LAW4701 Commercial Transactions

Week 1: Introduction

- Partnerships are based on a contractual relationship involving at least two legal persons.
- Partners also owe each other fiduciary duties.
- Commercial transactions will be between legal entities that can organise themselves in any number of business structures:
  - Sole trader
  - Partnership
  - Company

- Any one of those business structures (**businesses**) can operate through agents (**Agency**). All except partnerships are separate legal persons; therefore, there are specific legal risks arising from such structure (**Partnerships**).
- Any of these businesses can engage in the purchase or sale of goods, domestically or internationally (**Sale of goods**).
- In the process of buying or selling goods (or other commercial transactions) businesses *or persons associated with them* may act as sureties for the financial or contractual obligations of the business structures (**Guarantees**).
- In addition, to raise operating capital the businesses may borrow money on security of their personal property (personal as opposed to real property) (**Security interest over personal property**)
- Commercial prudence dictates that businesses insure against common risks (**Insurance**).
- Businesses owned by natural persons that fail financially face bankruptcy (**Bankruptcy**).

Sole Trader

Advantages	Disadvantages
• Straightforward business structure • High degree of control by owner • Commercial privacy • No specific regulation • Retention of profits • Ownership of assets • Easy to terminate	• Unlimited legal liability (i.e. personal assets remain at risk) • Limited options in terms of offering security (e.g. not possible to grant a floating charge over business assets) • Transferability of business is problematic • Tax consequences – personal rate of income tax may be higher than the company rate

Partnership

Advantages	Disadvantages
• Very easy to establish – can be based on an oral agreement • No registration requirements • Freedom to tailor the arrangement pursuant to the terms of an agreement • A clear common goal (to make a profit) • Limited liability partnerships available in certain circumstances • A legislative framework that will 'fill the gaps'	• No separate legal entity • Written partnership agreement recommended which will usually require legal advice and the input of all partners • Automatic dissolution in certain circumstances unless partnership agreement provides otherwise • Partners remain jointly and severally liable for defaults of other partners • Number of partners limited under **s115** of the Corporations Act

Company

Advantages	Disadvantages
• A separate legal entity created with the powers of a natural person and more	• Expensive to register and maintain (compared to other forms of business structures)
• Simple registration process	• Ongoing regulatory requirements (can be extensive)
• A range of types to choose from (most types limit the liability of members)	• Compliance with Act required by all companies (even small Pty Ltd companies)
• Clear distinction between ownership and management (owners do not need to get involved)	• Limited options for owners to get involved in management decisions (power to manage is vested in directors)
• Company tax rate applies	
• Range of security may be given by the company	• Restrictions on transfers of shares for some company types

Agency

ACCC v Flight Centre Travel Group Ltd (2016)

- This case involved an action by ACCC against Flight Centre for a breach of s 45 of the *Trade Practices Act* 1974 (Cth).
- Section 45 prohibited a person from proposing an arrangement, with a competitor, for the purpose of lessening competition (Price fixing).
- Flight Centre proposed, to several airlines, that they do not discount their direct sales → A key element of s 45 was that the parties be "in competition".
- One of the questions before the court was whether Flight Centre, who was an agent of the airline, could also be in competition with them, for the purpose of s 45.
- The majority of the High Court found that the section had been breached with the French CJ dissenting.
- French CJ described agency at [15], as follows: The word ***"agent" connotes in law a person who has the authority or capacity to create legal relations between a person who occupies the position of principal and third parties***. The legal concept is encapsulated in the maxim quoted in *Petersen v Moloney*, "[*q*]*ui facit per alium* - he who does an act through another does it himself.
- Majority HC: An agent is "a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties"

Petersen v Moloney (1951)

- Petersen instructed an estate agent (Pulbrook) to find a purchaser for her house. Pulbrook found Moloney (the purchaser) who paid Pulbrook the full purchase price for the house and was issued a receipt by Pulbrook.
- Pulbrook did not pay the money to Petersen.
- Petersen sued both Moloney and Pulbrook. Pulbrook was bankrupt.
- Moloney's defence was that Pulbrook was Petersen's agent and that by paying the money to him, Moloney had discharged his obligation under the contract of sale
- Found that Pullbrook was not Petersen's agent and therefore Moloney had not discharged his obligation to pay the purchase price down: "In connection with sales and purchases of property the word "agent" is apt to be used in a misleading way. **The legal conception of agency is expressed in the maxim "*Qui facit per alium facit per se*", and an "agent" is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties.** When a person is employed to find a buyer of property, he is commonly said to be employed as an agent, and the term "estate agent" is a common description of a class of persons whose business is to find buyers for owners who wish to sell property. But the mere employment of such

a person under the designation of agent does not, apart from the general rule that the employer will be responsible for misrepresentations made by him, necessarily create any authority to do anything which will affect the legal position of his employer."

Section 31(3) Sale of Land Act 1962

A notice under subsection (2) must, within **3 clear business days** after the purchaser has signed the contract—

(a) be given to one of the following persons—
  (i) the vendor;
  (ii) an agent of the vendor;
  (iii) an estate agent engaged or appointed by the vendor to sell the land; or
(b) be left at one of the following addresses—
  (i) the address for service of the vendor specified in the contract;
  (ii) the address of the vendor's agent;
  (iii) the address of the estate agent engaged or appointed by the vendor to sell the land.

- This section was amended as a consequence of a matter that came before the Supreme Court and appealed to the Court of Appeal; *Cheng Lo and Eng Kiat Tan v Thomas John Russell* [2016] VSCA: The trial judge and the Court of Appeal found that an agent of the vendor did not include the vendor's estate agent, and that it should be given its general law meaning (i.e. authorised agent who has either express or implied authority).

International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co (1958)

- While at the Sydney Agricultural Show Carrigan, a farmer, was handed a pamphlet describing the benefits of a baler manufactured by International Harvester (IH).
- Carrigan bought a bayler from Hassan & Kensell Pty Ltd (HK). HK conducted a business under the description of machinery and general agents and also described itself as a dealer for the principal's products.
- The bayler was defective. HK had gone into liquidation. Carrigan sued IH.
- The question before the court was whether the HK was acting as an agent for IH or as an independent dealer.
- In finding that HK was not acting as agent for IH, and therefore IH had no liability for the defective bayler, the courts said as follows: **Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in the business world its significance is by no means thus restricted.** [emphasis added] No word is more commonly and constantly abused than the word ' agent '. A person may be spoken of as an ' agent ', and no doubt in the popular sense of the word may properly be said to be an' agent', although when it is attempted to suggest that he is an ' agent ' under **such circumstances as create the legal obligations attaching to agency that use of the word is only misleading**"

Legal Definition of Agency

- Petersen v Moloney: The legal conception of agency is expressed in the maxim "Qui facit per alium facit per se", and an "agent" is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties

Employer/ Employee

This relationship may include agency where:

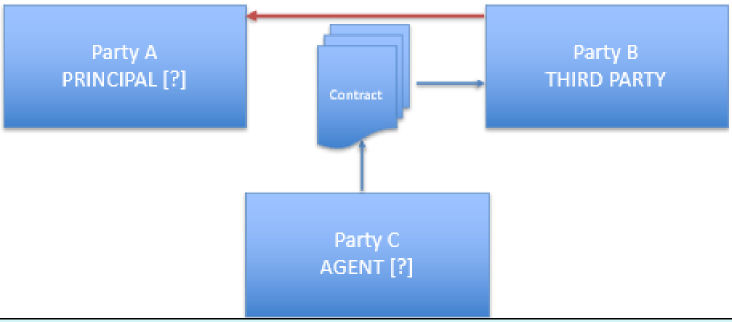
- Expressly given under the employment contract
- Expressly implied by the nature of the employment
- By holding out to the third party, by the employer

Independent Contractor

This relationship may include agency where:

- Expressly given under the contract engaging the independent contractor (rare)
- Expressly implied by the nature of the employment (rare)
- By holding out to the third party, by the employer

Common Commercial Context



Creating Agency

- An agency can arise in any of the following ways:
  1. By the principal aurally given the agent authority:

  This can be either by:
  - actual **express** authority; or
  - actual **implied** authority

  2. By holding out – this is referred to as apparent or ostensible authority
  3. Ratification
  4. Operation of Law (not covered)

1. A. ACTUAL EXPRESS AUTHORITY

- Actual express authority arises in circumstances, for example, where an employer appoints an employee as its authorised agent to enter into contracts.
- That authority may be limited or otherwise qualified (e.g. to a maximum value and/or subject matter).
- This type of authority is relatively ety.asy to identify.
- Such authority may be in **writing**, usually contained in the employment contract; however, it can also be **oral**.
- Powers of attorney are appointments of an agent **under seal** (i.e. by deed) → A appointment under seal is necessary if the principal wishes to authorise the agent to sign instruments under seal on the principal's behalf.
- Company – can be provided, constitution, employment, board meeting

1. B. ACTUAL IMPLIED AUTHORITY

- Based on arrangement between Principal and agent, inferred either by virtue of way the principal has acted in regard to the agent or in virtue of the way
- Actual implied authority can arise where the authority is necessarily incidental to carrying out the agents duties or responsibilities.
- In the context of a company, this could be by virtue of a person's appointed position within the company. The company is taken to have intended that appointee to have the authority usually attached to the position, or positions similar to it.
- A managing director has actual implied authority to enter into transactions that can be categorised as ordinary trading transactions. However, the managing director does not have actual implied authority to enter into transactions that *fall outside the ordinary course of business* or to sell the company's main business.

Hely-Hutchinson v Brayhead Ltd [1968]

- In this case the plaintiff Hely-Hutchinson (**HH**) (respondent on appeal to the Court of Appeal) sued the defendant (appellant on appeal) company, Brayhead Ltd (**B**), on two agreements:

a. An **indemnity** by B in favour of HH, against loss suffered by HH by reason of having to honour a guarantee he gave to a lender as security for a loan (of £50,000) by that lender to B (**Indemnity**). B defaulted on the loan and the lender called up the guarantee which HH paid; and
b. A **guarantee** by B in favour of HH as security for any money loaned by HH to another company Peridio (in which BB held shares and had intentions of taking over) (**Guarantee**). HH had lent Peridio the sum of £45,000).

- Both these agreements were in the form of letter, on B's letterhead, signed by A.J Richards (**R**) in his capacity as Chairman of B. **R had not been appointed as managing director**.
- B defended the claims on two main grounds:
  - that R had neither actual nor ostensible authority to bind B to the two agreements; and
  - in the alternative; if it were found that R had ostensible authority, because HH was also a director of B he had been put on notice of the requirement under article 99 of the company's constitution which required such transactions between directors and B to be disclosed.

- Roskill J concluded, that R had apparent or ostensible authority; that the board of B ***knew of and acquiesced in R acting as the de facto managing director***; that HH relied upon the representations made to him, and as a consequence of which advanced £45,000.
- Roskil J also found that the fact the HH was also a director of B did not affect his findings; as it did not breach art 99 of the company constitution.
- B appealed to the Court of Appeal. In dismissing the appeal and holding that B was bound by the agreements, the Court of Appeal found, on the facts as were put before the trial judge, that **R had actual implied authority** and therefore found it unnecessary to consider whether there was ostensible authority as found by the trial judge**.**
- Lord Denning MR, explained actual implied authority as follows: It is implied when it is ***inferred from the conduct of the parties and the circumstances of the case***, such as when the board of directors appoint one of their number to be managing director. They ***thereby impliedly authorise him to do all such things as fall within the usual scope of that office***. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.
- The [trial judge] held that Mr. Richards had ostensible or apparent authority to make the contract, but I think his findings carry with it the necessary inference that he had also actual authority, ***such authority being implied from the circumstance that the board by their conduct over many months had acquiesced in his acting as their chief executive*** and committing Brayhead Ltd. to contracts without the necessity of sanction from the board**.**

ANZ Bank Ltd v Ateliers de Constructions Electrique de Charleroi (1966) (Privy Council)

- Ateliers, a Belgium company, appointed an Australian agent, Helios Heavy Electrical Engineering Co Pty Ltd (Helios) to receive cheques on its own behalf from an Australian customer, Snowy Mountains Hydor-Electrical Authority (Snowy).
- Atliers had no bank accounts in Australia and Australia prohibited the export of currency beyond a certain amount.
- The agent endorsed the cheques and paid them into its own account. The agent became insolvent, and Ateliers sought to recover the money from the ANZ, by way of damages for conversion.
- In finding that Helios did have implied actual authority to bank the cheques into its own account, it stated: In the end the compelling point is this. The sums due were payable in Australian currency . If Snowy had chosen to make payment in cash, admittedly Helios had authority to receive it. But payment by order cheques in favour of [Alteliers] must have been expected. It could not have been supposed that they would be sent to Belgium to be indorsed, and [Alteliers] had no bank account of their own in

Australia. Apart from exchange control difficulties, the only practical plan from a business point of view was for Helios to indorse the cheques and pay them in to the Helios account. This became the only possible plan when the total amount of the cheques exceeded the sum which exchange control permitted to be exported, or when it became proper for Helios to retain part of the sum in any cheque to pay local expenses. ***Implied authority was necessary to give business efficacy to the transactions***. In view of the large sums which the plaintiff company knew that Helios had earlier paid into that account under other contracts, it is easy and natural to infer the necessary authority to meet any difficulty caused by the fact that the precise method of payment by Snowy differed from the methods of payment under earlier contracts → authority implied if necessarily incidental to express authority

2. APPARENT OR OSTENSIBLE AUTHORITY

- Ostensible authority does not arise by virtue of an agreement (either expressed or implied) between the principal and the agent, it arises with reference to ***<u>what would reasonably appear to the third party</u>*** as the agent having the requites authority to act as the agent of the principal.
- The focus is therefore on the principal's behavior and actions with reference to the third party and not the agent (i.e. the representations made by the principal and relied on by the third party).
- An agent may have actual express authority in relation to only a specified scope of matters, and the third party may, therefore, be required (in order to establish the validity of the contract) to establish an ostensible authority that goes beyond the scope of the actual authority.
- Because the focus is on the principal's behaviour with reference to the third party the effect of ostensible authority is ***to <u>estop the principal from claiming that the representative had no authority to act as agent</u>.***

Freeman & Lockyer v Buckhurst Properties Ltd [1964]

- In this case, Mr Kapoor (a director of Buckhurst Properties Ltd) managed the day to day business of the company without the involvement of any of the other directors. He engaged a firm of architects and the company later tried to assert that the services contract was invalid.
- The court held that the board, by its conduct, had represented to the outside world that Mr Kapoor had authority to enter into contracts of a kind that a managing director would, in the normal course, be authorised to enter into for and on behalf of the company.
- Lord Diplock observed as follows: Distinguishes between "actual" authority and "ostensible" authority stating that the <u>"[g]enerally they co-exist and coincide, but either may exist without the other and their respective scopes may be different."</u>
- Actual authority is "a legal relationship between principal and agent created by a consensual agreement to which they alone are parties." The third-party is not party and may be entirely ignorant of its existence.
- In contrast ostensible authority is "a ***legal relationship between the principal and the [third-party] created by a representation***, ***<u>made by the principal to the [third-party],</u>*** intended to be and in fact acted on by the [third-party], that the agent has authority to enter on behalf of the principal into a contract of the kind within the scope of the 'apparent' authority, so as to render the principal liable to perform [under that contract]."[emphasis added]
- Diplock LJ set out the four requirements to be established by the third party in order for the contract to be binding:
  i. A *<u>representation</u>* by words or by conduct that the person purporting to act on the company's behalf did have authority to enter into a contract of the type in question on the company's behalf ('a holding out');
  ii. The representation was *<u>made by a person who had actual authority (PRINCIPAL)</u>* to act for the company either generally or in relation to the matters to which the contract relates;
  iii. The *<u>third party was induced by the representation</u>* to enter into the contract (i.e. there was reliance on the representation); and

iv. The memorandum or articles do not deprive the company of the *capacity* to enter into the type of contract concerned or to delegate authority to enter into that kind of contract to the agent (no longer relevant due to the abolition of doctrine of ultra vires under section 125 *Corporations Act 2001*(Cth)).

- Two further considerations in the context of a company:
  i. That the capacity of a company is limited by its constitution; this had been overtaken by section 125, which has removed the principle ultra vires.
  ii. The second is that a corporation can only make a representation, which is necessary to make out ostensible authority, through an agent (i.e. a natural person) who has **actual authority from the corporation to make the representation**. "Such 'actual' authority may be conferred by the constitution of the corporation itself, as, for example, in the case of the company, on the board of directors, or it may be conferred by those who under the constitution have the powers of the management on some other person to whom the constitution permits them to delegate authority to make representations of this kind." [emphasis added]

- In *Freeman & Lockyer v Buckhurst Properties Ltd* it was held that the board itself had made the representation or the holding out; the board has the actual authority. Often the representation will come from a particular person or delegate as opposed to the board.
- **A representation of authority cannot be made by a person who has only apparent authority.**

Crabtree Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Company Pty Ltd (1975)

- Peter was given express and limited authority to only make enquires regarding a printing press including quotes. He had no authority to purchase.
- Peter obtained a quote from Crabtree Vickers Pty Ltd and placed an order on the company's order form. The form had Bruce Jnr (Chair) name printed at the bottom followed by the word "per" and then a line for a signature. Peter completed the details of the purchase and signed his name after the word "per".
- Crabtree sought to enforce the contract, comprising of the completed and signed order form that it had accepted.
- In finding that the contract was not binding on the Australian Direct Mail Advertising and Addressing Company Pty Ltd, the High Court stated: the finding of fact is that this particular managing director did not have power to manage the affairs of the respondent generally (because of the limitation on his power) or in respect of the purchase of this machinery. He therefore had no authority to make the representation which would give Peter McWilliam ostensible authority. ***In other words, a person with no actual, but only ostensible, authority to do an act or to make a representation cannot make a representation which may be relied on as giving a further agent an ostensible authority.***
- Due to the unique management arrangements, Bruce Jnr (who was in fact the managing director of the company) himself only had apparent authority to carry on the management of the company or enter into the contract. This meant that he was not capable of cloaking Peter with authority.

Pacific Carriers Ltd v BNP Parabas (2004)

- Confirmed finding in Crabtree, that is the representation can also be made for the purposes of Freeman & Lockyer if the ***principal arms the purported agent with the accruements of authority*** → in case provided Ms Dhiri with stamp to approve documents and be presented as an agent of the bank
- HC was willing to take a **broad approach** to the concept of which party had made "the representation" → The bank alleged that the only representation as to Ms Dhiri's authority came from Ms Dhiri herself. The court disagreed with this approach and held that the bank itself had made a representation by permitting Ms Dhiri to ***act in a certain manner without taking proper safeguards*** against misrepresentation.

- The High Court noted that a kind of representation that often arises in business dealings is one which flows from equipping an officer of the company with a certain title, status and facilities. Ms Dhiri was placed in a position whereby she was able to affix the relevant 'chop' to the documents and send them to the client. There were no safeguards in place to protect the bank and outsiders that dealt with it from her unauthorised conduct

3. RATIFICATION

- A contract that is purportedly entered into by a representative with no authority can be ratified by the company, through its board, whereupon the company and the third party will be bound.
- Ratification can apply where:
  - The person acting had no authority whatsoever; or
  - The agent (with authority) acted outside the scope of that authority.

Consequences of Ratification

- A principal is subject to *legal consequences* of the act as if it had been effected by an agent properly authorised to do that act on the principal's behalf → Therefore, ratification is an ***exception to the rule of privity of contract***.
- A principal who has validly ratified an unauthorised act cannot unilaterally revoke the ratification - This is different to actual authority.
- An agent is discharged from liability to 3rd party for breach of warranty of authority.
- A principal will be liable to the agent to either pay the agent the agreed or reasonable remuneration or payment by way of indemnity for loss sustained by Agent.

Elements of Ratification

a. The acts must have been done as ***agent*** for and on behalf of the supposed principal.
b. The principal must have been in ***existence*** at the time of the making of the contract. However, s131(1) of the Corporations Act 2001 (Cth) provides that where a nonexistent company purports to contract and the company is formed within a reasonable time, the company may then ratify the contract.
c. The principal must have the ***capacity*** to make the contract both at the date of the contract and at the date of ratification.
d. The ***whole contract*** must be ratified. A principal cannot ratify that which is beneficial and reject the remainder.
e. Ratification must be with ***"full knowledge"*** or with ***"an unqualified adoption"*** → "silence or acquiescence" is not ratification unless there is "proof of a knowing acceptance" that may be regarded as assent.
f. Ratification is only possible where the agent had concluded a ***valid contract*** with the third party.
g. Ratification must take place within a ***reasonable time*** of the agent's act (unless the contract stipulates otherwise)

Duties, Rights and Liabilities of an Agent

Duties

Summary:

(i) Duty to follow the principal's instructions
(ii) Duty to act in person
(iii) Duty to make full disclosure of personal interest
(iv) Duty not to make a secret profit
(v) Duty to exercise reasonable care and skill
(vi) Fiduciary duties
(vii) Other duties

These duties vary according to the nature of the agency or the express terms of the contract *(i) Duty to follow instructions*

- This is the primary duty of every agent.
- Failure to comply with the principal's instructions, except where they are illegal, will render the agent liable for the loss suffered by the principal as a result of the breach.

(ii) Duty to act in person

- An agent has no authority to delegate their duties as agent to another.
- Owing to the exigencies of business, this rule is relaxed in order to enable the agent in certain cases to delegate their powers and appoint a sub-agent.

(iii) Duty to exercise reasonable care and skill

- An agent employed for remuneration is bound to exercise such skill, care and diligence in the performance of the undertaking as is usual or necessary for the ordinary or proper conduct of the profession or business in which the agent is employed.
- If the agent fails to exercise the requisite care and skill, the agent will be liable to the principal for the loss sustained as a result of the breach of duty.

(iv) Fiduciary duties

- Hospital Products Ltd v United States Surgical Corp (1984): The accepted fiduciary relationship are sometimes referred to as relationships of trust and confidence or confidential relations…***The critical feature of these relationships is that the fiduciary undertakes or agrees to act for and on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position…***it is partly because the fiduciary's exercise of the power or the discretion can adversely affect the interest of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interest of the person to whom it is owned

- An agent also owes fiduciary duties to the principal → confirmed by the majority in *ACCC v Flight Centre Travel Group Ltd (2016):* "the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether expressed or implied", as a consequence of which "[i]t is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract"
- **Duty to avoid conflicts**: *Lintrose Nominees Pty Ltd v King [1995]:* An agent has a duty to avoid conflicts of duty and conflicts of interest. The agent was effectively retained by both the vendor and purchaser of the property, and the court found that the purchaser was entitled to rescind the contract with the vendor.

(v) Duty to make full disclosure of any personal interest

- An agent must disclose to the principal all the material circumstances they are aware of that might influence the principal in entering into any negotiation.

(vi) Duty to not make a secret profit

- A fundamental duty of an agent is not to use their position to make a gain for themselves without the knowledge and assent of the principal.
- Should the agent receive a secret commission or profit, the principal may recover it and dismiss the agent without notice.
- This general principle applies unless a special usage or custom which is notorious, certain and reasonable is proved to the contrary.

(vii) Duty to exercise reasonable care and skill

- An agent employed for remuneration is bound to exercise such skill, care and diligence in the performance of the undertaking as is usual or necessary for the ordinary or proper conduct of the profession or business in which the agent is employed.
- If the agent fails to exercise the requisite care and skill, the agent will be liable to the principal for the loss sustained as a result of the breach of duty.
- *Mitor Investments Pty Ltd v General Accident Fire:* broker liable for costs: The agent's duty is to follow his instructions clearly and the general rule is that he departs from them at his peril." MacGillivray and Parkington on Insurance Law (7th ed), p 367; The Law of Insurance (4th ed), p 297 et seq,…If a broker using reasonable care and skill in his attempt to do so is unable to obtain cover as instructed - and it is not pleaded or in the evidence suggested that this was such a case - his duty is to advise his clients so enabling him to obtain cover elsewhere. That was not done in the instant case, and I am satisfied that had it been done the plaintiff would have taken steps to obtain cover elsewhere. On the contrary the plaintiff was advised that cover as instructed had been obtained.

(viii) Other duties

- To take such care of the property of the principal as a reasonably prudent person would take in caring for their own property.
- To keep all moneys and property of the principal separate from their own.
- To keep separate accounts of all dealings on behalf of the principal, and to have such accounts ready for inspection by the principal.
- To preserve confidentiality regarding all matters coming to their knowledge while acting as agent.