**The latest developments in the law on apparent authority to enable an agent to make representations about their authority to the third party. Discuss**

Introduction

The latest developments in the law on apparent authority have divided commentators, encouraging much academic debate. Some argue against the developments as they completely abandon the doctrine of apparent authority (DOAA).[[1]](#footnote-1) Such commentators would suggest that allowing an agent to make representations is unfavourable as it imposes unwarranted liability upon a principal. In contrast, others welcome the developments as the orthodox principles do not accommodate all situations[[2]](#footnote-2) nor do they give effect to commercial realities of agency.[[3]](#footnote-3) The latest developments do ostensibly indicate a complete abandonment of the traditional DOAA, as unauthorised agents may be allowed to *enter* into transactions on their principal’s behalf. However, this essay argues that in reality, these agents have been authorised to represent that their principal has *approved* a transaction.[[4]](#footnote-4) It will also be submitted that the source of the agent’s apparent authority to make representations comes from the principal’s conduct[[5]](#footnote-5) as agents cannot be self-authorising.[[6]](#footnote-6) In order to evaluate the significance and effect of the developments, the justifications and arguments against the ‘divergence’ from the traditional DOAA must be analysed. Furthermore, it is important to determine how far this ‘deviance’ will be applied in future litigation.

The Traditional Doctrine

Under the traditional doctrine:

‘apparent authority is created by a representation, made by the principal to the third party, 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, [rendering] the principal liable to perform any obligations imposed upon him.’[[7]](#footnote-7)

The law with regards to a representation, a key requirement under *Rama Corporation[[8]](#footnote-8)*, clearly stipulates that the representation is to be made by a principal or by someone with actual authority.[[9]](#footnote-9) The court in *Freeman*[[10]](#footnote-10) confirmed this approach to representations by holding that the principal represented that the agent had authority to engage in activities that a managing director would be authorised to undertake.

To this end, early case law emphasises that an agent cannot make representations as to what he is authorised to do.[[11]](#footnote-11) As Busch *et al* correctly argue, if this was not the position, anyone with some nexus to the principal could claim to have authority, causing the principal to incur [unwanted] obligations to a third party.[[12]](#footnote-12) This view was taken by Lord Neuberger in *Thanakarn Kasikorn* as a third party allowed to rely upon an agent’s statement without the authority of the principal would seem ‘close to pulling up oneself by one’s own bootstraps’.[[13]](#footnote-13) Thus, suggesting that an agent could give himself authority by his own representations, which may subsequently deter principals from using agents in commerce. Furthermore, if an agent can make representations about their authority, ‘commercial undertakings would be forced to inform all and sundry exactly what their employees could or could not do’[[14]](#footnote-14). Therefore, the traditional approach which affords greater protection to the principal is more favourable for business convenience.

Although the orthodox doctrine is welcomed for its protection to principals, it has also been challenged as too narrow. The agent is embodied as a ‘stranger’[[15]](#footnote-15) which is ‘inadequate and inapt’[[16]](#footnote-16) when applied to organisational behaviour in the late 20th century, where agents act on behalf of transnational impersonal corporations.[[17]](#footnote-17) Brown stipulates that the agent in *Freeman* was presented as an ‘inert channel of communication between the principal and third party’.[[18]](#footnote-18) His commentary suggests that the traditional doctrine does not take account of commercial reality[[19]](#footnote-19) where agents have a much greater role in transactional work than is presumed.[[20]](#footnote-20) Therefore, the latest developments which deviate from this stringent approach in *Freeman* have been welcomed.

The Developments

The first development that has been well received is the approach taken in the *Raffaella.[[21]](#footnote-21)* This case considered the principal’s conduct as a whole, inquiring that ‘if a company confers actual or apparent authority on an agent to make representations but no actual authority to enter into a transaction, why should an agent’s representation as to his authority not be capable of being relied on?’[[22]](#footnote-22) The significance of this development is that by focusing on the principal’s conduct, the law enables an agent to make representations about his authority to a third party even if they are false. Therefore, this case initiated the courts ‘deviating’ from the strict approach sought by Lord Diplock in *Freeman* by holding that an agent’s representation about his apparent authority may be valid.

*First energy (FE)[[23]](#footnote-23)* further expanded the DOAA and robust approach in *Freeman*; holding that a senior manager in the position of an agent possessed the apparent authority to inform the client that the bank had approved the grant of a transaction. Consequently, the principal was bound. *FE* builds upon the *Raffaella* signifying that an ‘agent who has no apparent authority to *conclude* a particular transaction may sometimes be clothed [by a principal] with apparent authority to make representations of *fact*’.[[24]](#footnote-24) *FE* therefore enables an agent to make representations about their authority to a third party and so at first appears to abolish the principle that an agent cannot confer authority upon himself.[[25]](#footnote-25)

The wide approach to apparent authority appears to make it difficult for *FE* to flourish within the conventional principles of apparent authority as:

‘To allow a person known to have no authority in effect to give himself authority by wrongly purporting to notify a decision of someone else that the act is authorised is virtually to abandon the strict requirement that a representation concerning the agent’s authority emanates from a manifestation made by the principal.’[[26]](#footnote-26)

Reynolds suggests that *FE* disregards the requirements of apparent authority by allowing an agent to give himself authority.However, he fails to acknowledge the conceptual distinction that the decision in *FE* does not enable an agent to make a representation that gives himself apparent authority to enter into a transaction on behalf of his principal.[[27]](#footnote-27) Instead, *FE* enables a principal to clothe an agent with authority to make representations of fact[[28]](#footnote-28) in a way that gives effect to modern commerce and business efficacy.[[29]](#footnote-29) In limited situations, an agent, based on his position has apparent authority to represent that his principal has approved a given transaction.[[30]](#footnote-30) The legal consequences are the same,[[31]](#footnote-31) as in both situations, the representation binds the principal. This interpretation of FE does not wholly abolish the DOAA as ‘there is no conceptual incongruity inherent in such a situation’.[[32]](#footnote-32) In this way, the source of the agent’s apparent authority to make representations of approval does not derive from his own representations but from the principal’s conduct in holding out that the agent could make such representations[[33]](#footnote-33).

However, this approach is still contested as some argue *FE* is irreconcilable[[34]](#footnote-34) with *Armagas.*[[35]](#footnote-35) This case held that where a party knows that an agent lacks authority to enter into a transaction, the principal will not be bound where the agent wrongly claims to have obtained such authority.[[36]](#footnote-36) As a result, *Armagas* recognises there is ‘no such thing as a self-authorising agent’[[37]](#footnote-37) and to decide otherwise would ‘produce an extraordinary inconsistency’,[[38]](#footnote-38) reinforcing the traditional positon of apparent authority. This suggests that representations made by an agent cannot establish apparent authority. Some argue *Armagas* does not accord with *FE[[39]](#footnote-39)*, as an agent was allowed to make a representation as to his apparent authority. As a result, commentators, including Reynolds, have described *FE* as inconsistent with *Armagas* and an ‘example of a difficult case making bad law.’[[40]](#footnote-40)

In agreement with Lord Sumption in *Kelly v Fraser,[[41]](#footnote-41)* although some suggest that there is inconsistency between the two cases,[[42]](#footnote-42) *FE* can be distinguished from *Armagas* as ‘every case calls for a careful examination of its particular facts’.[[43]](#footnote-43) The main distinction which is widely discussed and will be extensively analysed is based on the seniority of the agent.[[44]](#footnote-44) In *Armagas,* both the alleged authority to enter into a transaction andcommunicate approval of a transaction were found not to exist, as the court treated them as interchangeable.[[45]](#footnote-45) However, *Armagas* did not deal expressly with a situation [[46]](#footnote-46) where the agent by virtue of his positionnecessarily had some authority to communicate decisions made by his seniors.[[47]](#footnote-47) The distinction suggests that *FE* is not as ‘revolutionary’[[48]](#footnote-48) as initially believed because it can be distinguished from *Armagas* based on the agent’s position. Thus, undermining the submission that the two cases cannot be reconciled.

The recognition of the agent’s position has been welcomed as it would be unrealistic for a plaintiff to question the agent’s general apparent authority which enabled him to communicate the approval of the transaction in question.[[49]](#footnote-49) Academics correctly suggest that it is ‘unreasonable’,[[50]](#footnote-50) ‘risky’,[[51]](#footnote-51)‘commercially unwise’[[52]](#footnote-52) and ‘absurd’[[53]](#footnote-53) to propose a third party should seek information from the board of directors.[[54]](#footnote-54) Therefore, this development has been welcomed by the judiciary[[55]](#footnote-55) as it complies with commercial reality[[56]](#footnote-56) that where an agent is clothed with authority by his principal to make representations of fact[[57]](#footnote-57), it is not always ‘realistic’[[58]](#footnote-58) to question their authority. Furthermore, such a requirement would not afford adequate protection to third parties.

Despite this argument being the most advanced, Tan contends that it would have been reasonable for the third party in *FE* to have checked the authority of the agent with the principal.[[59]](#footnote-59) This is because *FE* did not concern ‘a run of the mill transaction’ and involved a ‘long process of negotiation’.[[60]](#footnote-60) However, this argument does not acknowledge that questioning the agent’s authority would not give effect to the ‘commercial realities of the situation’[[61]](#footnote-61) where principals are rarely ‘accessible and visible.’[[62]](#footnote-62) It would be ‘unreasonable to expect the third party to doubt or suspect that the fund transfer had not been approved’.[[63]](#footnote-63) Furthermore, if confirmation had to be obtained from the company’s head office, this would ‘defeat the object of appointing a senior manager.’[[64]](#footnote-64) Therefore, judgement for the defendant would ‘fly in the face of the way in which negotiations are concluded between trading banks and customers seeking commercial loans.’[[65]](#footnote-65) This contention again reinforces that the developments rightly give recognition to the realities of modern commerce that business is impersonal and complex,[[66]](#footnote-66) and that agents have a substantial role in the facilitation of transactions.[[67]](#footnote-67)

As previously highlighted, the courts have traditionally been overprotective of a principal’s interests,[[68]](#footnote-68) also endorsed in *British Bank v Sunlife[[69]](#footnote-69).* However, the developments in the *Raffaella* and *FE* are based on the third party’s perception of the conduct of the agent[[70]](#footnote-70) and desirability of them being able to rely on letters such as those written in the cases.[[71]](#footnote-71) As a result, ‘reasonable expectations of honest men [are] protected and this is the ‘moulding force of our law of contract’.[[72]](#footnote-72) Accordingly, the developments suggest the law is taking considerable positive steps in acknowledging the position of third parties ‘who are often helpless in the modern corporate environment to discover the true scope of an agent’s authority’.[[73]](#footnote-73) Whilst the developments may unnecessarily increase the potential liability of a principal, they are logical and justified,[[74]](#footnote-74) as they recognise the vulnerabilities of third parties who rely on agent’s representations, complying with the needs of modern commerce.

Future Litigation

Although *FE* is described as ‘exceptional on its facts’,[[75]](#footnote-75) *Kelly*[[76]](#footnote-76)affirms *FE.* This casemade clear that an agent lacking authority to approve a transaction himself can still have apparent authority to communicate that a transaction has been approved.[[77]](#footnote-77) Despite being a Privy Council decision which is not binding, it suggests the law is prepared to give effect to *FE.* Both cases acknowledge that the law does not recognise the idea of a self-authorising agent,[[78]](#footnote-78) undermining the contention that the latest developments enable any agent to make anyrepresentations about their authority in any given situation. However, both cases do suggest that it may be necessary in modern commerce to allow agents authority to state facts from which legal conclusions can be drawn,[[79]](#footnote-79) where the principal ‘holds out the agent as a person authorised to convey its approval.’[[80]](#footnote-80) As a result, the latest developments rightly expand the DOAA in some circumstances but do not completely abolish it.[[81]](#footnote-81) Nonetheless, the impact of the developments remain uncertain[[82]](#footnote-82) and ‘modification of the theoretical basis of apparent authority may be needed’.[[83]](#footnote-83) Accordingly, the developments could radically effect the doctrine in the future,[[84]](#footnote-84) which as a result, may allow broader situations that enable agents to make representations as to their apparent authority.

Reflections

From this analysis, it is evident that the latest developments suggest that agents can make representations as to their apparent authority. However, crucially, it has been demonstrated that the developments do not propose an agent can make representations that they may approve transactions themselves.[[85]](#footnote-85) They instead indicate that based on their position, some agents are authorised to represent that their principalhas approved a given transaction.[[86]](#footnote-86) This result does not suggest that agents can be self-authorising. The source of their apparent authority to make representations ultimately derives from the principal’s conduct in authorising their agent to communicatethe approval of decisions made by their superiors.[[87]](#footnote-87) Moreover, whilst it is submitted that the developments undermine the DOAA, they are welcomed as they give effect to the commercial reality that agents have an active role and are not strangers in the facilitation of transactions.[[88]](#footnote-88) These developments do not completely abolish the DOAA; they may, however, have the potential to change its entire notion.[[89]](#footnote-89)

UK Cases:

* Armagas Ltd v Mundogas SA [1986] AC 717
* British Bank of the Middle East v Sun life Assurance Co of Canada (UK) Ltd [1983] 2 Lloyds Rep 9
* First Energy (UK) v Hungarian International Bank Ltd [1993] B.C.C. 533
* Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480
* Kelly v Fraser [2012] 3 WLR 1008
* Rama Corporation Ltd v Proved Tin and General Investments Ltd [1952] 2 QB 147
* The Raffaella[1985] 2 Lloyds Rep 36

International Cases:

* Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings [2016] HKCFA 64

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* Munday R, *Agency Law and Principles* (Third edition, Oxford University Press 2016)
* Reynolds F, ‘Apparent Authority’ (2009) 17(6) European Review of Private Law 975
* Reynolds F, ‘The Ultimate Apparent Authority’ (2014) 17(6) The European Law Review 21
* Woan P, The Apparent Authority of the Unauthorised Agent’ (2014) 26 Singapore Academy of Law Journal 258
* Yap J, ‘Apparent authority: doctrinal underpinnings and competing policy goals’ [2014] Journal of Business Law 72

1. Francis Reynolds, ‘The Ultimate Apparent Authority’ (2014) 17(6) The European Law Review 21, 24 [↑](#footnote-ref-1)
2. Ian Brown, ‘The agent’s apparent authority’ [1995] Journal of Business Law 360 [↑](#footnote-ref-2)
3. *First Energy (UK) v Hungarian International Bank Ltd* [1993] B.C.C. 533

   [544] (Evans L.J) [↑](#footnote-ref-3)
4. JI Lian Yap, ‘Apparent authority: doctrinal underpinnings and competing policy goals’ [2014] Journal of Business Law 72, 72. [↑](#footnote-ref-4)
5. Pey Woan, The Apparent Authority of the Unauthorised Agent’ (2014) 26 Singapore Academy of Law Journal 258, 263 [↑](#footnote-ref-5)
6. *First Energy* (n3) [540] (Steyn L.J) [↑](#footnote-ref-6)
7. *Freeman and Lockyer V Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [503] (Lord Diplock) [↑](#footnote-ref-7)
8. *Rama Corporation Ltd* v *Proved Tin and General Investments Ltd* [1952] 2 QB 147 [149-50] (Slade J) [↑](#footnote-ref-8)
9. Robert Munday, *Agency Law and Principles* (Third edition, Oxford University Press 2016) 84 [↑](#footnote-ref-9)
10. *Freeman (*n7) [↑](#footnote-ref-10)
11. Danny Busch and Laura J. Macgregor, *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge University Press 2009) 189 [↑](#footnote-ref-11)
12. Ibid 189-190 [↑](#footnote-ref-12)
13. *Thanakharn Kasikorn Thai Chamkat (Mahachon)* v *Akai Holdings* [2016] HKCFA 64, 64 [Lord Neuberger] [↑](#footnote-ref-13)
14. Busch and Macgregor (n11) 190 [↑](#footnote-ref-14)
15. Brown (n2) 362 [↑](#footnote-ref-15)
16. Ibid 362 [↑](#footnote-ref-16)
17. Ibid 362 [↑](#footnote-ref-17)
18. Ibid 362 [↑](#footnote-ref-18)
19. *First Energy* (n3) [544] (Evans L.J) [↑](#footnote-ref-19)
20. Brown (n2) 362 [↑](#footnote-ref-20)
21. *The Raffaella* [1985] 2 Lloyds Rep 36. [↑](#footnote-ref-21)
22. Ibid [42-43] (Lord Browne-Wilkinson) [↑](#footnote-ref-22)
23. *First Energy* (n3) [↑](#footnote-ref-23)
24. Ibid [543] (Steyn L.J) [↑](#footnote-ref-24)
25. Ibid [540] (Steyn L.J) [↑](#footnote-ref-25)
26. Reynolds (n1) 24 [↑](#footnote-ref-26)
27. Yap (n4) 75 [↑](#footnote-ref-27)
28. *First energy* (n3) [543] (Steyn L.J) [↑](#footnote-ref-28)
29. Munday (n9) 66 [↑](#footnote-ref-29)
30. Yap (n4) 92 [↑](#footnote-ref-30)
31. Yap argues representations of fact may have significant legal consequences (n4) 73 [↑](#footnote-ref-31)
32. Woan (n5) 263 [↑](#footnote-ref-32)
33. Ibid 263 [↑](#footnote-ref-33)
34. Reynolds (n1) 23 [↑](#footnote-ref-34)
35. *Armagas Ltd v Mundogas SA* [1986] AC 717 [↑](#footnote-ref-35)
36. Ibid [731] (Goff L.J) [↑](#footnote-ref-36)
37. *First Energy* (n3) [540] (Steyn L.J) [↑](#footnote-ref-37)
38. Brown (n2) 365 [↑](#footnote-ref-38)
39. Reynolds (n1) 23 [↑](#footnote-ref-39)
40. Tan, *The Law of Agency* (Academy Publishing 2010) 05-034 as discussed by Yap (n4) [↑](#footnote-ref-40)
41. *Kelly* v *Fraser* [2012] 3 WLR 1008 [↑](#footnote-ref-41)
42. Reynolds (n1) 23 [↑](#footnote-ref-42)
43. *Kelly* (n41) [15] (Lord Sumption) [↑](#footnote-ref-43)
44. Brown (n2) 365 [↑](#footnote-ref-44)
45. *Armagas* (n35) [731] (Goff L.J) [↑](#footnote-ref-45)
46. *First Energy* (n3) [546] (Evans L.J) [↑](#footnote-ref-46)
47. Ibid [547] (Evans L.J) [↑](#footnote-ref-47)
48. Munday (n9) 91 [↑](#footnote-ref-48)
49. Munday (n9) 91 [↑](#footnote-ref-49)
50. Brown (n2) 362 [↑](#footnote-ref-50)
51. Reynolds (n1) 24 [↑](#footnote-ref-51)
52. Munday (n9) 91 [↑](#footnote-ref-52)
53. *First Energy* (n3) [544] (Steyn L.J) [↑](#footnote-ref-53)
54. Ibid [544] (Steyn L.J) [↑](#footnote-ref-54)
55. Mance L.J in *Primus Telecommunications Inc* v *MCI WorldCom international Inc* [2004] 2 All ER (Comm) 833[25] accepted this proposition that the law recognises that an agent may be clothed with apparent authority to make representations of fact. [↑](#footnote-ref-55)
56. *First Energy* (n3) [544] (Evans L.J) [↑](#footnote-ref-56)
57. Ibid [543] (Evans L.J) [↑](#footnote-ref-57)
58. Munday (n9) 91 [↑](#footnote-ref-58)
59. Tan (n40) 05-048 as discussed by Yap (n4) [↑](#footnote-ref-59)
60. Ibid [↑](#footnote-ref-60)
61. *First Energy* (n3) [544] (Evans L.J) [↑](#footnote-ref-61)
62. Ian Brown ‘The significance of General and Special Authority in the Development of the Agent’s External Authority in English Law’ (2004) Journal of Business Law 391, 421 [↑](#footnote-ref-62)
63. *First Energy* (n3) [548] (Nourse L.J) [↑](#footnote-ref-63)
64. Ibid [547] (Evans L.J) [↑](#footnote-ref-64)
65. Ibid [544] (Steyn L.J) [↑](#footnote-ref-65)
66. Munday (n9) 91 [↑](#footnote-ref-66)
67. Brown (n2) 362 [↑](#footnote-ref-67)
68. Munday (n9) 92 [↑](#footnote-ref-68)
69. *British Bank of the Middle East v Sun life Assurance* Co of Canada (UK) Ltd [1983] 2 Lloyds Rep 9 [↑](#footnote-ref-69)
70. Munday (n9) 92 [↑](#footnote-ref-70)
71. Reynolds (n1) 24 [↑](#footnote-ref-71)
72. *First Energy* (n3) [533] (Steyn L.J) [↑](#footnote-ref-72)
73. Munday (n9) 92 [↑](#footnote-ref-73)
74. For example, Toulson J *in ING Re (UK Ltd)* v *R& V Versicherung AG* [2006] 2 All ER (Comm) was concerned at the risks to which those dealing with agents are exposed whenever an agent lacks the authority he claims to possess, as explained in Munday (n9) 93 [↑](#footnote-ref-74)
75. Reynolds (n1) 24 [↑](#footnote-ref-75)
76. Kelly (n41) [↑](#footnote-ref-76)
77. Yap (n4) 75 [↑](#footnote-ref-77)
78. *First Energy* (n3) [540] (Steyn L.J) [↑](#footnote-ref-78)
79. Francis Reynolds ‘Apparent Authority’ (2009) 17(6) European Review of Private Law 975, 978 [↑](#footnote-ref-79)
80. Woan (n5) 263 [↑](#footnote-ref-80)
81. Reynolds (n1) 24 [↑](#footnote-ref-81)
82. Munday (n9) 87 [↑](#footnote-ref-82)
83. Reynolds (n1) 25 & Munday (n9) 91 [↑](#footnote-ref-83)
84. Eric Baskind et al, *Commercial Law*, (Second edition, Oxford University Press 2016) [↑](#footnote-ref-84)
85. Yap (n4) 72 [↑](#footnote-ref-85)
86. Yap (n4) 72 [↑](#footnote-ref-86)
87. Woan (n5) 263 [↑](#footnote-ref-87)
88. Brown (n2) 362 [↑](#footnote-ref-88)
89. Munday (n9) 91 [↑](#footnote-ref-89)