University of Liverpool LLM

Commercial Contracts

Week 2: Agency
This week focuses on the legal concept of agency and the relationships among principal, agent and third parties.

The legal concept of agency

Textbook reading: Sealy and Hooley, Chapter 3

Chapter 3 ‘Introduction (to agency)’ discusses:

1. The legal concept of agency (pp. 95–110)

Acts and Treaties:


While the creation of valid contract requires agreement between two parties (commonly a buyer and a seller but also, for example, a tenant and a landlord, an insured and an insurer, or an employee and an employer), such agreement may be negotiated with the aid of the services of another person (or persons) who acts for one or other (or both of) the parties. Such a person is termed at law the agent of the contracting party, while the party for whom he or she acts is termed the principal.

Sealy and Hooley offer several definitions of agency, while noting that ‘any concise definition of the concept of agency must be treated with care’. This is because different definitions emphasise points which may be normal (the ‘paradigm case’) but not essential in all circumstances. Examples of such points are:

- **Consent.** While the element of consent to the relationship of agency is normally essential (i.e. both agent and principal consent to entering that relationship with each other) it is possible for agency to arise without the express consent of one of the parties. This may occur when agency arises by virtue of the following:
  - The apparent authority of the agent. In an analysis of the law as to the ostensible authority of officers and servants to enter into contracts on behalf
of corporations, Diplock\(^1\) set out four conditions which must be fulfilled to entitle a third party to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. He said, ‘It must be shown...:

(i) that a representation that the agent had authority to enter on behalf of the company into contract of the kind sought to be enforced was made to the third party;

(ii) that such representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(iii) that the third party was induced by such representation to enter into the contract, i.e., that he in fact relied upon it; and

(iv) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

As pointed out by Lord Denning MR,\(^2\) authority can be conferred expressly, for example, by a board resolution, or it can be implied, for example, by appointment to office of managing director, which would impliedly authorise the person so appointed to do all things following within the usual scope of the office. However, the grant of actual authority is impliedly subject to a condition that it is to be exercised honestly and on behalf of the principal.

- **Operation of law,** especially in cases of **agency of necessity.**

- **Power/liability analysis** of the relationship, as described by Dowrick\(^3\) and McMeel.\(^4\) As Sealy and Hooley note, agency is a triangular relationship among principal, agent and third party, and as such, it is as much concerned with both the relationship between the agent and the principal and between the agent and a third party. Therefore, it is not possible to encompass all aspects of agency in a definition focused on the power/liability aspects of the relationship. Further, ‘power’ and ‘authority’ have different sources: power is a legal concept, while authority is a matter of fact.

You are advised to read the discussion of these points in Sealy and Hooley.

Agency can be distinguished from other power/liability relationships, although the following relationships are not mutually exclusive (i.e. several of these relationships, excluding agency and sale, may co-exist):

- Agency and trust;
- Agency and bailment;

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\(^1\) *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd*, (1964) 2 QB 480.

\(^2\) *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, 583.

\(^3\) FE Dowrick, ‘The Relationship of Principal and Agent’ (1954) 17 MLR 24, 36–38.

• Agency and sale;
• Agency, distributorship and franchising; and
• Agency, servants and independent contractors.

There are three broad classes of agent:

1. **Universal** agents hold broad authority to act on behalf of the principal e.g. they may hold a power of attorney (also known as a mandate in civil law jurisdictions) or have a professional relationship, say, as lawyer and client;

2. **General** agents hold a more limited authority to conduct a series of transactions over a continuous period of time; and

3. **Special** agents are authorised to conduct either only a single transaction or a specified series of transactions over a limited period of time.

There are many different types of agent, including the following:

• Auctioneers—for the seller but also possibly for the buyer;
• Directors of a company—for the company;
• Partners—for the firm and for its partners related to the business of the partnership; and
• Solicitors and counsel—for their client.

Note that estate agents have very little power to change their principal’s legal relationship with third parties and so have been termed ‘anomalous’ or ‘incomplete’ agents.

Agents who play a particular role in commercial transactions include:

• Factors;
• Brokers;
• *Del credere* agents;
• Confirming houses; and
• Commission agents.

Again, you are advised to read the detailed description of these types of agent provided in your textbook.

Agency law in the United Kingdom is influenced by EU law in three main ways:

• **Self-employed commercial agents.** The Commercial Agents (Council Directive) Regulations 1993\(^5\) (in force 1 Jan 1994) implemented EC Directive 86/653.\(^6\) The directive was drafted in response to a perceived need to protect self-employed

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commercial agents from exploitation by their principals. As discussed at length in Sealy and Hooley, the definition contained in the regulations (Reg 2 (1)) raises four main points:

- The agent must be **self-employed** (i.e. an ‘independent contractor’). A company or a partnership can be a commercial agent.
- The agent must have **continuing authority**.
- The agent must have continuing authority to ‘negotiate’ on behalf of the principal. Note that what constitutes ‘negotiation’ has been discussed in several cases, with differing results.
- A person who **buys and sells as principal** (acting on his or her own behalf and not on behalf of another) is not a commercial agent within the regulations.

Note that some commercial agents are expressly excluded from the regulations (Reg 2 (2)): those who are unpaid, who work on commodity exchanges and in commodity markets and Crown Agents for Overseas Governments.

The regulations cover matters such as the following:

- The rights and duties of the principal and commercial agent (Regs 3–5);
- Remuneration of the commercial agent (Regs 6–12);
- Termination of the agency agreement (Regs 13–16);
- The agent’s right to an indemnity or compensation on termination of the agency agreement (Regs 17–19); and
- Restraint of trade clauses (Reg 20).

**• Competition law.** Articles 101 and 102 of the Treaty on Functioning of the European Union\(^7\) (formerly 81 and 82 TEC) are the main European competition provisions. Sealy and Hooley discuss the impact of these articles on the UK concept of agency in your textbook.

**• Harmonisation of agency law.** The Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983),\(^8\) based on a UNIDROIT draft, was an attempt to facilitate the unification of international trade law by assimilating the different common law and civil law rules of agency. This convention has not been ratified by the United Kingdom.

**Creation of agency and the authority of the agent**

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Textbook reading: Sealy and Hooley, Chapter 4

Chapter 4 ‘Creation of agency and the authority of the agent’ discusses:

1. Creation of the agency relationship (pp. 111–112)
2. Authority of the agent (pp. 113–148)

As discussed in Sealy and Hooley, the relationship of principal and agent may be created in any of the following ways:

1. By express or implied agreement between principal and agent;
2. Under the doctrine of apparent authority;
3. By operation of law; or
4. By ratification of the agent’s acts by the principal.

Whether an agent has authority of is a question of fact. Such authority may arise in a number of ways:

- **Actual** authority. This arises when the principal has given prior consent to the agent and will be conferred on the agent by the principal under the terms of the agreement or contract between them. Actual authority can be conferred in two forms:

  - **Express** actual authority. Here the authority is stated by the principal, orally or in writing, under seal (signature) or not, or by deed. Where the instruction is given orally or in writing but not under seal, it is to be construed liberally (although, with modern communication systems, where instructions are unclear, the agent should seek clarification from the principal). Where it is given by deed, the usual strict rules of construction apply.

  - **Implied** actual authority. This is the authority of the agent as it appears to others.

    - It usually coincides with actual authority, but in some circumstances it may not: e.g. the managing director of a company will appear to others as having all the usual authority of the position, even if that authority has been expressly limited in the employment contract. Implied authority may arise in the following forms:

      - **Incidental** authority: i.e. an agent has implied actual authority to do everything necessary for, or incidental to, the effective execution of his or her express authority in the usual way.

      - **Usual** authority: i.e. an agent has implied actual authority to do what is usual in his or her trade, profession or business for the purpose of carrying out his or her authority or anything necessary or incidental thereto.

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9 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (per Lord Denning), 583.
- **Customary** authority: i.e an agent has implied actual authority to act in accordance with the usages and customs of the particular place, market or business in which he or she is employed, so long as those usages and customs are reasonable and lawful.

- Implied actual authority may be *inferred* from the conduct of the parties and the circumstances of the case.

While the first three of these arise adjunct to an express agreement between the principal and agent, the fourth corresponds to the creation of an agency relationship by implied agreement (see above).

- **Apparent** authority. Ostensible or apparent authority has been termed ‘agency by estoppel’, and as such it has been noted that three key ingredients are required:\(^{10}\)
  - **Representation.** A representation (usually by conduct) is 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. Note here the comments of LJ Diplock\(^ {11}\), quoted above, in relation to apparent authority in relation to a company which, not being a natural person, must act through an agent. Note also that the representation must be made by the principal (or an intermediary agent empowered to do so) and not by the agent himself or herself. The representation
    - Can be express (oral or in writing) or implied from a course of dealing;
    - Must be made to a particular third party who deals with the agent or to the public at large when it would be expected that members of the general public would be likely to deal with the agent;
    - Must be of fact and not of law;
    - Must be that the ‘agent’ is authorised to act as agent and not as principal; and
    - Must be made intentionally or possibly, negligently.

Read more about these points, and the related case law, in your textbook.

  - **Reliance** is in fact placed on the representation by the contractor and, where representation by negligence is alleged, the principal’s breach of duty of care must be the proximate cause of the damage.

  - **Alteration of position.** The position of the contractor is altered as a consequence of relying on the representation. Whether this alteration need be to the contactor’s detriment is unclear; there are cases going either way.

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\(^{10}\) J Slade in *Rama Corporation Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147.

\(^{11}\) In *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* (1964) 2 QB 480.
Subsequent conduct of the principal. Estoppel also arises where the subsequent conduct of the (possibly undisclosed) principal appears to support the ‘agency’, even though the requirements of apparent authority have not been met. In such cases, reliance must be to the detriment of the contractor.

- **Usual** authority. This principle, stated in *Watteau v Fenwick*[^12^], is that

  > The principal is liable for all the acts of the agent which are within the authority usually conferred to an agent of that character not withstanding limitations, as between the principal and the agent, put upon that authority. [emphasis added]

Whether or not this principle will hold in situations where the principal was undisclosed and the ‘agent was not known to be an agent’, is currently unclear. See the discussion in Sealy and Hooley.

- **Authority by operation of law** (agency of necessity). This has been stated as arising as follows:[^13^]

  1. A person may have authority to act on behalf of another in certain circumstances where he is faced with an emergency in which the property or interests of that other are in imminent jeopardy and it becomes necessary, in order to preserve the property or interest, so to act.

  2. In some cases this authority may entitle him to affect his principal’s legal position by making contracts or disposing of property. In others it may merely entitle him to reimbursement of expenses or indemnity against liabilities incurred in so acting, or to a defence against a claim that what he did was wrongful as against the person for whose benefit he acted.

Sealy and Hooley note that ‘true agency of necessity’ will only arise:

- If it is impossible or impracticable for the agent to communicate with the principal;
- If the action is necessary for the benefit of the principal;
- If the agent acts *bona fide* in the interests of the principal;
- If the action taken by the agent is reasonable and prudent; and
- If the principal has not given the agent instructions to the contrary.

On the other hand, this kind of authority can arise in situations where there is no true agency of necessity but where agents act for another in circumstances of necessity (such as the salvage of a ship’s cargo in *The Winson*[^14^]) and seek reimbursement, or look to defend themselves against an action for interference with the principal’s property.

- ‘Retrospective’ authorisation by ratification. While an agent acting without authority (or exceeding one’s authority) cannot bind his or her principal, the

[^13^]: Bowstead and Reynolds on Agency (18th edn, Sweet & Maxwell 2006) art 33.
principal may subsequently ratify the agent’s acts. If so, ratification takes effect from the time those actions took place. Where ratification is complete, it ‘is equivalent to antecedent authority.’

- Key elements of ratification:
  - Ratification may be express or implied from the principal’s unequivocal conduct.
  - The principal must have had knowledge of what the agent has done.
  - Ignorance of the law will not allow the principal to avoid the effect of an act that, objectively viewed, exposes him or her to liability to third parties.
  - Silence or inactivity alone will not amount to ratification, unless it is coupled with other factors.
  - A party wishing to ratify a transaction must adopt it in its entirety. In some circumstances, adoption of a part may be construed as adoption of the whole.
  - The principal can only ratify acts which the agent has purported to do on the principal’s behalf, but not acts done where the agent purports to act on his or her own behalf.

- Other requirements for ratification:
  - The principal must be in existence at the time of the agent’s act (so a newly incorporated company cannot ratify a prior contract made by its promoters).
  - The principal must have been competent at the time when the act was done by the agent and have capacity at the date of the purported ratification.
  - An act which is void \textit{ab initio} (e.g. on the grounds of illegality or because it is a nullity) cannot be ratified.

- Effect of ratification: Note the rule in \textit{Bolton Partners and Lambert} \textsuperscript{16} (related to an attempt to withdraw an offer made to and accepted by an agent who lacked authority, prior to ratification) and the limitations placed on that rule.

### Relations with third parties

**Textbook reading:** Sealy and Hooley, Chapter 5

**Chapter 5 ‘Relations with third parties’ discusses:**

\textsuperscript{15} \textit{Koenigsblatt v Sweet} [1923] 2 Ch 314, 325 (per Lord Sterndale MR).

\textsuperscript{16} (1889) 41 Ch D 295.
1. Disclosed agency  
2. Undisclosed agency

As Sealy and Hooley point out, when discussing the rights and liabilities arising under a contract made by an agent, it is important to ascertain whether the agent was acting for a **disclosed** (whether named or unnamed; identified or unidentified) or **undisclosed** principal.

**Disclosed agency**

- Relations between principal and third party.
  - **The general rule.** This was stated in *Montgomerie*\(^\text{17}\) where the principal was undisclosed, but the statement made as to the normal relationship between the principal and the third party applies to disclosed principals generally:

    > [T]hat where a person contracts as agent for a principal the contract is the contract of the principal, and not that of the agent; and, *prima facie*, at common law the only person who may sue is the principal, and the only person who can be sued is the principal. To that rule there are, of course, many exceptions.

    First, the agent may be added as a party to the contract if he has so contracted, and is appointed as the party to be sued.

    Secondly, the principal may be excluded in several other cases. He may be excluded if the contract is made by deed *inter partes*, to which the principal is no party. In that case, by ancient rule of common law, it does not matter whether the person who made a party is or is not an agent … Another exception is as regards bills and notes … Another is that by usage … when there is a foreign principal …

    > [I]n all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal. [paragraphing added for clarity]

Read further notes on the general rule (especially as to agreements made by deed and foreign principals) in your textbook.

  - **Settlement with the agent.** While an agent for one or both parties (being disclosed principals) may be used to negotiate an agreement, what happens when the buyer settles (pays for the goods) with the agent? In *Irvine v Watson*\(^\text{18}\), the buyer (W) used a broker (Conning) to make a contract to buy oil from the seller (I) with payment to be ‘cash on or before delivery’. The broker was the agent of the buyer. The seller dispatched the oil to the buyer prior to receiving payment, and the buyer paid the broker, but the broker did not pay the seller. The seller then sued the buyer for the price of the goods. Judgement was given for the seller—i.e. the buyer had not paid the seller and

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\(^{17}\) *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370 (QB per Wright J).

\(^{18}\) *Irvine & Co v Watson & Sons* (1880) 5 QBD 414 (CA).
so was still obliged to pay the seller in full. This would leave the buyer to recover the first payment from the agent. The buyer appealed, and the judgement was affirmed. As part of the judgement, LJ Bramwell noted with affirmation a similar ruling\textsuperscript{19} where the agent in question was the agent of the seller, and it was held that the seller could not afterwards ‘throw off the mask’ and sue the principal.

- **Set-off and other defences available against the agent.** The third party is entitled to set up against the disclosed principal all defences which arise out of the contract itself and all defences which are available against the principal himself or herself (e.g. set-off and the fact that the principal is an enemy alien). Defences and set-off which the third party may have against the agent personally, and which are unconnected with the contract made by the agent, are not generally available against the disclosed principal.

- **Merger and election.** These concepts were explained in Debenham’s v Perkins\textsuperscript{20} as follows:

> When an agent acts for a disclosed principal, it may be that the agent makes himself or herself personally liable as well as the principal. But in such a case the person with whom the contract is made may not get judgment against both. He may get judgment against the principal or he may get judgment against the agent who is liable as principal, but once he has got judgment against [one or the other] he cannot then proceed against the other party who might be liable on the contract if proceedings had been taken against him or her first. This is sometimes explained by the doctrine of election and sometimes the doctrine that when one has merged the contract into a judgment … one cannot use the contract to get a second judgment. It is unnecessary to consider which is right. [emphasis added]

The doctrines of merger and election only become relevant if the agent is personally liable on the main contract made with the third party, and where this has been the case, the courts have held the agent’s liability to be in the alternative to that of the principal.

- **Relations between agent and third party**

  - **The general rule.** This was stated, in Lewis v Nicholson and Parker,\textsuperscript{21} to be that where the agent expressly makes the contract as agent but lacks authority, the agent will not become a principal in the contract.

    > [I]n general, no contract is made by the law contrary to the intention of the parties. The definition of a contract is that it is the mutual intention of both parties.

    However, as noted in Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation:\textsuperscript{22}

\textsuperscript{19} Heald v Kenworthy (1885) 10 Exch 739.
\textsuperscript{20} Debenham’s Ltd v Perkins (1925) 133 LT 252 (KB per Scrutton LJ).
\textsuperscript{21} Lewis v Nicholson and Parker (1852) 18 QB 503 (QB per Erle J).
\textsuperscript{22} Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation [1981] AC 787, 795 (PC per Lord Scarman).
It is not the case that, if a principal is liable, his agent cannot be. The true principle of law is that a person is liable for his engagements (as for his torts) even though he acts for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negated his personal liability.

o **When will the agent be liable on the contract made on behalf of the principal?**

There are a number of circumstances in which an agent may become liable on such contracts. These include:

- **Contracts in writing.** Where the agent clearly signs ‘as agent’ (or something to similar effect) or the terms of the contract make it clear that the objective intention of the parties is that the agent is acting solely as an agent, he or she will not be held personally liable. Where the individual signs as ‘agent’, ‘director’ or similar, the intention is not clear, unless other terms of the contract or the surrounding circumstances clarify whether this was intended as a description or as a qualification of the agent’s personal liability. Where the agent signs in his or her own name without more, he or she will be deemed to have contracted personally, unless some term of the contract plainly shows the opposite intention.

- **Oral contracts.** Where the agent is clearly known to be acting as agent, he or she will not be held personally liable. In these cases, the signature ‘as agent’ required by a written contract is deemed met when both parties are clear (by custom—e.g. when the agent is known to be a broker and is dealing as a broker—or by statement) that the contract is being made ‘as agent’.

- **Deeds.** If an agent contracts by deed, he or she will be a party to the contract so long as he or she is a party to the deed and has executed it in his or her own name. In these circumstances, the individual will be liable even if he or she is described in the deed as acting for and on behalf of a named principal.

- **Negotiable instruments.** Special rules apply.

- **Agents for fictitious or non-existent persons** (e.g. a company that is yet to be formed). In these circumstances, the agent may be held personally liable on the contract.

- **Statute.** A statutory provision may make an agent personally liable on a contract made on behalf of his principal (e.g. the Companies Act 2006, s 51(1)).

Your textbook expands on all these points.

o **When will the agent be able to sue on the contract made on behalf of a disclosed principal?** In the following circumstances:

- Where it is the intention of the parties that the agent should have rights as well as liabilities on the contract.
• Where the agent’s right of action arises out of a collateral contract with the third party.
• Where the agent has some special property in the subject matter of the contract, or possesses a lien over it, or has a beneficial interest in completion of the contract.
• Where the agent purports to contract on behalf of a company yet to be formed, the agent may be entitled as well as liable on the contract (under the Companies Act 2006, s 51(1)).
• Where the real principal is, in fact, the agent, as long as that fact has been disclosed or the third party has otherwise become aware of the true position, and the identity of the principal was immaterial to the making of the contract to the third party.

  o **Breach of warranty of authority.** In *Yonge and Toynbee*,23 LJ Buckley stated:

    [T]he liability of the person who professes to act as agent arises [in relation to a breach of warranty of authority]:
    
    (a) if he has been fraudulent,
    
    (b) if he has without fraud untruly represented that he had authority when he had not, and
    
    (c) also where he innocently represents that he has authority where the fact is either
    
    (1) that he never had authority, or
    
    (2) that his original authority has ceased by reasons of facts of which he has not knowledge or means of knowledge.[paragraphing added]

    Again, your textbook expands on all these points.

**Undisclosed agency.**

• Relations between principal and third party.
  o **The general rule.** This is that an undisclosed principal can sue and be sued on a contract made on his behalf by his agent acting within the scope of his actual authority. As Sealy and Hooley point out, this doctrine has attracted much discussion (as it gives the undisclosed principal rights, and subjects him to liabilities, that arise under a contract to which he was not originally privy).
  
  o **Exclusion of the undisclosed principal** may occur:

    • By the terms of the contract. In *Siu Yin Kwan v Eastern Insurance Co Ltd*24, Lord Lloyd stated (at his point 5):

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23 *Yonge and Toynbee* [1910] 1 KB 215 (CA).
The terms of the contract may, expressly or by implication, exclude the principal’s right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

- In other circumstances. If the third party can show that he or she wanted to deal with the agent and no one else, the undisclosed principal cannot intervene.

- Deeds, bills of exchange and promissory notes. An undisclosed principal cannot sue or be sued on a deed inter partes, nor can he or she be made liable on any negotiable instrument.

  - **Particular aspects** of the relationship between undisclosed principal and third party.
    - Merger and election. There is clear authority that the doctrine of merger applies to cases of undisclosed agency when the third party proceeds to judgement against the principal or the agent. What constitutes election is a question of fact to be decided in the circumstances of the case.
    - Set-off and other defences available against the agent. As a general rule, any defences, including set-off, that would have been available to the third party as against the agent will be available to the third part against an undisclosed principal who intervenes in his or her agent’s contract, as long as those defences accrued before the third party had notice of the principal’s existence. But note the restriction in *Cooke and Sons v Eshelby.*
    - Settlement with the agent. Unlike the case of a disclosed principal, the general rule for an undisclosed principal appears to be that he or she can avoid liability to the third party if he or she settles with his or her own agent. When the principal is disclosed, he or she can only avoid liability if the third party induced him or her to settle with the agent.

- **Relations between agent and third party**

  In the first instant, the agent may sue and be sued on a contract where the agent’s principal is undisclosed. But should the undisclosed principal intervene on the contract the agent loses the right of action against the third party. However, even if the principal does intervene, the agent remains liable to the third party until the third party elects whether to hold the principal or agent liable.

Much more detailed discussion and relevant case law is provided by Sealy and Hooley. You are advised to read the whole chapter.

**Relations between principal and agent**

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25 *Cooke and Sons v Eshelby* (1887) 12 AC 271 (HL).
Textbook reading: Sealy and Hooley, Chapter 6

Chapter 6 ‘Relations between principal and agent’ discusses:

1. Duties of the agent (pp. 202–231)
2. Rights of the agent (pp. 231–244)
3. Termination of agency (pp. 244–261)

Duties of the agent: In most cases these derive either from a contract made between the principal and the agent, or from the fiduciary nature of their relationship. However, some may arise from other sources (e.g. tort, statute or the law of restitution).

- Duty to perform his or her undertaking and obey instructions. Where the agent has entered into a bilateral contract with his or her principal, the agent must do what he or she has undertaken to do. When performing that undertaking, he or she must obey the lawful and reasonable instructions of her principal, even in circumstances where he or she genuinely believes that some other course of action would be in his or her principal's best interests. However, where the agent is a professional, he or she will have a duty to warn and advise in relation to the principal’s instructions. Where the agent acts under a unilateral contract, he or she is under no duty to do anything at all.

- Duty of care and skill. A contractually rewarded agent owes his or her principal a duty to exercise reasonable care and skill in the performance of his or her undertaking. Whether the agent complies with the duty is a question of fact. However, you should read the relevant cases regarding the standard of care required.

- Duties arising from the fiduciary nature of the agency relationship. Agents are normally subject to fiduciary duties, because the principal normally places trust and confidence in the agent and the agent has the power to affect the legal situation of the principal. Core duties are those of loyalty and fidelity. Fiduciary duties are proscriptive in nature: they tell the fiduciary what not to do.

You should note the discussion in Sealy and Hooley regarding the special cases of company directors and commercial agents.

Specific fiduciary duties of an agent are as follows:

- Duty not to put himself or herself in a position where the duties as agent conflict with his or her own interests, or the interests of another principal;
- Duty not to make a secret profit;
- Duty not to accept bribes; and
- Duty to account.
Read about these in your textbook. They will be relevant in future weeks.

- Duty **not to delegate her authority**. An agent cannot delegate his or her authority to another person, or appoint a sub-agent to do some of the acts which the agent has to do, unless the agent has the express or implied consent of the principal. The rule applies in situations where the principal places trust and confidence in the agent, and where the principal relies on the personal skill of the agent.

**Rights** of the agent: The rights of the agent derive either from a contract made between the principal and the agent, or other sources (such as common law and statute).

- **Right to remuneration.**
  - Is a contractual right. An agent will only be entitled to remuneration from the principal for services if the agency is contractual and there is an express or implied term of the agency contract to that effect. The exception is the ‘commercial agent’ whose position has now been regulated (discussed elsewhere).
  - Effective cause. Unless otherwise agreed, when an agent is to be paid commission on bringing about a particular event, no commission will be payable unless he or she can show that services were the effective cause of that event.
  - Opportunity to earn commission. Unless there is an express or implied promise to the contrary in the agency contract, the principal is free to prevent the agent from earning commission. Such a promise may be implied by trade custom or otherwise to give effect to the intention of the parties.
  - Loss of right to commission. The agent will lose the right to commission if he or she does the following:
    - Acts outside the scope of actual authority;
    - Acts in a manner which he or she knows, or ought to have known, is unlawful, or is otherwise dishonest; and
    - Commits a serious breach of duties as an agent.
  - Commercial agents. The right of a commercial agent to remuneration is now covered by Part III of the Commercial Agents (Council Directive) Regulations 1993. You should read carefully the section of your textbook that covers this.

- **Right to reimbursement and indemnity.** An agent has a right against the principal to be reimbursed all expenses and indemnified against all losses and liabilities incurred while acting within the scope of his or her express or implied actual authority. Read about the sources of this right, and the situation for gratuitous agents.

- **Right to a lien.** Read about the situations in which this might arise.
Termination of the agency:

- Termination of the relationship between principal and agent. This may be achieved by revocation (whether or not this constitutes a breach of contract), as long as the agent has not already fulfilled his or her obligations. It can also be achieved by the following:
  - Execution of the agent’s commission;
  - If the agent was appointed for a fixed period, expiry of the period;
  - Agreement between the principal and agent;
  - Destruction of the subject matter of the agency;
  - Frustration of the agency rendering its performance illegal, impossible or radically different from that which the parties originally contemplated; and
  - The death, insanity or bankruptcy of the principal or agent, or, where the agent is a company, its winding-up or dissolution.

There are some situations in which an irrevocable agency is created. The agent’s authority cannot be revoked by the principal without the agent’s consent or determined by death, insanity or bankruptcy of the principal.

Termination of the agent’s authority is prospective and not retrospective.

- Commercial agents.
  - Minimum periods of notice for termination
  - Indemnity and compensation.
    Read this section of your textbook carefully.

- Termination and third parties.

In summary

This week’s work has been designed to introduce you to the general concepts of agency and to the relationships among principal, agent and third parties.

Next week (and the following three weeks), you will go on to consider the Sale of Goods Act (SOGA).