SUPREME COURT OF QUEENSLAND

CITATION:	*McDonald v Ellem Warren Pty Ltd* [2023] QSC 255
PARTIES:	**KAYE LEANNE McDONALD** (plaintiff) **v** **ELLEM WARREN PTY LTD** **ACN 160 660 891** (defendant)
FILE NO:	BS No 1406 of 2021
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2023
JUDGE:	Davis J
ORDERS:	**1. As to the application filed by the defendant:** **(a) the application for summary judgment is dismissed;** **(b) paragraphs 42.2 and 46 of the amended statement of claim are struck out.** **2. The application filed by the plaintiff is adjourned to a date to be fixed.** **3. The questions of costs and directions are reserved for further argument on a date to be fixed.** **4. The matter will be mentioned at 9.15 am on 21 November 2023.**
CATCHWORDS:	CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – AUTHORITY OF AGENTS – CONSTRUCTION AND EXTENT OF AUTHORITY – where trustees in bankruptcy sued the plaintiff – where third parties were funding the trustees in bankruptcy – where the defendant was the solicitor for the plaintiff – where the defendant and solicitors for the third parties purported to make an agreement – whether the agreement settled rights beyond those litigated – where the plaintiff alleged that the defendant had no express authority to enter into the agreement – where the plaintiff alleged that the defendant had

ostensible authority to bind her – where she sued the defendant for loss occasioned by the agreement – whether the defendant had ostensible authority to bind her

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where trustees in bankruptcy sued the plaintiff – where third parties were funding the trustees in bankruptcy – where the defendant was the solicitor for the plaintiff – where the defendant and solicitors for the third parties purported to make an agreement – where the agreement settled rights beyond those litigated – where the plaintiff alleged that the defendant had no express authority to enter into the agreement – where the plaintiff alleged that the defendant had ostensible authority to bind her – where the plaintiff sued the defendant for loss occasioned to her by the agreement – where the defendant alleged that the plaintiff's pleading did not establish ostensible authority – whether the pleading should be struck out

Bankruptcy Act 1966 (Cth), s 120, s 121
Uniform Civil Procedure Rules 1999, r 149, r 171, r 293

GE Dal Pont, *Law of Agency*, 3rd Edition, LexisNexis Butterworths, 2014

Across Australia Finance v Bassenger [2008] NSWSC 799, cited
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd [2011] QCA 252, followed
Cassar v New South Wales Crime Commission (2014) 87 NSWLR 683; [2014] NSWCA 356, cited
Central Newbury Car Auctions Ltd v Unity Finance Limited [1957] 1 QB 371, followed
CIC Insurance Ltd v Bankstown Football Club Ltd (1994-1995) 8 ANZ Insurance Cases 61-232; [1994] NSWCA 359, cited
Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72; [1975] HCA 49, followed
DL v The Queen (2018) 266 CLR 1; [2018] HCA 26, cited
Equiticorp Finance Ltd (in liq) v Bank of New Zealand (1993) 32 NSWLR 50, cited
Equititrust Limited v Tucker (No 2) [2019] QSC 248, cited
Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, cited
IVI Pty Ltd v Baycrown Pty Ltd [2005] QCA 205, cited
Kent v Hogarth [1995] QCA 472, followed
Lucke v Cleary (2011) 111 SASR 134; [2011] SASFC 118, followed

Matthews v Munster (1887) 20 QBD 141; [1887] UKLawRpKQB 189, followed
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146; [1990] HCA 32, followed
Nowrani Pty Ltd v Brown [1989] 2 Qd R 582, cited
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35, followed
Pavlovic v Universal Music Australia Pty Ltd (2015) 90 NSWLR 605; [2015] NSWCA 313, cited
Pianta v National Finance & Trustees Ltd (1964) 180 CLR 146; [1964] HCA 61, followed
Prestwich v Poley (1865) 144 ER 662; [1865] EngR 461, cited
Re a Debtor [1914] 2 KB 758; [1914] UKLawRpKQB 71, followed
Saffron Walden Second Benefit Building Society v Rayner (1880) 14 Ch D 406; [1880] UKLawRpKQB 71, followed
Shepherd v Robinson [1919] 1 KB 474, cited
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited
Strauss v Francis (1866) LR 1 QB 379; [1866] UKLawRpKQB 22, cited
Swinfen v Lord Chelmsford (1860) 5 H & N 890; [1860] EngR 838, cited
Waugh & Ors v HB Clifford & Sons Ltd & Anor [1982] Ch 374; [1982] 1 All ER 1095, followed

COUNSEL: T Pincus with A Campbell for the applicant/defendant
CJ Jennings KC for the respondent/plaintiff

SOLICITORS: Barry Nilsson Lawyers for the applicant/defendant
Sajen Legal for the respondent/plaintiff

[1] The defendant, Ellem Warren Pty Ltd (EW), applied for summary judgment on the claim against it[1] and, in the alternative, to strike out various paragraphs of the statement of claim.[2] The plaintiff, Kaye Leanne McDonald, applied to strike out particular paragraphs of the defence filed by EW.[3]

Background

[2] EW is an incorporated legal practice.

[3] Tristan Appleby was, at relevant times, a law clerk employed by EW.

[4] MCG Group Pty Ltd (MCG) is a company controlled by William McDonald.

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1 *Uniform Civil Procedure Rules* 1999, r 293.
2 *Uniform Civil Procedure Rules* 1999, r 171; the current pleading is the amended statement of claim filed 14 October 2022.
3 *Uniform Civil Procedure Rules* 1999, r 171; the current pleading is the further amended defence filed 28 February 2023.

[5] Mrs McDonald's husband, Paul McDonald, was a defendant along with a company, Ftrus Pty Ltd (Ftrus), in proceedings brought by MCG in the Federal Court of Australia. Those proceedings (QUD107) were commenced on 23 March 2015 and sought relief under the *Australian Consumer Law*. Before the proceedings were commenced, Mr and Mrs McDonald were involved in real estate transactions concerning properties at Noosaville, namely 22 The Anchorage and 24 The Anchorage.

[6] Mr and Mrs McDonald acquired 22 The Anchorage on 20 March 2008. They held that property as tenants in common as to 1/100th share by Mr McDonald and 99/100th shares to Mrs McDonald.

[7] Mr and Mrs McDonald acquired 24 The Anchorage on 12 August 2008. That was initially held by them as joint tenants.

[8] In May 2014, Mr McDonald severed the joint tenancy and transferred all his interest (except for a 1/100 share) in 24 The Anchorage to Mrs McDonald.

[9] There are three companies bearing the name "Fortrus"; Fortrus Australia Pty Ltd (Fortrus Australia), Fortrus Resources Pty Ltd (Fortrus Resources) and Fortrus Holdings Pty Ltd (Fortrus Holdings).[4] At relevant times, Mr McDonald was the only shareholder of Fortrus Holdings.

[10] On 30 June 2014:

1. Fortrus Australia loaned $16,831,000.77 to Mr and Mrs McDonald;
2. Mr and Mrs McDonald mortgaged both 22 and 24 The Anchorage to Fortrus Australia to secure the sum advanced.

[11] Fortrus Holdings owned all issued shares in Fortrus Australia. Mr McDonald transferred his shares in Fortrus Holdings to Mrs McDonald on 30 June 2015 in consideration of a payment of $100.

[12] The effect of all these transactions was that Mrs McDonald became the registered proprietor of 99/100th shares in the fee simple in both 22 The Anchorage and 24 The Anchorage subject to a mortgage to an entity she effectively controlled.

[13] Proceedings QUD107 were tried in the Federal Court of Australia and judgment was given against Mr McDonald and Ftrus for damages on 10 June 2016. The amount of damages initially awarded was varied on 17 June 2016 and interest was also awarded. On 5 April 2017, Ftrus and Mr McDonald were ordered to pay MCG's costs.

[14] Ftrus was wound up by order placing it in liquidation on 2 September 2016. Mr McDonald was declared bankrupt on 18 August 2016.

[15] One effect of the bankruptcy was to vest in Mr McDonald's trustees in bankruptcy (the trustees) his 1/100th interest in each of 22 and 24 The Anchorage.

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4 There are actually more Fortus companies but not relevant to the present dispute.

[16] MCG lodged a proof of debt in Mr McDonald's bankruptcy for $2,060,080. All but $945,462.75 was constituted by the judgment sum in the MCG proceedings together with costs and interest on that judgment and costs of the bankruptcy proceedings. The remaining $945,462.75 was a sum said to be owing as a contribution under a deed of company arrangement for Fortrus Resources.

[17] Mr McDonald's trustees in bankruptcy brought proceedings (QUD846) to attack:[5]

1. the transfer by Mr McDonald to Mrs McDonald of his interest in 24 The Anchorage;

2. the mortgage to Fortrus Australia over 22 and 24 The Anchorage.

[18] The trustees also sought an order for the appointment of a trustee for sale of 24 The Anchorage.

[19] Orders were made in favour of the trustees on 9 March 2017 setting aside the transfer of Mr McDonald's interest in 24 The Anchorage and setting aside the mortgage to Fortrus Australia. Further orders were made requiring Mrs McDonald to acquire the trustees' 1/100th interest in 22 The Anchorage which she did.

[20] The effect of all this was that Mrs McDonald became the sole proprietor of 22 The Anchorage and a tenant in common (as to one-half) with the trustees (as to the other half) in 24 The Anchorage.

[21] What remained for determination in QUD846 was the trustees' application for the appointment of a trustee for sale of 24 The Anchorage.

[22] Further proceedings were commenced by the trustees against Mrs McDonald on 21 April 2017 (QUD266). These proceedings sought to attack the transfer by Mr McDonald to Mrs McDonald of the shares in Fortrus Holdings.[6]

[23] Judgment was given in QUD266 on 29 August 2017, setting aside the transfer of the shares and ordering Mrs McDonald to pay the trustees' costs.

[24] EW was retained in late 2016 to act for Mrs McDonald in QUD846 and later retained to act in QUD226. Mr Appleby had worked on the matters.

[25] MCG and William McDonald were represented by Mills Oakley, in particular by a solicitor Dale Cliff.

[26] On 18 March 2017, an oral agreement (the settlement agreement) was reached between Mr Appleby and Mr Cliff. It is not pleaded by Mrs McDonald that EW was retained not only by her, but also by Mr McDonald and their son, Jacob McDonald, but it is pleaded[7] that Mr Appleby contracted for Mrs McDonald, Mr McDonald and Jacob McDonald. Mr Cliff, it is alleged,[8] contracted on behalf of both MCG and William McDonald.

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5 *Bankruptcy Act* 1966 (Cth), s 120, "Undervalued Transactions".
6 *Bankruptcy Act* 1966 (Cth), s 121, "Transfers to defeat creditors".
7 Amended statement of claim, paragraph 38.
8 Amended statement of claim, paragraph 38.

[27] The terms of the settlement agreement were recorded in an email sent on the evening of 18 March 2017 from Mr Appleby to Mr Cliff. The full text of the email is pleaded[9] and appears in paragraph [33] of these reasons.

[28] In summary, the settlement agreement:

1. Is between Mr McDonald, Mrs McDonald, Jacob McDonald, William McDonald and MCG.
2. Mr McDonald, Mrs McDonald and Jacob McDonald agree to pay $2,300,000 (a sum exceeding the proof of debt)[10] to MCG, and William McDonald or their nominee.
3. All parties will cooperate in having QUD846 adjourned.
4. MCG and William McDonald will assign to Mrs McDonald all debts and causes of action against Mr McDonald and otherwise discharge him.

[29] Importantly, there is nothing in the email or pleaded by Mrs McDonald:

1. alleging that Mr Cliff was acting for the trustees in making the settlement agreement; or
2. suggesting that the trustees are a party to, and bound by the settlement agreement. In fact, Mrs McDonald specifically pleads that the trustees are not a party and are not bound.[11]

[30] The trustees have continued to pursue Mrs McDonald. MCG and William McDonald commenced proceedings to enforce the settlement agreement (3607 of 2017). Mrs McDonald sues EW for negligence and breach of the retainer.

[31] On 16 May 2017, Mrs McDonald, Mr McDonald and Jacob McDonald entered into a deed of settlement of 3607 of 2017 with William McDonald and MCG, the terms of which are not presently important but are said to be not favourable to her. That was, it is alleged, forced upon Mrs McDonald because she was bound by the settlement agreement.

The pleadings

[32] The amended statement of claim pleads the various transactions and court proceedings leading to the settlement agreement. It pleads that Mrs McDonald retained EW as her solicitor and pleads the terms of the retainer.

[33] By paragraphs 38 to 43A and 46 of the amended statement of claim, Mrs McDonald pleads the making of the settlement agreement:

> "38 On or about 18 March 2017, MCG Group and William McDonald, by Dale Cliff ('**Cliff**') of Mills Oakley, and the plaintiff, Paul McDonald and Jacob McDonald, by Ellem and/or Appleby, entered into a contract ('**the Settlement Agreement**').

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9 Amended statement of claim, paragraph 40.
10 See paragraph [16] of these reasons.
11 Amended statement of claim, paragraph 43A.4.

39 The Settlement Agreement comprised a discussion or discussions between Appleby and Ellem, for the plaintiff, Paul McDonald and Jacob McDonald, and Cliff, for MCG Group and William McDonald, on or about 18 March 2017.

40 On 18 March 2017, at about 6.26pm, Appleby sent an email to Cliff in the following terms ('**the Settlement Email**'):

> Dale,
>
> Further to our earlier 'without prejudice' discussion, our clients are in agreement and have achieved settlement in this matter.
>
> Settlement terms will be more fully expressed in a Deed to be prepared by the lawyers for execution by the parties but, as requested by you, and for posterity, essential terms of the settlement agreed to by the parties are as follows:
>
> (1) Our clients, specifically Paul McDonald, Jacob McDonald and/or Kaye McDonald (jointly and severally), will pay to MCG Group Pty Ltd and Bill McDonald or their nominee a total of $2,300,000 (the Settlement Sum) in accordance with the following:
>
> (a) $650,000 on Monday, 20 March 2017 provided funds are made available to our clients by B2B Capital Pty Ltd by that time;
>
> (b) $800,000 on the settlement of Lot 780 and, in this regard, our clients will use best endeavours to complete pool works and achieve settlement of Lot 780 by Friday, 24 March 2017;
>
> (c) The balance (less any distribution from the trustee in bankruptcy) within fourteen (14) days of the final distribution by the trustee in bankruptcy.
>
> (2) Your client:
>
> (a) accepts the Settlement Sum in full and final satisfaction of all claims, debts and/or causes of action;
>
> (b) agrees to discharge and will promptly pay all remuneration, costs and expenses incurred in both the bankrupt estate and the administration of the liquidation, and indemnifies and holds harmless our clients (and each of them) in respect of any such remuneration, costs or expense.

(3) The parties will cooperate in adjourning the Federal Court proceedings QUD846/2016 to the registry pending payment of the Settlement Sum in accordance with para. (1) above and upon payment or securing of the Settlement Sum, the parties will promptly cooperate to discontinue those proceedings.

(4) Upon payment of the Settlement Sum, MCG Group Pty Ltd and Bill McDonald will each execute in favour of Kaye McDonald a deed of assignment of all debts and/or causes of action to which they are otherwise entitled as against Paul McDonald (known or unknown) or, at the election of Kaye McDonald, a comprehensive release and discharge of all such debts and/or causes of action.

41 The material terms of the Settlement Agreement were stated in the Settlement Email.

42 By its acts alleged in paragraphs 38 to 40 herein, the defendant:

42.1 was carrying out work under the Retainer; ~~and/or~~

42.1A was carrying out work[12] ~~and/or~~ as the plaintiff's solicitors;

42.2 expressly or impliedly represented that it, through Ellem and/or Appleby, was authorised and instructed to act for the plaintiff to enter into the Settlement Agreement.

43 Before entering into the Settlement Agreement, the defendant failed to inform the plaintiff about and failed to obtain instructions from the plaintiff concerning:

43.1 the terms of the Settlement Agreement;

43.2 entering into the Settlement Agreement.

43A. Further or alternatively, before entering into the Settlement Agreement, the defendant failed to provide advice to the plaintiff (either directly or indirectly through any agent of the plaintiff) concerning the terms of the Settlement Agreement and/or whether the plaintiff should enter into the Settlement Agreement, including advice or advice to the effect that (individually and collectively):

43A.1 at the time of the Settlement Agreement, Paul McDonald and Ftrus each had no assets from which they were able to pay $2.3 million (or part thereof) to

12 Amendments on the Amended Statement of Claim are underlined.

the MCG Group or to William McDonald, as required by the Settlement Agreement (as was the fact);

43A.2 the plaintiff was not indebted to the MCG Group or to William McDonald and was not liable to pay (jointly or severally with Paul McDonald and/or Ftrus) $2.3 million or any amount (as was the fact);

43A.3 as between the plaintiff, Paul McDonald and Jacob McDonald, the plaintiff was the only party that held assets of a value capable of satisfying, in whole or in part, the liability to pay $2.3 million under the Settlement Agreement (as was the fact);

43A.4 the Trustees were not parties to the Settlement Agreement, so the Settlement Agreement would not and did not resolve the plaintiff's liability to the Trustees (as alleged herein arising in proceedings QUD 846 of 2016 and QUD 226 of 2017) (as was the fact);

43A.5 the Australian Taxation Office ('**ATO**') was not a party to the Settlement Agreement, so the Settlement Agreement would not and did not resolve any prospective liability on the part of the plaintiff (of which there was none) to the ATO (as was the fact);

43A.6 further and accordingly:

(a) entering into the Settlement Agreement was not in the plaintiff's interests (as was the fact);

(b) the plaintiff should not enter into the Settlement Agreement."

And:

"46 Notwithstanding, at the time of the Settlement Agreement:

46.1 the defendant, as solicitors acting for the plaintiff, had ostensible authority to enter into the Settlement Agreement on behalf of the plaintiff;

46.2 further and accordingly, the plaintiff was bound by the terms of the Settlement Agreement."

[34] Mrs McDonald's case against EW is:

1. EW settled the case without instructions, ie without actual authority;
2. EW had ostensible authority to bind Mrs McDonald which it did;
3. the settlement is disadvantageous to Mrs McDonald because:
   (a) the trustees were not parties and continued with other claims against her;

(b) the Australian Taxation Office was not a party and therefore the settlement did not resolve any tax liability;

(c) the only party who held assets and was of any financial substance was Mrs McDonald so there was no commercial sense in her entering into the settlement agreement;[13]

4. EW should have advised Mrs McDonald not to enter into the settlement agreement;

5. because she was bound through EW's agreement, she settled 3607 of 2017.

[35] EW pleads the following as to its authority to enter into the settlement agreement:

> "38. As to the allegations in paragraph 38 of the Statement of Claim, the Defendant:
>
> (a) Repeats and relies on paragraph 43(a) below;
>
> (a)1 says that on or about 18 March 2017, MCG Group and William McDonald by Cliff on the one hand, and PKJ McDonald by Ellem and/or Appleby on the other hand, purported to enter, intended to enter and believed they had entered into a contract (**Intended Settlement Agreement**) the essential terms of which were recorded in the email referred to in paragraph 40 of the Statement of Claim (**Intended Settlement Email**);[14]
>
> (b) Otherwise does not admit the allegations because:
>
> (i) Whether the parties entered a binding contract depends *inter alia* on whether Ellem and/or Appleby had *inter alia* Kaye McDonald's authority to create such a contract; ~~The allegations are vague and unparticularised, and cannot be responded to in their present form;~~
>
> (i)1 The Defendant contends that:
>
> A. Ellem and/or Appleby had Kaye McDonald's actual authority to. enter the Intended Settlement Agreement and it was therefore a binding contract:
>
> B. alternatively, if they did not have such actual authority, there was not a binding contract entered because Ellem and/or Appleby did not have ostensible authority; and …"[15]

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13 Paragraph 43 of the Amended Statement of Claim.

14 Amendments on the Further Amended Defence are underlined.

15 And denies (with explanation) the allegation of ostensible authority made in paragraph 46 of the amended statement of claim.

The application

[36] EW attacks the pleading of ostensible authority made in the amended statement of claim. It says:

1. Mrs McDonald's case is dependent upon the settlement agreement being binding upon her;
2. Mrs McDonald's case is that she did not give actual authority;
3. Mrs McDonald's only pleaded case is that she is bound to the settlement agreement through the ostensible authority of EW;
4. the material facts pleaded to support ostensible authority are not sufficient to establish it;
5. consequently, there being no alternative basis pleaded upon which Mrs McDonald says that EW bound her to the settlement agreement, the claim must fail and summary judgment should be given.

[37] The application may, in the end, be much to do about nothing. EW pleads that the settlement agreement is binding upon Mrs McDonald. EW says that it had actual authority to bind her. Whether the settlement agreement is binding upon Mrs McDonald because EW had actual or ostensible authority does not alter the fact that it is binding upon her (which is not contentious) and that enables her to at least allege that the agreement was disadvantageous to her and she should have been advised not to enter into it, etc. Even if Mrs McDonald established that EW entered into the agreement with only ostensible and not actual authority, she will not succeed unless she establishes the failure of EW to competently advise her and that the agreement was disadvantageous to her, etc.

[38] The short point is that on the pleadings as they presently stand, it is not contentious that EW possessed legal authority (whether ostensibly or actually) to bind Mrs McDonald to the settlement agreement and she was bound by it.

[39] In any event, both parties argued before me whether Mrs McDonald's pleadings properly plead ostensible authority and I should determine that issue.

[40] During the hearing of the application, it became apparent that the summary judgment application could not succeed. This was because if Mrs McDonald's reliance upon ostensible authority was unsustainable, her action could still proceed on EW's admission of actual authority. It also became apparent that Mrs McDonald's application to strike out parts of the amended defence should not proceed because there is a distinct possibility that the pleadings may be recast in the aftermath of the current application.

[41] The parties agreed during the hearing that the appropriate course was to:

1. dismiss the summary judgment application;
2. decide the application to strike out the relevant parts of the amended statement of claim;
3. adjourn Mrs McDonald's application generally.

[42] EW have identified the particular paragraphs of the amended statement of claim which should be struck out as 42.2, 46, 48, 52.2, 55, 57 and 58.

Consideration of the application to strike out offending paragraphs of the amended statement of claim

[43] As explained below, the plea of ostensible authority fails. The plea in paragraph 42.2 is (for reasons which follow) irrelevant and the plea in paragraph 46 is otherwise bad. Paragraphs 48, 52.2, 55, 57 and 58 all, one way or another, plead the consequences of the settlement agreement. As it is common ground that the settlement agreement is binding upon Mrs McDonald, these paragraphs should not be struck out.

[44] An agent may bind the principal where the agent has the actual or ostensible authority of the principal to enter into the transaction in question. An agent's actual authority includes such authority as can be implied from the express grant of authority.[16] As explained by Dal Pont,[17] authority may be implied as being necessarily incidental to an express grant, or might be implied as the "usual authority" which such an agent would have, or might be implied by the usages and customs of the market in which the agent is to operate.

[45] Ostensible authority arises from the actions of the principal so as to represent to third parties that the agent has the authority to enter into the particular transaction on behalf of the principal.[18] The rationale of ostensible authority as a vehicle by which a principal may become bound to a transaction in the absence of actual authorisation, was described by Denning LJ in *Central Newbury Car Auctions Ltd v Unity Finance Limited*[19] as follows:

> "[Y]ou start with an innocent person who has been led to believe in a state of affairs which he takes to be correct (in this case the purchaser has been led to believe that the rogue was the owner of the car) and has acted upon it. Then you ask yourself how has this innocent person been led into this belief. If it has been brought about by the conduct of another (in this case by the conduct of the original owner), who, though not solely responsible, nevertheless has contributed so large a part to it that it would be unfair or unjust to allow him to depart from it, then he is not allowed to go back on it so as to prejudice the innocent person who has acted on it ... [T]he basis of estoppel is that it would be unfair or unjust to allow a party to depart from a particular state of affairs which another has taken to be correct."[20] (emphasis added)

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16 *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 132-133 following *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 502.

17 GE Dal Pont, *Law of Agency*, 3rd Edition, LexisNexis Butterworths, 2014 at 8.2.

18 *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 and *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [36] following *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503.

19 [1957] 1 QB 371.

20 At 379-80.

[46] It is important to observe that a solicitor has no special and broad-ranging authority (actual or ostensible) and any authority must be determined on consideration of the circumstances of the particular retainer. In *Saffron Walden Second Benefit Building Society v Rayner*,[21] James LJ observed:

> "I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of solicitor, that is to say, that a man has got a solicitor not as a person whom he is employing to do some particular business for him, either conveyancing, scrivening, or conducting an action, but as an official solicitor, and that because the solicitor has been in the habit of acting for him, or been employed to do something for him, that solicitor is his agent to bind him by anything he says, or to bind him by receiving notices or information. There is no such officer known to the law. A man has no more a solicitor in that sense than he has an accountant, or a baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ him or deal with him, and the solicitor is his solicitor when he chooses to employ him and in the matter in which he is so employed."[22]

[47] Ultimately, the existence of, and the extent of the ostensible authority of an agent, be it a solicitor or otherwise, depends upon the facts of the particular case. There is no principle of law which limits the factual circumstances in which ostensible authority might arise in a solicitor to bind the client. However, the concentration must be upon the actions of the principal,[23] here Mrs McDonald.

[48] It is for this reason that paragraph 42.2, which appears at paragraph [33] of these reasons, is irrelevant. A representation by the agent does not cloak the agent with authority.

[49] As a pleading must plead all material facts,[24] the starting point is the amended statement of claim and the material facts upon which the ostensible authority is said to arise.

[50] In this respect, Mrs McDonald pleads nothing in the amended statement of claim beyond:

1. EW was retained in the litigation and for the settlement negotiations;[25] and
2. therefore, EW had ostensible authority to enter into the settlement agreement.[26]

[51] Mrs McDonald pleads further facts in her amended reply which are said to be relevant to the allegation of ostensible authority. I shall return to that later.

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21 (1880) 14 Ch D 406.

22 At 409, with Baggally and Bramwell LJJ expressing similar views, followed in *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QCA 205 at [34] per Keane JA (as his Honour then was).

23 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 187.

24 *Uniform Civil Procedure Rules* 1999, r 149.

25 Amended Statement of Claim, paragraphs 30 and 31.

26 Amended Statement of Claim, paragraph 46.

[52] A distinction has been drawn in the authorities between the position of solicitors performing contractual work and those engaged in litigation.

[53] In relation to transactional work, Pincus JA in *Kent v Hogarth*,[27] observed as follows:

> "A solicitor authorised to negotiate and agree the terms of a contract does not for that reason ordinarily have authority to enter into a contract: Pianta v. National Finance & Trustees Ltd (1964) 180 C.L.R. 146 at 152; see also Rymark Australia Development Consultants Pty Ltd v. Draper [1977] Qd.R. 336 at 344 and Nowrani Pty Ltd v. Brown [1989] 2 Qd.R. 582 at 586. In Australia, at least, the tendency is not to treat a solicitor as having ostensible authority to contract, still less to alter a contract: CTM Nominees Pty Ltd v. Galba Pty Ltd (1982) 2 B.P.R. 9588, Longpocket Investments Pty Ltd v. Hoadley (1985) 3 B.P.R. 9606."[28]

[54] In *Pianta v National Finance & Trustees Ltd*,[29] the High Court considered the implied authority of a solicitor to contract on behalf of the client. Barwick CJ said this:

> "So far as the solicitor is concerned, however, the terms of his retainer are clearly enough defined in the evidence. He was retained, in the capacity of a solicitor, to settle written terms of sale which he could advise his clients to accept and sign. For this purpose, he could negotiate and agree with the representatives of the respondent the terms which the respondent could be expected to accept or, if the representatives were so authorized, which they could accept on behalf of the respondent and which the solicitor could advise his clients as satisfactory in their interest. But this does not confer on the solicitor authority to contract on behalf of the clients to sell the land. If he is to have that authority it must be given expressly or by necessary implication. There was in my opinion no such authority given in this case."[30]

[55] Circumstances could no doubt arise where a solicitor has ostensible authority to contract on a clients behalf, however, it is difficult to imagine circumstances where ostensible authority to contract[31] would arise, but where the retainer did not give actual authority either express or implied.

[56] These principles have been consistently followed and applied.[32] However, the position of a solicitor acting in litigation is different. As long ago as the mid-1800s, it was held that a lawyer who is retained to conduct litigation will generally have the implied or ostensible authority of the client to compromise the proceedings and thus

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27 [1995] QCA 472.
28 At 9.
29 (1964) 180 CLR 146.
30 At 152 and Menzies J at 154.
31 Otherwise than in litigation.
32 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1994-1995) 8 ANZ Insurance Cases 61-232 at 75,555, *Nowrani Pty Ltd v Brown* [1989] 2 Qd R 582 at 586, *Pavlovic v Universal Music Australia Pty Ltd* (2015) 90 NSWLR 605 at [21] and [150], *Lucke v Cleary* (2011) 111 SASR 134 at [60].

bind the client to the compromise.[33] The rationale for such a distinction is that by retaining the lawyer to act in specific litigation a representation is made to the opposing litigant that the lawyer has the authority of the client to take all necessary steps in the litigation, including compromise. As Lord Esher MR explained in *Matthews v Munster*:[34]

> "when the client has requested counsel to act as his advocate . . . he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues. ... The request does not mean that counsel is to act in- any other character than that of advocate or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client."[35]

[57] However, the representation by the client that the lawyer is to act for him in the litigation raises no ostensible authority that the lawyer may bind the client beyond the scope of the litigation. In *Waugh & Ors v HB Clifford & Sons Ltd & Anor*,[36] Brightman LJ referred to cases such as *Swinfen v Lord Chelmsford*,[37] *Matthews v Munster*[38] and *Shepherd v Robinson*[39] and observed:

> "It follows, in my view, that a solicitor (or counsel) may in a particular case have ostensible authority vis-a-vis the opposing litigant where he has no implied authority vis-a-vis his client. I see no objection to that. All that the opposing litigant need ask himself when testing the ostensible authority of the solicitor or counsel, is the question whether the compromise contains matter 'collateral to the suit.' The magnitude of the compromise, or the burden which its terms impose on the other party, is irrelevant. But much more than that question may need to be asked by a solicitor when deciding whether he can safely compromise without reference to his client.
>
> If I am right so far, all that has to be considered in the present appeal, which concerns *ostensible* and not *implied* authority, is whether the repurchase of the allegedly defective dwelling-houses is properly to be described as matter of collateral to the action. For the buyers and their solicitors had no notice of any limitation imposed by the builders on the *ostensible* authority of the builders' solicitors."[40] (emphasis added)

[58] In *Waugh & Ors v HB Clifford & Sons Ltd & Anor*, the litigation arose from the purchase by two plaintiffs of semi-detached houses which were built and sold to them by the defendant. The plaintiffs brought an action for damages as a result of

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33 *Prestwich v Poley* (1865) 144 ER 662 at 664 and *Strauss v Francis* (1866) LR 1 QB 379 at 381.
34 (1887) 20 QBD 141.
35 At 143.
36 [1982] Ch 374.
37 (1860) 5 H&N 890.
38 (1887) 20 QBD 141 at 145.
39 [1919] 1 KB 474.
40 At 387-388.

defects in the houses. The lawyers purported to settle the litigation on the basis that the houses would be repurchased.

[59] It was held that the term of the compromise to repurchase the houses was not a matter "collateral" to the litigation. In so finding, Brightman LJ made the following observations:

> "I think it would be regrettable if this court were to place too restrictive a limitation on the ostensible authority of solicitors to bind their clients to a compromise. I do not think we should decide that matter is 'collateral' to the action unless it really involves extraneous subject matter, as in *Aspin v. Wilkinson* (1879) 23 S.J. 388, and *In re A Debtor* [1914] 2 K.B. 758. So many compromises are made in court, or in counsel's chambers, in the presence of the solicitor but not the client. This is almost inevitable where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be affixed; or that a director should sign who can show that the articles confer the requisite power upon him; or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor. Only in the exceptional case, where the compromise introduces extraneous subject-matter, should the solicitor retained in the action be put to proof of his authority."[41] (emphasis added)

[60] These principles have also been consistently applied and it is now well-established that a lawyer engaged in litigation has the ostensible authority of the client to contract a compromise provided the compromise does not involve collateral matters.[42] That will be so, on the authority of *Waugh & Ors v HB Clifford & Sons Ltd*, even where the settlement of the litigation involves terms beyond the relief which could be given by the court.

[61] Mr Jennings KC, who appeared for Mrs McDonald, relied upon a passage in *Lucke v Cleary*[43] as follows:

> "That general proposition,[44] however, is subject to the qualification that, in the context of litigation, a legal practitioner has ostensible authority to bind his or her client to a contract which relates to and, in particular, compromises that litigation.[45] In *CIC Insurance Ltd v Bankstown Football Club Ltd*,[46] Kirby P drew a clear distinction between ostensible authority in litigious and non-litigious matters:[47]

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41 At 388.

42 *Lucke v Cleary* (2011) 111 SASR 134 at [61]-[64], *Across Australia Finance v Bassenger* [2008] NSWSC 799 at [78], *Cassar v New South Wales Crime Commission* (2014) 87 NSWLR 683 at [57] and *Pavlovic v Universal Music Australia Pty Ltd* (2015) 90 NSWLR 605 at [149].

43 (2011) SASR 134.

44 That a solicitor has no ostensible authority to contract for the client.

45 *Strauss v Francis* (1866) LR 1 QB 379 at 381; *Across Australia Finance v Bassenger* [2008] NSWSC 799.

46 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1994) 8 ANZ Insurance Cases 75,546 (61-232).

> 'It is not unreasonable for the appellant to view the conduct of the club, in apparently instructing its solicitor to pursue the subject insurance claim, as including all necessary authority to give effect to those instructions. Incidental to those instructions, it can be inferred, was the power to deal with the issue of the purported cancellation of the contract. Indeed, I should have thought that the instruction of a solicitor to pursue a matter such as a controversial insurance claim would leave a third party dealing with the solicitor with the impression that that solicitor, having been retained for his or her legal expertise, would have all necessary authority to deal with all issues which reasonably and foreseeably arose in the pursuit of that claim. It is not a situation akin to the instruction of a solicitor to pursue non-litigious business where the nature and extent of the solicitor's authority is not so easily inferred to be so widely encompassing.'"[48] (emphasis added)

[62] Mr Jennings submits that the term "relates to" is wide and might include, in some circumstances, authority to compromise matters that may be considered "collateral to" the litigation.

[63] If it was intended by the Full Court of the Supreme Court of South Australia to change the test laid down in the longstanding line of authority to which I have referred above, one would think that would be more emphatically achieved.

[64] Reasons must be understood as an explanation of the process by which the decision is made[49] and must be read accordingly. There is nothing in *Lucke v Cleary* to suggest a change in the law. Quite the contrary, later in the judgment,[50] the court specifically endorsed and followed *Waugh v HB Clifford & Sons Ltd*:

> "In *Waugh v H B Clifford & Sons Ltd*,[51] Brightman LJ explained that there may be ostensible authority to enter into a contract that compromises an action so long as the contract does not contain terms which are 'collateral to the action'. His Lordship said:
>
> > 'It follows, in my view, that a solicitor (or counsel) may in a particular case have ostensible authority *vis à-vis* the opposing litigant where he has no implied authority *vis à-vis* his client. I see no objection to that. All that the opposing litigant need ask himself when testing the ostensible authority

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47 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1994) 8 ANZ Insurance Cases 75,546 (61-232) at 75,555.

48 At [61].

49 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 and *DL v The Queen* (2018) 266 CLR 1.

50 Paragraph [63].

51 [1982] Ch 374.

> of the solicitor or counsel, is the question whether the compromise contains matter 'collateral to the suit'.'"[52]

[65] Here, the compromise is well beyond the scope of the litigation and concerns many collateral matters.

[66] The only parties to the litigation (relevantly QUD846) were the trustees in bankruptcy, Mrs McDonald and Fortrus Australia. The parties to the settlement agreement were Mr McDonald, Jacob McDonald, Mrs McDonald, MCG and William McDonald. Self-evidently then, the settlement agreement was dealing with rights possessed by persons who have no legal interest in the litigation being compromised.

[67] This can starkly be seen from the fact that the obligation to pay the settlement sum fell upon Mrs McDonald (who is a party to the litigation), but also upon Mr McDonald and Jacob McDonald. The parties who obtained a right to payment of the money under the settlement agreement were not the trustees but two parties who were not parties to the litigation, MCG and William McDonald. It was the rights of MCG and William McDonald which were satisfied by payment of the settlement sum.

[68] In *Re a Debtor*,[53] a solicitor was retained in proceedings to recover damages as a result of the death of the client's husband in an accident. Judgment was obtained and the defendant made a deed of assignment to a trustee for the benefit of his creditors. A clerk of the solicitor attended the creditor's meeting, voted against the appointment of the trustee proposed by the debtor and procured the appointment of a nominee of his own as trustee. The client alleged this was done without instructions and authority.

[69] The question in the case was whether the solicitor had implied authority to enter into the deed of assignment. Atkin J explained:

> "It does not seem to me to be necessary to determine whether after judgment a solicitor has implied authority to compromise the judgment which he has obtained for his client. I think that, if he has such authority, it would not extend to such a compromise as entering into a deed of arrangement which involves entering into relations not merely with the debtor but with the trustee and the other creditors of the debtor, persons who are strangers to the action in which the judgment was obtained."[54]

[70] In my view, not only would the solicitor in *Re a Debtor* not have implied authority, but the entering into by the client of a retainer with the solicitor to act in litigation between particular parties would not constitute a representation to other parties that the solicitor had authority to contract.

[71] Here, by the time the settlement agreement was made, the only live controversy in QUD846 was as to the appointment of a statutory trustee for sale of 24 The Anchorage.

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52 Paragraph [63].
53 [1914] 2 KB 758.
54 At 761.

[72] In the present case, rights and obligations of parties beyond the litigation have been settled and, on the case pleaded against it, EW had no ostensible authority to enter into an arrangement such as that.

[73] Mr Jennings, in his written submissions, said this:

> "It appears uncontroversial that MCG Group and Bill McDonald were funding the Trustees and the Settlement Agreement was intended to achieve a position whereby they would no longer provide that funding so that the Trustees would not continue any proceeding against the plaintiff."

[74] The plea at paragraph 4B(a) of the Amended Reply to the Further Amended Defence is:

> "4B As to subparagraph 42(a)3 of the Defence, the Plaintiff:
>
> (a) denies as untrue that the Defendant did not have ostensible authority to enter into the Settlement Agreement because:
>
> (i) a legal practitioner has ostensible authority to bind his or her client to a contract which relates to litigation and/or is directly related to the subject matter of the dispute the subject of litigation;
>
> (ii) the Settlement Agreement related to litigation the subject of proceeding QUD846/2016, because William McDonald and the MCG Group funded the applicant in that proceeding and the parties thereto agreed to cooperate in having that proceeding discontinued, and was otherwise directly related to the subject matter of the dispute the subject of that proceeding;"[55]

[75] The plea in paragraph 4B(a) does not support an allegation of ostensible authority but undermines it.

[76] As explained, the authorities demonstrate that a solicitor does not, by force only of his position as solicitor of the client, have ostensible authority to contract on behalf of the client. An exception is where the solicitor is acting in litigation. The solicitor then possesses ostensible authority to compromise the action, but not to contract in relation to collateral matters. A compromise reached, not with the parties to the action to be compromised and compromising their rights, but with a litigation funder of one of the parties and compromising the funder's rights, is most definitely collateral to the litigation. This is especially so when the subject matter of the compromise is beyond the subject matter of the litigation and the claim for relief outstanding (appointment of trustees for sale).

[77] Mr Jennings submitted that pleadings, or parts thereof, should only be struck out in the clearest of cases. This is not a case where the striking out of offending paragraphs will result in judgment for EW, so a more robust approach is justified

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55 Amendments on the Amended Reply to the Further Amended Defence are underlined.

than would be the case if an order striking out parts of the pleading was tantamount to summary judgment. [56] In view of the fact that EW admits that a binding compromise was reached, Mrs McDonald's case can be repleaded.

[78] As presently framed, the material facts pleaded to support the allegation of ostensible authority do not do so.

[79] It follows that those paragraphs of the amended statement of claim which concern the allegation of ostensible authority should be struck out.

Conclusions and orders

[80] As earlier observed, EW abandoned the application for summary judgment and it should be dismissed. It was also common ground that Mrs McDonald's application to strike out parts of the further amended defence should be adjourned. For the reasons given, I will strike out the offending paragraphs of the amended statement of claim.

[81] That leaves questions about costs and directions for repleading, etc. The parties should be given an opportunity to consider their respective positions on these matters and I will set a date for the matter to be mentioned before me.

[82] The orders are:

1. As to the application filed by the defendant:
   (a) the application for summary judgment is dismissed;
   (b) paragraphs 42.2 and 46 of the amended statement of claim are struck out.
2. The application filed by the plaintiff is adjourned to a date to be fixed.
3. The questions of costs and directions are reserved for further argument on a date to be fixed.
4. The matter will be mentioned at 9.15 am on 21 November 2023.

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[56] *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [24]-[27] followed recently in *Equititrust Limited v Tucker (No 2)* [2019] QSC 248 at [13].