

# 1.0 Agency

Thursday, 25 May 2017 9:25 AM

## 1.1. Establishing agency & scope

- **EXAM TIP:** Do Agency and Scope *separately*
- Look at **substance over form** → Mere word 'agent' is *not conclusive* of the agency relationship
  - **International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co**
  - **AMP v Chaplin**
    - **Employees** can be agents depending on the circumstances
- Agents can have a **limited scope**
  - **Petersen v Moloney**
- **Methods of creation**
  - (A) Actual authority
    - (i) Express
    - (ii) Implied
      - (a) Implied from facts
        - ◆ Terms of the K
        - ◆ Position or role of agent
      - (b) Implied by law
    - (iii) Ratification
  - (B) Apparent authority
    - Estoppel

### 1.1.1 Express actual authority

- Authority is conferred on the Agent by the Principal **by agreement** between the parties
  - Oral
  - Written
  - Deed

### 1.1.2 Implied actual authority

#### (I) Implied from facts

- Consent of the Principal for Agent to act on their behalf may be inferred from:
  - The relationship between parties (i.e. **terms of the K**); OR
  - Conduct between the parties
- Take a **practical commercial view** in order to ascertain the parties' intention
  - **ANZ Bank Ltd v Ateliers de Constructions**
- Consider **who is benefiting** from the contract → Agent acts for the benefit of the Principal
  - **Toll (FGCC) Pty Ltd v Alphapharm Pty Ltd**

#### (II) Implied by law

##### (A) Incidental or usual authority

- By virtue of **holding a position**, an Agent may have authority incidental to powers and usually held by others in similar positions
  - **Hely-Hutchinson v Brayhead**
    - ◆ MD has implied authority to enter into transactions in day-to-day management

- **Brick and Pipe Industries Ltd v Occidental Life Nominees**
    - ◆ A MD has the usual authority to:
      - ◇ Employ others to provide services to the company
      - ◇ Guarantee loans made to the subsidiary of the company
      - ◇ Agree to indemnify other guarantors.
    - ◆ An **ordinary director** on the other hand does not have had any implied authority to bind the company
- (B) Ordinary custom of trade
  - Court can look at the **ordinary custom of the trade** of an industry to establish whether establish whether agency exists
  - **Agency**
    - **Perpetual Trustee v Schmidt**
      - ◆ Generally, **broker** acts on behalf of the **lender**
  - **Scope**
    - **LJ Hooker v Adams**
      - ◆ Generally, a real estate agent would be entitled to locate potential purchasers of property
    - **Peterson v Moloney**
      - ◆ Estate agent's authority is **limited to finding a buyer**
        - ◇ Does NOT extend to an ability to **bind vendor** (*absence of specific authority*)
    - **Hansen v Marco Engineering**
      - ◆ Generally, **barristers are agents** for their clients, in so far as dealing with settlement of matters
- (C) Business efficacy
  - Agency can be implied into contract as a term of **business efficacy**
    - **Peterson v Moloney**
- (D) Necessity
  - Emergency situations which allows one person to bind another without the authority of the other
  - Factors:
    - (a) A person must be **entrusted with another's property**
    - (b) There must be a **commercial necessity** for the action (i.e. an emergency)
    - (c) It must be 'commercially impossible or extraordinarily difficult' to communicate with the owner of goods
      - ◆ **Sachs v Milkos**
    - (d) The Agent must act bona fide in the interest of the Principal
  - Types:
    - Agent can affect Principal's legal position **in connection w/ a 3P**
      - ◆ **Great Northern Railway Co v Swaffield**
        - ◇ Agent was able to recover the amounts paid to a 3P to take care of horse till Principal took possession
    - The doctrine of **necessitous intervention**
      - ◆ **Munro v Willmott**
        - ◇ Parked car causing a person inconvenience does not constitute an emergency
- (E) Cohabitation
  - Gives wife the authority to pledge husband's credit for **necessaries in all domestic matters** ordinarily entrusted to a wife
    - **Phillipson v Hayter**

### 1.1.3 Ratification of agency

- Approval by **words or conduct** by Principal to give authority, after the event, to the act of Agent in circumstances where agent had no authority
  - Express words

- Conduct
  - e.g. Principal uses materials ordered by Agent even if it was not for the authorised price (knowing that Agent had ordered for unauthorised price)
- **Effect**
  - Operates **retrospectively to validate** the Agent's unauthorised act
  - Does **NOT** cure **defects in transaction**
    - **Davison v Vickery's Motors**
- **Requirements**
  - (A) Agent must have **purported to act for Principal**
    - **Howard Smith v Varawa**
    - Principal must be **named or ascertainable**
      - **Black v Smallwood**
    - **Keighley, Maxted & Co v Durant**
      - **Cannot ratify** an act if the Agent did not purport to act for someone else
  - (B) *At the time of the transaction*, the Principal must have been **competent** (for individuals) or **in existence** (for companies)
    - **Section 131(1) Corporations Act**
      - If the company is formed within a *reasonable time* after transaction, ratification may be effective
  - (C) The Principal should be **legally capable** of entering the transaction *at the time of ratification*
  - (D) Ratification must be of the **whole of the K**
    - **Cox v Mosman**
  - (E) Principal must have "full knowledge" of the **material facts** relating to the act carried out by the Agent
    - **Marsh v Joseph**
  - (F) Ratification must take place within a **reasonable time** after Agent's act

#### 1.1.4 Apparent authority (estoppel)

- Principal (by words or conduct) **leads others to believe** that Agent has authority to act as Principal's agent
  - **Freeman v Lockyer**
- **Requires**
  - (A) Principal's **representation** to the world/ 3P that Agent had authority to act for Principal
    - **Pacific Carriers v BNP Paribas**
      - Employer held out that employee had necessary authority by permitting employee to do certain acts *without appropriate precautions*
  - (B) 3P believed that Agent had authority, on Principal's representation, and **relied on the representation**
    - **Lysaght Brothers v Falk**
    - **Pacific Carriers v BNP Paribas**
      - Plaintiff had *regular dealings* with apparent agent
  - (C) 3P **suffered detriment** as a result of reliance
    - **Hely-Hutchinson v Brayhead**
  - (D) Principal had the **power to do the acts** performed by Agent
    - **Crabtree-Vickers v Australian Direct Mail**
      - Director who made the representation did not have the power to enter into the transaction without Board approval

## 1.2 Agent's duties

- **Fiduciary duties**

- Duty to act in good faith
- Duty to fully disclose personal interest
- Duty not to make a secret profit
- **Duty to exercise care**
  - Duty to follow Principal's instructions
  - Duty to act in person
  - Duty to use reasonable care and skill

### 1.2.1 Duty to follow principal's instructions

- If the Principal's instructions are clear, there is a duty to follow instructions **strictly**
- Failure to meet obligations → Indemnify the Principal for losses as a result of breach
  - **Donellan v Watson**

### 1.2.2 Duty to act in person

- Agent must **act in person** and **cannot delegate** the tasks given by the Principal
  - UNLESS
    - There is express/ implied power to delegate
    - Purely administrative tasks
- **Implied power to delegate**
  - In the trade, an agent usually acts through other agents
  - Duties performed by the agent are purely administrative
    - Does not involve exercise of discretion or skill
  - It was intended/ reasonably presumed to have known that a sub-agent is necessary
  - Due to unforeseen circumstances which requires the Agent delegating

### 1.2.3 Duty to exercise reasonable care and skill

- It is presumed that an Agent takes care and skill that is necessary for the conduct of the profession or business in which the Agent is employed, or reasonably necessary for proper performance of duties
  - Failure = liable for losses suffered by Principal due to breach of duty

### 1.2.4 Duty to act in good faith

- Agent is under a duty to act, in all cases, in the **interests of the Principal**
- **Lintrose Nominees v King**
  - The **dual allegiance** of the Agent was not disclosed to the Principal → **Breach**

### 1.2.5 Duty to disclose personal interests

- Agent must disclose to the Principal all **material circumstances** of which they are aware which may influence the Principal in entering into a negotiation
  - **Dargusch v Sherley Investments**
    - Not entitled to commission unless Agent does so

### 1.2.6 Duty not to make a secret profit

- Agent must not **use their position in order to make a personal gain** without the knowledge and consent of the Principal

- **Parker v McKenna**

### 1.2.7 Duty to account to the principal

- Agent is under a duty to account to the Principal
  - Keep accounts of all transactions and produce them to Principal on demand
  - Keep Principal's property and **money separate** from their own

## 1.3 Rights of agents

- **Agent's rights include**
  - (A) Remuneration
  - (B) Indemnity and reimbursement
  - (C) A lien

### 1.3.1 Remuneration

- Agent must have been the **effective cause** of the sale to be entitled for remuneration (or commission)
  - **L J Hooker v W J Adams Estates**

### 1.3.2 Indemnity and reimbursement

- Agent is entitled to be indemnified against losses and liabilities sustained and reimbursed for all **expenses lawfully incurred**
  - Does not include where Agent has acted **outside the scope of authority** or engaged in **unlawful act**

### 1.3.3 Lien

- Agent has a lien on property of the Principal in **actual or constructive possession** in relation to remuneration/ expenses incurred in performing its duties
- The **transactions must relate to the property** over which the Agent exercises a lien

## 1.4 Remedies

- **Breach of contract**
  - Damages
- **Equitable remedies**
  - Recession
  - Recover commissions and remuneration paid to Agent
  - Recover Agent's secret profits
    - **Chan v Zachariah**

## 1.5 Termination of agency

- (I) By agreement
- (II) Impossibility of performance
  - Subject matter of agency of destroyed
- (III) Revocation by Principal or renouncement by Agent

- There is an implied term that either party can terminate the relationship upon notice
  - UNLESS contract expressly provides otherwise

(IV) Other circumstances

- Death (either Principal or Agent)
  - Or liquidation - for a company
  - Agent is personally liable for transactions entered into after the death of Principal
- Insanity
  - *Yonge v Toynbee*
- Bankruptcy
  - Principal
    - Ends relationship
  - Agent
    - Ends relationship unless it does not affect Agent's capacity

## 2.0 Partnerships

Friday, 26 May 2017 8:40 AM

### 2.1 Existence of a partnership

- **Section 5 PA**
  - The relation which subsists between persons **carrying on a business in common** with a **view of profit**
- **Elements**
  - (A) **Carrying on a business**
    - **Section 3 PA**
      - A **business** includes every trade, occupation or profession
    - Carrying on *normally* suggests the idea of continuity
      - **UDC v Brian**
      - Partnerships can arise when people enter into a JV in respect of a **single undertaking**
        - ◆ **Canny Gabriel Castle Jackson Advertising v Volume Sales**
  - (B) **Mutuality of obligations**
    - There must be **mutuality of rights and obligations**
      - **Degiorgio v Dunn**
        - ◆ More than mere agency is required
      - **UDC v Brian**
        - ◆ Obligations to contribute capital and share in liabilities and losses (in return for a right in share of profits)
  - (C) **With a view to profit**
    - **M Young Legal Associates v Zahid**
      - At CL, a partner had to participate in the profits and losses of a business
- **Rules (Section 6 PA)**
  - (1) Joint tenancy, tenancy in common, joint property (i.e. **co-ownership**) *does not itself* create a partnership whether the owners do or do not share profits from its use
    - **Cripps v FCT**
      - Wife and husband who co-owned rental properties not in a partnership
  - (2) Sharing of **gross returns** (c.f. profits) *does not itself* create a partnership (whether or not the persons have a common right in the property deriving the returns)
  - (3) The receipt of **share of profits** is prima facie evidence that they are a partner in the business (*evidential presumption*)
    - BUT *does not itself* make a partner
    - The following circumstances *by themselves* do not make a partner
      - (a) Receipt of a debt by instalments
      - (b) Receipt of remuneration by a person engaged in business, by a share of the profits of that business
      - (c) Receipt by a spouse or child of a deceased partner of an annuity out of profits
      - (d) Receipt of interest varying with profits in consideration for an advance
        - ◆ PROVIDED THAT the contract is in writing and signed by all parties
      - (e) Receipt of a portion of the profits in consideration of the sale of the goodwill of business
- **EXAM TIP:** Question of **substance over form** and contractual interpretation
  - **Consider:**

- Agreed terms
- Course of dealing between the parties
- **Pooley v Driver**
  - Loan terms pointed to partnership **despite contrary terms**
    - Lender was entitled to enforce to partnership agreement against the partners
    - Loan was treated as a **contribution of capital** to the partnership
    - Capital was divided and a portion was allocated to lender
    - Right to **inspect books and accounts** of the business
    - Lender entitled to **share of profits** proportionate to capital holdings
- **Limitations**
  - **Minors** can be partners
    - **Whundo Copper Syndicate v Ferrari**
      - Cannot seize minor's separate property (c.f. partnership property)
  - Illegality
    - A partnership cannot be formed if doing so would be illegal under statute or CL

## 2.2 Relationship *between partners*

- Usually governed by the **partnership agreement**
  - **Section 23 PA**
    - The provisions of the PA can be **supplemented, amended or excluded** by agreement
- **Default rules for partnership agreement (Section 28 PA)**
  - (1) All partners are entitled to **share equally** in the **capital gains** and **profits** of the business and must contribute equally to **losses**
  - (2) The partnership must **indemnify** each partner in respect of **payments and personal liabilities** incurred:
    - In the **ordinary and proper conduct** of the business of the firm; or
    - Anything necessarily done for the **preservation of the business or property** of the firm
  - (3) A partner who makes payment/ advance (for the purpose of the partnership) **beyond capital which they agreed to subscribe** is entitled to interest at a rate of 7% from the date of advance
  - (4) A partner cannot claim the interest on the capital subscribed to them **before ascertaining profits**
    - Partner's **right to profits** cannot be diluted by another partner claiming interest on capital
    - CL presumption that **capital contribution is to be repaid** upon dissolution
      - **Kelly v Tucker**
        - ◆ It was intended that the capital contribution be repaid to the one that made it unless contracted otherwise
      - c.f. **Kilpatrick v Mackay**
        - ◆ Parties had agreed to share in the profits regardless of capital contribution
  - (5) Every partner may take part in the **management** of the partnership business
  - (6) No partner is entitled to remuneration for acting in the partnership business
  - (7) A new partner cannot be added without the **consent of all existing partners**
  - (8) Any differences arising as to **ordinary matters** connected to the partnership business may be decided by a **majority of partners**
    - HOWEVER, a change to the **nature of partnership** requires consent of **all existing partners**
  - (9) The partnership books are to be kept at the place of business of the partnership
    - All partners should have access to inspect and copy books

- **Poole v Driver**
- **Expulsion of partners**
  - A partner can only be expelled if the partnership agreement contains **express power** to do so
  - **Section 29 PA**
    - No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners
  - **Bond v Hale**
    - Courts will take a **restrictive interpretation** of such a provision
      - Provision provided for expulsion of 'any partner'
      - Expulsion of **two** partners for breaches were found to be invalid

### 2.2.1 Duties owed by partners to each other

- There is a strong fiduciary relationship between partners because it is based upon a **mutual confidence**
  - **Birtchnell v Equity Trustees**
- **Obligations**
  - **Common Law**
    - (A) Act in **good faith** and honesty
    - (B) Avoid **conflicts of interest**
      - [REFER below]
    - (C) Avoid **profiting personally** from partnership opportunities and information
      - [REFER below]
  - **Partnership Act**
    - (A) Provide **full accounts** of all information and assets in a partner's possession/control which are **material to the partnership business**
      - **Section 32 PA**
    - (B) **Account for benefits** obtained from *partnership business* without the consent of the other partners
      - **Section 33 PA**
      - **Birtchnell v Equity Trustees**
        - ◆ Profited as a result of his connection with the firm and the type of work was **in the course of the firm's business**
    - (C) **Account for benefits** obtained from carrying on any business of the same nature as and **competing with that of the firm, without consent of other partners**
      - **Section 34 PA**
      - **Birtchnell v Equity Trustees**
- **Duration of fiduciary obligations**
  - The fiduciary obligations do not cease upon dissolution
    - **Chan v Zachariah**
      - Partner had to account for a lease obtained from partnership business, even after its dissolution
  - The fiduciary obligations will arise before the partnership business commences, when prospective partners enter into negotiations that involve **disclosure of sensitive information**
    - **UDC v Brian**

## 2.3 Partnership property

- **Section 24 PA**
  - All property and rights and interests in property **originally brought into the partnership stock** or **acquired** whether by purchase or otherwise on **account of the firm** or **for the**

***purposes and in the course of the partnership business***

- Partnership property must be used ***exclusively for the purposes of the partnership*** and in the manner set out in partnership agreement

**(I) What is the type of property?**

- (1) Property originally brought into the partnership
- (2) Property acquired for the purpose and in the course of partnership business
- (3) Property acquired with the firm's money

**(II) What was the intention of the parties?**

**(A) Separate assets by partners**

- Partners can ***agree*** that their separate assets:
  - (a) Will become partnership property; OR
  - (b) Will remain their own separate property – in which case the partnership merely gets a ***right to use it***
- The ***acts and intentions of the parties*** determine whether the property owned by one partner becomes partnership property
  - ***O'Brien v Komesaroff***
- In order to conclude that personal property was partnership property, ***their conduct must plainly lead to that result***
  - ***Kelly v Kelly***
    - ◆ Did not become partnership property due to the fact that the property in question was not listed in the ***partnership accounting records***
- ***Livingston v Commissioner of Stamp Duties***
  - If a partner contributes money and the other contributes know how, the other contributes land → neither owns separate assets

**(B) Property bought with partnership funds**

- Unless the contrary intention appears property bought with money belonging to the firm is ***deemed to have been bought on the account of the firm***
  - ***Section 25 PA***
  - ***Carter Brothers v Renouf***
    - ◆ Presumption that insurance premiums paid out for a life insurance out of partnership money resulted in partnership property
- ***Land***
  - ***Section 24(3) PA***
    - ◆ Land brought from profits (*partners as to profits*) arising from land (that is not partnership property, rather co-ownership) will be ***held to be co-ownership***

**(III) What is the partner's interest in partnership property?**

- Each partner has NO specific rights to specific assets of partnership property, but rather a ***proprietary interest in all partnership property***
  - Rich J in ***Sharp v The Union Trustee***
  - ***Volume Sales***
  - ***Connell v Bond Corporation***
- It is a ***personal property right***
  - ***FCT v Everett***
    - It is an ***equitable chose in action***
  - ***Section 26 PA***
    - Even if it is land, which constitutes partnership property
- ***Land***
  - If it relates to *real property owned in the name of individual partners*, there is a ***beneficial interest*** in the real property that the individual partner holds ***on trust*** for others in the partnership
    - ***Section 24 PA***
    - ***Chan v Zachariah***