

LAWS5136 – Commercial Law

Lecture Notes

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Lecture 2 – Agency in Commercial Transactions

- Main question asked regarding agency issues is **whether A was B's agent for the purpose of binding B to the contract**
- Example: a real-estate agent and a property owner are in an agency relationship, but what is the agent authorised to do?
- **Tan v Russell**
 - Issue was whether a purchaser had validly terminated a contract by emailing the vendor's real-estate agent on last day of cooling off period
 - Generally, a real-estate agent is authorised to find and introduce a purchaser to the owner
 - Authority does not extend to entering into a contract of sale or receiving a letter of termination/refusal

The concept of agency

- **International Harvester v Carrigan's** – agency involves an authority to create legal relations between a person occupying the position of principal and third parties (strict view)
- **Erikson v Carr** – where a person consents to act on behalf of another, either generally or in respect of a particular act or matter (wide)
- **Petersen v Moloney** – an agent is a person who is able, by virtue of authority conferred upon him to create or affect legal rights and duties as between another person (principal) and third parties (**preferred definition**)

- Need to specifically determine what the agent is authorised to do

International Harvester

- Farmers brought an action of breach of warranty against Intl. Harvester, however the farmers dealt with H & K (agent or principal?)
- H & K had gone into liquidation – so farmers could only bring action against Harvester
- Harvester argued that that no contractual relation existed between them and the Farmers – H & K was a principal, not their agent
- The purchase document did not mention Harvester; H & K were listed as the dealers and the owners (internally inconsistent)
- The nature of H & K's business was that of “dealers and agents”
- HC held: despite the fact they were listed as agents they were still principals
 - “agent” is very commonly misused
 - Harvester was not a party to the contract

Kit Digital Australia

- Gestion and Kit entered in a “pass through” arrangement to provide consulting services to Telstra
- Kit was on Telstra's advising panel and authorised to do work for Telstra
- Gestion was not on the panel, therefore, Kit was an agent for Gestion
- Gestion would give Kit an invoice, Kit would add 5% and pass it through to Telstra
- Kit went into liquidation
- If Kit was Gestion's agent, any money received by Kit would be held on trust for Gestion and, therefore, could not be taken by Kit's creditors
- Court held: no agency because there wasn't any intention for there to be agency
 - Telstra only wanted work from the panel, which Gestion was not on

Capacity

- ***Christire v Permewan Wright*** – principal must have capacity to perform the act being performed through an agent
- ***Watkins v Vince*** – agents do not need contractual capacity themselves to act as agent for another
 - A minor (<16 years old) signed a contract – held that Vince was still liable
- Legal professionals lacking accreditation acting as agents may be charged with statutory breaches, however the contract itself may still be binding

Authority

- Nature and extent of an agent's authority
 - Actual express authority
 - Actual implied authority
 - Ostensible authority (apparent authority)
 - Ratification
- 3 parties to agency – principal, agent and third party
- If the agent acts outside of their authority, the principal is not bound (there are exceptions)

- Agent may still be liable to principal due to breach of contract
- Breach of warranty of authority – agent liable to third party (not a breach of contract, because there is no contract between agent and third party)
- Actual authority
 - A consensual form of authority
 - Requires the consent of the principal and the agent
 - **Poulet Frais v Silver Fox** – consent can be express or implied

Actual express authority

- Consent is given in writing or by words
 - Eg. delegation of authority from the Board of Directors to a single Director by resolution of the Board
- **Tobin v Broadbent** – construe source of express authority in determining extent of authority

Actual implied authority

- P has consented to A acting for him by implication
 - I.e. by P's conduct or by the relationship between the parties, as opposed to express words
- Examples:
 1. The act performed by A is necessarily or normally incidental to the acts expressly authorised
 2. The act is one which an A of that type would usually have authority to do
 3. The act is in accordance with reasonable business practice applicable to the particular transaction
 4. Authority implied from the conduct of the parties and the circumstances of the case (repeated and consented business practice)
- A person in a certain position will usually only have authority to do what a person in that position would normally do
- Case law dictates what is normal for a certain position
- **Pavlovic v Universal Music Australia** – solicitor's implied authority does not extend to making contracts on behalf of client
- Keane J – common fallacy for solicitors to have implied authority to accept notice on behalf of a client
- **Tan v Russell** – real estate agent's implied authority does not extend to receiving notice of termination of contract within cooling off period

Hely-Hutchinson v Brayhead

- H-H was chairman of Perdio, Mr R was chairman of Brayhead
- Brayhead acquired several companies that Perdio also had interests in
- Perdio was incurring losses and discussion were had about Brayhead purchasing Perdio
 - Brayhead purchased numerous Perdio shares
- Sometime later, H-H became a director at Brayhead; didn't attend a board meeting until some months later
- Perdio was still experiencing financial difficulty
- H-H gave own personal guarantee to Perdio for 50,000 pounds

- Matters became worse and H-H had to fulfil the guarantee
- H-H agreed with Mr R that he would lend his own money if he:
 - Was released of 50,000 pound guarantee
 - Brayhead indemnified him for any money lent to Perdio
- 2 letters of this effect were provided by Mr R on Brayhead letterhead and signed by Mr R as chairman
- This was not reported to any board meetings, nor was this agreement disclosed per the article of association
- Mr R did not think there was any limitation on his authorisation
- H-H advanced 45,000 pounds to Perdio, which later went bankrupt
- H-H paid 50,000 pounds to Period creditors
- H-H issued writ of 95,000 pounds from Brayhead
- Brayhead denied the authority of Mr R to make such an agreement with H-H
- **Held:** Mr R had implied authority to enter into contract with H-H
- Lord Denning – implied not from office as chairman (because that office did not carry with it the authority to enter into these contracts without sanction of the board) but from the **conduct of the parties and the circumstances of the case**
- Board had over many months acquiesced in Mr R acting as their chief executive and managing director and committing Brayhead Ltd to contracts without the approval of the Board

Ostensible authority

- Not based on the consent of P but on P having intentionally or negligently held out A to be his or her agent
- **Rosecell v JP Haines Plumbing** – extent of ostensible authority depends on the width of the representation
- Based off principals of equitable estoppel
 - Remedies damages that flow if one party made false representations to a party that suffers detriment due to their reliance on that representation
- **Elements of ostensible authority**
 1. Representation by P to a third party that A has P's authority to do a certain act (most difficult to determine)
 2. Reliance upon that representation
 3. Detriment
- Representation MUST come from P, not agent (no self-authorisation)
 - Exception: if A has implied or express authority, and claims to have authority which they lack, and P does nothing to interfere (**Armagas v Mundogas**)
- Consider:
 1. Manner in which representation is made
 2. Who made the representation
 3. To whom the representation was made
- Ostensible authority may sometimes cross over with implied authority
- **Examples:**
 1. P appointing A to a particular position or entrusting them with some responsibility
 2. Course of dealing between a third party and P through an agent

3. ***Freeman & Lockyer v Buckhurst Park Properties*** – P standing by mute while someone deals with a third party apparently on behalf of P
 4. ***Pacific Carriers v BNP Paribas*** – P equipping officer with a title, status and facilities
 5. If A holds themselves to have authority, and P has control over A's representations – A may have ostensible authority, through P's misrepresentation by silence
- Depending on analysis, A may have authority through P's conduct or lack thereof

Freeman & Lockyer v Buckhurst Park Properties

- One director acted as managing director for the company despite not being formally appointed
- Director appointed architect to do work
- Architect completed work and sought money from the company
- Company claimed the director was not authorised
- **Held:** company was liable for fees because they had allowed the director to act as the managing director, thus implying he had such authority
- Similar circumstances to H-H (which was decided to be implied authority)
- **2 step approach:**
 1. Company represented that he was a managing director
 2. What is within the ordinary ambit of a managing director?
- Based off case law – a managing director normally has authority to enter into such contracts