

Topic 1: Agency

Agent: a person who acts, or purports to act, on behalf of another person when dealing with a third party.

Nature of Agency



Principal: person granting the authority

Agent: Person acting in pursuant to the authority

- Effect of agency relationship is to increase the legal personality of the principal by allowing him to transact in different places in more or less the same time
- Problems: formation (*international harvester*), compliance

Misinterpreted for agency



Bailment: delivery or transport of possession of a chattel with a specific mandate with requires the identical item either to be returned to the bailor or to be dealt with in a specific way by the bailee. Bailor cannot make contracts on bailees behalf

Scope of Agency

- Distinguish between agency and other relationships
- Look at substance of relationship

International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldine... (1958)

- C visited IH's hay bailer exhibit at show
- IH told C he could buy it from Hassan & Kensell
- HK called themselves machinery and general AGENTS
- Can C sue IH for the faulty bailer?

Result

- If HK=IH's agent, then yes
- If HK= Independent contractor, then no
- Agent for one purpose doesn't mean agent for all purposes

Definitions of Agency

International Harvester (1958)

Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in the business world its significance is by no means thus restricted

Petersen v Moloney (1951)

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, who is called his principal, and third parties

Assessing agency

- Was A the agent for P for this exact act established in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004); *Beazley v Seed and Grain sales Moree Pty Ltd* (1988)
- Must relate to an act
- Principal must have legal capacity to perform the act authorised to the agent
- Agent must have authority for this act *Peterson v Moloney* (1951)

Beazley v Seed and Grain sales Moree Pty Ltd (1988)

- Agent authorised to sell particular land prepared written record of an oral agreement between vendor and purchaser and sent copies to both the purchaser and vendor
- Vendors argued written record constituted a written memo signed by them
- Was there a contract?

Result

- It is never sufficient to say of a person that he is an agent. One must always ask for what purpose the person concerned the person was appointed agent
- Was particular act done as agent or in some other capacity
- At the time he sent the letter, the **agent** was not actually an agent for this aspect of this particular transaction

Capacity of principal

- P must have the legal capacity to perform an act through A – *Cristie v Permewan Wright & Co Ltd* (1904)
- Whatever a person can do themselves, they can do through an agent
- Agent void if P is insane, whether they know or not
- S 124 of Corporations Act provides that company has legal capacity as a natural person

Capacity of Agent

- Agent does not need contractual capacity *Watkins v Vince* (1818)
- Some have statutory capacity: Auctioneer, real estate agents, brokers

Actual Authority

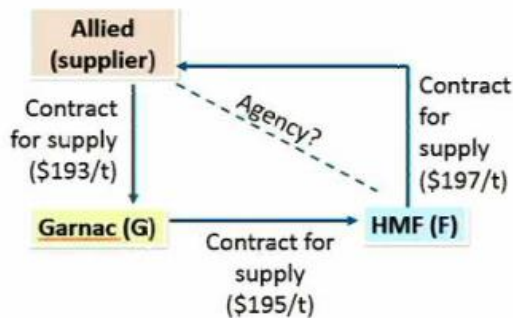
- Express or implied
- “there must be consensual agreement between the principal and the agent” *Clarke and Cripps JJA Equiticorp finance v BNZ* (1993)
- Agreement is sufficient, not contract
- Based on the substance of the parties’ relationship rather than the form

- *International harvester v Carringans*: form required in some instances

Express

- Oral or in writing
- Authority construed liberally considering commercial
- If uncertain, A will not have exceeded authority if acting in good faith
- Deed (under seal) → known as Power of Attorney → Construed in favour of P

Garnac Grain Co Inc v HMF Faure & Fairclough Ltd [1968]



Held

- HMF did not enter into the contract with Garnac of behalf of Allied (no evidence)
- There were two separate contracts HMF purchased from Garnac; HMF sold to Allied
- Observations by Lord Pearson → “the relationship of principal and agent can only be established by the consent of the principal and agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it...”

Equiticorp Finance v Bank of NZ (1993) set out the basic concept of actual express authority

- P must grant and A must accept, authority to perform certain tasks for P
- Must be consensual agreement (consent the basis)
- Can be created by written contract or spoken words
- “Where the question is whether the agent has implied authority to act in a particular way, the court directs its attention to the conduct of the parties in order to decide whether the inference of authority should be drawn”. (overlap with estoppel; from express to *implied*)



- Has P made a representation to T that A has the necessary authority?
- A need not be aware of the representation
- A must not purport to make the agreement as P
- Representation, when acted upon, creates and estoppel



Implied Authority

May arise:

- Because act performed by the agent is necessarily or normally incidental to the acts expressly authorised
- Because the act is one which the agent of the type concerned would usually have authority to do (*Hely Hutchinson v Brayhead Ltd*)
- The act is in accordance with reasonable business practice applicable to the particular transaction (customary authority), e.g. stock exchange. Must be shown that the usage or custom is notorious, certain and reasonable- *Con- Stan industries Australia Pty Ltd v Norwich (1986)*
- Authority may also be implied from the conduct of the parties and the circumstances of the case
→ *Bank of NZ v Fiberna Pty Ltd (1992)*
→ *Cousens v Grayridge Pty Ltd [2000]*

Aspects

- Rests upon consent of the principal but relationship inferred by conduct rather than express words
- "Where the question is whether the agent has implied authority to act in a particular way, the court directs its attention to the conduct of the parties in order to decide whether the inference of authority should be drawn". (overlap with estoppel; from express to *implied*) *Equiticorp*
- Actual implied authority means the authority actually exists- but it has not been spelled out in writing or orally by the principal

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] A case of ostensible authority, but one which also explored the parameters of actual implied authority

Diplock LJ stated: An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its 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 between the parties

Limitations

- There can be no consent where there is an express instruction from the principal to his agent that is contrary to the implication that is being sought: ***Fray v Voules (1859)***
- Thus a **contrary instruction** will immediately defeat any argument of an implied actual authority
- But even so there is still the possibility that ostensible authority can be found to exist: *Wough v HG Clifford and Sons [1982]*

Hely-Hutchinson v Brayhead Limited [1968]

- Richard was director of Brayhead Ltd
- Acted as de facto MD- often made decisions without Board of Directors' consent but would inform board afterwards
- Board failed to discipline Richards
- He entered into a transaction that Brayhead didn't want
- Argued he lacked authority

Result

- Trial court → For Hely-Hutchinson on grounds of ostensible authority
- Court of appeal → had actual implied authority because of past dealings
- Board acquiesced Richards committing the company to contracts without checking the board etc
→ Created actual implied authority

Norwich Fire Insurance Society Ltd v Brennans (Horsham) Pty Ltd [1981]

- Norwich (P) Insurance co. was negotiating contract with Brennans (TP)
- Brennans (TP) told to deal with Norwich's agent
- Brennans paid agents and signed contract
- Agent went bankrupt, no money passed to Norwich
- Was there actual implied authority for agent to collect money?

Result

- The court held that the agents had actual implied authority
- Court at trial, focused on what could be implied from the conduct of the parties
- Implication that the agent had actual authority to receive payment on behalf of Norwich was derived from the suggestion that the Brennans deal with the agents on the matter of insurance
- The concept of 'dealing' in this context clearly covered signing the contract and paying the money

Lord Denning: ... actual implied authority may be express or implied... it is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. Thereby impliedly authorise him to do all such things as fall within the usual scope of that office.

This case represents the **course of past dealings**. **Past dealing determine authority for future dealings**