

WEEK 1: Structuring Business Activities: Associations, Partnerships and Companies

Incorporation

- The act of setting up an artificial entity, which is recognized by the law as a legal person with, **rights and liabilities separate from its members.**
- Creates an artificial person, which is a **separate legal entity.**
- **A company has its own legal rights and responsibilities, quite apart from those who own or run it, and this is a fundamental concept with which all students of business and law must come to terms.” (p304)**

T. Guigni reading

Incorporated Associations

- Have separate legal personality.
- Can sue and be sued.
- Can enter into contracts.

Unincorporated Associations

- Have **no** separate legal personality.
- Can **not** sue or be sued.
- Can **not** enter into contracts.

Incorporation acts through its agents.

Agency

Agency is a relationship existing between two parties whereby one (the Agent; A) is authorised by the other (the Principal; P) to do, on the P's behalf, certain act(s), which effect the P's rights and duties in relation to Third Parties (3P).

- *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 653:
- '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.'

- Note that A takes on role of P in the situation – as such, cannot have more authority/capacity than P has themselves. P cannot authorise A to do something that P cannot do.
- Note in *International Harvester v Carrigan* – was a difference between being called an agent in business, and the legal relationship of agency. Simply referring to someone as 'an agent' when in fact they actually purchase the goods and then resell them, does not necessarily give them the status of a legal agent.

Creation of Agency

- Contract – Creation of Agency by Agreement
 - Express or implied agency created either orally and/or in writing
- Ratification
 - Where the agent acted outside their authority, but the principal retroactively authorises the act
- Operation of law
 - Necessity
 - Arising out of Co-habitation
- Estoppel / Holding Out
 - Principal's conduct creates the impression of agency which 3P relies on

Authority

P is only bound by acts that are done by A that are **within the scope of A's authority.**

- Contract – Contract becomes the key document/agreement that determines the nature of the agency. The main component of this is investing the agent with authority to bind the principal, however it should also cover commission/payment, period for which it runs, type of transactions/scope, etc. Common method of appointing an agent is by power of attorney.
- Ratification – needs to have been a relationship in existence at the time of the contract – cannot ratify, as a form of agency, an agreement between 3P and the A directly (i.e. where A is actually P in the transaction) – ratification must be for the whole of the act (not just part of it)
- Necessity – generally emergency, though also where one can pledge spouse's credit if they have no means of providing basic needs themselves
- Co-habitation – one can pledge spouse's credit
- Estoppel – where the principal either via words or conduct creates the impression of agency, they are estopped from denying that agency existed – i.e. if they make it look like an agency relationship, then it is *treated* an agency relationship.

Actual Authority

- P **expressly or impliedly** gives A authority to act in particular way.
- Once the court decides that actual authority exists, they will then determine if the actual acts relied upon **fall within the scope of that authority**.

Apparent/Ostensible Authority

- Arises when P represents to 3P that A has authority to act on their behalf in a particular matter/certain way.
- How does the situation appear to outsiders?

Again, for apparent authority, P must have authority to make representation in the first place.

Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971] 2 QB 711

Facts

- A company secretary hired cars, told the car company that they were for picking up important clients and to invoice the company. However, he used the cars personally (not for company use at all) and had not been authorised by the company to hire the cars - **no actual authority**.

Held

- Company secretary had ostensible authority to enter into such agreements and, as such, the company was liable for the debts incurred.

Note

- Measure of reasonableness - was it reasonable for 3P to believe A had the requisite authority.

In the case, correspondence was on company letterhead and the secretary had signed as the Company Secretary. Held that company secretaries, in their general capacity as an officer of the company, would have authority to enter such arrangements.

Fiduciary Duties of an Agent

The agency relationship is a fiduciary one and the agent must always act in good faith for the P.

As such, agents have the following duties:

- Must always act in P's interest.
- Must make full disclosure of any personal interest.
- Must not make a secret profit or commission.
- Must give personal attention to P (cannot delegate responsibility).
- Must follow P's instructions.
- Must exercise due care, skill and diligence.
- Must account for all transactions.

Note that because these are fiduciary duties, there does not need to be loss or harm on behalf of the principal for there to be an action against the agent. A breach is enough.

- **Act in P's interests** – must never allow the duty to the principal and their personal interest to conflict - example of stockbroker that also trades in shares – could potentially be trading in competition with the client (i.e. client says BHP is at a good price, buy me 1000 shares. If stockbroker was to buy shares for themselves first, and the price is going up, then by buying the shares for the client second they are not acting in P's interest but their own).
- **Full disclosure** – stockbroker cannot act as principal with a client without disclosing this fact (and in those circumstances, cannot charge a fee)

If agent fails to make such disclosure, they are not entitled to commission.

- **No secret profit** – agent cannot accept payment from another party (without the principal's consent) – accepting a secret commission/profit puts the agent in a position of conflict – e.g. agent says go and buy me the best vacuum cleaner for \$200 – if vacuum cleaner seller will pay the agent a commission of \$50 to buy from them, or to buy a particular vacuum cleaner, then the agent's decision is going to be biased in that direction. If there is a secret commission, even if it did not change the agent's decision/action, the principal is entitled to that commission.
- **Act in person** – appointment of agent is personal – cannot delegate responsibility and must act on behalf of principal in person – however, in certain areas this is altered by practice/custom (i.e. through trade, acts through other agents) or where duties performed are purely ministerial and do not involve the exercise of any discretion or skill on the part of the agent, where unforeseen circumstance force it to be the case or where from the nature of the transaction it is intended for others to act. – Again, vacuum cleaner example – if I asked you because you were an expert in vacuum cleaners and you delegated to someone who didn't have a clue, then I'm not getting what I paid for. However, if I asked you to mail a letter, then giving that to your secretary to do is not a problem. However, you retain the *responsibility*
- **Must follow P's instructions** – if does not follow P's instructions (in agency agreement), then not entitled to remuneration – failure to comply with instructions, except where they are illegal, will render the agent liable for the loss suffered.
- **Exercise due care, skill and diligence** – this is generally only 'usual' standards of care, skill and diligence – except where the agent professes special skills and is engaged for that purpose – thus, if I engage a lawyer as an agent, then they are expected to exercise the usual due care, skill and diligence of a lawyer – if I was to engage an ordinary person, then it would only be general standard of care, skill and diligence that an ordinary person would engage in if they were acting on their own behalf.
- **Account for all transactions** – must keep personal and principal transactions and monies separate, and must be able to give account for all transactions – this is why real estate agents, lawyers keep trust accounts separate, also stockbrokers now keep separate accounts – cannot mingle funds.

Rights of Agent

- Right to remuneration
 - *LJ Hooker Ltd v WJ Adams Estates P/L* (1977) 138 CLR 52 – agent must be effective cause of the sale
- Right to indemnity and reimbursement
- Right of Lien
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Remuneration is generally dependent on agreement – presumption that there will be remuneration for a professional agent once they've carried out their duties – generally agent has to be the cause of carrying out their duties. Case – Agent engaged to sell property, introduced company A. Owner also dealing with Company B. A & B then discover this and form JV to develop property, Company B purchases the property. Held that, because the agent had not been the cause of the sale, was not entitled to commission.

Agent is entitled to indemnity and reimbursement for any losses/liabilities sustained when they are 'lawfully' carrying out their duties (so excludes losses due to unlawful act, unauthorised act or negligent act – but includes any incurred due to carrying out their duties as required)

Right of Lien – agent has a right of lien over any of the p's goods which they have in their possession – note that these have to relate to the transaction in question.

Relationship with 3rd Parties

Name of Principal Disclosed

- Where acting within authority, A is not liable to 3P.
- If acting outside of authority: **breach of authority** - liable to 3P for damages.

Existence, but not name, of Principal is disclosed

- Generally the same as above - as long as the agent contracts as agent (may be altered by trade/custom).

Doctrine of Undisclosed Principal

- Agent says I'm acting as a principal, when in reality they're acting as an agent.
- Agent contracts in their own name without expressly contracting as agent or disclosing the existence of agency.
- Agent becomes personally liable.
- If 3P becomes aware of agency, may elect to hold either the agent or principal liable on the contract.

➤ *Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd* [2001] NSWSC752

- To principal – generally no liability if they carry out their acts. However, liability if they are negligent for any loss and liable
- Breach of warranty of authority – 'occurs where the A claims to be acting with authority but in fact is acting beyond the scope of their authority.'
- Key here is that the agent 'professes to contract on behalf of a principal' – so they are saying that they are contracting on the principal's behalf, therefore they should have no liability. If, however, they say they are contracting on the principal's behalf but they are not authorised or are acting outside of their authority, then they have warranted that they had authority which they did not have, and are liable for that (unless the principal's ratifies their actions). There is no defence for A if they acted innocently or mistakenly, however they are not liable where 3P knew of agent's lack of authority.
- 'A person who uses an agent for his/her/its negotiations with a third party, often when the agent pretends to be acting for himself/herself. As a result, the third party does not know he/she can look to the real principal in any dispute.'
- Once 3P has elected, they cannot change their mind. If A is sued, they are indemnified by P under the agency agreement.

If Agent fails to pay

Burden is on the principal.

3P pays money to A (for P)

- P is deemed to have received the money and is bound at that point - cannot charge again.

P provides payment to A (for 3P)

- Payment has not been made provided to 3P and therefore P must pay again (unless statute intervenes).

Termination

By action

- Performance of contract/duties.
- Mutual agreement.
- Revocation of A's authority.

By law

- Death
- Insanity
- Bankruptcy

- Performance – if contract is for a specific action/transaction, once the action has been performed and payment provided, the agency is at an end
- Mutual agreement – if both parties consent then agency is concluded
- Revocation – implied term that either party may terminate on notice (but does not affect any rights/liabilities which have arisen prior to notice) – P may still be liable to 3P – P may still be required to indemnify A for losses incurred up to that point (may also have a claim for remuneration if they have already completed their duties – P cannot cancel agency to get out of paying)
- Death – agency ends immediately without notice (estate of P will not become liable, though executor may confirm the contract) – altered by state legislation for PoA done in good faith prior to notice
- Insanity – agency ends, but 3P entitled to treat authority of agent as subsisting until they receive notice
- Bankruptcy of Agent – may affect authority/capacity to contract as agent
- Bankruptcy of Principal – now limited to their capacity under the bankruptcy – agent can complete transactions already binding on P before bankruptcy