



Commercial Law Concentrate: Law Revision and Study Guide (6th edn)  
Eric Baskind

### p. 208 13. The relationships created by agency: the rights and liabilities of the parties

Eric Baskind, Senior Lecturer in Law, Liverpool John Moores University Visiting Research Fellow, Oxford Brookes University

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#### Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter focuses on the relationships created by agency, namely, the rights and liabilities of the agent, the principal, and the third party. It first explains disclosed agency as opposed to undisclosed agency with regard to the contract made by the agent, and then, after discussing the rights and liabilities of the principal and the third party, considers the rights of the agent against their principal, including remuneration, indemnity, and lien. The chapter examines the agent's two kinds of duty to their principal (contractual duty and fiduciary duty) and discusses remedies for breach of fiduciary duty and how an agency may be terminated as well as the effects of termination. It concludes by highlighting the provisions of the Commercial Agents (Council Directive) Regulations 1993.

**Keywords:** agency, agent, principal, third party, contract, commercial agents, remuneration, indemnity, contractual and fiduciary duty, remedies

#### Key facts

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- The distinction between a disclosed and an undisclosed agency is important because this might affect the parties' rights and liabilities.
- The rights and liabilities of the various parties are discussed in this chapter.
- An agent owes two kinds of duty to their principal: contractual and fiduciary.
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In addition to the situations where the agent may be liable to the third party, it is important to note that they may also be liable for breach of warranty of authority. This would arise where the agent claims (warrants) to have authority to make the contract when they in fact have no such authority.

- A different species of agent, known as the ‘commercial agent’, was created by the (**Commercial Agents (Council Directive) Regulations 1993**) and has many of its own rules.
- It is important to understand the different ways in which an agency can be terminated as well as the consequences of bringing it to an end.

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## Introduction

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In Chapter 12, we looked at the creation of agent (‘The creation of agency’, p 195). This chapter considers the relationships that are created by agency, namely, the rights and liabilities of the parties involved.

One of the first things to consider is whether the agency is disclosed or undisclosed because this might affect the parties’ rights and liabilities.

## The rights and liabilities of the parties

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We will consider separately the rights and liabilities of the **principal**, the third party, and the **agent**.

### The rights and liabilities of the principal on the contract made by the agent

#### Disclosed agency

##### Where the agent has actual authority

In cases where an **agent** has **actual authority** (express or implied) to make a contract for a **disclosed principal**, then:

- the **principal** is entitled to enforce the agreement against the third party; and
- the third party may likewise enforce it against the principal.

This is because the contract takes effect as between the principal and the third party in the same way as if they had made the contract directly.

#### Looking for extra marks?

We saw in Chapter 12, ‘Ratification’, p 203, that where a **principal** ratifies a contract made by an **agent** acting without **actual authority**, then the act of **ratification** has the effect of giving the agent retrospective actual authority. You should explain that in cases where the agent has ratified the

contract, the principal is entitled to enforce the agreement against the third party and the third party may likewise enforce it against the principal in the same way as if the agent had the principal's actual authority in the first place.

#### Where the agent has apparent authority

Where the **agent** has apparent (but not actual) authority, then:

- the **principal** cannot enforce the contract against the third party; but
- the third party may enforce it against the principal.

The only exception to the rule preventing the principal from enforcing the contract against the third party is where the principal is entitled to, and does, ratify the contract.

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#### Looking for extra marks?

We discussed *Watteau v Fenwick (1893)* in Chapter 12, 'Usual authority', p 200. You should recall that in that case, the **agent** had neither **actual** nor **apparent authority** and made the contract in his own name. A number of consequences arise from such a situation. The **principal** would not be able to enforce the contract against the third party, although the third party could enforce it against the principal. You should also note that because the agent had neither actual nor apparent authority and made the contract in his own name, **ratification** would not have been possible.

#### Undisclosed agency

It is essential to appreciate that in the case of an **undisclosed principal**, they (the undisclosed principal) can sue the third party on a contract made by the **agent** even though the third party did not know that the agent contracted on the principal's behalf. However, an undisclosed principal will only be able to bring a claim against the third party if the agent had actual authority to make the contract.

#### Looking for extra marks?

It might appear rather unfair to allow an **undisclosed principal** to sue a third party on a contract where the third party was unaware that the **agent** had contracted on the **principal's** behalf. The justification for this was explained by Lord Lindley in *Keighley, Maxted & Co v Durant (1901)* as little more than mere 'convenience'.

Notwithstanding that in most situations a concealed, **undisclosed principal** will be entitled to sue or may be sued on contracts their **agent** has concluded on their behalf, in the following situations the **principal** will not be entitled to sue the third party or otherwise intervene in the agent's contract:

1. where an **express term** of the contract made between the agent and the third party excluded the relationship of agency, for example, by excluding the intervention of an undisclosed principal.

This is the most straightforward situation. It makes sense that where the agent expressly

☞ undertakes that they are not acting for any other person, then an undisclosed principal cannot intervene in the contract;

2. where, by *implication*, there is a term in the contract made between the agent and the third party that excludes the intervention of an undisclosed principal.

Rather than there being an *express* term in the contract that excludes the intervention of an undisclosed principal, in this situation the contract may, *by implication*, exclude the intervention of an undisclosed principal. In many cases, this will be apparent by the way the agent's role was described in the contract;

#### ***Humble v Hunter (1848) 12 QB 310***

An **agent** entered into a charterparty on behalf of an **undisclosed principal** and signed the document indicating that he was the owner of the ship. The principal then sought to intervene in the contract but was unsuccessful because the agent, by signing as owner, had impliedly indicated that there was no (undisclosed) principal.

3. where the third party intended to contract with the agent personally and not as agent. This would arise, for example, where the agent's identity was of particular importance to the third party who wished to contract with the agent to the exclusion of any other party.

Where there is a personal contract (e.g. for a famous musician to perform at a concert), an undisclosed principal will not be permitted to intervene and substitute themselves in place of the contracted agent.

A similar situation arises where it is the identity or personality of the undisclosed principal that is of particular importance to the third party:

#### ***Said v Butt [1920] 3 KB 497***

Said, a theatre critic, wished to attend the first night of a play. He knew that, in consequence of his having made certain comments against some members of the theatre staff, he would not be allowed to purchase a ticket in his own name. He therefore asked a friend (the **agent**) to buy a ticket for him,

which he did without disclosing that it was for Said (the **principal**). Butt, the theatre's managing director, refused Said entry. McCardie J held that in the case of an undisclosed agency with a 'strikingly present' personal element, an **undisclosed principal** will not be allowed to intervene on the agent's contract by seeking to enforce it.

#### Looking for extra marks?

A third party does not owe an undisclosed principal a duty of care for negligent misstatement (*Banca Nazionale del Lavoro SPA v Playboy Club London Ltd (2018)*).

## The rights and liabilities of the third party on the contract made by the agent

### Disclosed agency

#### p. 212 Where the agent has actual authority

Where the **agent** has **actual authority** and makes a contract on behalf of the **principal**, then:

- the third party will be entitled to enforce it against the **principal**; and similarly
- the **principal** will be entitled to enforce it against the third party.

#### Where the agent has apparent authority

Where the **agent** has apparent (but not actual) authority, then:

- the third party will be entitled to enforce the contract against the **principal**; however,
- the **principal** will not be able to enforce the contract against the third party.

#### Looking for extra marks?

You should explain that the reason the **principal** will not be able to enforce the contract against the third party is because (even though they made a representation to the third party) the third party made no representation to them.

#### Settlement with the agent

Where the **agent** is acting on behalf of a **disclosed principal** and the third party settles with the agent, then they will be deemed to have settled with the **principal** provided the agent had either actual or **apparent authority** to accept monies on behalf of the principal. A typical example of this can be seen in the retail environment. Where the purchaser (third party) pays the shop assistant (agent) for goods or services they have purchased, they are deemed to have settled with the owner (principal). Authority was discussed in Chapter 12, 'The agent's authority', pp 195–201. In the above example, the agent is likely to have actual authority to accept the third party's settlement on their principal's behalf and will certainly have apparent authority to do so.

#### Undisclosed agency

Where the **agent** is acting on behalf of an **undisclosed principal**, the third party is entitled to sue the agent on the contract as soon as the contract is made. The position is different once the undisclosed principal is revealed and, in this situation, the third party then has the choice of suing either the principal or the agent. However, once the third party has unequivocally elected to sue either the principal or the agent, then they must keep to that choice and may not then sue the other. The issuing of proceedings does not of itself amount to an election to pursue the remedy against that party to the exclusion of the other, but it is strong evidence of an election, which, if not rebutted by the circumstances, will show an election (*Clarkson Booker Ltd v Andjel (1964)*). It may also be that the terms of the contract provide that the agent and principal are to be jointly liable (*Tattersalls Ltd v McMahon (2021)*).

#### Settlement with an undisclosed agent

p. 213 Where the third party settles with an undisclosed agent, then they will be deemed to have settled with the **principal**. This will be the case even if the **agent** then fails to account to the principal for this money. For example, an agent sells to a third party a vehicle on behalf of an **undisclosed principal**. The agent then disappears without paying the sale money to the principal. ↵ The third party will be deemed to have settled with the principal in the same way as they would had they paid the money directly to the principal (which, of course, they could not do because the principal in this example was undisclosed).

#### Looking for extra marks?

You should explain that the reason for the above rule is that by allowing an undisclosed agent to act for them, the **principal** is deemed to have made a representation to the third party that the third party may settle with the **agent**. It therefore doesn't matter to the third party what the agent then does with the money. This is said to be a form of estoppel. This is hardly convincing because it is hard to imagine how a principal, who is undisclosed, is capable of making a representation to any third party who, by the very fact they are undisclosed, is unaware of their existence.

## The rights and liabilities of the agent to the third party on the contract made by the agent

### Disclosed agency

The general rule with a **disclosed agency** is that the **agent** cannot sue or be sued on the contract made with the third party. This is simply because it is not the agent's contract (*Montgomerie and others v United Kingdom Mutual Steamship Association Ltd (1891)*). This rule is subject to certain exceptions, in particular where either the contract itself or the circumstances show that the agent accepts personal liability in the contract. Even in such circumstances, with a disclosed agency, the **principal** is also likely to be liable.

### Undisclosed agency

With an **undisclosed agency**, it is important to consider the position both from when the principal remains undisclosed and then when they are revealed.

#### While the principal remains undisclosed

The **agent** is liable to the third party. This is because the third party thought they were contracting directly with the agent.

#### When the undisclosed principal is revealed

Once the hitherto **undisclosed principal** is revealed, they also become liable on the contract. You should note that, even in this situation, the agent's liability to the third party continues and the third party can choose whether to sue the **principal** or the **agent**. The rule in *Clarkson Booker Ltd v Andjel (1964)* ('Undisclosed agency', p 212) also applies here.

### Breach of warranty of authority

p. 214 It is important to note that the **agent** may also be liable to the third party for breach of **warranty** of authority. This would arise where the agent claims (warrants) to have authority to make the contract when they in fact have no such authority. In such a situation, they will be liable to the third party if the third party relies on the warranty and suffers a loss as a result (*Yonge v Toynbee (1910)*).

## The rights of the agent against their principal

Unlike the relatively sizeable number of duties owed by an **agent** to their **principal**, the principal's duties towards their agent are more limited. This is owing to the view taken by the common law that it is the principal who needs protecting from their agent and not the other way around.

As against their principal, and depending upon the circumstances, an agent might have the following rights:

#### Remuneration

Provided there is a term in the agency agreement to this effect, and the **agent** acts within their authority (or the **principal** has ratified an agent's unlawful act), then the agent will be entitled to be remunerated by the principal. Otherwise, no such entitlement will arise. The term as to the right to remuneration may be express or implied, although a court will be slow to imply a term into the agency agreement which entitles an agent to remuneration where the agreement is silent on this point (*Attorney General of Belize v Belize Telecom Ltd (2009)*). Alternatively, the agent may be entitled to be paid on a **quantum meruit** basis. In *Benedetti v Sawiris and others (2014)*, the Supreme Court confirmed that an award of **quantum meruit** should be calculated on the basis of unjust enrichment, meaning that it will be based on the benefit unjustly gained by the defendant at the expense of the claimant.

Commercial agents, as defined by the **Commercial Agents (Council Directive) Regulations 1993**, operate differently and will be considered under 'Commercial Agents (Council Directive) Regulations 1993', p 220.

#### An indemnity

At common law, an **agent** is entitled to be indemnified by their **principal** for expenses, losses, and liabilities that they reasonably incur whilst executing their duties as agent within the scope of their actual authority (*Thacker v Hardy (1878–79)*). An **express term** in the agency agreement to the effect that the agent is not entitled to an indemnity will mean that no indemnity will be paid.

The principal's duty to indemnify their agent might also arise in cases where the agent is liable in tort (*Adamson v Jarvis (1827)*).

#### A lien

Where an **agent** is owed money by their **principal**, they are entitled to retain possession of the principal's property until they have been paid. The **lien** is not a general lien and arises only in respect of the particular property for which the money is owed (*Bock v Gorrissen (1860)*). The right of lien can be excluded by contract between the agent and principal and, in any event, will only exist where property belonging to the principal is in the agent's possession (*Bryans v Nix (1839)*).

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### The agent's duties to their principal

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The duties of an **agent** have been described in the following way: 'the position of principal and agent gives rise to particular and onerous duties on the part of the agent, and the high standard of conduct required of him springs from the fiduciary relationship between his employer and himself' (*Armstrong v Jackson (1917)*).

An **agent** owes two kinds of duty to their **principal**:

1. a contractual duty; and
2. a **fiduciary** duty.



## The agent's contractual duties to their principal

The agent owes three different contractual duties to their principal:

### A duty to obey their principal's lawful instructions

This duty arises out of a *bilateral* agreement between the agent and their principal; that is, in return for payment to the agent, the agent undertakes to carry out the principal's instructions:

#### ***Turpin v Bilton (1843) 5 Man & G 455***

An agent undertook to insure his principal's ship but failed to do so. The ship was destroyed and the agent was held liable for the principal's loss for failing to obey his instructions.

In the case of a *unilateral* agreement between the agent and their principal, the agent will not be liable if they fail to obey their principal's lawful instructions. This is because with unilateral agreements the agent will not have made a contractual promise to perform and they are therefore under no legal obligation to do so. For example, if the principal promises to pay their agent £100 if the agent sells their watch, the agent will be under no contractual obligation to sell it and will therefore not be in breach of their duty to obey their principal's instructions by not selling it.

Just as an agent will not be liable for failing to obey their principal's lawful instructions under a unilateral agreement, an agent will not be liable if they are a mere *gratuitous* agent, that is, an agent who acts for a principal without payment. This is because the principal does not provide consideration. A gratuitous agent can still be liable to their principal under the law of tort if they are in breach of a duty of care owed to their principal.

### A duty to act with due care and skill in the performance of their duties

An agent is required to exercise the degree of care, skill, and diligence that is to be expected of an agent carrying out the particular role. The standard required will be case-specific and will depend on all of the circumstances.

p. 216 ↩ Where an agent performs a service in the course of a business, this duty is implied by virtue of s 13 of the Supply of Goods and Services Act 1982 (see Chapter 2, 'Sections 12–16 SGSA', pp 39–40).

A *gratuitous* agent will also owe this duty but (as there is no contract) only in tort (*Chaudhry v Prabhakar (1989)*).

#### Looking for extra marks?

Don't forget that any attempt to exclude or restrict this duty will be subject to the **Unfair Contract Terms Act 1977**, which was considered in Chapter 5, 'Unfair Contract Terms Act 1977 (UCTA)', p 81.

#### A duty to perform their obligations personally

Because of the **fiduciary** nature of the parties' relationship, an **agent** must not delegate their duties to a sub-agent unless:


- the principal expressly or impliedly authorises it. If an agent delegates their duties without authority, then the sub-agent's acts will not be valid and will not bind the principal (*John McCann & Co v Pow* (1974)). The principal may, however, ratify the agent's delegation;
- it is the usual practice in the trade or profession to which the agent belongs to delegate the authority and it is neither unreasonable to do so nor inconsistent with the terms of the agent's contract with their principal (*Solley and others v Wood* (1852));
- the nature of the agency requires that it be performed either wholly or partly by a sub-agent (*The Quebec and Richmond Railroad Co v Quinn* (1858));
- the delegation is necessitated by an unforeseen circumstance; and
- the duty is purely 'ministerial' and does not require particular confidence and discretion.

#### *Del credere* agents

It is a general principle of agency law that 'a person who makes a contract ostensibly as an agent cannot afterwards sue or be sued upon it, subject to ... where there is a *del credere* agency' (*Phonogram Ltd v Lane* (1982), per Shaw LJ).

Although cases involving *del credere* agencies can be traced back to the 1800s, they are now quite rare because of the range of alternative methods of credit that are available.

#### The agent's fiduciary duty to their principal

p. 217 An **agent** owes a **fiduciary** duty to their **principal**. You should explain that this is due to the fact that the agent has the power to affect the legal relations between their principal and the third party and therefore occupies a position of trust and confidence. As a result, equity imposes  fiduciary duties on agents to protect their principals. An agent will owe these fiduciary duties to their principal whether they are paid or act gratuitously.

The fiduciary duties owed by an agent to their principal are:

#### A duty to avoid a conflict of interest

An **agent** must avoid situations where their personal interest conflicts, or possibly conflicts, with their duty to their **principal** (*Aberdeen Rail Co v Blaikie Brothers* (1843–60)).

An agent must not, without their principal's consent, use the principal's property to secure a profit for themselves or use any information or knowledge for their own benefit which they have acquired by virtue of their position as agent (*Boardman v Phipps* (1967)).

Agents might have certain interests that might conflict with (or might be seen to conflict with) the interests of their principal. In such situations, an agent can avoid placing themselves in a conflict situation by disclosing any potential conflict to their principal, who may then, if they so wish, permit the agent to continue to act for them in full knowledge of the potential conflict (*Clark Boyce v Mouat* (1994)).

#### A duty not to make a 'secret profit' or to accept a bribe

A secret profit is made where an **agent**, whilst acting for their **principal**, receives some profit over and above that agreed with the principal. An agent is not allowed to accept commission from a third party without their principal's approval (*Imageview Management Ltd v Jack* (2009)).

In appropriate circumstances, a **principal** may have both a personal and a proprietary remedy against the **agent** and is free to elect which of these remedies to proceed with (*FHR European Ventures LLP v Cedar Capital Partners LLC* (2015)).

#### *Hippisley v Knee Brothers* [1905] 1 KB 1

An auctioneer advertised for sale certain goods belonging to his **principal**. He paid a reduced trade price for the advertising but charged his principal the full non-trade rate. The court held that he had committed a breach of his **fiduciary** duty to his principal not to make a secret profit.

#### A duty to account to the principal for payments received

An **agent** has two key duties in respect of payments they receive that are intended for their **principal**:

1. they must keep such monies separate from their own money unless they are permitted by the agency agreement to mix the funds;
2. they must keep and maintain accurate accounts of transactions and furnish their principal with them when their principal requests them (*Turner v Burkinshaw* (1867)). The duty to furnish their principal with accounts upon their principal's request survives the termination of the agency agreement (*Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* (1995)).

- p. 218 ↩ An agent who fails to maintain proper accounts of transactions made on their principal's behalf will put their own funds at risk because there is a presumption that any monies that the agent cannot prove to be their own will be deemed to belong to their principal (*Lupton v White (1808)*).

#### A duty to preserve confidentiality

An **agent** is under an absolute duty to preserve their **principal's** confidentiality. This includes not disclosing any confidential information to any third parties. This duty is higher than merely taking reasonable precautions with the principal's information and survives the termination of the agency agreement (*Bolkiah v KPMG (1999)*).

#### Remedies for breach of fiduciary duty

The court has wide discretion when awarding remedies to a **principal** where their **agent** has committed a breach of a **fiduciary** duty. Where the agent makes a profit as a result of their breach of a fiduciary duty, the following remedies might be available to the principal:

- they may dismiss the agent summarily without notice;
- they may recover any profits made by the agent as a result of the agent's breach;
- they may rescind the contract made with the third party; and
- where the agent has received a bribe, they may recover from the agent the amount of the bribe or bring a claim in damages against the agent or the party paying the bribe to recover any losses they have sustained as a result of the bribe.

#### Looking for extra marks?

When awarding damages to the **principal** for their **agent's** breach of **fiduciary** duty, the court will take account of the circumstances of the agent's breach. If the breach is of a minor or technical nature (e.g. *Hippisley v Knee Brothers*, discussed earlier) then the court is likely to order the agent to account to the principal for the profit wrongly made. However, where the agent's breach of fiduciary duty is fraudulent, then the court will take a more serious view. This can be seen from the Privy Council's decision in *Attorney General for Hong Kong v Reid (1994)*, where it held that the property that was purchased using money obtained from bribery was held on trust for the principal, who was also entitled to dismiss the agent.

#### Termination of agency

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We will now consider how an agency may be terminated and the effects of termination.

## Termination by agreement

- As between *principal and agent*, an agency can be terminated by agreement just as it can be created by one.
- An agency may also come to an end when the specific task given to the agent has been completed. It may also end on the date fixed by the agreement.

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However, this might not have the same effect as between *principal and the third party* and, just because the agent's actual authority has been terminated or restricted, it does not necessarily mean that the agent's acts can no longer bind the principal in relation to third parties if the third party is unaware of the agent's lack of authority.

## Termination by operation of law

Independently of the wishes of the parties, an agency will normally be held to have been terminated in any of the following circumstances:

### Where the principal or agent loses legal capacity such as with death or mental incapacity

This rule is said to be justified because of the personal nature of the agency agreement and the particular importance given to the specific identity of the principal and the agent.

#### Death

### *Campanari v Woodburn (1854) 15 CB 400*

Campanari (the **agent**) agreed to sell a picture on behalf of Woodburn (the **principal**) for which he was to receive £100 commission upon the conclusion of the sale. Before the agent was able to sell the picture, his principal died. The agent was unaware of the death and continued to sell the picture. Jervis CJ held that the agent was not entitled to his commission because the agency had automatically terminated on the principal's death but he was entitled to his reasonable expenses incurred in carrying out his duties.

#### Mental incapacity

The supervening mental incapacity of the agent automatically terminates the agency because the **agent** is unable to comprehend the nature and character of the acts their **principal** requires of them (*Boughton v Knight (1872–75)*). Similarly, the principal's mental incapacity terminates the agency because 'where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him' (*Drew v Nunn (1878–79)*).

#### Where the principal or agent becomes insolvent

Where the **principal** becomes insolvent, the agency automatically terminates on the ground that insolvency equates to legal incapacity. Generally, where it is the **agent** who becomes insolvent, the agency will terminate, although this might depend on the terms of the agency agreement itself.

#### Where the contract between the principal and agent becomes frustrated

Where the agency agreement is embodied in a contract, certain intervening events may frustrate the contract. These events include those that would render performance of the contract impossible or illegal (*Marshall v Glanvill and another* (1917)).

## p. 220 The Commercial Agents (Council Directive) Regulations 1993

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In addition to the traditional relationship of **agent** that is largely governed by common law, there is another distinct species of agent known as the 'commercial agent'. Commercial agents are governed by the **Commercial Agents (Council Directive) Regulations 1993**. The Regulations only govern the relationship between the commercial agent and the **principal** and do not apply to the rights and obligations involving the third party, which remain to be governed by common law.

Provided the Regulations apply (and they will only apply if the definition of 'commercial agent' in **reg 2** is satisfied), then the duties owed to the principal are contained in **reg 3**. It has been said that these duties are broadly similar to those owed under common law (*Cureton v Mark Insulations Ltd* (2006)).

**Regulation 2(1)** defines a commercial agent as:

#### **Reg 2 of the Commercial Agents (Council Directive) Regulations 1993:**

a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the 'principal'), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal.

It will be seen from the above that a commercial agent must have 'continuing authority' to negotiate the sale or purchase of 'goods' on behalf of the principal. Thus, where the agent's function is to negotiate contracts of service, they will not be a commercial agent. The question of whether or not software is goods is not confined to decisions made under the **Sale of Goods Act 1979 (SGA)**. In *Computer Associates (UK) Ltd v The Software Incubator Ltd* (2021) the Court of Appeal held that the provision of a licence to use electronically downloaded software is not a sale of goods for the purposes of the Commercial Agents (Council Directive) Regulations 1993 and that any widening of the meaning of goods in the context of the Regulations was a matter for Parliament and not judicial interpretation. This decision was appealed to the Supreme Court, which referred the question to the Court of Justice of the European Union (CJEU). In 2021, the CJEU has determined that the supply of computer software by electronic means together with the grant of a licence to use the software falls within the definition of 'sale of goods' for the purposes of the Regulations. It noted that the word 'goods' is to

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be understood as meaning products which can be valued in money terms and which are capable of forming the subject of commercial transactions. The CJEU also determined that software can be classified as ‘goods’ irrespective of whether it is supplied on a tangible medium such as a CD or USB drive or by electronic download, as a download is the functional equivalent of supply via a material medium. This preliminary ruling will now go back to the Supreme Court for its consideration. The CJEU’s ruling is limited to the electronic supply of software under a perpetual licence. The court did not provide much guidance on the distinction between downloading software onto a customer’s own computer as opposed to a customer being granted access to a hosted cloud service or Software as a Service (SaaS) solution. This presents a degree of uncertainty as to whether SaaS solutions may also be regarded as goods under the Directive, although even if SaaS solutions were considered to be goods, the more limited access rights and subscription nature of SaaS solutions would not constitute a sale of goods and should, therefore, still fall outside the scope of the Directive.

The words ‘continuing authority’ do not mean that the commercial agent’s authority cannot be subject to time limits: **regs 14 and 15** envisage the possibility of commercial agency contracts being for a fixed term. However, a commercial agent who is engaged to negotiate or conclude a mere one-off transaction is not a commercial agent as they will not have the necessary ‘continuing authority’ (*Poseidon Chartering BV v Marianne Zeeschip VOF (Case C-3/04) (2007)*). Continuing authority to negotiate is a question which is to be ‘determined by reference to the terms of the contract with the principal, not by the extent or frequency of the exercise of that authority. [This is because] an agent may have authority to carry out functions which in the event he never performs, or performs only occasionally’ (*W Nagel v Pluczenik Diamond Co NV (2018)*).

A person who has power to enter into commitments on behalf of a company in their capacity as an officer of a company is not a commercial agent. Neither is a partner acting as a partner in their firm or a person who acts as an insolvency practitioner.

The Regulations also only apply to commercial agents *whose activities are paid*.

## The duties of a commercial agent to their principal

**Regulation 3** sets out the duties of a commercial agent to their principal. These are that:

### **Reg 3(1) of the Commercial Agents (Council Directive) Regulations 1993:**

in performing his activities a commercial agent must look after the interests of his principal and act dutifully and in good faith.

In addition, **reg 3(2)** sets out that a commercial agent must:

- make proper efforts to negotiate and, where appropriate, conclude the transactions they are instructed to take care of;
- communicate to their principal all the necessary information available to them; and
- comply with reasonable instructions given by their principal.



### The duties of a principal to their commercial agent

**Regulation 4** sets out the duties of the **principal** to their commercial **agent**. This provides that the principal 'must act dutifully and in good faith' (**reg 4(1)**).

In particular, **reg 4(2)** explains that the principal must:

- provide their commercial agent with the necessary documentation relating to the goods concerned; and
- obtain for their commercial agent the information necessary for the performance of the agency contract and notify their commercial agent within a reasonable period once they anticipate that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.

In addition, **reg 4(3)** sets out that the principal shall:

#### **Reg 4(3) of the Commercial Agents (Council Directive) Regulations 1993:**

inform his commercial agent within a reasonable period of his acceptance or refusal of, and of any non-execution by him of, a commercial transaction which the commercial agent has procured for him.

Unlike an agency governed by common law, **reg 5** provides that the parties to a commercial agency governed by the Regulations cannot contract out of the above duties.

### The remuneration of commercial agents

#### During the period of the agency

**Part III** of the **Regulations** deals with remuneration. The first thing to note is that if there is no agreement as to remuneration (which, as a matter of good practice, there ought to be), the **agent** is entitled to remuneration customarily allowed to agents for the type of goods involved in the area where the agent carries on their activities. If there is no such customary practice, the agent is entitled to a reasonable remuneration taking into account all the aspects of the transaction (**reg 6**).

**Regulation 7** sets out the commercial agent's entitlement to commission. They shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract:

- (a) where the transaction has been concluded as a result of his action; or
- (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.



A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract where they have an exclusive right to a specific geographical area or to a specific group of customers and where the transaction has been entered into with a customer belonging to that area or group.

#### After the termination of the agency

**Regulation 8** provides that a commercial **agent** shall be entitled to commission on commercial transactions concluded after the agency contract has terminated if:

- p. 223
- (a) the transaction is mainly attributable to his efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
  - (b) the order of the third party reached the **principal** or the commercial agent before the agency contract terminated. The principal must also provide the commercial agent with statements of commission quarterly and the commercial agent must be provided with all available information which he needs to check the amount of commission due to him (**reg 12**).

#### Duration of the agency agreement

The **agent** and the **principal** are entitled to receive from the other on request a signed statement setting out the terms of the agency (**reg 13**).

An agency agreement for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an *indefinite* period (**reg 14**).

#### Termination of the agency agreement

Where the agency agreement is for an indefinite period, either party may terminate it by notice. The periods of notice are set out in **reg 15**:

- one month for the first year;
- two months during the second year; and
- three months during the third and subsequent years.

Shorter notice periods may not be agreed but longer ones can be. However, if longer notice periods are agreed, the notice to be given by the **principal** may not be shorter than the notice to be given by the **agent**.

These rules do not prevent the immediate termination of the agency agreement either where one party fails to carry out all or part of their obligations under the contract or for exceptional circumstances that might arise where the law permits immediate termination (**reg 16**).

## Compensation or indemnity due to the commercial agent on termination of the agency

**Regulation 17** provides that on the termination of the agency agreement the **agent** is entitled either to be compensated for damage or indemnified and that unless the agency agreement provides otherwise, they are entitled to be compensated rather than indemnified. This is also the position where the agreement expires rather than being terminated (*Tigana Ltd v Decoro Ltd (2003)*).

p. 224 Where the commercial agent is entitled to be *compensated*, they are entitled to compensation for the damage they suffer as a result of the termination of their relations with their ↵ **principal**. Damage is deemed to occur particularly when termination takes place in either or both of the following circumstances:

- circumstances which deprive the commercial agent of the commission which proper performance of the agency contract would have procured for them whilst providing their principal with substantial benefits linked to the activities of the commercial agent; and
- circumstances where the commercial agent has not been enabled to amortise the costs and expenses that they had incurred in the performance of the agency contract on the advice of their principal.

Where the commercial agent is entitled to be *indemnified*, the entitlement to an indemnity applies if they have brought in new customers or, alternatively, they have significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from ongoing business with these customers. The amount of indemnity the commercial agent is likely to receive is whatever is equitable having regard to all the circumstances and, in particular, the commission lost by the agent on the business transacted with those customers. Having said that, the indemnity will not exceed one year's average annual remuneration calculated over the previous five years of the agreement or, if it lasted for less than five years, over the entire agreement.

In *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd (2019)*, the court clarified that compensation under **reg 17(6)** is an entirely different remedy to an award of common-law damages. Thus, compensation under **reg 17** is available even where there is no breach of contract. Compensation under **reg 17** might be recoverable alongside damages (e.g. for loss of profits), but this would not be permitted where the loss resulting from the breach was recovered via the compensation award or where an additional award of damages would result in double recovery.

The commercial agent is also entitled to this compensation if the contract ends because of their death.

The commercial agent must notify their principal within 12 months following the end of the agreement that they intend to make a claim, failing which they will lose their right to pursue a claim.

The commercial agent's right to receive compensation and/or an indemnity will be lost in the following circumstances:

- where the principal terminates the agreement where they could have justified immediate termination because of the agent's default;

### 13. The relationships created by agency: the rights and liabilities of the parties

- where the commercial agent terminates the agreement, except where such termination is justified because of the principal's default or where the commercial agent terminated it because, owing to their age, infirmity, or illness, they could not reasonably have been expected to carry on; or
- where the commercial agent assigns the agreement to another person with the agreement of their principal.

The parties are not allowed to contract out of the rules for compensation and indemnity if this would be to the detriment of the agent.

## Key cases

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CASE	FACTS	HELD/PRINCIPLE
<b>↩ <i>Armstrong v Jackson</i> [1917] 2 KB 822</b>	A stockbroker acting as agent for his principal was instructed by his principal to purchase 600 shares in a company. The stockbroker already owned 600 of these shares, which he transferred to his principal.	The stockbroker's conduct placed himself in a position whereby his duty to his client (principal) conflicted with his own personal interest. The principal was entitled to rescind the entire transaction even though the shares had by then decreased in value.
<b><i>Attorney General for Hong Kong v Reid</i> [1994] 1 AC 324</b>	Reid (the agent) was working as a customs officer. In breach of his fiduciary duty to the Crown (the principal), he accepted bribes, with which he purchased a number of properties.	The Privy Council held that a gift accepted by a person in a fiduciary position as an incentive for his breach of duty constituted a bribe and, although in law it belonged to the fiduciary, in equity he not only became a debtor for the amount of the bribe to the person to whom the duty was owed but also held the bribe and any property acquired therewith on constructive trust for that person.
<b><i>Boardman v Phipps</i> [1967] 2 AC 46</b>	A solicitor, acting as agent for the trustees of an estate, attended annual general meetings of a company in which the estate held a small interest. The solicitor thereby obtained information about the company from which he concluded that its shares were undervalued. The trustees of the estate did not wish to purchase more of the shares. The solicitor, using his own personal money, then purchased a controlling interest in the company. The solicitor made a substantial personal gain from this investment. The estate also benefited from the increase in the value of the shares it held.	The House of Lords held that the solicitor must account to the estate for the personal profit he had made because the information he acquired whilst attending the company's annual general meetings belonged to the estate. It did not matter that he was acting in good faith nor that his actions also produced a financial benefit for the estate.

### 13. The relationships created by agency: the rights and liabilities of the parties

CASE	FACTS	HELD/PRINCIPLE
<i>Hippisley v Knee Brothers</i> [1905] 1 KB 1	An auctioneer advertised for sale certain goods belonging to his principal. He paid a reduced trade price for the advertising but charged his principal the full non-trade rate.	The court held that he had committed a breach of his fiduciary duty to his principal not to make a secret profit but as he had acted without fraud and as the advertising contract was incidental to, and severable from, the primary contract of sale of goods, he was still entitled to his commission for the sale of his principal's goods.
p. 226 ← <i>Imageview Management Ltd v Jack</i> [2009] EWCA Civ 63	A football agent negotiated the transfer of a player. His fee was to be 10 per cent of the player's salary. At the same time, the agent agreed a separate deal with the club for arranging a work permit for the player. This separate deal was not declared to the player. When the player eventually found out that his agent had made a secret profit, he stopped paying him the agreed 10 per cent of his salary.	The law imposes high standards on agents whose personal interests come second to the interests of their clients. If an agent undertakes to act for a man, he has to act for him as if he were him and not allow his own interest to get in the way without telling the client. The Court of Appeal held that in making an undisclosed private deal with a football club to obtain a work permit for a foreign footballer, a football agent had acted in breach of his fiduciary duty to the footballer. The footballer did not have to pay any more fees to the agent and was entitled to the repayment of commission already paid as well as the fee received by the agent for the secret deal.

## Key debates

TOPIC	UNDISCLOSED PRINCIPALS AND CONTRACT
Author/ academic	Robert Flannigan
Viewpoint	Discusses the distinction between a duty of fidelity and a <b>fiduciary</b> duty as it might apply to an <b>agent</b> .
Source	(2008) 124 <i>Law Quarterly Review</i> 274
TOPIC	THE (FIDUCIARY) DUTY OF FIDELITY
Author/ academic	Tan Cheng-Han

TOPIC	UNDISCLOSED PRINCIPALS AND CONTRACT
<b>Viewpoint</b>	Discusses whether a basis for the doctrine of the <b>undisclosed principal</b> exists which can be reconciled with the rules on privity of contract.
<b>Source</b>	(2004) 120 <i>Law Quarterly Review</i> 480

## p. 227 Exam questions

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### Problem question

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Sue appoints Ian as her agent to buy furniture and to sell it to her trade customers. She informs her suppliers and customers of Ian's appointment. Sue tells Ian that he is not to buy any red sofas as she doesn't think they are good sellers. Unbeknown to Sue, Ian is a thief and has recently served a term of imprisonment for dishonesty. Ian visits Sofas Ltd, one of Sue's main suppliers, and, purporting to act for Sue, agrees to purchase 20 red sofas for £15,000. In fact, Ian knows that he can sell these sofas to his friend Bob for £20,000 and keep the profit for himself. The following day, Ian enters into an agreement with Bob to sell the sofas for £20,000 without telling Bob that he is Sue's agent. Shortly afterwards, Sofas Ltd finds out what Ian was up to and tells Sue that it will not honour the agreement to sell the red sofas. Fearing a loss of business, Sue then purports to ratify the purchase with Sofas Ltd as well as the sale to Bob.

Advise the parties.

### Essay question

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The duties owed by agents to their principals are to be found in the express terms of their contract.

Critically evaluate this statement.

### Online resources

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This chapter is accompanied by a selection of online resources to help you with this topic, including:

- multiple-choice questions [\\_<https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-multiple-choice-questions?options=showName>](https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-multiple-choice-questions?options=showName>);
- key facts checklists [\\_<https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-key-facts-checklists?options=showName>](https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-key-facts-checklists?options=showName>);
- interactive flashcards of key cases [\\_<https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-interactive-flashcards-of-key-cases?options=showName>](https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-interactive-flashcards-of-key-cases?options=showName>);

- problem question guidance [\\_<https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-problem-question-guidance?options=showName>;](https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-problem-question-guidance?options=showName)
- outline answers to essay questions [\\_<https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-outline-answers-to-essay-questions?options=showName>.](https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-13-outline-answers-to-essay-questions?options=showName)

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