

Table of Contents

<u>Topic 1: Agency</u>	1
Classification of Agents	1
Creation of Agency	1
Agency by Actual Authority (express)	2
Appointment under Seal.....	2
Appointment in Writing	2
By word of mouth	2
Holding out or Estoppel	2
<i>Tooth & Co v Laws</i> (1888) 9 LR (NSW) 154	3
<i>Watteau v Fenwick</i> (1893) 1 AB 346.....	3
<i>Peterson v Moloney</i> (1951) 84 CLR 91	3
<i>Crabtree Vickers P/L v Aust Direct Mail Advertising & Addressing Co P/L</i>	4
<i>Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal)</i>	4
Agency by operation of Law	4
Agency by Necessity	4
<i>Great Northern Railway Co v Swaffield</i> (1874) LR 9 Exch 132	5
<i>Sachs v Miklos</i> (1948) 2 KB 23.....	5
Agency arising by cohabitation.....	5
Ratification	6
3 Requirements for ratification	6
Nature & Scope of Agent's Authority	7
Actual Authority.....	7
<i>ANZ Bank Ltd v Ateliers de Constructions Electriques de Charleroi</i> (1946)	8
Apparent (ostensible) Authority	8
<i>Tooth & Co v Laws</i> (1888) 9 LR (NSW) 154	9
<i>Watteau v Fenwick</i> (1893) 1 AB 346.....	9
<i>Peterson v Moloney</i> (1951) 84 CLR 91	9
<i>Crabtree Vickers P/L v Aust Direct Mail Advertising & Addressing Co P/L</i>	9
<i>Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal)</i>	10
The distinction btw Actual & Apparent Authority	10
The distinction btw Implied & Apparent Authority	11
<i>Derham v AMEV Life Assurance Co Ltd</i> (1981)	11

Duties of an Agent	11
Duty to follow principal's instructions.....	11
Duty to act in person	11
Duty to act in good faith	11
Duty to make full disclosure of any personal interest.....	12
Duty to not make a secret profit.....	12
<i>Hewson v Sydney Stock Exchange (1967)</i>	13
Duty to exercise reasonable care & skill.....	13
Other duties	13
Rights of an Agent	13
Right to remuneration if expressly agreed	13
Right to commission & expenses.....	14
Right to indemnity against losses & liabilities incurred during performance.....	15
Right to lien.....	15
Liability of Agent to Principle	16
Liability of Agent to Third Parties	16
Where Ps name is disclosed.....	16
Exceptions.....	16
Where the existence of agency is disclosed but not Ps name.....	17
Where existence of P is not disclosed	17
Breach of warranty of authority	18
Liability of principle & agent for negligence & deceit	18
Misrepresentations.....	18
Torts	18
Termination of Agency	19
Types of Agents.....	20
<u>Topic 2: Sale of Goods</u>	22
Background	22
ACL (Schedule 2 of CCA)	22
Sale of Goods Act	23
Consumer Guarantees	23
Statutory Obligations where services provided to Consumer	24

Duties of a Bailor.....	24
<i>Pivovarov v Chernabaeff (1978) 21 SASR 1</i>	25
Hire of Goods	25
Common law.....	25
By Statute.....	25
The Contract	26
Goods.....	26
Money Consideration.....	26
Transfer of Property.....	26
Contracts for sale & for work & materials.....	26
Capacity to buy & sell.....	27
Sale & Agreement to Sell	27
Rights under a sale.....	27
Rights under an agreement to sell.....	27
Classification of goods.....	27
The price.....	28
Formalities.....	28
Terms of the Contract	28
Conditions implied in contracts of sale (under SGA & common law).....	29
Condition as to title.....	29
Warranties as to title.....	29
Correspondence with description.....	29
<i>Elder Smith Goldsmith Mort Ltd v McBride (1976) 2 NSWLR 631</i>	30
Merchantable Quality.....	30
<i>David Jones Ltd v Willis (1934) 52 CLR 110</i>	31
<i>Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (2012)</i>	31
Fitness for purpose.....	31
<i>Ashford Shire Council v Dependable Motors P/L (1960)</i>	32
<i>Grant v Australian Knitting Mills Ltd (1936) 54 CLR 49</i>	32
<i>McWilliams Wines P/L v Liaweena (NSW) P/L (1991)</i>	32
<i>Ashington Piggeries Ltd v Christopher Hill Ltd (1972)</i>	32
Sale by Sample.....	33

Exclusion of the terms implied by the SGAs	33
When a condition is to be treated as a warranty	33
Consumer Guarantees	34
As to title.....	34
Acceptable Quality.....	34
<i>E v Australian Red Cross Society (1992_ 31 FCR 299)</i>	35
Fitness for disclosed purpose	35
<i>Merck Sharp v Dohme (Australia) P/L v Peterson (2011) 196 FCR 145</i>	35
Correspondence with description.....	35
Supply of goods by sample or demo model.....	36
Repairs & spare parts.....	36
Express warranties.....	36
Exemption of auction sales.....	36
Guarantees & the supply of services	36
Limitation of Liability	37
Remedies for non-compliance with consumer guarantees	37
Limitations on consumer's right to reject goods	38
Defences	39
Contributory negligence	40
Limitation period	40
Non-exclusion	40
Work-related injuries.....	40
Representative action.....	40
Liability of Manufacturer to Consumer for non-compliance with statutory guarantees.....	40
Liability of Manufacturer to seller of defective goods.....	41
Limitation of Liability	41
Transfer of Property	42
Transfer of ownership or property in goods.....	42
Rules (5)	42
<i>Bodilingo P/L v Webb Projects P/L (1990)</i>	42
<i>Wardar's (Import & Export) Co Ltd v W Norwood & Sons</i>	43
Contracts for sale of bulk goods	44

Reservation of Right to Disposal.....	44
'Romalpa' clauses.....	44
<i>Associated Alloys P/L v CAN 001 452 106 P/L (2000)</i>	44
<i>BHP Steel Ltd v HH Robertson P/L (2002) NSWSC 336</i>	45
<i>Hardy Wine Co Ltd v Tasman Liquor Traders P/L (2006)</i>	45
Risk.....	45
<i>Allied Mills Ltd v Gwydir Valley Oilseeds P/L (1978)</i>	46
Title of Transferee.....	46
Exceptions.....	46
Estoppel	46
<i>Big Rock P/L v Esanda Finance Corp Ltd (1992)</i>	47
Sale under a voidable title	47
<i>Vassallo v Haddad Import & Export P/L (2004) 2 DCLR (NSW) 123</i>	47
Sale by Seller or Buyer in possession after sale	47
Sale by seller in possession.....	47
Sale by buyer in possession	48
<i>Gamer's Motor Centre (Newcastle) P/L v Natwest Wholesale</i>	48
<i>Ford Credit Aust Ltd v Auto Trade Auction P/L (1982)</i>	48
Performance of the Contract	48
Rules as to delivery	49
Constructive or Symbolic delivery	50
Delivery of wrong quantity or mixed goods	50
Instalment deliveries	50
<i>Hammer & Barrow v Coca-Cola (1962)</i>	50
FOB & CIF contracts	50
Rights of Buyer.....	51
Acceptance of the goods	51
Remedies for Breach of the Contract of Sale	52
Remedies of the unpaid seller	52
Rights of unpaid seller against goods	52
A lien	52
Withholding delivery.....	53

Stoppage in transitu.....	53
Duration of transit	53
How stoppage in transit is effected.....	53
Defeat of stoppage in transitu.....	54
Right of resale	54
<i>Wherry v Watson</i> (1991) ASC 56-048	54
Rights of unpaid seller against buyer.....	54
Action for price	54
Damages for non-acceptance	54
<i>WL Thompson Ltd v Robinson (Gunmakers) Ltd</i> (1955)	55
<i>Kargotich v Mustica</i> (1973) WAR 167.....	55
Remedies for Buyer	55
Repudiation of contract.....	56
Damages for breach of warranty of quality.....	56
<i>Bostock & Co Ltd v Nicholson & Sons Ltd</i> (1904) 1 KB 725	56
<i>Kasler & Cohen v Slavouski</i> (1928) 1 KB 78.....	57
Damages for non-delivery.....	57
Specific Performance	57
Auction Sales	58
Duties of auctioneer	58
Warranties by auctioneers.....	59
<i>Elder Smith Goldsborough Mort Ltd v McBridge</i> (1976) 2 NSWLR 631	59
Topic 3: Credit Law	60
Background	60
The National Credit Code	60
Credit to which the Code applies.....	60
Licensing scheme	60
Australian credit license.....	61
General standards of conduct	61
What ASIC is empowered to do.....	62
Assessment of suitability of contracts	62
Requirement of licensees to give credit guide to customer.....	62

Consumer Remedies	63
Formalities & Contents of Credit Contracts	64
Pre-contractual disclosure	64
Form of credit contract.....	64
Contents of credit contract.....	64
Termination of contract by debtor before credit is obtained	65
Prohibited fees & charges.....	65
Civil Penalties for Contraventions of "key requirements" by Credit Providers	65
Those who may apply for imposition of civil penalty	65
Effect of an application by debtor or guarantor	65
Effect of an applic for civil penalty by credit provider or govt consumer agency	66
Assessment of the amount of civil penalty	66
<i>GE Capital Finance Aust v Various Debtors (2000)</i>	67
Penalties for offences under the Code	67
Related Mortgages	67
Prohibited securities	68
Assignment or Disposal of Mortgaged property by Mortgagor	68
Related guarantees	68
Enforcement of Credit Contracts, Mortgages & Guarantees	69
Direct debit default.....	69
Negotiation of postponement of proceedings	69
Limitations on taking possession of mortgaged goods.....	70
Exceptions.....	70
Procedure after taking possession of goods.....	70
Sale of repossessed goods by credit provider	71
Mortgagor may apply to regain possession of mortgaged goods	71
Surrender of mortgaged goods	71
Ending of credit contract by debtor.....	72
Enforcement of a guarantee	73
Hardship & Unjust Transactions	73
<i>McNally v ANZ Bank (2001) ASC 155-047</i>	73
Reopening unjust transactions	73

Matters to be considered by the court.....	74
Court orders for reopening transactions	75
<i>Maisano v Car & Home Finance P/L (2006)</i>	75
<i>Permanent Mortgages Pty Ltd v Cook (2006)</i>	75
Court may review unconscionable interest & other charges	76
Related Sale Contracts	76
Tied loan contract	76
Linked credit provider.....	76
Tied continuing credit contract.....	76
Termination of Related Transactions.....	76
Termination of sale contract which was conditional upon obtaining credit.....	77
<i>Agussol v Aust Finance Direct Ltd (2004)</i>	77
Related insurance contracts	77
Consumer leases & Hire-purchase agreements.....	78
Advertising & misleading conduct	78
Other provisions of the Code.....	78
"Contracting out" period	78
Contravention does not make the credit contract illegal.....	78
Registration of security interests	79
Attachment	79
2 req's must be met for a security interest to attach to collateral.....	79
Enforcement against TPs	79
Perfection.....	79
Priority between security interests.....	80
The general priority rules.....	80
Priority of purchase money security interests.....	80
Other special priority rules	80
Acquiring personal property free of security interests	81
Relationship with the National Credit Code	81
Personal Property Securities Register	82
Guide to Problem Solving – National Credit Code Problem Qs	83

Topic 4: The Law of E-Commerce 84

Main features of <i>Electronic Transactions Act 1999 (Cth)</i> ("ETA")	84
Validity of electronic transactions	84
Writing	84
Signatures	84
Production of docs	85
Consent	85
Retention of information & docs	85
Time of dispatch of electronic communication	85
Time of receipt of electronic communications	86
<i>Reed Constructions P/L v Eire Contractors P/L (2009)</i>	86
Place of dispatch & receipt of electronic communication	86
Attribution of electronic communications	86
Shrinkwrap, Clickwrap & Browsewrap contracts	87
Shrinkwrap	87
Clickwrap	87
<i>Hotmail Corp v Van\$ Money Pie Inc</i> 47 USPQ 2d 1020	87
<i>Ebay International AG v Creative Festival Entertainment (2006)</i>	87
Browsewrap	87
<i>Specht v Netscape Communications Corp</i> 306 F 3d 17	87
Evidence of electronic records	88
Rejection of hard copies of email as evidence	88
Social media as evidence	88
Domain Names	89
Remedies	89
Passing off	89
<i>Mark & Spencer Plc v One in a Million Ltd (1999)</i>	89
<i>CI JI Family P/L v National Australian Nappies (NAN) P/L (2014)</i>	90
Trade marks & Misleading or Deceptive Conduct	90
<i>CSR Ltd v Resource Capital Australia P/L (2003)</i>	90
<i>ACCC v Chen (2003)</i>	90
<i>Sheather v Staples Waste Removals P/L (No 2) (2014)</i>	91

Enforcement	91
Common law – 4 conditions	91
ACCC v Chen (2003)	91
Dispute Resolution Policies	91
Jurisdiction in cyberspace	92
Dow Jones v Gutnick (2002)	92
Privacy	92
Electronic Commerce & Crime	93
Unauthorised access to, or modification of, restricted data	94
Using a carriage service to menace, harass or cause offence	94
Investigative Powers	94
Anti-spam legislation	94
Copyright issues & E-commerce	95
National Rugby League Investments P/L v Singtel Optus P/L (2012)	95
Peer-to-peer file sharing	95
A&M Records Inc v Napster Inc 114 F Supp 896 (2000)	95
Roadshow Films P/L v iiNet Ltd (2012)	96
Guide to Problem-Solving: E-Commerce Problem Qs	96

Topic 5: Guarantees 97

A Guarantee & an Indemnity	97
Contract of Indemnity	97
Contract of Guarantee	97
Guarantee not a contract of utmost good faith	97
Vadasz v Pioneer Concrete (SA) Pty Ltd (1995)	98
Fidelity Guarantees	98
Unconscionable Contracts	98
Commercial Bank of Australia Ltd v Amadio (1983)	98
Louth v Diprose (1992)	99
Mackintosh v Johnson (2013)	99
Bridgewater v Leahy (1998)	100
Liabilities & Rights of Guarantors	100
Guarantees & Minors	100

Effect of breach of duty by Creditor	100
Continuing Guarantees	100
<i>Henderson-Smart v Quality Blow Moulders Pty Ltd (2010)</i>	100
Guarantees by married woman of their husband's debt	101
<i>Agripay P/L v Byrne (2011)</i>	101
Rights of Guarantor after payment of debt.....	101
Unconscionable Conduct under ACL & NCC	102
Discharge of Guarantor	102
<i>Ankar P/L v National Westminster Finance (Aust) Ltd (1987)</i>	103
Effect of Bankruptcy of the debtor	103
Effect of death of guarantor	103
Revocation of the Guarantee.....	104
Statutory provisions affecting guarantees.....	104
Contracts Review Act 1980 (NSW)	104
Restrictions on grant of relief	106
Other important provisions	106
Examples of cases applying the Contracts Review Act 1980 (NSW)	106
<i>Sharman v Kent (1985)</i>	106
<i>West v ACG (Advances) Ltd (1986)</i>	106
<i>SH Lock (Aust) Ltd v Kennedy (1988)</i>	107
<i>Baltic Shipping Co v Dillon (1991)</i>	107
<i>Kowalczyk v Accom Finance (2008)</i>	107
Unconscionable conduct within the meaning of the unwritten law	107
<i>ACCC v CG Berbatis Holdings P/L (2003)</i>	108
Unconscionable conduct RE goods or services.....	108
<i>ACCC v Radio Rentals Ltd (2005)</i>	109
<i>ACCC v Lux Distributors P/L (2013)</i>	109
Remedies for Contravention.....	109
False or misleading representation (in supply of goods & services)	109
<i>Ascot Four P/L v ACCC (2009)</i>	110
<i>ACCC v Gordon Superstore P/L (2014)</i>	110
Penalties for Contravention.....	110

Guide to Problem-Solving - Guarantees	110
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Topic 6: Bailments 111

What is a bailment?	111
What is a license	111
<i>Greenwood v Council of the Municipality of Waverley (1928)</i>	112
The elements necessary to create a bailment at law	112
Classification of Bailments	112
Gratuitous Bailments	112
Bailment for reward.....	112
Duties of a Bailee	113
Duties of a Bailee for Reward	113
Duties of a Gratuitous Bailee	114
Liability of Bailee for Employees & Agents	114
Duty of Care with sub-bailments	114
Exclusion of Liability.....	115
<i>Thomas National Transport (Melb) P/L v Mary & Baker (Aust) P/L (1966)</i>	115
Statutory obligations where services are provided to a consumer.....	115
Duties of a Bailor	116
<i>Pivavaroff v Chernabaeff (1978)</i>	116
Hire of Goods.....	116
At common law	116
<i>Cottees v Franklins Self-Serve P/L (1997)</i>	116
Australian Consumer Law	117
Termination of Bailments	117
By expiry of the term	117
By demand of a gratuitous bailor	117
By wrongful act of bailee	117
<i>Anderson Group P/L v Tynan Motors P/L (2006)</i>	118
By destruction of the subject matter.....	118
By repossession of bailed goods.....	118
Rights against third parties	118
Special types of bailees	119

Common Carriers	119
Private Carriers (contrast)	119
<i>Cowper v JG Goldner P/L (1986)</i>	119
Duties of a common carrier	120
Liability of a common carrier	120
Exceptions.....	120
Statutory Limitations on liability of common carrier.....	120
New South Wales.....	120
Queensland.....	121
Application of ACL	121
Rights of a common carrier.....	121
Carriage of goods by rail	121
Carriage of goods by air	122
Carriage of goods by sea.....	122
Innkeepers	122
Common law	123
<i>Daniel v Hotel Pacific P/L (1953)</i>	123
Statutory limitations on liability of innkeepers	123
New South Wales.....	124
Queensland.....	124
Inkeeper's lien.....	124

Topic 1: Agency

Agency is the legal relationship between a principle (P) & his agent (A) where A is authorised by P to do certain acts on their behalf in relation to a third party (TP)

- The "law of agency" governs the situations in which P will be bound by the acts of A

An agent is a person who is authorised (expressly or impliedly) to act for P so as to create or affect legal relations between P and TP: *Peterson v Moloney* (1951) 84 CLR 91 at 94

- P is bound in law by the acts of A as a result of (& generally only to the extent of) the authority given to A
- Whether a relationship of agency exists depends not on the terminology used by the parties but on the nature of the authority conferred
- There is no restriction on who may be an agent (thus it is possible to appoint a minor)

Agency is one form of 'employment' in the widest sense of that word, but it must be distinguished from other forms of employment, in particular

- the relationship between an independent contractor and his 'employer'
- the relationship between an employer and his employee (in the strict 'master and servant' sense of those terms)
- the relationship between a trustee and his *cestui que* trust or beneficiary

A relationship of agency may be found to exist even where there is an express contractual provision to the contrary: *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130; *Colbron v St Bees Island Pty Ltd* (1995) 56 FCR 303

- However where the category to which the relationship belongs is not clear, the parties are free to remove the ambiguity by express agreement
 - *AMP Society v Chaplin* (1978) 18 ALR 385 - the court ruled that a written agreement between a life assurance society and its representative constituted the parties principal and agent, not employer and employee (an express provision in the agreement said so - this was one factor which influenced the court in reaching its decision)

Classification of Agents – TXT213

Special agent – where an appointment is limited to a special act

General agent – usually an appointment to act on behalf of P in a broader range of matters relating to a particular trade or business

Universal agent – the appointment is usually unlimited & usually done by POA (b/c its so extensive)

Creation of Agency – TXT213

- ❖ Agency by actual authority (express)
- ❖ Agency by actual authority (implied)
- ❖ Agency by holding out OR estoppel (apparent authority/ostensible authority)
- ❖ Agency by operation of law (of necessity or by cohabitation)
- ❖ Agency by Ratification

Agency by Actual Authority (express)

'An actual authority is a legal relationship btw P & A created by a consensual agreement to which they alone are parties. It's scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business btw the parties': Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd (1964) 2 QB 480 per Diplock LJ at 502-3

NOTE:- There are some cases where A's appt must be under seal or must be in writing

Appointment under Seal (by deed)

This is necessary if A is to be authorised to make contracts or execute other docs under seal

"Power of attorney" is an appointment made under seal

- It may be limited in time or indefinite
- It may be revocable or irrevocable
- Sometimes the doc needs to be registered before an act can be valid (eg. Deal with land): **s29 Powers of Attorney Act 2003 (NSW); s132 Land Title Act 1994 (QLD)**

A company registered under the **Corporations Act** may appoint agents in the same way an individual does & need only make an appointment by deed where an individual would be required to confer authority in that way: **s126 Corporations Act 2001 (Cth)**

Appointment in Writing

This is necessary in certain cases:-

- Land dealings disposing or creating an interest in land: **s23C Conveyancing Act 1919 (NSW); s11 Property Law Act 1974 (QLD)** etc
- The establishment of specific agencies may require writing under certain statutes
 - Eg. NSW – creation of non-commercial sub-agency arrangements must be established by agreements in writing: **s34 Property, Stock & Business Agents Act 2002 (NSW)**

By word of mouth

A verbal offer followed by acceptance in writing or verbally is sufficient to establish agency for most purposes except those that require it to be in writing (above)

Holding out or Estoppel – **TXT214**

The relationship of P & A may arise btw 2 ppl by virtue of 1 party (by words or conduct) "holding out" that the other is their agent or permitting the latter to do so

Where P (either by words or conduct) leads others to believe that A is Ps agent – P cannot deny As authority to act as his agent where TP has entered into an agreement with A on faith of the representation that A was the agent of P: **Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd (1964) 2 QB 480** (case summary P4)

It is a Q of fact to be decided upon the circumstances of each particular case whether 1 person has led TPs to believe that another person is their agent: **Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72** (case summary P4)

Where P has appointed A to an office or position without any agreed restriction on his authority, they will be co-extensive and will be measured by the extent of authority that usually attaches to the office or position: See **Peterson v Moloney (1951) 84 CLR 91** (case summary P3)

In such a case, the issue is which of 2 innocent parties (P & TP) is to suffer by the wrong of another (A) – the one who is to do so is entitled to a remedy against the wrongdoer (A) but usually this is of little practical value

Derham v AMEV Life Assurance Co Ltd (1981) 56 FLR 34 –the court held that by permitting A to have P's business cards, letter heads & receipt books, P had represented/permitted A to represent that A had authority to act for P to solicit business & receive money in connection with that business – on the basis of ostensible authority, P was liable to refund the amounts but P could not be said to have held out A as authorised to receive money for investment & so was held not liable to pay the money back to TP – P547

Tooth & Co v Laws (1888) 9 LR (NSW) 154

- Laws was a licensee of a hotel & had left his name over the door of an Inn @ Parramatta but was no longer involved in the business
- The hotel was now run by Mr & Mrs Kinchela
- Tooth & Co supplied \$300 worth of beer to the hotel & sued Laws when they were unable to obtain payment from Kinchela's
- It was held that it was a fair & reasonable inference from Law's conduct that the Kinchela's were his agents to buy & sell so Law was estopped from denying they did not have authority
- The court indicated that if notice had been given to Tooth & Co that the Kinchela's were not his agent then estoppel would not have been established

Watteau & Fenwick (1893) 1 QB 346

- A firm of brewer's owned a VIC hotel (P) & appointed Mr Humble (A) as mgr
- The licence was taken out in Humble's (A's) name & also appeared over the door
- The owners prohibited Humble from buying cigars but Humble purchased them from the Plaintiffs (TP) on credit
- When payment was not rec'd TP sued P upon discovering they were the real owners of the hotel
- It was held the owners were liable for all acts of their agent which were within their authority usually conferred upon an agent of his particular character, even though:-
 - He had never been held out by Ps as their agent
 - He had exceeded the authority given to him AND
 - TPs did not know of the Ps existence at the time of the contract

Peterson v Moloney (1951) 84 CLR 91

- Mrs Peterson (Plaintiff) instructed her estate agent (Pulbrook) to 'find a purchaser' for her house
- He found a purchaser (Moloney) who foolishly paid the whole purchase price to the agent
- The agent (who was later declared bankrupt and ended up in prison for forgery) did not pay the amount to Mrs Peterson
- Mrs Peterson sued Moloney for the purchase price
- Moloney pleaded (unsuccessfully) that he had paid Pulbrook & that the agent had authority to receive the purchase money
- It was held there was no evidence to support that the agent had authority to receive the purchase money and of any ratification by Mrs Peterson or of any estoppel against Mrs Peterson

Crabtree Vickers P/L v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 7 ALR 527

- Appellant sued for breach of contract arising out of an alleged purchase by respondent of certain equipment costing over \$200K
- The contract was contained in an order form signed 'per' Peter McWilliam beneath the printed signature of Bruce McWilliam, a junior who was managing director of the company
- Peter had no actual authority to purchase goods on behalf of the company
- There was a finding of fact that the managing director did not have actual authority to enter into a contract to purchase machinery – thus he had no authority to make the representation which would have given Peter ostensible authority
- Thus – a person with no actual, but only ostensible, authority to do an act or to make a representation cannot make a representation which may be relied on as giving a further agent an ostensible authority

Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd (1964) 2 QB 480

- Kapoor & Hoon formed a company to purchase Buckhurst Park Estate – develop & re-sell at a profit
- Kapoor entered into a contract on behalf of the company with a firm of architects who eventually sued the company for non-payment of their fees
- Kapoor & Hoon were directors along with 2 others who were their nominees
- Kapoor had not been appointed managing director but there was evidence he was acting as if he had been to the knowledge of his fellow directors
- It was held the company was liable for the architect's fees
- Kapoor's act in engaging the architects was within the normal authority of a managing director
- The articles conferred full powers of management on the board
- The architects did not have to inquire whether he was properly appointed – it being sufficient for them that under the articles of association power existed to appoint Kapoor as managing director
- The firm, finding Kapoor acting in relation to the company's business as if he was authorised to so act, was induced to believe he was authorised by the company to enter into contracts on its behalf

Operation of Law – TXT215

Agency can arise by operation of law, irrespective of assent or intention in 2 main situations:-

- (i) Necessity
- (ii) Arising out of cohabitation

Agency of Necessity

A person may become the agent of another without being appointed as such under certain circumstances

This can arise in cases of urgent necessity without agreement btw P & A or a holding out by P to TP – circumstances where it may arise includes:-

- Where A is already in an agency or bailment relationship with P; or
- Where A & P are not otherwise in an existing relationship

Before a person can act as an agent of necessity, A (or TP who seeks to bind P) must prove:-

- ✓ A was entrusted with P's property
- ✓ There was an emergency insofar as it was necessary to take steps to preserve property
 - A necessity of expenditure to preserve P's property or safeguard P's interests
 - Eg. Property entrusted in A's care is in danger of destruction (captain of ship with its cargo), A may incur such expense as is reasonably necessary to preserve the property
- ✓ It must be commercially impossible or extraordinarily difficult to communicate with P (owner of the property): **Sachs v Miklos (1948) 2 KB 23**
 - This condition will rarely be satisfied these days with the effectiveness of modern communication
- ✓ An honest endeavour by A to act in P's best interests (agent acts *bona fide* in the interests of P/owner)

In most of these cases, A pays TP & seeks reimbursement or indemnity from P rather than making a contract btw P & TP

Great Northern Railway Co v Swaffield (1874) LR 9 Exch 132

- Plaintiff railway company transported a horse to a station on behalf of D
- When the horse arrived there was nobody there to collect it so P sent it to a stable
- Months later, Plaintiff paid the stabling charges & then went straight to D to recover what it had paid
- The court held Plaintiff's claim succeeded and the doctrine of agency of necessity was extended to include a carrier of goods by land
- There was an agency of necessity because the Plaintiff was found to have no choice but arrange for the proper care of the horse

HOWEVER if there is no urgency and the goods are then sold just because A was inconvenienced then the agency of necessity DOES NOT arise

If A sells the goods then they may be liable in tort of conversion because the goods do not belong to them

Sachs v Miklos (1948) 2 KB 23

- D stored Plaintiff's furniture
- D wanted to lease the house and after being unable to successfully contact Plaintiff he organised for an auctioneer to sell the Plaintiff's furniture
- It was held there was no emergency and so D was liable for conversion

Agency arising by cohabitation – TXT216

In the case of a married/unmarried woman cohabiting with her husband/man, the law presumes she has his authority to pledge his credit for necessities & all domestic matters entrusted to wife

The man can rebut the presumption in various ways

This common law doctrine has been abolished in NSW, SA, ACT & NT

Ratification – TXT215

Even though there has been no express authority, P adopts As acts & ratifies it by continuing to go about his business without trying to change anything once he finds out

The ratification is referred to the date of the original contract & the contract becomes binding from its inception as if he had originally been the party who made it

There are **3 requirements** for an effective ratification: *Quarante (2008) NSWCA 258* per Sackville:-

1. **A must have purported to act as P's agent**

- This fact must be known to TP, although P need not have been named by A: *Trident General Insurance Co Ltd v McNiece Bros P/L (1987) 8 NSWLR 270* at 276
- *Re Tiedemann & Ledermann Freres (1899) 2 QB 66* – court held P could ratify the contract & hold TP to the bargain even though A contracted in Ps name without authority from P intending to use the benefit of the contract for himself
- *Keighley, Maxsted & Co v Durant (1901) AC 240* – A purchased wheat in his own name with intention to buy it for P in excess of his authority – TP failed in an action against P after A failed to pay the price because A's subjective (unrevealed) intention at the time of contracting was immaterial
 - It was held that because he did not contract as agent, P's conduct in 'ratifying' was unsuccessful and TP was unable to sue P for price (HCA applied this principle in *Howard Smith & Co v Varawa (1907) 5 CLR 68*)
- Thus the acts must have been done as agent for & on behalf of the supposed principal: *Howard Smith & Co Ltd v Varawa (1907)*
- Consider:-
 - Reconciliation with rule as to undisclosed principals (this was commented on in the judgments)
 - **Estoppel** – there are 2 ways estoppel might be argued:-
 - *Acquiescence*: see *Spiro v Lintern (1973) 3 All ER 319* where Lintern authorised his wife to find a buyer but did not authorise her to sell the property
 - His wife contracted on his behalf without his knowledge & did not disclose the agency
 - Lintern took no steps to object the contract once he found out
 - His conduct could not amount to ratification (*Keighley*) but was held to establish estoppel preventing him from denying the validity of the original contract
 - In the meantime, the buyer suffered detriment in expending \$ on the property
 - *Expressly*: If P made certain representations which were acted upon to the detriment of the other party in purporting to ratify the contract (which he could not do at law because of *Keighley*), TP may be able to use *Waltons v Maher (1988)* to establish a remedy (if plaintiff acts to their own detriment, in reliance on the allusions of the unconscionable party, equity law has the capability to intervene)

2. **P must have been in existence & capable of being ascertained at the time of the contract**

- **Corporations Law** has resolved the difficulty of ppl contracting on behalf of a company which was unincorporated at the time of the contract by altering the general law to allow ratification by a company after it comes into existence: **ss131-133**
 - **s131** provides that where a person enters into (or purports to enter into) a contract on behalf of or for the benefit of a company that has not yet been reg'd, the company becomes bound by the contract & is entitled to the benefit of it, if the company (or a company that is reasonably identifiable with it) is reg'd & ratifies the contract **(a)** within the time agreed to by the parties of the contract OR **(b)** if there is no agreed time then within a reasonable time after the contract is entered into
 - If the company is not reg'd or does not ratify the contract within that time, the person who entered into the contract is liable to pay damages to the other party to the contract
 - However if the company is reg'd but refuses to ratify the contract, a court may order the company to
 - Pay all or part of the damages the person is liable to pay
 - Transfer property the company rec'd because of the contract to a part to the contract OR
 - Pay an amount to a party to the contract
 - If the company is formed & does ratify the contract but fails to perform it, a court may order the person to pay all or part of the damages the company is ordered to pay
 - **s132** provides that a party to the pre-incorporation contract may release the person who contracted on behalf of the company from his liability under s131 by signing a release
 - P must have the capacity to make the contract both at date of contract & the time of ratification by P
 - Only P (the person for whom A purported to contract) can ratify

3. P must have the capacity to make the contract, both at the date of the contract & at date of ratification

4. Ratification must be of the whole contract – P cannot ratify that which is beneficial & reject the remainder: *Cox v Mosman* (1909) QSR 45

5. Ratification must be with full knowledge of what has been done so that the inference may properly be drawn that P intended to take upon themselves the responsibility for such acts: *Marsh v Joseph* (1897) 1 Ch 213

- At the time of ratification, P must know all the essential facts relating to the making of the contract: *Taylor v Smith* (1926) 38 CLR 48
- P may ratify the contract either
 - Expressly (& ratification must be by deed if the contract was by deed) OR
 - By implication (eg. By adopting benefits under the contract or commencing performance of the contract)

ALSO: - Ratification must occur 'within a reasonable time & the standard of reasonableness must depend upon the circumstances of the case': *re Portugese Mines* (1890) 45 Ch. D. 16 at 34

Nature & Scope of Agent's Authority – **TXT216**

Actual authority

Actual authority arises from consensus between P & A – their agreement (whether **express** or **implied**) is the only source of actual authority

- A's exceeding of his actual authority may be repudiated or ratified by P at P's choice

- Actual authority may activate the doctrine of the undisclosed principal whereas apparent authority obviously requires that the identity of P be known to TP

Where an agency has been created by express (NOT implied) agreement btw P & A – A is said to have **'express actual authority'** in relation to the subject matter of the agreement

A may have **'implied actual authority'** in addition to the express actual authority because of the circumstances of the case & because of the need to give effect to the intention of the parties

So... A will not necessarily exceed his authority merely because he has done something outside the terms of his agreement with P

Courts are concerned with giving 'business efficacy' to commercial contracts

ANZ Bank Ltd v Ateliers de Constructions Electriques de Charleroi (1966) 39 ALJR 414

Privy Council decided the agent could justifiably be taken by an outside such as the bank to have had implied authority from P to bank the cheques given the circumstances

- A was their sole agent in Australia
- There was a written agreement btw them
- A had negotiated a contract with TP & the contract price was payable in Australia in AUS currency
- Progress payments were made by chqs in favour of P c/- its agent which he indorsed into his own bank account
- P had no bank account in Australia (P537)

Apparent (ostensible) authority

'The apparent or ostensible authority rests upon a representation made by P that A has authority to enter into a contract of a kind within the scope of the apparent authority': Pegela Pty Ltd & Ors v National Mutual Life Association of Australasia Ltd (2006) VSC 507 per Redlich J at 492-3

...is really no authority at all but an appearance of an authority

- It arises by virtue of words or conduct of P which cause TP to believe that A is P's agent & to deal with A believing that by doing so he will be able to conclude a contract with P
- A contract made by A in excess of his actual authority but within his apparent authority will bind P contractually with TP, but A remains liable to P for having exceeded his actual authority (if any) as fixed by the agreement between them
- To establish this authority, PT must show he relied on 'holding out' by P
- However where actual authority exists, TP need not have known of it
- In those cases where P conferred an unusual authority on A, TP will succeed against P even though he could not have succeeded if he had been forced, by the absence of actual authority, to rely on A's ostensible authority
- The courts have taken the view that if P allows or acquiesces in A occupying a particular position, then A will have apparent or ostensible authority to deal with TPs in a manner consistent with the functions & duties normally falling within the usual authority of the holder of such position: *Freeman v Lockyer & Bathurst Park Properties (Mangal) Ltd (1964) 2 QB 480*
- Where A is appointed to a usual position, A will have as part of their apparent authority all the usual authority of a person occupying that position: *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd (1971) 2 QB 711*
- P is bound by those acts of A which fall within the scope of As apparent authority even though A acted outside the terms of their actual authority

Tooth & Co v Laws (1888) 9 LR (NSW) 154

- Laws was a licensee of a hotel & had left his name over the door of an Inn @ Parramatta but was no longer involved in the business
- The hotel was now run by Mr & Mrs Kinchela
- Tooth & Co supplied \$300 worth of beer to the hotel & sued Laws when they were unable to obtain payment from Kinchela's
- It was held that it was a fair & reasonable inference from Law's conduct that the Kinchela's were his agents to buy & sell so Law was estopped from denying they did not have authority
- The court indicated that if notice had been given to Tooth & Co that the Kinchela's were not his agent then estoppel would not have been established

Watteau & Fenwick (1893) 1 QB 346

- A firm of brewer's owned a VIC hotel (P) & appointed Mr Humble (A) as mgr
- The licence was taken out in Humble's (A's) name & also appeared over the door
- The owners prohibited Humble from buying cigars but Humble purchased them from the Plaintiffs (TP) on credit
- When payment was not rec'd TP sued P upon discovering they were the real owners of the hotel
- It was held the owners were liable for all acts of their agent which were within their authority usually conferred upon an agent of his particular character, even though:-
 - He had never been held out by Ps as their agent
 - He had exceeded the authority given to him AND
 - TPs did not know of the Ps existence at the time of the contract

Peterson v Moloney (1951) 84 CLR 91

- Mrs Peterson (Plaintiff) instructed her estate agent (Pulbrook) to 'find a purchaser' for her house
- He found a purchaser (Moloney) who foolishly paid the whole purchase price to the agent
- The agent (who was later declared bankrupt and ended up in prison for forgery) did not pay the amount to Mrs Peterson
- Mrs Peterson sued Moloney for the purchase price
- Moloney pleaded (unsuccessfully) that he had paid Pulbrook & that the agent had authority to receive the purchase money
- It was held there was no evidence to support that the agent had authority to receive the purchase money and of any ratification by Mrs Peterson or of any estoppel against Mrs Peterson

Crabtree Vickers P/L v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 7 ALR 527

- Appellant sued for breach of contract arising out of an alleged purchase by respondent of certain equipment costing over \$200K
- The contract was contained in an order form signed 'per' Peter McWilliam beneath the printed signature of Bruce McWilliam, a junior who was managing director of the company
- Peter had no actual authority to purchase goods on behalf of the company

- There was a finding of fact that the managing director did not have actual authority to enter into a contract to purchase machinery – thus he had no authority to make the representation which would have given Peter ostensible authority
- Thus – a person with no actual, but only ostensible, authority to do an act or to make a representation cannot make a representation which may be relied on as giving a further agent an ostensible authority

Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd (1964) 2 QB 480

- Kapoor & Hoon formed a company to purchase Buckhurst Park Estate – develop & re-sell at a profit
- Kapoor entered into a contract on behalf of the company with a firm of architects who eventually sued the company for non-payment of their fees
- Kapoor & Hoon were directors along with 2 others who were their nominees
- Kapoor had not been appointed managing director but there was evidence he was acting as if he had been to the knowledge of his fellow directors
- It was held the company was liable for the architect's fees
- Kapoor's act in engaging the architects was within the normal authority of a managing director
- The articles conferred full powers of management on the board
- The architects did not have to inquire whether he was properly appointed – it being sufficient for them that under the articles of association power existed to appoint Kapoor as managing director
- The firm, finding Kapoor acting in relation to the company's business as if he was authorised to so act, was induced to believe he was authorised by the company to enter into contracts on its behalf

The distinction between Actual Authority & Apparent (ostensible) Authority

Actual authority arises from consensus between P & A – their agreement (whether express or implied) is the only source of actual authority

- A's exceeding of his actual authority may be repudiated or ratified by P at P's choice
- Actual authority may activate the doctrine of the undisclosed principal whereas apparent authority obviously requires that the identity of P be known to TP

Apparent authority is really no authority at all but an appearance of an authority

- It arises by virtue of words or conduct of P which cause TP to believe that A is P's agent & to deal with A believing that by doing so he will be able to conclude a contract with P
- A contract made by A in excess of his actual authority but within his apparent authority will bind P contractually with TP, but A remains liable to P for having exceeded his actual authority (if any) as fixed by the agreement between them
- To establish this authority, TP must show he relied on 'holding out' by P
- However where actual authority exists, TP need not have known of it
- In those cases where P conferred an unusual authority on A, TP will succeed against P even though he could not have succeeded if he had been forced, by the absence of actual authority, to rely on A's ostensible authority

The distinction between IMPLIED Actual Authority & Apparent (ostensible) Authority

In the absence of express actual authority for the purpose of the particular contract in Q, TP will succeed against P only upon proving either one of:-

- Implied actual authority; OR
- Ostensible authority

Where P has appointed A to an office or position without any agreed restriction on his authority, they will be co-extensive and will be measured by the extent of authority that usually attaches to the office or position: See *Peterson v Moloney* (1951) 84 CLR 91

In such a case, the issue is which of 2 innocent parties (P & TP) is to suffer by the wrong of another (A) – the one who is to do so is entitled to a remedy against the wrongdoer (A) but usually this is of little practical value

Derham v AMEV Life Assurance Co Ltd (1981) 56 FLR 34 –the court held that by permitting A to have P's business cards, letter heads & receipt books, P had represented/permitted A to represent that A had authority to act for P to solicit business & receive money in connection with that business – on the basis of ostensible authority, P was liable to refund the amounts but P could not be said to have held out A as authorised to receive money for investment & so was held not liable to pay the money back to TP

Duties of an Agent – TXT220

(a) Duty to follow the principal's instructions

- A must observe the terms of their authority & instructions: *Spiers v Taylor* (1984)
- A must comply with provisions of the contract of agency before they will be entitled to remuneration
- Failure to comply with Ps instructions (except where illegal) will render A liable for loss suffered by P as a result of the breach

(b) Duty to act in person

A must act in person unless they are either expressly or impliedly authorised to delegate authority

General rule: a person to whom authority is delegated may not delegate to another (*delegates non potest delegare* (a delegate cannot delegate))

This rule may be relaxed/excepted where a professional/trade custom recognises a right of delegation

- An agent may use the services of others to perform mere 'ministerial acts' involving no special skill or discretion: *John McCann & Co (a Firm) v Pow* (1975) 1 All ER 129
- Where from the nature of the transaction it is clear the parties intended (or may reasonably presumed to have known) that it might be necessary to act through a sub-agent
- Where unforeseen circumstances arise which necessitate A delegating – it must be urgent & the sub-agent must be appointed with discretion

(c) Duty to act in good faith

An agent occupies a fiduciary position

It was recognised by the court that there are special classes of persons who normally stand in a fiduciary relationship with another – eg. Partners, *principal & agent*, director & company etc:

Hospital Products Ltd v US Surgical Corp (1984 – 1985) 156 CLR 41 per Gibbs CJ at 68 (he later comments that a statement that every agent is a fiduciary is open to some doubt)

(d) Duty to make full disclosure of any personal interest

An agent cannot make a secret profit & must disclose all personal interests to P: *Hewson v Sydney Stock Exchange Ltd* (1967) 87 WN(Pt 1) NSW 422

- If A fails to make full disclosure then they are not entitled to commission: *Dargusch v Sherley Investments Pty Ltd* (1970)
- Any profit received by A resulting from non-disclosure is recoverable by P on learning the true facts: *Walden Properties Ltd v Beaver Properties Pty Ltd* (1973)

(e) Duty not to make a secret profit

An agent must act in the best interests of P & not his own: *De Bussche v Alt* (1878) 8 ChD 286 (bought ship from P for \$90K & on sold to Prince for \$160K)

- A must act in good faith in P's best interests & must not take advantage of P or make a secret profit
- This requires all material facts which might influence P be disclosed
- A should not further their own interests at the expense of the interests of P
- Directors of companies are under a duty not to make secret profit: *Regal (Hastings) Ltd v Gulliver* (1967)
 - Directors are also subject to statutory provisions whereby they must give notice of any material personal interest in matters that relate to the affairs of the company: s191(1) *Corporations Act 2001 (Cth)*
- Where an agent procures an item to order for a principal and sells it to him for a personal profit, the agent is liable to the principal for that profit: *Bentley v Cragven* (1853) 18 Beav 75
- It is permissible to act for both parties after both parties have full knowledge of that fact: *Fullwood v Hurley* (1928) 1 KB 498
- An agent cannot make a secret profit & must disclose all personal interests to P: *Hewson v Sydney Stock Exchange Ltd* (1967) 87 WN(Pt 1) NSW 422
- Because the agent must act in good faith, the agent may not make a secret commission or profit
 - Bribes: *Industries & General Mortgage Co v Lewis* (1949) 2 All ER 573; *Mahesan (T) s/o Thambiah v Malaysian Govt Officers Co-op* (1979)
 - A defrauded principal has alternative remedies in tort against both the briber and the agent for money had and received where he can recover the amount of the bribe, or for damages for fraud where he can recover the amount of any actual loss sustained by entering into the transaction in respect of which the bribe was given
 - The plaintiffs need not elect between these alternatives before the time has come for judgment to be entered in their favour in one or other of those causes of action
- If the agent directly/indirectly makes a profit by purchasing the property through a sub-agent or other party & agent profits from the transaction on resale, it constitutes a breach of his duty and is considered a secret profit: see *Blackham v Haythorpe* (1917) 23 CLR 156
 - Therefore the agent must make full and accurate disclosure of material facts before obtaining the principal's consent in entering into a contract for sale but he/she must also disclose all material facts of which the agent became aware before completion of the sale.

Hewson v Sydney Stock Exchange Ltd (1967) 87 WN(Pt 1) NSW 422

- Hewson (stockbroker) dealt in shares extensively for his own account to the point where he was trading in competition with his clients
- He was held to have 'gravely compromised' a fundamental principle of commercial morality
- No man acting as an agent can be 'allowed to put himself in a position in which his interest and his duty will be in conflict': *Parker v McKenna* (quoted with approval by Street J)

(f) Duty to exercise reasonable care & skill

If A fails to exercise the requisite care & skill in carrying out the terms of the contract of agency, A will be liable to P for the loss sustained as a result of A's breach of duty

- Insurance broker was liable because he failed to exercise reasonable care & skill in effecting the insurance for his clients when told to obtain unqualified insurance cover against damage caused by storm & flood (didn't cover flood caused by sea): *Mitor Investments P/L v General Accident Fire & Life Assurance Corp* (1984)
- A RE agent owes vendor the duty to inform vendor as soon as practicable that purchaser has avoided the contract of sale – if they fail to do so, A is liable to vendor for loss they suffer as a result of the delay: *Havas v Cornish & Co P/L* (1985)
- Directors of companies must discharge their duties with reasonable care & diligence that a reasonable person would exercise if they were director/officer of a corp in the same circumstances: **s180(1) Corporations Act 2001 (Cth)**

(g) Several other duties

- **The Agent must not disclose confidential information:** *Prebble v Reeves* (1910) VLR 88; *Weld-Blundell v Stephens* (1920) AC 956
- **A must keep an accurate account of all transactions entered into on P's behalf:** *Hannaford v Australian Farmlink* (2008) FCA 159 per Finn J at 54
- **A must keep P's property separate from its own:** *Hannaford v Australian Farmlink* (2008) FCA 159 per Finn J at 54

Rights of an Agent – TXT223**Right of Remuneration if this has been expressly agreed**

- *Dolphin v Harrison San Miguel Pty Ltd* (1911) 13 CLR 271 – the court ruled that the correspondence btw Cork & General Merchants (A) and a brewer (P) did not establish an agreement by P to employ A as his agents to introduce a purchaser or pay A a commission if they did so
- **Agent must be effective cause of sale**
 - A must have been the actor within their scope of authority & the transaction resulted from the services they rendered
 - A must have been the means whereby the 2 contracting parties were brought together & entered into a legally binding contract: *Luxor (Eastbourne) Ltd v Cooper* (1941) AC 108
 - *LJ Hooker Ltd v WJ Adams Estate Pty Ltd* (1977) 138 CLR 52 – HC majority held the appellant RE agent was not entitled to recover commission as it had not

been an effective cause of sale to Company B, nor any interest in the property to Company A – **TXT224**

- **Rasmussen & Russo Pty Ltd v Gaviglio (1982) Qd R 571** – RE agent #1 was not able to claim commission for a sale that RE agent #2 arranged as there had been a break in the necessary causal connection btw #1's actions & the actual sale that took place through #2 – **TXT224**

- **Amount of remuneration?**

- Depends on the agreement between P & A
- The commission is sometimes fixed in particular trades/professions by custom or by regulations governing that trade/profession (eg. Real Estate Agents)
- Where there is no express/implied agreement as to the amount but there is an agreement – the amount payable is a reasonable amount or % which will depend on all the circumstances

Right to Commission & Expenses

- **Luxor v Cooper (1941) 1 All ER 43** – The vendor company had instructed agents to sell properties on its behalf and had agreed to pay commission on completion of the sale. The sale was agreed with a prospective purchaser introduced by the agents. Before the sale was completed, the vendor company withdrew from the sale because of an objection by one of its directors. The vendor company later sold to someone who had not been introduced by the agents. The agents claimed their commission.
- Where the contract provides on its proper construction for payment of commission on the occurrence of some other event (eg. A person being "introduced to the property" either by agent or vendor) and "as a result" of such introduction the property is sold, then the agent is entitled to a commission on occurrence of the specified event: **Max Christmas**
- **Max Christmas Real Estate v Schumann Marine Pty Ltd (1987) 1 QdR 325** – Agent to be paid if buyers introduced & sale made as a result of introduction. Agent brought the buyers to the auction & the buyers bought later (this is eg of an agent fulfilling conditions for remuneration, despite seeming not to be effective cause of sale)
 - The Q of commission is always to be determined according to the express terms of the agreement under consideration: **Max Christmas** per McPherson at 334
- Each case depends on the construction of the terms of the agency contract btw vendor & estate agent & particular circumstances of the case: **Midgley Estates Ltd v Hand (1952)**
- Where the agency agreement provides for payment of commission on the RE agent "finding a purchaser" or "introducing a person who shall become a purchaser", the agent is not entitled to commission unless they introduce a purchaser who (at the vendor's price & terms) is ready & willing to purchase, is able to purchase & in fact purchases by entering into a binding contract to purchase: **Gerlach v Pearson (1950) VLR 321**; **Turnbull v Wrightman (1945) 45 SR (NSW) 592**
- If contract fails to stipulate the event on which agent's right to commission arises, commission becomes payable only upon completion of the sale by purchaser (unless the failure to complete is the vendor's fault) & not at the time of purchaser signing the contract of sale

- If (upon the circumstances just mentioned above) purchaser fails to complete sale after entering the contract of sale, the vendor is not liable to pay commission to the agent: *RJ Mabarrack Pty Ltd v King* (1971) 1 SASR 313
- Should vendor refuse to complete the sale, the agent will be entitled to their commission: *Christie Owen & Davies Ltd v Rapacioli* (1974) QB 781
- **Statutory restrictions on right to remuneration**
 - Sometimes A is debarred by statute from suing for commission unless A's engagement or appointment to act is in writing signed by the person to be charged
 - VIC & WA – applies to agents employed to buy/sell land & businesses
 - QLD – applies to resident letting agents, property agents, chattel auctioneers, motor dealers & debt collectors: *ss88 & 132 Motor Dealers & Chattel Auctioneers Act 2014 (QLD)*
 - NSW – a "licensee" is not entitled to any commission unless the agreement is in writing & signed by licensee & person for whom services were performed: *s52(1) Property, Stock & Business Agents Act 2002 (NSW)* (PSBAA)
 - NSW – a copy of the agreement must be served by licensee on the person to be charged within 48hrs after signature by that person: *s52(2) PSBAA*
 - NSW – a licensee cannot commence action for recovery of remuneration until 28 days has passed after written statement of claim has been served on person to be charged: *ss36 & 52 PSBAA*
 - Service of a statutory demand does not constitute service of a statement of claim: *Investmentsource Corporation Pty Ltd v Knox St Apartments P/L* (2002) 56 NSWLR 27 at 48-49

Right to Indemnity against Losses & liabilities incurred in reasonable performance of his/her duties

- A is entitled to be indemnified against all losses & liabilities sustained
- A is entitled to be reimbursed for all expenses lawfully incurred in carrying out P's instructions
- Cannot claim if guilty of a breach of duty
- *Hitchens Harrison Woolston v Jackson* (1943) 1 All ER 128 – Solicitors (P) instructed stockbrokers (A) to sell stock and enclosed the certificate and a blank transfer signed by the stockholder (TP). A sold the stock, but TP repudiated the contract and the company, (on her instructions) refused to register the transfer. A replaced the stock by a purchase on the Stock Exchange and sued P for their expenses. It was held that it was P's duty to deliver a transfer executed by a transferor willing that it should be registered & P was liable

Right to lien

- A has a lien over P's property in his/her possession for the due payment of all expenses & remuneration lawfully incurred by A in transacting P's affairs: *Rolls Razor Ltd v Cox* (1967) 1 QB 552
- The transactions must relate to the property over which A desires to exercise a lien
- A may have a general lien extending to all claims arising out of the agency either by express contract or by usage

Liability of Agent to Principle – TXT226

Generally A incurs no liability to P re the contract

HOWEVER if A disobeys P's instructions – A will be liable for loss suffered by P as a result of the breach of contract of agency

Where A is negligent carrying out their duties – A will be liable to make good the damage suffered by P as a consequence of A's negligence: *Mitor Investments v General Accident Fire & Life Assurance Corp* (1984) WAR 365

Liability of Agent to Third Parties – TXT226

(Where there is authority)

Where the name of P is disclosed – only P is liable

- Where A contracts as agent, then usually only P is liable
 - *Wakefield v Duckworth* (1915) 1 KB 218 – Wakefield (TP) failed in attempting to seek payment from Duckworth Solicitors (A) for his photos which were taken for P's manslaughter defence hearing – only P is liable
- **Exceptions:-**
 - If A contracts on behalf of non-existent P & there is no evidence that A intended to be personally bound
 - *Kelner v Baxter* (1866) LR 2 CP 174 – the court held the company could not acquire rights or incur obligations by acts antecedent to its formation (signed contract as directors of company for supply of goods for use in the business before the company was formed) therefore the signatories each became personally liable (*ut res magis valeat quam pereat*)
 - **HOWEVER** *Black v Smallwood* (1966) 117 CLR 52 – Ds had not contracted as agents but as Directors & so they were not personally liable –
 - HCA expressed the view that when a man purports to contract as agent for a non-existent P the Q re personal liability on the contract depends on the presumed intention of the parties in each case, & denied that *Kelner v Baxter* is authority for the proposition that there is a rule of law that when a man purports to contract as A for a non-existent P he is personally liable on the contract
 - If A signed a bill of exchange then A will be liable on it
 - A is in fact the real P (ie. A intends to take the benefit of the contract even though they are purporting to be the agent)
 - Where usage or custom makes A liable
 - If A executes a deed in their own name
 - A contracts outside their actual authority
 - A agrees to be liable
- The fundamental Q in such cases must be what the parties intended or must be fairly understood to have intended

- Where the intention is that the contract be made by the company & the person signs "for and on behalf of" the company & does not purport to contract as agent, then they will not be personally liable on the contract: *Miller Associates (Australia) P/L v Bennington Pty Ltd* (1975) 2 NSWLR 506
- The person is liable to pay damages to OP to the pre-registration contract if the company is not reg'd or the company is reg'd but does not ratify the contract within the time agreed by the parties OR if there is no agreed time – within a reasonable time after contract entered: *s131(2) Corporations Act 2001 (Cth)*

Where the existence of the agency is disclosed but not the name of P (TXT228)

- *Southwell v Bowditch* (1876) 1 CPD 374 - A will not be liable if A clearly indicates they are contracting merely as A
- *Universal Steam Navigation v James McKelvie* (1923) 129 LT 395 – adding 'as agents' to the signature may avoid A's liability
- If TP contracts knowing there is a P & yet does not ascertain P's name, TP cannot sue A: *Marsh & McLennan P/L v Stanyers Transport P/L* (1994) 2 VR 232 at 241 (this principle may alter where custom or trade makes A personally liable)

HOWEVER!

- If A does not clearly show on the face of the contract they are merely acting as an agent then they may incur personal liability (ie. Q of intention is objectively determined) – see *Black v Smallwood*
- Where the principals would be drawn from a known class (the agent's clients) but A had not selected any particular client at the time the contract was made, A is held to have contracted as P: *Carminco Gold & Resources Ltd v Findlay & Co Stockbrokers (Underwriters) Pty Ltd* (2007) 243 ALR 472 at 25

Where existence of P is not disclosed

- The general rule where P is not disclosed & contract is made by A in their own name is that either A or P may sue or be sued upon it: *Sims v Bond* (1833) 110 ER KB 83419
 - UNLESS a personal qualification of A is material to the Ds signing the contract, P will have rights under the contract: *Dyster v Randall & Sons* (1926) Ch 932; *Brunton v Thomson* (1846) 7 LTOS 430 OR
 - UNLESS the contract btw A & TP expressly or impliedly excludes the rights of persons other than A to be party to the contract: *Maynegrain P/L v Compafina Bank* (1982) 2 NSWLW 141 at 149-150
- TP cannot change his mind & later try & sue P or A after learning existence/identity of P if he has already elected to sue P or A (cant go suing the other one)
 - *Thomson v Davenport* (1829) 9 B & C 78 – court held that as TP did not know who A's principal was at the time he debited A for the goods, TP did not have the opportunity of making an 'election' & so remained entitled to sue P
- BUT the general rule may be disturbed if it can be shown that the person who signed expressly contracted on their own behalf (they signed as P): see *Humble v Hunter*
 - *Humble v Hunter* (1848) 12 QB 310 – court held that as P's son had signed as owner, evidence could not be admitted to show that he signed as A

- An undisclosed P cannot purport to ratify as the act of A, a transaction entered into without their authority by 1 who purports at the time to be P & does not disclose they are A: *Keighley, Maxsted & Co v Durant* (1901) AC 240
- The general principles applying to undisclosed P's were summarised in *Siu Yin Kwan (Administratrix of the Estate of Chan Ying Lung, Decd) v Eastern Insurance Co Ltd* (1994) 2 AC 199 at 207 per Lord Lloyd at **TXT229** (good quote)

Breach of Warranty of Authority (**TXT230**)

- A person who purports to act as A impliedly warrants that they have authority & is liable for breach of that warranty even though their authority has come to an end by reason of facts of which they have no knowledge or means of knowledge: *Yonge v Toynebee* (1910) 1 KB 215
- *Collen v Wright* (1857) 120 ER 241 – If A makes a contract beyond the scope of his authority then A is liable himself for damage caused on breach of warranty of authority (A signed contract to lease TP's farm but did not have authority to do so even though he believed he had)
 - The person impliedly (if not expressly) undertakes that the authority they profess to have does in fact exist (at 245)
 - It does not matter that A was acting honestly
 - This action is only available against A, not P
- HOWEVER A is not liable where TP knew of A's lack of authority: *Weigall & Co v Runciman & Co* (1916) 85 LKB 1187; *Halbot v Lens* (1901) 1 Ch 344

Liability of Principal & Agent for Negligence & Deceit (**TXT230**)

- **Misrepresentations**
 - If A's representations are untrue, the vendor will be liable to purchaser for loss suffered by purchaser as a result of relying on A's representations: *Aliotta v Broadmeadows Bus Service P/L* (1988) ATPR 40-873 at 49,445
 - Such misrepresentations may also constitute misleading or deceptive conduct in contravention of **s18 ACL**
- **Torts**
 - Where A makes negligent misrepresentations which purchaser relies on, A will be liable in damages to purchaser for loss suffered: *Roots v Oentory P/L* (1983) Qd R 745
 - P is vicariously liable for a tort committed by A where A acted within the scope of their actual or apparent authority (this includes liability for negligent misreps of A): *Thompson v Henderson & Partners P/L* (1990) 58 SASR 548
 - P may be liable for loss/injury caused by the tort of A (esp) if wrongful act was specifically instigated, authorised or ratified by P: *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) FCA 1558 per Lindgren J at 618
 - If A is an employee then employer is vicariously liable for A's acts provided they were done during ordinary course of employment
 - *Koragang v Richardson & Wrench Ltd* (1981) 36 ALR 142 - HL rejected the broad proposition that so long as the employee is doing acts of the same kind as those it is within his authority to do, the employer is liable and he is not entitled to

show the employee had no authority to do them (authorised to carry out valuations but did an unauth'd private valuation as well)

- If A is not an employee, liability will also depend on whether the act is done within the scope of A's authority
 - *CML v Producers & Citizens Life (1931) 46 CLR 41* - the court found P liable for their “representatives” & found the independent contractor was advancing the economic interests of P and thus constituted P's “representative” (CML was liable for defamatory statements made by A (ins salesman) even though A had been directed NOT to make such statements)
 - *Sweeney v Boylan Nominees Pty Ltd (2006) HCA 19* – HCA held a hirer will not always be liable to a hiree, simply because the hirer gains a benefit or has their interests advanced by the hiree (P was not liable for the negligent repair work of a fridge door by an indpt contractor they hired to fix door)
 - *Royal Globe Life Assurance Co Ltd v Kovacevic (1979) 22 SASR 78* – A had rec'd money from K during course of A's employment by insurance company which was accordingly liable to K for the agent's fraud
 - *Armstrong v Strain (1952) 1 KB 232* – purchaser was unable to recover damages against P for fraudulent misrepresentation since no fraudulent intention had been established on part of either Skinner (A) or P (A believed it was true & P knew it was not true but did not authorise A to say it or know he was going to say it) – **TXT231**
 - *Deatons Pty Ltd v Flew (1949) 79 CLR 370* - Hotel was not liable to pay damages for bartender glassing a patron as bartender was not acting within their scope of employment when doing what they did

Termination of Agency – **TXT232**

Termination of relationship btw P & A will depend upon terms of the original contract of agency...

The appointment of an Agent may be terminated:-

- (i) **Performance or completion of agency**
- (ii) **Impossibility of performance**
 - By A becoming '*functus officio*' (having completed agency assignment they were engaged to perform, or by destruction of the subject matter of agency, rendering performance impossible)
- (iii) **Agreement**
 - By mutual agreement between A & P
- (iv) **Revocation**
 - Cant do it if A has partly completed his duties & A would be prejudiced: *Read v Anderson (1884) 13 QBD 779*
 - Cant do it if authority was given to A by way of security or to protect some interest of A's: *Gausson v Morton (1830) 10 B & C 731*
 - P cannot capriciously or without reasonable grounds refuse to enter into contract & determine the agency when A has found & introduced a purchaser ready, willing & able to buy at stipulated price: *Trollope (George) & Sons v Martyn Bros (1934)*
- (v) **By death of P or A**

- A's authority to draw on P's bank account terminates upon P's death: *Noonan v Martin* (1987) 10 NSWLR 402
- General rule = death of P terminates authority of A even though A is unaware of & had no means of ascertaining the fact
- A becomes personally liable to TPs for having made any contract entered into by A after death of P & on behalf of P & may be sued by such party for breach of warranty of authority even though A was ignorant of P's death
- The state of P is not liable under such a contract BUT the PR may confirm the contract

(vi) **By incapacity of P or A**

- Once insanity has overtaken either P or A, the contract of agency (with its attendant rights & liabilities) is at an end: *Yonge v Toynbee* (1910) 1 KB 215
- HOWEVER a TP is entitled to treat authority of A as subsisting until they receive notice of the insanity in cases where P (before becoming insane) held out A as having authority

(vii) **By bankruptcy of P or A**

- Bankruptcy of A determines their authority unless the bankruptcy does not affect their capacity to contract as A
- So where the duties of A are merely formal, A's bankruptcy would not affect their authority
- Bankruptcy of P determines the relationship of P & A
- HOWEVER A (even after notice of P's bankruptcy) may do such acts as are necessary to complete some transaction which was already binding on P before bankruptcy

(viii) **Renunciation**

- A may renounce the agency at any time BUT must compensate P for any loss occasioned by such renunciation

(ix) **By supervening illegality** (eg. P becoming an enemy alien, A accepting a bribe etc)

Types of Agents – TXT235

- ❖ Auctioneer
 - An agent for the sale of property at a public auction
- ❖ Factors & Mercantile Agents
 - An agent with the power to sell goods is a 'factor' or 'mercantile agent'
 - If a mercantile agent's authority is revoked, the revocation must be made public because a sale or pledge of goods or docs of title to goods that are in A's hands binds P unless the lack of authority is known to the buyer or pledge: *Folkes v King* (1923) 1 KB 232
- ❖ Broker
 - Is a mercantile agent employed to buy or sell on behalf of another person rather than in broker's own name

- They often do little more than bring the parties together & when contract is concluded they take their commission & drop out of the transaction completely
- ❖ Del credere Agents
 - An agent who receives an additional commission from P in return for which he undertakes not only that he will attempt to sell the goods entrusted to him but also if they are sold they will be paid for (if not by the buyer then A himself)
- ❖ Bankers
- ❖ Partners
 - Each partner is a general agent of the other re partnership matters & are bound by any act done by one of its members in the course of the firm's business
 - UNLESS partner had no authority to act for the firm & person the partner is dealing with either knows they had no authority or does not know or believe they are a partner
- ❖ Sub-agents
 - An agent cannot employ another person to perform what he has undertaken to do unless it by the custom of a particular trade, by consent of P, in the ordinary course of business or in case of necessity
 - If a sub-agent is properly employed, P is bound by it
 - If a sub-agent is not properly employed, P is not bound, though A himself will be bound by the acts of the sub-agent towards both P & TP: *John McCann & Co (a Firm) v Pow (1975) 1 All ER 129*
- ❖ Company Directors
 - The Directors as a group are Agents in the widest sense for their company & the company will be liable under all contracts made on its behalf by the board
 - This is so where the board acts within its scope of the power vested in it by the company's constitution
 - HOWEVER the company is also not able to disclaim liability on the grounds that the contract lay outside the scope of the company's objects or even an express restriction or prohibition in the company's constitution: **s125 CA**
- ❖ Estate agent
 - Agents entrusted with the duty of buying or selling land or businesses on behalf of principals