

LAWS 4210

Commercial Law



Agency

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Agency in commercial transactions

- The concept of agency
- The nature and extent of an agent's authority
- A closer look at different forms of authority

Historical Background: development of the concept of Agency

- ❑ Law did not recognise power of a legal person to authorise another to act in their stead.
- ❑ With time, practical necessities gave rise to the acceptance of the idea that a person could authorise another to act in their stead *and* that the actions of the representative could bind their 'principal' in law.

Historical Background: development of the concept of Agency

- “[T]he fact that the practice [of appointing agents] spread somewhat readily in the course of the 13th century is due to the two allied influences of mercantile necessity and canon law [church law].”

Sir William Holdsworth, *A History of English Law*, Vol.VIII (2nd edn) Methuen & Co. Ltd, London, 1937, 222.

Nature of Agency

□ Service element

- The object of the agency is for the agent to do something for the principal
- Agent should honour the commitment made to the principal

□ Business convenience

- Principals appoint agents to undertake legal acts which they cannot or cannot conveniently do for themselves.
- See: Fisher, *Agency Law*
Dal Pont, *Law of Agency*

Agency: definition

- *A word used in 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*
- High Court in *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 (*Tbk*: [4.30], p157).

*International Harvester Co of Australia Pty
Ltd v Hazeldene Pastoral Co (1968) 100 CLR
644*



Was H & K acting as agent for IH in entering the contract for the sale of the hay bailer?

International
Harvester

Hassan and Kensell:
Agent or principal?

Carrigan's (the
farmers)

Agency: definition

- ❑ But the High Court went on to say that,
- ❑ *In the business world its significance is by no means restricted.*
- ❑ Also referred to *WT Lamb and Sons v Goring Brick Co Ltd* (1932) 1 KB 710 where manufacturers sold bricks to merchants but described those merchants as “sole selling agents”.

Creation of Agency

- ❑ Actual express authority
- ❑ Actual implied authority
- ❑ Usual authority
- ❑ Agency by representation
- ❑ Agency by ratification
- ❑ Operation of law

Creation of Agency

- *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co.* (1958) 100 CLR
 - ***distinguishes between the general use of the term 'agent' and the legal institution of agency***

Agency: scope

Example: the real – estate agent

- Yes, there is an agency relationship.
- But what is the agent authorised to do?
- Can the agent bind the principal, and if so in what ways?

Creation of Agency

- *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co. Pty Ltd* 1975) 133 CLR 72 (TBK: [4.750], p.209.)
 - ***Deals with the circumstances in which a principal will be found to have held out to a third party that a particular person is the principal's agent.***

Creation of Agency

Crabtree – Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72



Creation of Agency

Crabtree – Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72

- ❑ Crabtree sued ADMA for damages for breach of contract
- ❑ Crabtree argued ADMA had, by its agent, Peter, agreed to buy a printing press and ancilliary equipment for over \$200 000.
- ❑ ADMA argued contract not binding because Peter was not authorised to enter into it on the company's behalf.
- ❑ Company structure: run by Mr McWilliam and sons, Bruce and Peter. Board of Directors constituted by the 3 men and Mr McW and Bruce's wives.
- ❑ Mr McW- chairman of directors & governing director
- ❑ Bruce - Managing Director
- ❑ Peter - salesman

Creation of Agency

Crabtree

- ❑ Board of Dirs or at least 3 men together could make the decision to buy the machine
- ❑ Peter had been authorised to gather quotes
- ❑ Order was signed by Peter above Bruce's typed name and in the presence of Bruce.
- ❑ Peter said, in presence of Bruce, "Bruce won't be in these discussions because he is non-technical. I am handling the negotiations."
- ❑ Order accepted by Crabtree who proceeded to order the machine from overseas manufacturers.
- ❑ ADMA did not pay the 20% deposit when due under the contract.

Creation of Agency

Was Peter authorised to enter into the contract to buy the machine?



Creation of Agency

Did Peter have authority?

- ❑ Did he have actual authority?
- ❑ Did he have ostensible authority?
- ❑ Was there a representation of authority by the Principal?
- ❑ Did Bruce give Peter actual authority to sign the order?
- ❑ Did Bruce represent that Peter had ostensible authority?
- ❑ If so, what authority did Bruce have to make that representation?

Creation of Agency

- ❑ Peter only had actual express authority to obtain quotes.
- ❑ No actual implied authority by virtue of position as salesman.
- ❑ Did Peter have ostensible authority?
- ❑ Was there a representation of authority by the P?
- ❑ The Board of Directors or at least the 3 men had actual authority to make the decision to buy the machine and to make the representation of authority.
- ❑ Representation of authority made by Peter and by Bruce.

Creation of Agency

- ❑ Bruce **did not have actual authority** to manage the business of the company generally or in respect of the matter to which the contract related. He did not have actual authority to make the representation that Peter had authority to sign the order.
- ❑ Bruce, as managing director, **did have ostensible authority** to make the contract.
- ❑ However Bruce (with only ostensible authority himself) cannot invest Peter with ostensible authority to make the contract.

Creation of Agency

- *Factors (Mercantile Agents) Act 1923 (NSW)*
 - ***Amends and consolidates the law relating to factors;***
 - ***Amplifies the powers of an agent at common law (s.10)***

Creation of Agency

- *Cook v Rodgers* (1946) 46 SR (NSW) 229
- *Mortgage Loan & Finance Co. of Australia Ltd v Richards* (1931) 32 SR (NSW) 50
- ***Statutory interpretation: meaning of s.5 Factors (Mercantile Agents) Act 1923 (NSW)***

Actual express authority

- The authority conferred by a principal on an agent by consent (usually by contract)
- *An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties.*

Per Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 502.

(TBK: [4.720], p.206.)

Actual implied authority

- Authority implied from the conduct of the parties and the circumstances of the case
- See Lord Denning in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480. (TBK: [4.720], p.206.)
- Note that Fisher says that implied authority is not the same as actual express authority. It is incidental to a grant of actual express authority or actual implied authority and is the authority to do whatever is necessary to put into effect the grant of actual authority.

Actual implied authority

1. The act performed by A is necessarily or normally **incidental** to the acts expressly authorised.
2. The act is one which the A of that type would **usually** have authority to do.
3. The act is in accordance with reasonable **business practice** applicable to the particular transaction.
4. Authority implied from the **conduct of the parties and the circumstances** of the case

Actual implied authority

Hely – Hutchinson v Brayhead Ltd [1968] 1
QB 549

**Perdio
Electronics**

Mr H-H

Brayhead Ltd

Mr R

Actual implied authority

- Lord Denning MR: Mr R had actual implied authority implied not from office as chairman (because that office did not carry with it the authority to enter into these contracts without sanction of the board) but from the **conduct of the parties and the circumstances of the case.**
- Board had over many months acquiesced in Mr R acting as their chief executive and managing director and committing Brayhead Ltd to contracts without the approval of the Board.

Actual implied authority

- If express directions to contrary may not be able to establish actual implied authority however may still be ostensible authority.
- However this does not preclude actual implied authority arising from a course of dealing where initially agent forbidden from doing the task: *Powercor Australia Ltd v Pacific Power* [1999] VSC 110.

Usual or customary authority

- Generally seen as sub-set of actual implied authority where the implication of authority stems from the usual authority entrusted to an agent appointed to act in that trade or business and in that place.
- Pearson et al say there is only one case in which this has been influential and the case has largely been criticised: *Watteau v Fenwick* [1893] 1QB 346. (TBK: [4.480], p.186.)

Usual or customary authority

- ❑ *Watteau v Fenwick* [1893] 1QB 346
- ❑ Plaintiff sued the defendants, owners of a hotel for the price of cigars supplied to it. P only dealt with the manager and gave credit to him, unaware of the defendants. The manager was expressly forbidden to buy cigars on credit. The transaction was one that might usually be entered into at such an establishment.
- ❑ Per Wills J, *...the principal is liable for all of the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations as between the principal and the agent put upon that authority.*

Usual or customary authority

- ❑ The concept of customary or usual authority is one which is relevant in relation to apparent or ostensible authority and is important in the *Corporations Act*
- ❑ See, eg., s 129(2) and (3) – statutory assumptions
- ❑ (2) assumption that a person who appears on the ASIC records as director or secretary has authority to exercise the powers and perform the duties customarily exercised by a director or secretary
- ❑ (3) assumption that a person held out as director or secretary has the authority to exercise the powers and perform the duties customarily exercised by a director or secretary.

Agency by representation (ostensible authority, apparent authority agency by estoppel)

- Representation made by or on behalf of the principal to the third party concerning the authority of the agent
- Reliance by the third party on the representation made by the principal to the third party and
- Alteration of his or her position as a consequence of the reliance (to their detriment)

Agency by representation (ostensible authority, apparent authority agency by estoppel)

- *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (TBK [4.720], p.206)
- Per Diplock LJ: *An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. ... An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. ...*

Agency by representation (ostensible authority, apparent authority agency by estoppel)

- ... *The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons.*

Agency by representation (ostensible authority, apparent authority agency by estoppel)

REPRESENTATION BY PRINCIPAL

- Manner in which representation can be made
- Who can make the representation
- To whom must the representation be made

Agency by representation (ostensible authority, apparent authority agency by estoppel)

OSTENSIBLE AUTHORITY

- Representation of authority must come from the P.
- This does not mean that anything said by the A is irrelevant.
- An A's authority cannot rest solely on the basis that he or she has held themselves out as having authority:
Armagas Ltd v Mundogas SA (The Ocean Frost) [1986] AC 717

Agency by representation (ostensible authority, apparent authority agency by estoppel)

1. Agent signs or stamps document on behalf of a company.
2. Constitutes representation by the A that has authority to sign.
3. Third party makes the reasonable assumption that A was, in fact, authorised
4. Issue will be whether P by its conduct, induced or assisted that assumption:

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35. (TBK: [4.760], p.215)

Agency by representation (ostensible authority,
apparent authority agency by estoppel)

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35



Agency by representation (ostensible authority, apparent authority agency by estoppel)

- ❑ BNP agreed to indemnify the charterer, Pacific for loss it might suffer in delivering goods (legumes) in India without getting bills of lading in return.
- ❑ Indemnity was signed by an employee of BNP, Ms Dhiri who was manager of the Documentary Credit Department.
- ❑ Internal bank instruction provided that such documents had to be signed by 2 "A" signatories. Ms Dhiri was an ordinary signatory.
- ❑ Ship arrested due to making delivery without bills of lading.
- ❑ Buyers financier sued Pacific. Pacific settled by paying US\$4m to the financier.
- ❑ Pacific then sought to recover its loss from BNP.

Agency by representation (ostensible authority, apparent authority agency by estoppel)

Was Ms Dhiri authorised to sign the indemnities?

- ❑ BNP insisted rep had to be by BNP not by Ms D.
- ❑ True but an over-simplification.
- ❑ Representation can be made by equipping an officer with a certain title, status and facilities.
- ❑ Representation may also result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation.

Agency by representation (ostensible authority, apparent authority agency by estoppel)

High Court:

- A commercial enterprise has internal lines of authority and procedures designed to ensure that appearances are reliable.
- Such an enterprise might induce or assist an assumption not only by the representation conveyed by its organisational structure and lines of communication with third parties but also by a failure to establish appropriate internal procedures designed to protect itself and people who deal with it in good faith, from unauthorised conduct.

Agency by representation (ostensible authority, apparent authority agency by estoppel)

REPRESENTATIONS in Paribas:

- ❑ Organisation structure where Dhiri point of contact with the third party.
- ❑ Signing, stamp and communication signified BNP had agreed to what was requested.
- ❑ No procedure or instruction as to how Dhiri was to use company stamp.
- ❑ No procedure for obtaining advice as to manner and form BNP's signature should take.
- ❑ No internal checks on documents to be sent out.

Agency by ratification

- Ratification retrospectively authorises an agent
 - Agent must have purported to act for the principal
 - At the time the act was done the agent must have had a competent principal
 - At the time of ratification the principal must be legally capable of doing the act
 - The principal must be disclosed or identifiable as well as competent
 - The principal must have full knowledge of all material facts
 - Ratification must take place within a reasonable time

Agency by operation of law

- Agency is generally consensual but this is not the case where agency arises through operation of law
- Agency of necessity
- *China Pacific SA v Food Corp of India (The Winson)* [1982] AC 939. (TBK [4.880], p.223)
- Per Lord Diplock: *Whether one person is entitled to act as an agent of necessity for another person is relevant to the question whether circumstances exist which in law have the effect of conferring on him authority to create contractual rights and obligations between that other person and a third party that are directly enforceable by each against the other.*

Agency by operation of law

- Per Lord Simon: *One of the ways in which an agency of necessity can arise is where A is in possession of goods the property of B, and an emergency arises which places those goods in imminent jeopardy: If A cannot obtain instructions from B as to how he should act in such circumstance, A is bound to take without authority such action in relation to the goods as B, as a prudent owner, would himself have taken in the circumstances.*

Effects of agency

- ❑ Principal whose identity is revealed by the agent is only liable to the 3P where the agent is acting within the scope of authority (including apparent authority)
- ❑ Contract created between principal and 3P
- ❑ In some circumstances the agent may be party to the contract (instead of the principal) or in addition to the principal and will have concurrent liability
- ❑ Principal won't be bound if contract is really made for the benefit of the agent to the knowledge of the 3P

Doctrine of the undisclosed principal

- ❑ A person may sue or be sued even though that person was not aware that the person with whom they were dealing was acting as agent for an undisclosed principal. That applies unless the terms of the contract are inconsistent with that. Either principal or agent may sue or be sued.
- ❑ The agent must be an agent having express or implied authority.

Doctrine of the undisclosed principal

1. UP may sue and be sued on a contract made by an A acting within the scope of his actual authority.
2. In entering the contract, the A must intend to act on behalf of P.
3. The A of an UP may also sue and be sued on the contract.
4. Any defence the T had against the A is available against P
5. The terms of the contract may, expressly or by implication, exclude the P's right to sue and liability to be sued.

Siu Yin Kwan v Eastern Insurance Co Ltd [1994] 2 AC 199 at 207. (TBK: [4.970], p.227)

Agency and...

...

- Sale
- Bailment
- Partnership
- Trust
- Distributors

Duties of the agent

- ❑ Agent is a fiduciary
- ❑ Duty to follow principal's instructions
- ❑ Duty to exercise care, skill and diligence
- ❑ Duty to avoid conflicts of interests and duty not to profit from position as agent
- ❑ Duty to account
- ❑ Duty to act personally

Duties of the principal

- ❑ To pay remuneration where that is a term of the contract and provided the agent has complied with the terms of the contract and earned the payment – the direct or effective cause of the event for which the principal has agreed to pay.
- ❑ To indemnify the agent for costs incurred arising out of the agency relationship where the agent was acting with authority and the loss was not due the agent's neglect or default.

Agents and third parties

- Liability of agent contracting for an unknown principal
 - agent liable in the case of an undisclosed principal
 - If existence of principal disclosed but not the name, agent generally not liable so long as it was clear he/she was contracting as agent.
- See, eg., *McNally v Jackson* (1938) 42 WALR 27 (TBK: [4.1310], p.246)

Agents and third parties

- ❑ Contracting for a known and disclosed principal – agent not liable on the contract.
- ❑ Liability in tort to the third party See *Elfah Pty Ltd v Sabbadini* (1994) 19 MVR 81 taxi driver liable in negligence for road accident and the owner of the taxi also found liable on the basis that the driver was driving the vehicle as agent of the owner. A principal is liable for the torts committed by his/her agent in the course of the business the agent was authorised to conduct for the principal.

Agents and third parties: Breach of Warranty of Authority

- ❑ *Bowstead on Agency (15th edn, as extracted in Pearson et al, **Commercial Law: Commentary and Materials**, 3rd edn, Lawbook Co., 2010, at 312):*
- ❑ *(1) Where a person, by words or conduct, represents that he has authority to act on behalf of another, and a third party is induced by such representation to act in a manner in which he would not have acted if such representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such a third party by a breach of such implied warranty, even if he acted in good faith, under a mistaken belief that he had such authority.*

Agents and third parties: Breach of Warranty of Authority

- *Bowstead on Agency cont'd:*
- *(2) Every person who purports to act as an agent is deemed by his conduct to represent that he is in fact duly authorised so to act, except where the nature and extent of his authority, or all material facts known to him from which its nature and extent may be inferred, are fully known to the other contracting party, or the purported agent expressly disclaims any present authority.*