
Mediator

CONVEYANCING
Lynne Morrisey: C.Dec

Melissa Barber

PERSONAL ASSISTANTS
John Webb. C.Dec

Jody Horner. J.P. (Qual)

ADMINISTRATION
Britt Seabrook

AREAS OF PRACTICE
Conveyancing –
Domestic & Commercial

Criminal Law –
State & Federal

Wills and Estates
Powers of Attorney
Advanced Health Directives

Family Law

Personal Injuries
Motor Accidents

Commercial Law
Conveyancing Leases

General Litigation"

[Original in one column, not two]

[21] The letterhead amounts to a representation that Mark Seabrook was employed by John Gould. Two letters were tendered as having been received by the plaintiff from Compass Legal Solutions. Both appear to be file copies. Neither is on letterhead. No attempt was made to explain the whereabouts of the original letters. I infer the original letters to the plaintiff were on the same letterhead as letters to other people which were tendered. It seems likely in the way of things. The

letterhead was the subject of some evidence by reason of it showing the name of Mark Seabrook at a time when Mr Gould asserted he no longer had a relationship with him. Mr Gould said he was using up old, out of date letterhead. It seems unlikely in those circumstances that he had another letterhead which he used when writing to the plaintiff.

[22] There is a question of timing in relation to the two letters proved to have been sent by Compass Legal Solutions to the plaintiff. The first such letter was to confirm Compass Legal Solutions acted for the plaintiff on the 15 July 2003 purchase of Staatz Court. No attempt was made to identify the date this letter was received by the plaintiff. If it was posted on the date it bears, 16 July, 2003, it might or might not have been received by the plaintiff before she gave Mr Seabrook instructions on 18 July 2003. However, no attempt was made to prove that the plaintiff saw Mr Seabrook's name in the left hand margin of the letterhead, much less that she drew any conclusion from it, or relied upon it in any way. Indeed, Ms Morrissey's name was on the letterhead as conveyancing manager and the letter of 16 July 2003 said that Ms Morrissey was the conveyancing manager of the firm, but the plaintiff's evidence was that at all material times she thought Ms Morrissey was Mr Seabrook's secretary. In this respect at least, the plaintiff does not seem to have taken any notice of the letterhead, or the contents of the letter of 16 July 2003. The second letter tendered as having been sent to the plaintiff was a letter dated 29 September 2003. By that date all the damage was done, there was no scope for showing the plaintiff relied upon the letterhead in dealing with Mr Seabrook. The plaintiff therefore fails to establish this limb of her holding out case.

Business Card

[23] John Gould supplied Mr Seabrook with business cards which read:

"Compass Legal Solutions
Lawyers, Mediators and Legal Services
ABN 66 570 536 420

MARK. L. SEABROOK
CTB.B.Bus. FAICD FAIM
Practice Manager & Mediator

Level 1, Trinity Place, 1 James Street, Beenleigh Qld, 4207
Telephone: (07) 3807 9577 Facsimile: (07) 3807 9677
PO Box 1428, Beenleigh Qld, 4207
Email: mls@compasslaw.org
Also in Thailand, Vietnam and Vanuatu

'The Right Direction'"

[24] The plaintiff says that on 18 July 2003, after she signed the contract for the sale of Kennedy Drive, Mr Seabrook gave her a folder which held a copy of that contract and his business card was stapled to the folder. That copy of the contract was in evidence, and it has been signed by the plaintiff, so it is clear that the folder and business card were handed over after the contract to sell Kennedy Drive was signed. The business card could not therefore have been relied upon the plaintiff before she signed the contract. There may conceivably have been a case that she relied upon it before handing over the title deeds on 23 July 2003, but no attempt was made to prove this. The plaintiff gave no evidence that she read or relied upon the business

card to form any impression as to the relationship of Mark Seabrook to Compass Legal Solutions. The plaintiff failed to establish this limb of her holding out case.

[25] There was some evidence that the folder holding the contract had Compass Legal Solutions printed on it. It did, but it was not part of the plaintiff's case that this amounted to a holding out. The folder had printed on it the names of half a dozen businesses all of which occupied the first floor of the building, Trinity Place, at James Street, Beenleigh, by way of advertising. It did not look as though it were a folder issued by Compass Legal Solutions.

Physical Proximity of John Gould's Premises to those used by Mark Seabrook

[26] The plaintiff says that on 18 July 2003 she met her brother at the front of Trinity Place at James Street, Beenleigh and went up some stairs to the first floor offices. Ms Morrissey said that there was a sign saying "Compass Legal Solutions" to be seen on the front door at the bottom of those stairs. The offices of Compass Legal Solutions were on the first floor next to the offices operated by Mr Seabrook. There were other businesses with offices on the first floor but, according to the evidence of Ms Morrissey, they were in quite a separate area. There was a sign saying, "Compass Legal Solutions" outside the offices of Compass Legal Solutions. The plaintiff says that there were no other signs showing the existence of other businesses on the first floor. Ms Morrissey's evidence was that the names of all the businesses were in the reception area. I prefer Ms Morrissey's evidence. Overall I found her a much more reliable witness than the plaintiff. I formed the view that the plaintiff's memory of matters from her July 2003 interactions with both Mark Seabrook and Lynne Morrissey was genuinely poor, but as discussed below, in several respects I am satisfied that the plaintiff's evidence was deliberately untrue in an effort to advance her case. The plaintiff attended at the James Street offices only twice, some eight years before she gave evidence and at a time when she had no reason to be looking to see if there were other businesses on the floor. On the other hand, Ms Morrissey saw the premises many, many times.

[27] At the top of the stairs, there was one reception desk common to all the offices on the first floor. Business cards from all the half dozen businesses on the first floor were on that desk, according to Ms Morrissey. The business cards of Compass Legal Solutions were on that desk, including the business cards of Mr Seabrook. However, there is no evidence that the plaintiff saw these business cards or relied upon them being there.

[28] Both the offices of Compass Legal Solutions and the offices operated by Mr Seabrook had doors which opened into a conference room which both Compass Legal Solutions and Mr Seabrook used. It seems this was where the plaintiff, her brother and Mr Seabrook met on 18 July 2003. There was no evidence that the plaintiff understood anything from the doors leading into and out of that room. There is no reason to think the plaintiff would have paid any particular attention to where the doors to and from the conference room led – she thought the conference room was part of Compass Legal Solutions because that is where she had been told she was going. That untruth was told to her by her brother.

[29] At some point Mr Seabrook operated a company called Compass Services Pty Ltd. Its letterhead looked deceptively similar to that of Compass Legal Solutions. However, there was no evidence that the plaintiff ever saw that letterhead until all

the loss in this matter had been incurred. Further, there was no evidence to the effect that the plaintiff ever saw a sign, "Compass Services" at the offices at James Street, Beenleigh, or in any other way was confused by the similarity in names between Mr Seabrook's business and that run by Mr Gould.

[30] I accept that the plaintiff thought that Mr Seabrook worked for Compass Legal Solutions and that it was Compass Legal Solutions who was handling the incorporation of a trustee and its purchase of Staatz Court. This belief was created by her brother who told her that Mr Seabrook was his solicitor; that his solicitors were Compass Legal Solutions, and that she was to visit Compass Legal Solutions on 18 July 2003. The plaintiff acknowledged that no-one else ever told her that Mr Seabrook was a solicitor. No doubt the physical proximity of Mr Seabrook's premises to those of Compass Legal Solutions made it possible for the plaintiff to remain under the impression created by her brother's untruths. On all of the evidence, however, I do not see that having his office next door to the offices used by Mr Seabrook amounted to a holding out by John Gould that Mark Seabrook was a solicitor, or any other employee, of Compass Legal Solutions.

[31] The plaintiff has therefore failed to make out her case of ostensible agency on a factual level. The result is twofold in terms of the plaintiff's case. First, while the plaintiff made arrangements for Mr Seabrook to incorporate SPL and have SPL buy Staatz Court, this arrangement did not amount to a retainer of the first defendant. Second, there is no basis proved on which to mount an argument that Mr Gould was vicariously liable for Mr Seabrook.

Vicarious Liability

[32] It is strictly unnecessary for me to consider the allegation that the first defendant was vicariously liable for the torts of Mr Seabrook given the findings I have made above. However, I note that there are fundamental problems with the idea that the first defendant could be vicariously liable for Mr Seabrook if the plaintiff had made out the facts she said established ostensible agency. The vicarious liability was said by the plaintiff to arise because Mr Seabrook was held out as an employed solicitor by Mr Gould, not because Mr Gould actually employed him as a solicitor. It is a difficult question whether or not a case of vicarious liability can be made in the absence of actual employment. In 1967 Atiyah wrote, "There is no more settled doctrine in the law of tort than that a master is liable for the torts of the servant committed in the course of his employment, but there is no more controverted proposition that a principal is generally liable for the torts of an agent committed within the scope of his authority."[7] Little has changed in the intervening years. In *Scott v Davis*[8] Gummow J said after reviewing the authorities, "The result then is that there can be a relationship between tort and agency, but that the extent thereof remains a matter of debate." In *Sweeney v Boylan Nominees Pty Ltd*[9] the High Court rejected the notion that there is any, "wider proposition … that if A 'represents' B, B is vicariously liable for the conduct of A …"[10] It is clear from the majority judgment in that case that, other than in exceptional cases, vicarious liability is generally limited to cases where there is employment.

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7 P S Atiyah, *Vicarious Liability in the Law of Torts* (1967), p 99.
8 (2000) 204 CLR 333, 411.
9 (2006) 226 CLR 161.
10 Above p 171.

[33] *Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd*[11] is an exceptional case. There a company was liable for slanderous statements made by an agent who was not a servant. Dixon J said, "In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be responsible if the actual tortfeasor is not his servant and he has not directly authorised the doing of the act which amounts to a tort."[12] In that case liability was found because, "the conduct of which complaint was made was conduct undertaken in the course of, and for the purpose of, executing that agency."[13]

[34] Here the only factual matters the plaintiff sought to prove were matters which might lead to the conclusion that Mark Seabrook was held out as the practice manager of, and mediator for, Compass Legal Solutions. That would not bring the plaintiff within the *Colonial Mutual* exception to the general rule: neither the position of practice manager nor of mediator carries with it any ostensible authority to give legal advice; undertake conveyancing matters, or establish corporations and trusts in the way in which Mark Seabrook did in this case.

[35] The case of *Lloyd v Grace, Smith & Co*[14] contrasts with the factual case the plaintiff tried to prove. In that case, the managing clerk of a law firm was actually authorised by that firm to act for the firm in conveyancing matters and received instructions from Emily Lloyd in such a matter. The clerk's fraud was committed in "the course of business such as he was authorised, or held out as authorised, to transact on behalf of his principal."[15] The principal was held liable for the fraud. The result is the same whether *Lloyd v Grace, Smith & Co* is regarded as a case of unauthorised acts falling within the scope of employment or as fraud committed within the scope of ostensible authority.[16]

[36] Even if the plaintiff had proved that Mark Seabrook was actually employed as practice manager, or mediator, it does not follow that the first defendant would be vicariously liable for torts committed in the course of performing legal work: that is not the work of a practice manager. An employer will be liable for the wrongful act of an employee only if those acts are authorised acts within the course of the servant's employment or, "unauthorised acts if they are so connected with authorised acts that they may be regarded as modes – although inappropriate modes – of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act."[17]

Conclusion as to Plaintiff's Case in Contract and Negligence

[37] My conclusion is that the plaintiff's case in contract and negligence fails. On a factual level, the plaintiff has failed to prove that she retained the first defendant in a way which is relevant to her claim. The first defendant therefore did not owe the

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11 (1931) 46 CLR 41.
12 *Colonial Mutual Life*, above p 48.
13 *Sweeney,* above p 170.
14 [1911] 2 KB 489.
15 Above, 725.
16 *Dubai Aluminium v Salaam & Ors* [2002] UKHL 48, 28.
17 Salmond, *Law of Torts* (1st ed, 1907), p 83, cited in *New South Wales v Lepore* (2002-2003) 212 CLR 511, 536.

pleaded contractual duties, or duties at general law. The plaintiff has not proved any other basis for my holding that Mr Seabrook was to be regarded as the first defendant's agent or which would make the first defendant vicariously liable for Mr Seabrook. Further, the plaintiff's case in negligence and contract also fails as a matter of causation, having regard to the view I take of the true commercial arrangement between the plaintiff and her brother.

The Commercial Arrangement between the Plaintiff and her Brother

[38] The plaintiff said, "My brother said to me that he could build units on Kennedy Drive and that what he would do, he would buy Kennedy Drive for 930,000, I could buy myself a cheaper home and he would put money in, I would put money in to build units on Kennedy Drive." On her case, she was to "put in" money by deferring the payment of $250,000 – the difference between the contract price for Kennedy Drive ($930,000) and the amount she would receive on settlement ($680,000). There are four contemporary documents signed by the plaintiff which are not consistent with this case. Together they convince me that the plaintiff agreed to do more than defer receipt of part of the purchase price for Kennedy Drive to assist with the unit development. I find that she agreed to lend money to her brother, including some that she borrowed against the security of Staatz Court.

[39] The first such document is a letter of instructions which the plaintiff wrote to Mark Seabrook. It reads:

> "
> 23-7-2003
>
> Mark
> Enclosed are the deeds for my house at Kennedy Drive. When the sale goes through can you settle Staatz Court. I have spoken to Tony and told him the money that is left we will use to build the units.
> Thanks for your help.
> Pam Lawson."

Tony is the plaintiff's brother. It is impossible to regard the reference to "the money that is left" as the $250,000, payment of which the plaintiff agreed was to be deferred until the unit development was completed. By definition, that money could not be used to "build the units": it would only be available once the development was finalised and sold.

[40] The second document is the contract for Staatz Court dated 15 July 2003. It was subject to finance. As well, a special condition that the purchase was subject to sale was marked not applicable. The plaintiff explains the contract being subject to finance on the basis that, "I didn't know, you know, if my brother would get the finance to buy the property at Kennedy Drive." There is no doubt that her brother did require finance to complete Kennedy Drive. The plaintiff's lack of worldliness may account for the contract being expressed to be subject to finance, rather than subject to sale. I am not sure that it accounts for the special condition being marked not applicable. This document assumes more significance when considered with the third and fourth contemporary documents, as they are also to the effect that the purchase of Staatz Court was to be the subject of finance.

[41] I take into consideration that the contract whereby SPL agreed to buy Staatz Court was not subject to finance. However, it was made on 30 July 2003, two days before

Kennedy Drive settled. By this time it may well have been known that finance was approved for the purchase of Staatz Court. Because of its date, it is removed from the commercial concept which was current as at 23 July 2003 and which is evident in the next two documents discussed.

[42] The third contemporary document is a form of authority dated 23 July 2003. The plaintiff gave the title deed to Kennedy Drive to Lynne Morrissey of Compass Legal Solutions on 23 July 2003. The plaintiff's evidence is that on that visit she signed a transfer form in blank and a blank piece of paper which, she says, must have been later altered to become the authority.

[43] The significance of the authority is that it authorises Compass Legal Solutions to pay significantly less than the amount needed to complete the Staatz Court purchase to SPL from the sale proceeds of Kennedy Drive. It reads:

> "To: COMPASS LEGAL SOLUTIONS
>
> I SYLVIA PAMELA LAWSON of 49 Kennedy Drive, Tweed Heads in the State of New South Wales hereby authorise and direct you to deposit the sum of THREE HUNDRED AND THIRTY THOUSAND DOLLARS ($330,000.00) to the account of SPL INVESTMENTS PTY LIMITED following the sale of my property at 49 Kennedy Drive, Tweed Heads.
>
> [signature on original]
> ……..
> Dated: 23 July 2003."

[44] The plaintiff accepted that her signature was on the authority. The plaintiff did not mention signing a blank piece of paper in the detailed narrative sequence of her evidence dealing with her attendance at Compass Legal Solutions on 23 July 2003. I attribute this to a reluctance to deal with the topic. When she was taken particularly to the authority, she expressed herself tentatively. Initially she said, "It's my signature, but I don't remember signing this." Later she said, "I – I think it was just a blank piece of paper that I'd signed with my signature on …" and, "The top part of there, I don't remember seeing any of that." At another stage when asked, "You don't recall signing that document?" she replied, "No, no, I don't." She said, "Well, I think I signed this document, but it was blank, …" Similarly she said, "I've signed it, but I don't remember that. I don't remember this part being on there." Rather inconsistently with all that, the plaintiff claimed a little later in her evidence that she could remember Lynne Morrissey saying to her, "I need you to sign this and this," meaning the transfer and the authority. At that same passage of her evidence she asserted she could remember signing a blank document which simply had her name on it below the place where she signed.

[45] The plaintiff could offer no sensible explanation as to why she had signed a blank sheet of paper and what she did say on the topic was inconsistent. At one point she said she thought it was for, "the transfer of the documents". What documents these were was not explained. At another point she said that she thought it was required paperwork to go to the bank which was to lend her brother money to buy Kennedy Drive.

[46] Ms Morrissey's evidence was that the authority was signed by the plaintiff on 23 July 2003 as a complete document in the form it is now in. She said that both the authority and the transfer were computer generated documents and were printed out complete before signing. She said there was no typewriter in the office to type in additional details after a document was printed or signed. The original authority is in evidence. No part of it is typewritten. I suppose it would be possible to feed a signed original document into a printer and print additional details on it. It would be difficult, and the alignment of the tabulation of the text and signature panel on the authority is, to my eye, exact. I do not think it likely to have occurred.

[47] The plaintiff's evidence as to the authority was reluctant, tentative and inconsistent. Her evidence as to the transfer was less so, but at one point she claimed the fact that the duty stamp on the transfer was dated 29 July 2003 in aid of her position, saying the document must have been signed in blank because the duty stamp was applied after she had left on her holiday. I thought this was clearly an opportunistic and rather desperate attempt to bolster her case. The contents of the transfer as signed by the plaintiff do not matter to the outcome of the case, but her evidence as to its being signed in blank is obviously connected with her claim that the authority was also signed in blank. I prefer the evidence of Ms Morrissey to that of the plaintiff in relation to the authority and transfer. Ms Morrissey was a mature woman who gave her evidence in a straightforward way. She impressed as a serious and efficient clerk who had learnt and applied a system for dealing with conveyances which she followed in a routine, perhaps rather mechanistic, way. She said she would not witness a document signed in blank – she was a Commissioner for Declarations.

[48] The fourth contemporary document is handwritten, signed by the plaintiff, and dated 23 July 2003. It reads:

> "I Pam Lawson authorise Mark Seabrook
> 1. Change contract to new trust
> 2. Do contracts for Tony
> 3. Pay deposit on house – Tweed
> 4. Arrange loan Westpac
>
> House $490,000
> 250,000
> $240,000
>
> Tony pay all costs
>
> Signed: Date 23/7/03
> [signature on original]"

[49] The plaintiff accepted that these were instructions she gave Mark Seabrook. The first numbered instruction relates to the substitution of SPL as the purchaser of Staatz Court. The second is more difficult to understand. The plaintiff said it was an instruction to draw up the contract for her brother to buy Kennedy Drive. I have some difficulty with that. By 23 July 2003 the contract for Kennedy Drive had been signed. Further, the reference is to contracts, not contract. The evidence is too uncertain to make any finding. The deposit on Staatz Court was paid from the sale proceeds of Kennedy Drive which was at Tweed Heads. I find that the third instruction referred to this, as the plaintiff said it did.

[50] The plaintiff said the Westpac loan referred to in the fourth instruction was that to her brother to buy Kennedy Drive. It was Westpac which lent her brother the

purchase price for that property. However, there is no sensible reason why the plaintiff would be giving instructions to Mark Seabrook about arranging that loan. Her brother was a property developer and not, one might think, in any need of assistance from anyone, much less his commercially naïve sister, as to obtaining finance. Part of this instruction is the note, "House $490,000". The plaintiff said this note referred to the Staatz Court property. I find that it did. The plaintiff said the following figure, "250,000" referred to the balance owing after settlement on Kennedy Drive, although she did not seem sure, and could not explain how that figure made sense in the context of the equation on the handwritten instructions. She denied the figure referred to the amount of a mortgage to be arranged on Staatz Court. The mortgage arranged on the Staatz Court property was in the amount of $250,000. It was not with Westpac. However, the bank account opened in the name of SPL was with Westpac. It is possible Westpac was originally approached to finance Staatz Court. In the context of the equation on the handwritten instructions, a reference to a mortgage of $250,000 does make sense. It is underneath a figure which is admittedly the purchase price of Staatz Court. The equation is part of an instruction to arrange a loan given by the plaintiff to the person she thought was a solicitor attending to SPL's purchase of Staatz Court. I find that the instruction was to arrange a mortgage on Staatz Court in an amount of $250,000.

[51] The last note on the handwritten instructions, "Tony pay all costs" supports this conclusion. There was no reason for the plaintiff's brother to pay the plaintiff's costs unless there was some wider commercial relationship between the two of them than is revealed on the plaintiff's version of events. The plaintiff at first explained this note by saying that, because the fourth instruction related to Mr Seabrook arranging her brother's loan with Westpac, that prompted her to say, and Mr Seabrook to write down, that her brother was to pay the costs of arranging finance. However, in re-examination the plaintiff gave a different version, saying that it was at instruction two that she said she was not paying, "Tony's fees for Kennedy Drive". The plaintiff recounted each of these inconsistent versions of events as if she could actually remember the words spoken in conversation between her and Mark Seabrook.

[52] Further, the plaintiff's evidence as to the circumstances in which the handwritten instructions came into existence was so inconsistent as to reveal her as telling deliberate untruths about it. At times she denied knowledge of the document's creation: she said things such as, "It must have been given to me by Mark Seabrook to sign and say this is what you want me to do." She said she did not see anybody write down the instructions contained on the document. She said she thought the writing was Mark Seabrook's but she did not know, in fact she had no idea whose writing it was. However, she directly contradicted this evidence on three occasions. When she was explaining the note, "Tony pay all fees" she said, "Well, these are the things he [Seabrook] was writing down because I was going away and he said he'll arrange the loan for Westpac and I said well, I'm not paying any fees for Tony so that's when he put in, 'pay all fees. Tony pay all costs'." And, inconsistently, "He was doing up the contract for Kennedy Drive for my brother and that's why I put in there for Tony to pay all costs and told him to pay the 490 for the house … my house at Staatz Court." And, at a third point, as to the second instruction in the handwritten note, "That was the contract for him to buy Kennedy – Kennedy Drive and I said, 'I'm not' – that's when I said, 'I'm not paying Tony's fees for Kennedy Drive'." These last three pieces of evidence are inconsistent with each other as

already noted. However, each of them is only consistent with the plaintiff having an actual memory of the circumstance in which the handwritten instructions came into existence and the plaintiff watching Mr Seabrook write the note and having input into it.

[53] The plaintiff's evidence was that as at July 2003 she earned only $380 a week cleaning, and from a part-pension. She says that she could not afford to make loan repayments and would not have agreed to borrow money against Staatz Court for that reason. Interestingly enough, when explaining that she could not afford to make loan repayments the plaintiff said, "I'd explained to Mark, and I'd explained to Tony, I couldn't service a loan." On the plaintiff's version of events, there could be no need to explain to either Mark or Tony that she could not service a loan. The plaintiff's evidence was that when she discovered Staatz Court had been mortgaged, she was reassured by her brother that he would make the repayments on the loan and it would all be okay. It seems to me likely that the plaintiff was persuaded to mortgage Staatz Court some time on or before 23 July 2003 on the basis that her brother would make repayments on the loan and that she would be repaid when the unit development was finalised.

[54] The plaintiff's version of events was that she discovered that Staatz Court was mortgaged on or about 8 August 2003, when she returned from overseas. In fact, the contract to purchase Staatz Court did not settle until 1 September 2003. The plaintiff's evidence as to her state of mind when she discovered the mortgage was, "I was just sort of beside myself thinking, 'What's happening here?' I went away for 14 days, a loan's been taken out and there's a mortgage on my house'." In fact Staatz Court did not settle until the plaintiff had been back in Australia for three weeks. Further, the plaintiff spent about $35,000 on improvements to Staatz Court, presumably after settlement. Some items were non-essential, for example air-conditioning and landscaping. She also lent some $15,000 to $16,000 to her daughter as the deposit for a house at about this time. On 18 September 2003 the plaintiff spent another $14,000, although there is no evidence as to what it was for. The expenditure of money on these items at this stage is not consistent with the plaintiff having discovered that Staatz Court had been mortgaged without her authority and confronting the reality that she would be liable for mortgage repayments which, on her evidence she could not afford.

[55] Finally, there was not one contemporary document tendered expressing shock, disapproval, or even doubt, on the part of the plaintiff as to the arrangements made on her behalf.

[56] My conclusion is that the plaintiff, contrary to her evidence, agreed with her brother that she would make a sum of money available to him to assist him to build the units on Kennedy Drive and that this money included money made available by mortgaging Staatz Court.

[57] A rather motley collection of documents was tendered by the first defendant to support the notion that the plaintiff agreed to lend money to her brother:

(a) An unsigned, undated deed of loan between the plaintiff's brother as borrower and SPL which was stated to be in relation to a "secured advance" of between $400,000 and $600,000, secured over Kennedy Drive.

(b) An unsigned, undated mortgage showing SPL as mortgagor [sic] and the plaintiff's brother as mortgagee [sic].

(c) A deed of guarantee and indemnity between SPL as beneficiary and the plaintiff's brother's wife as guarantor, also unsigned and undated.

(d) A declaration of purpose under the Consumer Credit Code which does appear to be signed by the plaintiff's brother, declaring to SPL that a loan of $600,000 was to be applied for business investment purposes.

(e) A copy of a caveat over Kennedy Drive lodged on behalf of SPL, claiming an interest under an unregistered mortgage dated 28 July 2003 between the plaintiff's brother and SPL. This does appear to have been lodged: it has been allocated a registry number, and bears a copy of a duty stamp for $10 as collateral, presumably to the mortgage. The duty stamp is dated 2 March 2004. The plaintiff had not signed the caveat.

(f) A copy of a form of withdrawal of caveat dated 23 March 2004. The plaintiff's signature is not on that document. Mr Gould's oral evidence was that it was lodged on the instructions of the plaintiff. The plaintiff was not cross-examined about this matter by counsel for the defendant.

[58] Mr Gould gave evidence that he prepared all these documents. Further, he said he had seen documents (a), (b) and (c) executed in accordance with their terms, and sent them off for registration, but did not keep copies of the signed originals on the file. Mr Gould said he prepared the loan, mortgage and guarantee on instructions from Mark Seabrook. There is certainly no suggestion that he was in any way taking instructions from or acting for the plaintiff. There are reasons to be sceptical about the authenticity of these documents and the transactions they purport to record. I do not use them to decide what the commercial arrangement between the plaintiff and her brother was. However, having come to my conclusions in that regard, on the basis of other documents, I note that this collection of documents is consistent with that conclusion.

[59] I mention documents dating from May 2004 purporting to acknowledge an advance of money from SPL to the plaintiff's brother (*inter alia*) and acknowledging a debt thereby created. The plaintiff acknowledged her signature on these documents but said they were not referable to any real transaction. She said that after she realised that the monies from the sale of Kennedy Drive were in jeopardy she consulted a solicitor and received advice that in order to secure these monies, a mortgage should be drawn up. She said these documents were prepared in train of that advice. The documents were manufactured well after any real transactions had occurred and I do not regard them as reliable indicators of the true state of affairs between the parties in mid-2003. Clucor Pty Ltd is shown as a party to the documents, when there is no other evidence that it was involved in the events of July 2003.

Causation

[60] My findings as to the commercial arrangement between the plaintiff and her brother are such that even if the plaintiff had established a breach of contract or a breach of duty owed to her, there would be no warrant for assuming that caused the loss she alleges. There was no evidence as to the value of Kennedy Drive. Had the plaintiff obtained independent legal advice and insisted upon proper security for both the $250,000 balance of the purchase price for Kennedy Drive and monies to be lent to her brother, there is no warrant to assume that Westpac, or any other lender, would have lent her brother the first instalment of the purchase price ($680,000) on a second mortgage. The evidence is to the effect that had the plaintiff taken a second

mortgage for the outstanding balance of the purchase price, that would not have availed her.

[61] Wider questions exist as to whether or not the plaintiff's brother would have been willing to purchase Kennedy Drive at all if the plaintiff had not been prepared to substantially fund the unit development. He may not have entered into any dealings with her at all, so that she might still own Kennedy Drive. There is no warrant to assume the sale price of $930,000 reflected the value of Kennedy Drive, so it is impossible to accurately compare this scenario with her current circumstances. On the other hand, had the plaintiff obtained independent legal advice and that advice had stymied her brother's plans, he may have prevailed upon her to act contrary to that advice so as to allow the unit development plan to go ahead. All of this is highly speculative, there is no basis on the evidence for drawing conclusions one way or the other.

[62] The plaintiff has failed to prove that the first defendant owed her any duty and also failed to prove that the loss she has suffered was caused by the first defendant. There should be judgment for the first defendant on the plaintiff's claim against him. I will hear the parties as to costs.