

Agency

Agency:

- The relationship between P and A whereby A has the authority to create a legal relationship between P and a TP.
- Enables P and TP to enter into a contract.
- The practical effect of the agency relationship is to increase the legal capacity of P by allowing him to transact in different places at more or less the same time.
- The critical issue is usually whether the actions of A have affected P's rights and obligations in relation to TP.
- Agency is governed by common law principles.

Agency must be associated with a specific act that the agent has authority to carry out on behalf of P.

Note: capacity is required of the principal and the agent.

Principal:

- The party conferring on another the authority to act on their behalf is the principal.
- Principal **must have legal capacity** to perform the act which they are performing through an agent.
- A corporation has the capacity and powers of an individual.

Agent:

- The party upon whom the authority to act is conferred is called the agent.
- An agent **does not need contractual capacity** to act as the agent for another.
- Thus, an infant can as agent bind a principal, although the infant must have sufficient capacity to understand the nature of the agency and give its consent to act.
- There are specific instances where agents are required to have certain qualifications/licences, e.g. real estate agent.

Sources of an agent's authority:

- In the context of creating or affecting legal relations, P will only be bound by acts of A which are within A's authority.
- There are 2 exceptions to this:
 1. Where the principal has held the agent out as having such authority (ostensible authority).
 2. Where the principal later ratifies those acts.

There are a number of ways in which authority may be granted and an agency created:

1. P may expressly grant to A authority to do a particular act;
 2. The relationship between P and A may be such that P impliedly authorises A to do a particular act: actual authority which is implied (as distinct from express);
 3. By operation of law;
 4. By operation of statute; or
 5. By ratification
- Agency requires the consent, express or implied, of the principal and of the agent.

Implied agency:

- This concept should not be confused with that of actual implied authority.
- Implied agency refers to the implication that an agency relationship exists.
- In the area of actual implied authority an agency relationship already exists but the implication is concerned with the extent of the authority.

When we are concerned with matters of authority the agency relationship already exists, the big question is the extent of this relationship.

Actual authority:

- Only exists if created by agreement.
- Requires the consent of the principal and the agent.
- Need not be contractual (no consideration required).
- Consent may be express or implied.
- 2 forms of actual authority: actual express authority and actual implied authority.

Actual express authority:

- It may take the form of a written or oral contract.
- If an agency has arisen by way of a contract then the scope of the agent's authority will be determined by construing the terms of the contract.

Actual implied authority:

- The consent is inferred from the relationship between, or conduct of the parties as opposed to express words.

- In *Hely-Hutchinson*, the COA held that, on the facts, actual authority was to be implied from the conduct of the parties and the circumstances of the case.
- The authority actually does exist, but it has not been explicitly spelled out in writing or orally by P.
- Actual implied authority may arise in a number of ways:
 1. Because the act performed by the agent is necessarily or normally incidental to the acts expressly authorised = incidental authority.
 2. Because the act is one which the agent of the type concerned would usually have authority to do = usual authority.
 3. The act is in accordance with reasonable business practice applicable to the particular transaction = customary authority.
 4. Authority may be implied from the conduct of the parties and the circumstances of the case (very controversial) – authority may also be implied from a course of dealings.
- **LIMITATION:** All of this depends upon consent – this area of law is about holding P to his/her implied consent: under actual implied authority the consent of P is inferred.
 - There can be no consent where there is an express instruction from P to A not to do something: *Fray v Voules* (1859).
 - Thus a contrary instruction will immediately defeat any argument of an implied actual authority
 - This does not mean that it defeats the argument for ostensible authority – there is still the possibility that ostensible authority can be found to exist.

Ratification

Previously examined creation of agency through either actual or ostensible authority – here creation of agency relationship is looked at via:

- P's ratification of A's act; and
- Operation of law.

Ratification:

- Where A has entered into a transaction on P's behalf, but without P's authority, P may adopt that transaction by subsequently ratifying A's action.
- R is favourable to P, as until R the P is not bound.
- **Converts an act which is unauthorised into one which is authorised.**
- R can occur for transactions in respect of which:
 - A had no authority to act for P at all; or
 - In respect of which A had some authority to act on P's behalf but exceeded that authority and there was no estoppels to create OA.
- R can be retrospective – subsequent R becomes effective from the time of the agent's act, not from the time of the later R.
- A contract subject to R is not a binding contract until R is communicated to TP from P – the former is unaware of the limits of A's authority.
- Ratification is equivalent to original authority.
- It is P's assumption of the authority of A that is ratified, not the act of the alleged A.
- The act of A originally done without authority becomes valid and effectual from the time of the act (not merely from R).

Preconditions for ratification – 6 elements:

1. A whose act is sought to be ratified must have purported to act for P.
2. P must ratify A's act either expressly or impliedly.
3. At the time the act was done, A must have had a competent P.
4. At the time of R P must be legally capable of doing the act himself.
5. P must know all material facts.
6. P must ratify within a reasonable time of A's act, unless the contract stipulates another timeframe.

What is the major benefit for P?

- Suppose if A purports to contract on behalf of P and enters a contract with TP.
- If circumstances in the market change and the contract comes to be tremendously advantageous to P and less advantageous to TP, then P effectively gets a windfall.
- TP doesn't suffer a loss per se, but they may be disadvantaged by having to forego an opportunity that they might have taken by abandoning A's contract.

Contract must be expressly entered on behalf of P:

- A voluntary A must expressly intend to benefit the person for whom he acts.
- A cannot be acting for himself.

- Doctrine of R cannot apply to an undisclosed P.

P must ratify the agent's act either expressly or impliedly:

- This is a factual question.
- Implied R exists where the conduct of the person in whose name the act was done is such as to show that he adopts or recognises such act, and may be implied from the mere inactivity or acquiescence of P.

Communication of R:

- Not necessary for P to communicate his/her R to TP.
- R doesn't rest on estoppel – it is a unilateral act.
- If P doesn't wish to R he should notify his dissent within a reasonable time.
- Because notice of ratification doesn't have to be given to anyone, silence or acquiescence can amount to ratification.

Authority to ratify:

- P may ratify through A (can be effected by A).

Full knowledge of material circumstances by P:

- P can only ratify if s/he is aware of all material facts at the time of R.
- P can state that they ratify irrespective of the circumstances surrounding the transaction.

P must ratify within a reasonable time:

- R must occur within a reasonable time of the unauthorised act.
- No rigid rule as to what constitutes reasonable time.

Formalities:

- Except where s 126 of the *Instruments Act 1958 (Vic)* applies, ratification need not be in writing even though the contract A negotiated has to be in writing.

Ratification is of the whole transaction:

- P must either accept or reject the transaction as a whole.
- If P adopts the favourable parts of a transaction P will be bound by the rest.
- It is possible to ratify a transaction for 1 purpose, whilst rejecting it for another.

Effect of ratification:

- Effect, generally, is to invest A, P and TP with the same rights and liabilities they would have possessed had A been authorised to act.

There are 9 exceptions to R:

1. R must occur within a reasonable time of the unauthorised act.
2. R must take place at a time and under circumstances when the ratifying party might themselves have lawfully done the act which they ratified.
3. R is not allowed where to permit it would result in it unfairly prejudicing the TP.
4. R cannot occur where the purported exercise of agency authority has created some duty with which another party must comply and the time for compliance has expired.
5. If an express time limit is prescribed for the performance of some act, whether by statute or by agreement, R will not be allowed to apply if its effect would be to extend that time limit.
6. R cannot occur where there has been a breach or loss under the contract before R.
7. Where the giving of a notice within a specified period or before the occurrence of a particular event has the result of affecting proprietary interests such as by way of terminating a demise, vesting an interest in a partnership, or resuming possession of goods with the right to retain them until payment or tender of the price, then an unauthorised giving of such a notice by a purported A is incapable of being ratified at any time after the time for the giving of the notice.
8. Once the estate has vested it cannot be divested by the application of the doctrine of R.
9. A contract cannot be ratified after the date fixed for performance of a contract has passed to the detriment of a party who has not begun to perform the contract.

Imputed knowledge:

- P is taken to have the knowledge of his A.
- But the knowledge in question must be material to the agency and A must be under a duty to communicate the relevant knowledge to P.
- The knowledge of more than 1 agent cannot be aggregated – unless 1 of them is under a duty to communicate to the others.
- A fraud exception operates in relation to knowledge – where A is committing fraud, this knowledge cannot be imputed to P.

Agency by operation of law

- Law imposes agency irrespective of the intentions of the parties in the following situations:
- 1. In an emergency to enable the preservation of P's property or interests; and
- 2. Arising from cohabitation for the purpose of ensuring the female partner can purchase necessities – this is of limited relevance today due to gender equality and a functional social welfare state.

Agency of necessity:

- An agency will be created where A, faced with an emergency in which P's property or interests are in jeopardy, acts on P's behalf in order to protect P's property or interests.
- Arises where:
 1. There is a necessity to incur expenditure to preserve P's property and safeguard P's interests.
 2. There exists a commercial impossibility or extreme difficulty of communicating with P.
 3. The agent acted bona fide in the interests of P.
- Circumstances (extraordinary) may arise which create an authority to act in relation to the property of another person or to impose a liability upon that person which would not exist in ordinary circumstances.
- Judicial reluctance to impose.
- Only in cases of real necessity or emergency e.g. under conditions of warfare.

Basis for agency of necessity:

- Its Classification as implied agency suggests that the intention is inferred from the circumstances of the case.
- Courts inquiry: fact of necessity or emergency.
- Question: whether the circumstances were such as to justify the law entitling the possessor of the goods to deal with them without the authority of the owner?

No AN where:

- A can communicate with P by some reasonable and practicable means.
- No necessity to do the act in question.

AN where:

- Urgency means no time to wait even if communication is possible and initiated but instructions not received.
- Necessity = real emergency (but may include commercial necessity).

Agency by cohabitation:

- Bestows authority on a married woman to pledge her husband's credit for 'necessaries' suitable to the style in which they live.
- 'Necessaries' covers the reasonable supply of goods and services for the use of the husband, his wife, children and household.
- Explanation 1 – wife could not own separate property.
- Explanation 2 – deserted wives' reasonable maintenance.
- Authority arises by operation of law, on basis of necessity (agency by necessity).
- The presumed agency is based on fact and can be rebutted by:
 - Evidence denying authority – wife forbidden to pledge P's credit.
 - Evidence denying premise on which authority is based – wife adequately provided for or wife made sufficient allowance.
- Abolished by statute in ACT, NSW, NT and SA.
- Elsewhere superseded by *Family Law Act 1975* (Cth) provisions governing spousal maintenance rights and obligations before and after separation.