

## BUSINESS LAW – LAW OF AGENCY (lecture 5)

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts. The three relationships in agency are: principal/agent, agent/third party (customer); principal/third party (customer). Agency and other relationships distinguished: common agent (where P authorizes A to enter into the contract with C in A's own name); direct selling (internet); distributor (distributor buys goods from business and get title to them, which does not happen with agency); licensing (owner of a design of goods or owner of an industrial process can grant a licence to sell or manufacture the products in question).

The common law principle in operation is usually represented in *qui facit per alium, facit per se*, i.e. *the one who acts through another, acts in his or her own interests* and it is a parallel concept to vicarious liability and strict liability in which one person is held liable in criminal law or tort for the acts or omissions of another. An agent who acts within the scope of authority conferred by his principal binds the principal in the obligations s/he creates against third parties. There are essentially three kinds of authority recognised in the law: actual authority (whether express or implied), apparent authority, and ratified authority.

### HOW DOES AN AGENCY AGREEMENT ARISE?

**\*Necessity** – *Great Northern Railway v Swaffield*; cf *Sachs v Miklos* (has to be some type of emergency)

**\*Ratification** – principal confirms the agency after the contract has been entered into - *Borvigilant (owners) v owners of the romina; kelnery v port*

### ACTUAL AUTHORITY:

**\*Express agreement** – an agent has been expressly told s/he may act on behalf of a principal (*Ireland v Livingstone*). *Chaudry v Prabhaker*. Depends on the express words used by P – a matter of evidence.

**\*Implied agreement** – can be inferred by virtue of a position held by an agent eg an agent may have implied authority to do what is usual or customary for an agent in his particular trade or profession eg company directors/secretaries – *Hely-Hutchinson v Brayhead Ltd*

**\*Usual or customary authority** – A has the authority which a person in his position usually or customarily has. This type of authority can either expand scope of A's actual or apparent authority or be seen as an independent head of authority.

### APPARENT/OSTENSIBLE

**AUTHORITY:** – exists where the principal's words or conduct would lead a reasonable person in the third party's position to believe that the agent was authorized to act, even if the principal and the purported agent had never discussed such a relationship.

**Agency by Estoppel** – If a principal creates the impression that an agent is authorized but there is no actual authority, third parties are protected so long as they have acted reasonably.

**\*Freeman & Lockyer v Buckhurst Park Properties** – the principal will be estopped from denying the grant of authority if third parties have changed their positions to their detriment in reliance on the representations made.

**\*Rama Corporation Ltd v Proved Tin and General Investments Ltd** – cannot call in aid an estoppel unless you have three ingredients:

(i) there must be a representation that the agent has authority – express or implied eg from dealings or from conduct.

(ii) that representation must come from someone with authority, usually, though not always, the principal – *Freeman & Lockyer v Buckhurst Park Properties* – the board of directors had actual authority to act on behalf of the company. It was the board of directors which made the representation, by allowing the director to act as de facto managing director.

(iii) that representation must be relied upon by the third party reliance and changed their position as a result. Entering into a contract with the agent will be sufficient. C must therefore know of the rep. Constructive notice is insufficient. C cannot claim to have relied on the rep if he knows the rep is false. BUT it may be determined that C ought to be aware of A's lack of authority – *Overbrooke Estates Ltd v Glencombe Properties Ltd*

**\*NB Watteau v Fenwick** – Even if the agent does act without authority, the principal may ratify the transaction and accept liability on the transactions as negotiated. This may be express or implied from the principal's behavior, e.g. if the agent has purported to act in a number of situations and the principal has knowingly acquiesced, the failure to notify all concerned of the agent's lack of authority is an implied ratification to those transactions and an implied grant of authority for future transactions of a similar nature.

### DUTIES OF AGENTS

**\*The agent has a duty to perform agreed tasks and follow instructions** – even where A believes that P's interests could be better served by doing something else. A must obey P and not go outside the terms of his authority - *Bertam, Armstrong & Co v Godfrey*

**\*Duty to exercise reasonable skill and care in performing his duties and generally to personally the agreed tasks.** – The standard of duty of A acting without payment is not necessarily any lower than that for a paid agent. Other factors include: A involved in relevant trade or profession; level of skill and expertise which he has or purports to have.

**\*Fiduciary duties** – duty to account; to avoid conflict of interests (that is, the agent cannot engage in conduct where stands to gain a benefit for himself to the detriment of the principal - *Armstrong v Jackson*); not to make secret profit (*Bradbury v Agip*); not to take bribes (*London Deep Sea Fishing and Ice Co v Ansell*); to maintain confidentiality.

**\*An agent also must not engage in self-dealing, or otherwise unduly enrich himself from the agency.** An agent must not usurp an opportunity from the principal by taking it for himself or passing it on to a third party.

**\*In return, the principal must make a full disclosure of all information relevant to the transactions that the agent is authorized to negotiate and pay the agent either a prearranged commission, or a reasonable fee established after the fact.**

### RIGHTS OF THE AGENT

**\*A is entitled to payment from P for his services and expenses if there is an agency contract – and express (or implied) term that A will be paid – *Luxor (Eastbourne) v Cooper*.**

**\*The agent can lose the right to commission if he acts outside the scope of his authority (*Mason v Clifton*); acts in an unlawful or dishonest manner; commits a serious breach of its duties (*Boston v Ansell* case)**

**\*The agent has a right to keep any of the P's goods which are in possession until the A has been paid any commission or expenses he is owed by the P.** The right to use such lien may be excluded by the terms of the agency contract – *Wolstenholm v Sheffield Banking Co*.

**TERMINATION** – by parties or operation of law.

**\*P can revoke A's authority as long as A has not fulfilled his obligations and/or properly incurred personal liability, since he is then entitled to be reimbursed by P.**

**\*Effective revocation will bring the agency contract to an end.**

### Other ways:

**\*A's task comes to an end.**

**\*A is appointed for a fixed time and the period ends.**

**\*Agreement between A & P to terminate the relationship.**

**\*Destruction of the subject matter of the agency.**

**\*Frustration of agency.**

**\*Death, insanity or bankruptcy of P or A, or insolvency if one party is a company**

**\*Notice by A to P renouncing the agency.**

### Effects of termination on pre-existing claims

**\*Although an agent's authority may be terminated, this deals with the future situation between the parties.**

**\*P & A are still entitled sue one another for claims occurring up to the point of termination, so A is entitled to sue for commission on completed deals.**

**\*If an agency is for fixed period, it is a matter of construction of the contract as to whether A has a claim if P goes out of business before the end of the period.**