

## TOPIC 1 - AGENCY

- **Agency** is the relationship existing between two parties whereby one (the agent) is authorised by the other (the principal) to do, on the principal's behalf, certain acts which affect the principal's rights and duties in relation to third parties.
- An **agent**, therefore, is a person who has authority (either express or implied) to act for a principal with the general object of bringing the principal into legal relations with a third party.
- An agent is a person who is authorised (expressly or impliedly) to act for a principal (**P**) so as **to create or affect legal relations between P and a third party** (**Petersen v Moloney**)
- Therefore, an agent can enter into contracts on P's behalf (cf. an independent contractor or servant)
- The P directs the agent (**A**) how to act (cf. trustee, who is directed by the trust deed and not the beneficiary)
- **The general position is that where the agent acts within the scope of their authority and accordingly brings about a contractual relationship between the principal and a third party, such contract is between the principal and the third party. The agent is not a party to that contract.**
- **Classification of agents:**
  - **Special agents**
    - One who is appointed for the performance of some special act, or to represent the principal in some particular transaction, such act or transaction not being in the ordinary course of the agent's trade, profession, or business as an agent
    - For example, P appoints A his agent for the purpose of procuring a truck suitable for towing; the only authority given to A as agent, is that necessary to procure the type of truck mentioned
  - **General agents**
    - Agent who has authority
      - to act for the principal in all matters, or in all matters concerning a particular trade or business, or of <sup>[[ ]]</sup><sub>SEP</sub> a particular nature; or <sup>[[ ]]</sup><sub>SEP</sub>
      - to do some act in the ordinary course of their trade, profession or business as an agent on behalf of the principal, for example where a solicitor or broker is employed as such
  - **Universal agents**
    - One whose authority is unlimited to do such things which the principal may do through the instrumentality of another. Such types of agents are rare in practice and, when they do exist, they are appointed by extensive powers of attorney. The only limits which are imposed upon the authority of a universal agent are those which the law imposes with regard to the legality of the objects and the capacity of the parties in relation to contracts in general.

### Examples of agency relationships

- Employee to its employer?
  - Australian Mutual Provident Society v Chaplin (1978) 18 ALR 385
- An independent contractor to its employer?
  - CFTO-TV Limited v Mr Submarine Ltd (1994) 108 DLR (4<sup>th</sup>) 517
- A barrister to the client?
  - Hansen v Marco Engineering (Aust) Pty Ltd [1948] VLR 198
- A travel agent to its customer?
  - Chittenden, 'Legal liability of Travel Agents: Are They Agents At All?' (1999) 8 Auck LR 1061
- A real estate agent to a vendor?
  - Colbron v St Bees Island Pty Ltd (1995) 56 FCR 303; see also L J Hooker Ltd v W J Adams Estates Pty Ltd (1977) 1387 CLR 52
- A finance broker to a lender?
  - Perpetual Trustees Australia Ltd v Schmidt [2010] VSC 67
  - If it appears lender is authorising broker to find potential customers, then could argue that broker is agent for lender
- A retailer to a credit provider that offers its customers merchandise with an option to finance through the provider?
  - Custom Credit Corporation v Lynch [1993] 2 VR 469
- A receiver to the mortgagor?
  - See Bride v Freehill Hollingdale and Page [1996] ANZ ConvR 593; Property Law Act 1958 (Vic) s101(1)(c) and s109(2)
- A mortgagor to a mortgagee (who refers to himself as "agent" of the mortgagee and purchases the property)?
  - Kennedy v De Trafford [1897] AC 180
- A freight forwarder to the shipper?
  - Bristow, 'Freight forwarder: principal or agent? What difference does it make' (1999) 27 ABLR 196

**Q1 - DOES AN AGENCY ARRANGEMENT EXIST?** If so, the contract is between P and the third party

- Express? If yes → agency
- If no, implied actual agency?
  - Implied from factual circumstances? If yes, → agency
  - If no, implied by operation of law? If yes → agency
- If no, has P ratified arrangement? If yes → agency
- If no, no actual authority but there may be apparent authority
- Apparent authority?

### ACTUAL AUTHORITY

i. **Express**

- **Agreement between P and A (written or oral) authorising A to contract on P's behalf**
- By deed (instrument under seal)
  - Necessary where the agent is required to execute any instrument under seal on behalf of their principal, in which case the document creating the power is termed a power of attorney
  - A power of attorney is often given where a principal is going abroad and desires to leave another in charge of their affairs.
- By writing
- Oral
  - A verbal offer followed by acceptance in writing or verbally is sufficient to conclude a contract of agency for most purposes
- However, an agency arrangement may exist *even where* there is **an express contractual provision** to the contrary (but where the relationship is ambiguous, the courts will defer to the contract - **AMP Society v Chaplin**)
- Use contract law to ascertain whether parties intended agency

ii. **Implied**

- Implied from the facts
  - Incidental – authority to do whatever is necessary to perform what is expressly authorised.
    - Worker at Hungry Jacks, leak, manager not there, has incidental authority to call plumber, contract between P and plumber, so worker need not pay for plumbing
  - Usual – authority to do what is usually done by agent of the same type
  - Customary – authority to act in accordance with applicable business customs as are reasonable
    - Barrister agent for client to the extent of settling/compromising dispute
  - General implied – authority to act that arises from the course of dealing between the parties
  - Consent may be implied from:
    - **The relationship**
      - Eg an agency arrangement may be **implied for business efficacy**. In **ANZ Bank v Ateliers**, Helios found clients for P. TP paid into H's ANZ account. Bank thought money was going into H's account for H's benefit and no one else's. H became insolvent. It is right to take a practical, commercial view rather than a technical or legalistic view. How would the case appear to the business people concerned? Take a realistic business perspective. H had import license on behalf of the principal, it was H who was organizing transport, insurance of goods. Could

argue on the other hand that H was simply a distributor and not an agent. Distributor gets goods, and those goods become the distributor's which they then sell to customers. Helios was found to be Ateliers' agent and have authority to bank cheques on behalf of the principal, because the cheques could not have been sent to the principal in Belgium (due exchange control limitations) and the principal had no bank account in Australia

- Eg an agency arrangement is apparent **where the agent has no interest in the contract** (**Press v Mathers** per **Dixon AJ**). In **Toll v Alphapharm**, the seller of goods (RT) contracted with the carrier (F) for their transportation to the buyer (A) (RT→F→A). The court held that RT was acting as agent for A in arranging the transport contract. This was because RT had no interest in the goods (the risk had passed to A), while the contract benefited A
  - A distributing goods. Goods imported from UK. Arrangement between UK company and Ebos for the importation of goods. Ebos has subsidiary which is Thompson. Goods imported and put in Thompson's warehouse and then distributed to A which were sold by A to their customers. Finemores (carrier) carried goods and transported goods to Qld in refrigerated trucks which broke down and medicine were destroyed. Could A sue Finemores which was a subsidiary of Toll for negligence? Clause that said not liable for any negligence. If there was a valid contract of carriage between A and Finemores, then A had agreed to indemnify the carrier against any loss/agreed not to sue F for negligence. A argue T not an agent, and therefore A not a party to the contract. F argued T was an agent for A and thus A was bound to contractual clause. Qu 1 – was Thompson an agent for A? Qu 2 – did Thomson have authority to contract on terms that included an exclusion of liability and indemnity clauses? Court turned to what Dixon JA said in *Press v Mathers* – “in any ordinary case the question whether one person authorized another to do an act or series of acts on his behalf is best answered by considering for whose benefit or in whose interest it was intended it should be done.” Who ultimately is benefiting from carriage of

these goods? It is for A's benefit, not T's, so there was an agency. Such a consideration may not be conclusive, but it is a useful point. Facts influencing the court were: left it to T to arrange for the delivery and storage of goods, to agree to the rate of freight, to make a contract for p upon some terms and conditions and there was no suggestion of any limitation being imposed by P as to the terms upon which A might agree.

▪ **The conduct between the parties**

- Has there been **past conduct** in which P has acquiesced to A acting on behalf of them?
- For example, the **agent has previously entered into contracts** on behalf of the company and company has treated those contracts as binding upon it, without sanctions
  - **Hely-Hutchinson v Brayhead** the chairman had no power to enter contracts, but he was held to have actual authority, because **over many months the Board had acquiesced in his acting as CEO and thus given the impression that he could act as a de facto CEO** and bind the company to transactions)
- Need communication by words or conduct – **silence is not enough (Freeman & Lockyer)**.
  - Eg in **Freeman**, the court said that there was no acquiescence, because the Board never communicated to the director their acceptance of his contracting.
- Implied by law
  - **Operation of law is overridden by express or implied (by facts) actual authority to the contrary**
  - **Business efficacy**
  - **Constructive authority**
  - **Custom or trade**
    - Eg if you employ a **real estate agent**, the law will imply that you have entered into an agency arrangement (**Peterson v Moloney**). The law will also imply terms into this agency – including the scope of the agent's authority (to find a buyer and show them the house, but not to enter into contracts) and remuneration (commission, judged against normal industry standards)
    - Can imply term that price is to be calculated at a reasonable rate ascertained in accordance with the custom of the trade

○ Necessity

- **Q1: May arise where: an agency relationship already exists; or where there is no agency relationship** (doctrine of necessitous intervention);
- **Q2: A (or the 3<sup>rd</sup> party who seeks to bind P) must prove:**
  - A was entrusted with another's property
  - **There was a necessity of expenditure/state of emergency** to preserve P's property or to safeguard P's interests – this led to A's intervention on behalf of P
  - They were **unable to obtain instructions** from P; and
    - It must be “commercially impossible, or extraordinarily difficult, ... to communicate with the [1<sup>st</sup> SEP]owner” of the property - **Sachs v Miklos** [1<sup>st</sup> SEP]
  - They **acted reasonably and in good faith** in P's best interests
  - A's act must be **reasonable and prudent** in all the circumstances
- **Goods on a ship. Refrigeration breaks down. Tried to get hold of owner. So carriers sell goods at nearby port for less money. Carriers are acting as agent for P.**
- Eg A pays TP and seeks reimbursement from P (or enters into contract), because they took urgent action to protect P's property.
- **Great Northern Railway Co v Swaffield** – **Facts** - P railway company agreed to deliver D's horse to a particular railway station. However, on arrival at the station at night there was no-one to take possession of the horse on D's behalf. Accordingly, the P's stationmaster sent the horse to a nearby livery stable. Subsequently, P paid the stablekeeper his charges. **Decision** - P had acted reasonably in placing the horse in the livery stable and was entitled to recover from D the expense it had incurred in doing so
- The fact that property (for example, a parked car) may be causing a person **inconvenience** does not mean that such an emergency has arisen which compels its disposal - **Munro v Willmott**
- **ANZ v Ateliers de Constructions Electricques de Charleroi (1966) 39 ALJR 414** – **Facts** - A received the cheque from customer of P in Australia. However, the amount of cheque exceeds the sum permitted to be exported and P doesn't have a bank account in Australia, therefore A put cheque in its own account. **Decision** - Implied authority was necessary for effective operation. A had no express authority to pay the cheques into its own account, but, in the circumstances, the authority to do so could be implied from the necessity to make the contract

commercially workable.

○ **Cohabitation**

- **The wife becomes an agent of the husband**, by entering into a contract to provide for “those things which are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles falls clearly within the domestic department, which is ordinarily confined to the management of the wife” **(Phillipson v Hayter)**
- In the case of a married woman cohabitating with her husband, and even in the case of an unmarried woman cohabitating with a man, the law presumes that **she has his authority to pledge his credit for necessities in all domestic matters ordinarily entrusted to a wife.**
  - Possible for the man to rebut the presumption of such authority – e.g. by showing that he had expressly warned the tradesman not to supply his wife or de facto wife, that he had expressly forbidden her to pledge his credit or that he had provided her with a sufficient allowance to pay for necessities - **Debenham v Mellon**
  - The common law also recognised that a wife left without adequate means of support by her husband, for example in the case of desertion, had the authority to pledge the husband’s credit for goods that she reasonably required for her maintenance.
- Abolished in SA, in relation to “marriage” **(Law of Property Act 1936 (SA) s 104)**, NSW, ACT, and NT and **may not be good law in Victoria**, doubtful whether doctrine exists any more.

○ **Usual authority**

- The agent is **presumed to have the usual authority** that attaches to that position in that type of company
- For example, the following are usually agents of the company (and can enter into contracts): Managing director, CEO and CFO
  - **Individual directors and chair cannot be principals/have actual authority. But the board as a whole could be P/have actual authority**
- A **MD** has the usual authority to employ others to provide services to the company, guarantee loans made to the subsidiary of the company and agree to indemnify other guarantors.
- An **ordinary director** on the other hand does not have any implied authority to bind the company
- **Company secretary** can make contracts concerning the day-to-day running of the company’s business **(Panorama Developments)**

- BUT **individual directors** are not agents **(Brick and Pipe Industries)**.
- G was the controller of Brick and Pipe and was also controller of S. S company wants to borrow money from O, O lends money to S but requires B&P to enter into a guarantee/indemnity arrangement. Documents go to lawyer. F purports to be company secretary but company records show F is company director but not secretary. Financial officer in B&P says F is secretary, gives assurance. B&P become insolvent. This triggered a breach of the loan agreement. O says it wants money back from S. B&P say F didn't have authority to sign on behalf of company, therefore guarantee loan was not validly entered into on behalf of B&P. Court found there was a valid agency. F had been held out as being a director with authority to perform those acts. If G have actual authority to F, then implied actual authority. On the other hand could argue apparent authority because G acquiesced to the fact that F was company secretary even though he was not.

- **Ratification**

- **Ratification is the subsequent approval by P of A's act**
- Ratification is the approval by act, word or conduct of that which was attempted but was improperly or without authorisation performed in the first instance.
  - In circumstances where the agent acted without authority but later has her actions authorised by P
  - Operates retrospectively
- Only P has the capacity to ratify - not A or TP
- Even if the agent does not have actual authority at the time the agreement with the third party is entered into, if the principal subsequently ratifies the agreement, both the principal and the third party will be bound
  - Where one person acts on behalf of another, without having authority to do the particular act, the person on whose behalf the act is done may, by "ratifying" it, render the act as valid and effectual as if it had been done by their duly authorised agent.
- **That is, the agent initially acted without authority but P later acquiesced**
- For example, where an estate agent enters into a contract for a lease for a term longer than the principal has stipulated, the principal may adopt the transaction and thus bind themselves to the unauthorised act of the agent
- Requirements/elements
  - **A purported to act as P's agent** (A does not need to name P, but A must make it clear that they are contracting on behalf of another)



- At the time of the act and the ratification, **P must have existed<sup>1</sup> and be legally able to do the act themselves** (i.e. P was **competent**) (e.g. if P was a minor, A cannot enter into contracts on his behalf)
    - The ratification may only be by a principal who was in existence at the time of the making of the contract. However, **s 131(1) of the Corporations Act 2001 (Cth)** provides that where a nonexistent company purports to contract and the company is within a reasonable time subsequently formed, the company may then ratify the contract
    - The principal must have the capacity to make the contract both at the date of the contract and at the date of ratification
    - Ratification cannot cure defects that exists at the time the act was done – e.g. if P did not exist at the time or a was a minor, contract was unlawful, then ratification will not cure this.
  - **P must be disclosed or identifiable, as well as competent to do the act personally**
  - **P must have full knowledge of all material facts relating to the act to be ratified**
    - Ratification must be with “full knowledge” of what has been done so that “the inference may properly be drawn that the principal intended to take upon” themselves “the responsibility for such acts”
    - “**Silence or acquiescence**” is not ratification unless there is “proof of a knowing acceptance” that may be regarded as assent
  - **P ratifies the act expressly or impliedly** (a contract may be ratified by commencement of an action under the contract; **Trident General Insurance**); and
  - Ratification takes place **within a reasonable time** of the A’s act (unless contract stipulates otherwise)
  - Ratification must be of the whole contract – P cannot ratify that which is beneficial and reject the remainder
- Where the rules set out above are satisfied, ratification operates **retrospectively** to validate a previously **unauthorised** act. The position is the same as if the agent had been vested with authority at the outset

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<sup>1</sup> At common law, contracts entered into on behalf of **a company not yet registered** could not be ratified by the company (because the company did not exist at the time of contracting; **Black v Smallwood**). However, this has been cured by **Corporations Act 2001 (Cth) s 133(1)** – If a person enters into a contract on behalf of a company before it is registered, the company becomes bound by the contract if the company is registered and ratifies the contract within the time agreed to by the parties to the contract, or within a reasonable time.

○ **Insurance policy:** A policy of marine insurance, or other insurance, may be ratified after loss (**Trident General Insurance**)

○ **Effect:** The agency relationship is adopted by the P (however, P can still sue A if they acted in excess of authority; **Davison v Vickery's Motors Ltd**). Therefore:

- P can sue and be sued by the 3<sup>rd</sup> party
- A is discharged from liability to the 3<sup>rd</sup> party breach of warranty of authority; and
- P will be liable to pay A remuneration or indemnify their loss

- **Summary**

- At the time A must have had a competent P

- P cannot ratify at a time that prejudices vested rights of TP. P must also exist at the time of contract, or be “anticipated” in the minds of the A, even if not actually named.
- *Kelner v Baxter* and *Black v Smallwood* company promoters run the risk of being personally liable if ratification by the newly formed company does not happen in a reasonable time – but note s.131 Corps Act.

- At time of *ratification* P must be legally capable of doing the act

- In some circumstances a minor cannot enter into contract eg those not for necessities

- A void contract cannot be ratified

- If contract is defective at its commencement, the defect cannot be cured by ratification
- [remember this only puts you in the tardus and sends you back in time to make the person purporting to be your agent actually become your agent]

- Class discussion

- A purports to act as P's agent
- Third party offers to sell A 10 tonnes of wheat which a accepts
- A did not have an authority to contract on P's behalf at that time
- Contract may be revoked by offeror before it is accepted by offeree. But who is offeree?
- Assume wheat suddenly rockets after TP made offer
- TP gets a better offer, and wants to withdraw the offer
- P wants to accept offer.
- **Contract was purportedly accepted on behalf of P on April 1. A acted without authority, but P ratifies April 3. So TP can't withdraw on April 2 because ratification takes us back in time (to April 1).**
- **If someone forged TP's signature and P wants to proceed with contract? Cannot do so, contract is void. What if TP wanted to proceed with contract despite forgery? Cannot do that, ratification cannot cure a defect.**

## APPARENT/OSTENSIBLE

- If no actual (express/implied) authority given by P for “A” to act as P’s agent
  - did P nevertheless hold “A” out as having authority to act as P’s agent?
- If so, P is estopped from standing on her strict legal rights in claiming A had no legal authority to act as P’s agent;
- A will therefore be treated as being P’s agent because of P’s conduct
  - (and 3<sup>rd</sup> party believing A was acting for P)
- Walton stores wanted to build a shopping centre. Walton wasn’t sure whether to sign. lawyers got back to builder and said contract would be signed. Builder relied on representation that contract would be signed. They acted to their detriment, spent money, started to build on the land. Later, Walston stores decide not to go ahead. Although there was no contract, there was equitable estoppel.
- **Freeman Lockyer v Buckhurst Park Properties** – FL is an architecture firm. B was a company formed by 2 people, Kapoor and Horn. B wanted to proceed with developing land, building stuff on land. K acted as if he was MD, and he purportedly entered into a contract with FL, got them to get approval, drawings etc. FL believed K was acting on behalf of the company, and proceeded with work to their detriment. Company argued K was not MD and had no authority to act on company’s behalf. Court of Appeal said the company held out that K was MD. Company thus estopped from denying authority.
- **Crabtree-Vickers** – Jnr as MD was constrained as he could not enter into contracts without board approval. TP argued Peter was clothed with apparent authority. P was not Bruce Jnr MD (although MDs normally have usual authority to purchase stuff on behalf of company) but here Jnr as MD could not have entered into the contract himself, so therefore no apparent authority.
- **Pacific Carriers v Paribas** – Peas loaded onto ship (Pacific carriers). As ship is carrying along, price of peas drops. Buyer wants to get out of contract. The bank acting for seller was BNP Paribas. Employee in bank who signed and stamped the indemnity documents and guarantee documents did not have actual authority (express nor implied) to enter into that arrangement, but court nevertheless found she had apparent authority. Manager of bank’s documentary credit department (Ms Dhiri) responsible for drafting up letters of credit. Her duties included supervising handling of letters of credit. Another section of bank responsible for issuing indemnity/guarantee so it was not part of the documentary credit department. He thought he was verifying it, not signing it. But bank held her out as having authority – they armed her with the stamp, which appeared to give her authority; TP believed representation that she had authority and acted to its detriment (taking carriage of goods) in reliance with representation. P was bank, A was Ms D.
- **P must have folded their arms and said nothing, knowing that P would rely on representation to their detriment.**
- **Hely-Hutchinson v Brayhead** – HH is chair and substantial shareholder of Predio Electronics abd director of brayhead. Richards was chair and de factor MD of brayhead. HH guarantees bank loan to P. HH makes personal loan to P. R signs letters addressed to HH purporting to be on behalf of B, identifying HH’s guarantee and guaranteeing HH’s loan to P. Issue - were indemnity or guarantee documents entered into on the behalf of B or not? HH has to establish that R had actual authority or B had held him out to

have actual authority. **Lower court** - B had held out R as having apparent authority. but there is a problem...board is holding R out to another board member (HH), there is no TP, how would it be fooling HH? Why would he rely on it? Hence court of appeal didn't think there was apparent authority. instead they said that R was chairman, and what board implicitly did they allowed him to be de facto MD, they knew he had a habit of entering into conduct, there was a course of conduct and they acquiesced. **Implied actual authority to proceed as if he were the MD and gave him implied authority to enter into contracts and notify board afterwards.** For a company, board of directors would be P. For chairs and individual directors, usually authority does not extend to entering into contracts on behalf o company unless they have actual authority from the board.

- **Apparent** (also known as ostensible) authority is the authority of an agent as it appears to others - **Hely-Hutchinson v Brayhead Ltd per Lord Denning MR**
- Where P, either by words or conduct, makes it appear to the TP that A is P's agent (i.e. has authority to contract on P's behalf), then P will be bound and will not be allowed to subsequently deny the authority of A to act as P's agent where a third person has entered into an agreement with A on the faith of the representation that A was the agent of P - **Freeman & Lockyer**
- This is a question of fact to be decided upon the circumstances of each particular case: **Crabtree-Vickers; Derham v Amey Life Assurance**
- Did P hold out A as having authority to act as P's agent? If so, P is estopped from denying that A had no legal authority.
- Three requirements:
  - **Representation**
    - **P must make a representation to the 3<sup>rd</sup> party that A has authority to enter on behalf of P into contract of the kind sought to be enforced**
    - Who must make the representation?
      - The representation must be **made by someone with the actual authority (express/implied) to make the contract/to manage the business of the company (not mere apparent authority) – ie P cannot hold out A to have more authority than P himself has** (eg the Board, or 'a person who has actual authority to manage that part of the business to which the contract relates') - **Crabtree-Vickers**
        - **Cannot authorise someone to do more than I can do myself**
      - **Crabtree-Vickers Facts** - Bruce Senior was chair of directors of ADMA, Bruce Junior was MD, but Peter had no designated role. Peter entered into a contract to buy a machine for \$200,000 on behalf of ADMA. **Issue** – Did Peter have authority to enter into contract on behalf of ADMA? **Decision** - Bruce Junior could not hold out Peter (the agent) as having authority to enter into the transaction, because he himself did not have actual authority to enter into the transaction (he was MD, but needed his father's approval to enter contracts). → But see **Paribas**
      - **Pacific Carriers Ltd v BNP Paribas** (2004) 218 CLR 451 – **Facts** -

Representative of BNP signed indemnity letter without having authority to do so (Pacific was unaware of this). P sued in order to enforce BNP to indemnify damages. **Decision** - Ms Dhiri had authority to sign and stamp documents verifying NEAT's undertaking but no authority to sign letters of indemnity. Nothing put Pacific on notice or inquiry as to her lack of authority. Ms Dhiri did have apparent authority, Pacific reasonably relied on that authority, and BNP was bound.

- **Examples** – board, sole director, MD, person having actual authority delegated from the board (**Brick and Pipe**)
- How is the representation made?
  - **Where the company permits the agent to occupy a particular position, then the company represents that the agent has the customary authority of a person in such position** (eg in **Freeman & Lockyer**, although there was no express communication by the Board to amount to implied actual authority, the Board knew that Mr Kapoor was acting as MD and they did nothing to stop him – therefore he had ostensible authority to enter into contracts on behalf of the company)
    - **Facts** – K and H formed the defendant company to acquire and develop certain land. The board of directors comprised K, H and a nominee of each. The development of the land was left to **K who, with the knowledge of the board of directors, acted as managing director although he had never been formally appointed to the position.** K employed the plaintiff firm of architects who later sued the company for payment of their fees for work they had done.
    - **Decision** – Defendant company was liable for the P's fees. Thus, the contract of employment entered into by K with the Ps fell within the scope of K's apparent or ostensible authority. It was the kind of contract which was within the usual authority of a managing director to enter into on behalf of a company
  - If P allows or acquiesces in an agent occupying a particular position, for example where board of directors of a company permits one of the directors to act as a managing director without having been formally appointed, A will have apparent or ostensible authority to deal with third parties in a manner consistent with the functions and duties normally falling within the usual authority of the holder of such position - **Freeman & Lockyer**
  - An employer may hold out that an employee has authority if the employer/principal permits the employee to act in a particular way, for example in signing documents without taking appropriate precautions.
    - **Paribas per the High Court** - "A kind of representation that often arises in business dealings is one which flows from equipping an

officer of a company with a certain title, status and facilities ... The holding out might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation". In those circumstances it may be unjust to permit the employer to depart from a reasonable assumption based upon that misrepresentation

- **Where the company arms an officer with the means to enter into the contract without taking proper safeguards against misrepresentation** (in **Paribas**, the bank gave a junior employee all of the documents and the stamp, and thus held out that she had authority, even though the bank did not intend for her to bind them to indemnities)
- Where a person is appointed to a particular position such person will have as part of their apparent authority all the usual authority of a person occupying that position.
  - **Panorama** – a modern company secretary has apparent authority to enter into contracts connected with the administrative side of company's affairs (matters of administration) – e.g. hire vehicles and the company is bound to pay the cost of such hire even where the vehicles are used for the secretary's own purposes
- **A himself might make the representation** – as in **Panorama Developments**, by writing letters to the 3<sup>rd</sup> party on P's stationary
  - **Induced by presentation and relied on representation; and**
    - The 3<sup>rd</sup> party must **rely on the representation when entering into the contract**
    - **3<sup>rd</sup> party was induced by such representation to enter into contract**
    - There must be a **causal link** between the representation and the reliance
    - Eg there is no estoppel **where 3<sup>rd</sup> party knows that A did not have P's authority (Lysaght Brothers)**. Similarly, there is no estoppel **where 3<sup>rd</sup> party knows that the contract is for A's benefit (Combulk v TNT Management)**
      - There must be no actual or constructive knowledge (whether they should have known/ought to have known) – thus if the third party has some reason to doubt the agent's authority, then the third party is put on inquiry, and is required to make further inquiries to determine whether actual authority exists and failure to do so will prevent the third party from enforcing the contract
      - **Combulk Pty Ltd v TNT Management Pty Ltd (1993) 41 FCR 59 - Facts** - Appellant company alleged respondent's agent made misrepresentation that induced appellant to enter agreement. Appellant suffered loss as result of agreement. Agent had personal financial interest in appellant entering agreement. Appellant aware of agent's financial interest. Appellant aware of agent's consequent conflict of interest. **Decision** - Agent exceeded authority of agency when acted to advance own financial interest. Appellant knew or

ought to have known agent exceeded authority, i.e. that in making representations, acted on his own behalf and not on behalf of P.

- **Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd – Facts**

- A deed was executed under seal of B&P to company O. The seal was attested by two directors, Goldberg (managing director) and Furst, with the latter saying he was the secretary as the companies constitution required it to be attested to by a director and the secretary. The other directors did not know about the transaction. O was aware Furst was not the secretary on ASICs records, but was verbally assured, in presence of Furst and Goldberg by Durlacher (financial controller of the group) that he had been recently appointed. B&P sought declaration saying it was not bound as it was an irregular execution. **Decision** - Primary judge said O was entitled under s 129(6) to assume it was validly sealed. Goldberg's acquiescence (even though it was mere silence) to Durlacher's representation that Furst was the secretary meant that Furst has been 'held out' by B&P to be its secretary, so as to entitle O to make the assumption permitted by s 129(3).

- A third party will generally rely on the apparent or ostensible authority of an agent when contending that the principal is bound by the acts of the agent, since:
  - the third party will usually be unaware of the terms of the agreement between the principal and the <sup>[[1]]</sup>~~[[2]]~~agent, and therefore be unaware of the extent of the agent's actual authority; and <sup>[[1]]</sup>~~[[2]]~~
  - the agent's apparent or ostensible authority will be unaffected by limitations on the agent's actual authority (whether express or implied) of which the third party was unaware. In other words, it is usually easier for the third party to establish that the agent acted within the scope of their apparent authority, rather than the agent's actual authority.

- **Detriment**

- The 3<sup>rd</sup> party must have **suffered detriment** as a result of the reliance
- Eg the 3<sup>rd</sup> party is **bound to an indemnity or guarantee** (Paribas, Brayhead)

## **Q2 – WHAT IS THE SCOPE OF THE AUTHORITY GRANTED TO A?**

- If agency derived from a contract - terms of the contract will be decisive in determining the duties of the agent
- If the agency does *not* derive from contract - general law of agency will supply the terms of the agency
- Look at intention of P, what they want A to do
- If there is no contract, then look at usual authority (e.g. for MD, Chair, CEO. Individual director)
- P will only be bound by those acts of A which fall within scope of A's authority. P will not be affected by what A does in excess of her/his authority (unless P ratifies act)
- If the agency has derived from a contract, then the **terms of the contract** will be decisive in determining the duties of the agent

- Otherwise, then the **general law of agency** will supply the terms
- **Petersen v Moloney (1951) 84 CLR 91 – Facts** – An estate agent (A) was instructed by a vendor (P) to ‘find a purchaser’ (TP) for her house. A found TP and received full purchase price from him. P did not receive purchase amount from A and sued TP for recovery of purchase amount. TP pleaded that he had paid A who had the authority to receive the purchase money. **Issue** - Did A have the authority to receive the purchase amount, thereby fulfilling TP's obligations when he paid A? **Decision (High Court)**- A did not have authority to receive the money, as being an agent for finding a buyer does not extend to being an agent to receive the purchase amount.
- **Actual express authority** - The express authority of an agent is the authority the principal has expressly given the agent in words or writing, for example where the principal gives the agent specific instructions to enter into a contract on the principal's behalf to purchase a particular piece of land at a stipulated price, or to sell a specific item. In other words, the agent's authority may be specifically created and limited by the terms of the agreement which gives rise to the agency relationship.
- **Actual implied authority** – A may have a further implied authority to do whatever is **necessarily incidental to carrying out P's express instructions**. For example, where an agent is expressly authorised to buy certain shares, the agent will also have implied authority to do everything in the usual course of business to complete the transaction.
  - Furthermore, where a person employs a particular type of agent to carry out some act on behalf of the principal, **the agent will have such implied authority as agents of that class normally have**, that is, **the agent will have the usual authority which agents of that particular profession or calling normally have to carry out their functions**.
    - For example, when the board of directors of a company appoints one of their number to be managing director: “They thereby impliedly authorise him to do all such things as fall within the usual scope of that office” - **Hely-Hutchinson v Brayhead Ltd**
    - **Hopcroft v Edmunds Facts** - Respondent's accountant sent a shareholders agreement to the appellants for signature. The respondents did not sign the agreement. The appellants argued that the accountant had authority to make an offer on the respondent's behalf by sending the contract for their signature. **Decision** - Accountant did not have actual authority to bind the respondents. The respondents had told their accountant to “do whatever [is] necessary. Such an instruction related only to ascertaining the necessary actions and preparing the necessary documents, not binding the respondents. The expectation that the respondents would need to have signed the agreement in order to be bound could only have been displaced by clear evidence of the accountant's authority to bind them.

### **Q3 – DID A ACT WITHIN THE SCOPE OF THEIR AUTHORITY? BREACH OF DUTY?**

- **Fiduciary duties**
  - A owes P a duty of absolute loyalty as a fiduciary
    - Duty to act in good faith



- Duty not to make an undisclosed/secret profit; and
  - Duty to avoid conflicts of interest/duty to fully disclose any personal interest
- **Duties to exercise care**
  - Duty to follow P's instructions
  - Duty to act in person
  - Duty to use reasonable skill and care
- **Common law duties:**
  - **Duty to follow P's instructions, written or verbal**
    - A contractual agent **who acts in excess of, or contrary to, the unambiguous, legal instructions of P** are liable to indemnify P for any loss caused (**Donellan v Watson**)
      - An agent's liability for failing to follow instructions is "strict, if not absolute" (**Donellan v Watson**)
    - BUT A will not be liable if he has **acted honestly on a reasonable interpretation** of P's instructions, if they are ambiguous (**Veljkovic**)
    - **Bertram, Armstrong & Co v Godfray (1830) 1 Knapp 381 (12 ER 364) – Facts –** P instructed A to sell stock when market price reached "85 per cent or above that price". A accepted this instruction. However, when price of stock reached 85 per cent, A decided not to sell immediately, expecting the price to rise further. The price dropped again and stayed low. P sued to recover the consequent loss. **Issue** – Was A bound to sell the stock at 85 per cent, or did A have discretion to wait in expectation that a higher price would be obtained? **Decision** – Instruction given by P was specific, and accordingly A had no discretion to wait for a higher price.
    - When an agent acts under a general authority he is bound to act for his principal as he would act for himself; when he acts under a particular authority, and for a special purpose, he has no discretion. If he thinks fit to accept such a commission, he must perform that commission according to his duty.
    - If the instructions are unclear, the agent may be required to seek clarification from the principal and in the event of not being able to do so, act in good faith in furtherance of one of the interpretations of the instructions that could be "fairly" made
    - The consequences of an agent failing to follow instructions may include indemnifying the principal for losses incurred as a result - A contractual agent who acts in excess of or contrary to the unambiguous instructions of his principal is normally liable to indemnify his principal for any loss thereby caused. A solicitor is of course the contractual agent of a client for the purposes of and within the scope of his retainer – Handley JA in Donellan
    - If the principal's instructions invest the agent with a discretion, the agent must also satisfy its common law duties to exercise reasonable care, skill and diligence
  - **Duty to act in person and cannot delegate**
    - However: there may be an express or implied power to delegate; A can delegate purely

administrative tasks; and it is not delegation if A oversees the work of a junior and approves it

- The authority of an agent to delegate their duties may be implied in the following situations:
  - Where by the usage of a trade an agent usually acts through other agents; for example a country solicitor may employ a city agent whose acts will bind the client. However, where the principal forbids the employment of a sub-agent, the agent has no authority to delegate. <sup>[L]</sup><sub>[SEP]</sub>
  - Where the duties to be performed by the agent are purely ministerial, and do not involve the exercise of any discretion or skill on the part of the agent in person; for example, collecting rents. <sup>[L]</sup><sub>[SEP]</sub>
  - Where from the nature of the transaction it is clear that the parties intended, or may be reasonably presumed to have known, that it might be necessary to act through a sub-agent.
  - Where unforeseen circumstances arise which necessitate the agent delegating. The necessity must be urgent and the sub-agent must be appointed with discretion

- **Duty to act in good faith**

- A is under a duty in all cases to act in the interests of the principal and must not allow their own interests to conflict with those of the principal
- **Duty of loyalty (Lintrose)** – a person who is acting as an agent should not put themselves in a position where personal interest and loyalty to P are in conflict. A who has accepted employment with one P cannot engage with second P where duties are inconsistent with P1, unless full disclosure is made. If at any stage you act secretly in favour of P1 to P2, then there is a presumption which A must rebut, that A is acting corruptly. Any surreptitious dealing will be treated as fraud.

- **Duty to make full disclosure of any personal interest**

- If A has any personal interest in the matter which might conflict with the duty owed to the intended P, they should decline to act as agent
- An agent must disclose to the principal all the material circumstances of which they are aware which might influence the principal in entering into any negotiation. If the agent fails to make such disclosure he or she is not entitled to commission
- Any profit received by the agent resulting from non-disclosure is recoverable by the principal on learning the true facts

- **Duty not to make a secret profit**

- Should the agent receive a secret commission or profit the principal may recover it as well as dismiss the agent without notice.
- Where the agent desires to act for both vendor and purchaser and to obtain commission from both, the agent must make full disclosure to each party of her or his intention to act for and receive payment from the other, and must obtain the assent of each party

for so acting

○ **Duty to use reasonable care and skill;** and

- An agent who is employed for remuneration is presumed to have and is bound to exercise such skill, care and diligence in the performance of the undertaking as is usual or necessary for the ordinary or proper conduct of the profession or business in which the agent is employed, or is reasonably necessary for the proper performance of the duties
- If A fails to exercise the requisite care and skill in carrying out the terms of the contract of agency, A will be liable to P for the loss sustained by the latter as a result of the agent's breach of duty.
- **Care** - means reasonable care, which at least involves A having a rudimentary knowledge of P's business or finding out about that business after she is appointed as agent.
- **Skill** is the mix of special knowledge, capabilities or competence to understand the business operations of the principal so that the agent executes the mandate. The measure of skill is an objective standard
- **Diligence** is the attention devoted to the affairs of P by A
- A is expected to have a rudimentary knowledge of P's business and 'exhibit the diligence in conducting the principal's business as the principal would reasonably have done if the principal had carried out the task personally'
- A paid A's duty to exercise reasonable care, skill and diligence is assessed according to an objective standard of care, reflecting the special skills, trade knowledge, expertise etc. of an ordinarily competent member of the profession or trade the agent belongs to ((if any).
- The position of a paid A, as opposed to a gratuitous A, may not be materially different
- The exact scope of this duty and standard of care will vary enormously depending on the facts, including any trade customs, industry specific norms and or specialist skills involved. *Luxmoore-May v Messenger May Baverstock (a firm)* [1990] 1 All ER 1067
- Not only is it possible for this duty to arise concurrently in tort and contract, but legislation may also inform its content and relevant standard of care – i.e. a director's duty of care and diligence under s180 of the Corporations Act
- **Mitor Investments – Facts** - An insurance broker was instructed by a client to obtain unqualified insurance cover against damage caused by storm and flood. Unknown to the client, the broker obtained insurance cover excluding flood caused by the sea. Subsequently the client suffered loss as a result of flooding by the sea in a cyclone but the insurance company avoided liability by virtue of the exclusion clause. **Decision** - broker held liable because of his failure to exercise reasonable care and skill in effecting the insurance
- **Kepple v Wheeler** - A firm of real estate agents received a higher offer but did not pass it on to the vendor. The agents thought that they had fulfilled their obligations

with the first offer. The vendor sued his agents for failing to communicate to him the higher offer. Because the first offer was “subject to contract” and was not a concluded contract, they had not fully discharged their responsibilities to the vendor.

- The measure of care which A must exercise is that which is **reasonable in all the circumstances** (eg the insurance broker in **Mitor Investments** had to exercise the skill and care appropriate to insurance brokers – that is, to obtain adequate cover or advise P if the cover is deficient)
- **Duty to account to P**
  - A is under a duty to **keep accounts** of all transactions and to produce them to P on demand
  - If A receives goods or money from 3<sup>rd</sup> party, A is bound to **keep it separate** from his own goods or money **and transfer it** to P.
  - A duty to account continues up to and beyond the termination of the agency
  - A has a duty to
    - Pass on information to P about dealings made by A on account of P; and
    - Pay over any money or handover or transfer property to P
- **Further duties** of the agent are:
  - to take such care in keeping the property (which includes money) of the principal as a reasonably <sup>[[[]]]</sup>prudent person would take in caring for their own property
  - to keep all moneys and property of the principal separate from their own
  - to keep separate accounts of all dealings on behalf of the principal, and to have such accounts ready for inspection by the principal, and, subject to the agent’s right of lien, to hand over to the principal, if so required, all moneys, papers and documents relating to the principal’s affairs; and
  - to preserve confidentiality in all matters coming to their knowledge whilst acting as agent

#### **Q4 – DOES THE AGENT HAVE ANY LIABILITIES?**

- **Liability to P**
  - Where A disobeys P’s instructions, A will be liable for the loss suffered by P as a result of the breach of the contract of agency.
  - Where A is negligent in carrying out their duties, A will be liable to make good the damage suffered by P as a consequence of A’s negligence - **Mitor Investments**
  - Any confidential knowledge acquired by A during the course of the agency should not be used by the agent or made available to third parties, and should A do so, he or she may be liable in an action for damages
- **Liability to third parties** – A’s liability towards third parties depends upon A’s method of contracting and in particular as to whether:
  - **A discloses the name of P**

- Contract deemed to be that of P and A not liable except
  - where A contracts outside the scope of their actual or apparent authority, in which case A will be liable to the third party in damages for breach of warranty of authority
  - A agrees to be liable
  - usage or custom makes A liable
  - A contracts by deed in their own name; or <sup>[11]</sup><sub>[SEP]</sub>
  - Where P is in fact non-existent
    - where a person professes to contract on behalf of a principal and the principal is a fictitious or non-existent person, the person so professing to contract is presumed to have intended to contract personally, unless a contrary intention is proved; and where the contract is in writing, such contrary intention cannot be proved by oral evidence, but must appear from the terms of the contract or from the surrounding circumstances
    - **Kelner v Baxter** - the promoters of a company entered into a contract to buy goods, the contract being signed by them “on behalf of the proposed Gravesend Royal Alexandra Hotel Company”. As the contract was not contingent upon the company being formed, the only persons who could be liable were the promoters
    - **Black v Smallwood** - a contract for the sale of land was signed “Western Suburbs Holdings Pty Limited, Robert Smallwood, J Cooper, Directors”. The two persons who purported to sign the contract as directors put their signatures on the contract not as agents but as part of the act of authenticating the signature for “Western Suburbs Holdings Pty Limited”. This being so, they did not purport or profess to act as agents and were accordingly not liable. Defendants had contracted not as agents but as directors, and therefore they were not personally liable. When a man purports to contract as agent for a non-existent principal the question as to whether or not he is personally liable on the contract depends on the presumed intention of the parties in each case
    - **The fundamental question must be what the parties intended, or must be fairly understood to have intended; thus, where the intention is that the contract be made by the company, and the person who signs “For and on behalf of” the company does not purport to contract as agent, he or she will not be personally liable on the contract**
- A does not disclose the name of P but does disclose the existence of P
  - A’s liability, provided he or she contracts as agent, is similar to the cases where the

name of the principal is disclosed. If the third party contracts knowing there is a principal and yet does not ascertain the principal's name, the third party cannot sue the agent

- **A does not disclose the existence of any agency, that is, where A acts as if he or she were a P**

- Third party believes that the person they have been negotiating with is the other party to the contract, whereas in reality such person is acting on behalf of an *undisclosed* principal
- Either the undisclosed principal or the agent can sue or be sued on the contract, unless the contract between the agent and the third party expressly or impliedly excludes the rights of persons other than the agent to be a party to the contract
- An undisclosed principal cannot purport to ratify as the act of their agent a transaction entered into without their authority by one who purports at the time to be a principal and does not disclose that he or she is an agent - **Keighley, Maxsted & Co v Durant**

- **Facts** – A was authorised by P to buy wheat on a joint account for himself and P at a certain price. A exceeded authority and bought wheat at a higher price from Durant. **A contracted in his own name** (i.e. the intention that he was acting for K& Co. as well as himself was not disclosed by A to Durant.) P later agreed with A to buy the wheat at that (high) price but eventually failed to do so. Durant resold it at a loss and sued them for loss. **Issue** – Whether a contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, can be ratified by that third party, so as to render him able to sue or liable to be sued on the contract. **Decision** – A contract made by an agent in his own name (as the present contract was) does not require and cannot receive any ratification: it is complete in itself. A contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal. Here, **P was not liable for the act of A who did not profess to be an agent when he entered into the contract.**

- **Breach of warranty of authority**

- Where an agent represents, either expressly or impliedly, that he or she has authority to enter into a particular transaction and a third party relies on that representation of authority, the agent is taken to warrant that such representation is true. If it is in fact untrue, the agent is liable in damages for breach of warranty of authority.
- The measure of damages is the actual loss sustained by the third party. It will be no defence that the agent acted innocently or in mistake as to the precise extent of the authority conferred upon her or him. **A person who purports to act as an agent**

**impliedly warrants that they have authority and is liable for breach of that warranty even though their authority has come to an end by reason of facts of which they have no knowledge or means of knowledge**

- A is not liable where the other party knew of the agent's lack of authority

○ **Liability of P and A for misrepresentations**

- Where an agent is engaged to sell property, it will normally fall within the scope of the agent's ostensible authority to describe the nature and quality of the property the agent is selling on behalf of the principal. Accordingly, if the agent's representations are untrue, the vendor will be liable to the purchaser for the loss suffered by the purchaser as a result of relying on the agent's representations
- Where the agent made a negligent misrepresentation which was relied on by the purchaser, the agent will be liable in damages to the purchaser for the loss suffered. For example, a real estate agent for the vendor of a business was held liable to the purchaser for negligent misrepresentations made by the agent as to earnings of the business
- A principal is vicariously liable for a tort committed by an agent where the agent has acted within the scope of their actual or apparent authority. The liability of the principal includes liability for the negligent misrepresentations of their agent. For example, the vendor of a building was held vicariously liable to the purchaser for damages because of the negligent misrepresentation made by the vendor's agent as to the "lettable" floor space of the building
- Where an agent's representation to a third party comprises information provided to the agent by their principal, the agent will be entitled to an indemnity from the principal in the event of the agent being liable to the third party because the representation proves to have been untrue. In such a case, the agent would have the ordinary right of indemnity of an agent against a principal where the agent has acted within the scope of their authority

○ **Liability of P and A for wrongful acts**

- An agent is liable for their tortious acts but the principal will also be liable for any tort committed by the agent where the agent has acted within the scope of their actual or apparent authority, whether the tort was committed for the benefit of the principal or of the agent
- Principal will also be liable for the fraudulent conduct of their agent or employee where such was committed within the scope of the agent's apparent authority or the employee's course of employment
- P may be liable in tort for damages if the agent is guilty of a wrong or deceit or fraudulent misrepresentation. The fraud may be the fraud of the principal in instructing the agent that a certain fact is true, whereas it is actually untrue; or it may be the fraud of the agent in taking upon themselves to say that it is true whereas the agent knows that it is untrue. In either case the principal is liable. However, it is not permissible to

“add together” the knowledge of the principal and that of the agent, where both are innocent, in an action for fraudulent misrepresentation

- P will not be liable for fraud, wrongful acts or negligence of an agent who acts without/outside authority and in their own interests

## Q5 – DOES THE AGENT HAVE ANY RIGHTS?

- **Remuneration** (calculated at a **reasonable rate** in the relevant industry; eg **LJ Hooker** – “the appellant should be paid commission at the rate currently charged in the City of Sydney by real estate agents for comparable transactions”)
  - Depends on the agreement
  - **Agent must be effective cause of sale** – The transaction in relation to which the agent claims remuneration must not only come within the scope of the agent’s authority but the transaction must have resulted from the services he or she has rendered. The agent must, in effect, have been the means whereby the two contracting parties were brought together and entered into a legally binding contract – **Luxor v Cooper**
  - **LJ Hooker – Facts** – P, who owned property, engaged real estate agent to ‘locate a satisfactory purchaser at a satisfactory price’. A introduced the to Company A which made several unsuccessful offers. Meanwhile, P, unknown to A, entered into negotiations with Company B in whose introduction A had played no part. On Companies A and B learning of each other’s interest in the property, they entered into a joint venture agreement for the purpose, inter alia, of avoiding the risk of forcing up the price by competing bids. The joint venture agreement provided that each company would continue to negotiate upon agreed terms and conditions with the respondent, and that upon one of the companies becoming the purchaser, that party would complete the purchase and carry out the redevelopment of the site with the other on an equal basis. Neither A nor P were then aware of the joint venture agreement. The property was eventually sold by P to Company B. A then sued P to recover commission. **Decision (High Court)** - A was not entitled to recover any commission as it had not been an effective cause of the sale to Company B, nor of any sale of any interest in the property to Company A. **A will be entitled to commission where A introduces a person to the vendor or property who ultimately becomes the purchaser of that property. A must show that the introduction was the effective cause of the sale.**
    - **Gibbs J** - “the [agent] must also establish the necessary causal relationship between its actions and the sale, or in other words, that the sale was brought about through its agency.” Thus, if a buyer sees your signs outside the house and nothing more, then you are not the effective cause of the sale.
    - **Barwick CJ** – A contract of agency was made between the respondent and the appellant. The terms of the agency, though not express, are, I think, clear enough. They were that the appellant should be paid commission at the rate currently charged in the City of Sydney by real estate agents for comparable transactions upon the purchase price to be paid to the respondent upon the sale of the property under a contract entered



into by a purchaser whom the appellant had introduced to the property or to the respondent as an intending purchaser

- Merely because A introduces a purchaser to the vendor or the property does not of itself and alone mean A was the effective cause of the sale.
- **Estate agent's entitlement to commission** - Where the agency agreement provides for the payment of commission on the estate agent "finding a purchaser" or "introducing a person who shall become a purchaser", the agent is not entitled to commission unless he or she introduces a purchaser who, at the vendor's price and on the vendor's terms: (i) is ready and willing to purchase; (ii) is able to purchase; and (iii) in fact purchases by entering into a binding contract to purchase - **Gerlach v Pearson**
  - Where the contract of agency provides on its proper construction for the payment of commission on the occurrence of some other event, for example on a person being "introduced to the property" either by the agent or the vendor and "as a result" of such introduction the property is sold, the agent will be entitled to commission on the occurrence of the specified event
  - If the contract fails to stipulate the event on which the agent's right to commission arises, commission becomes payable only on completion of the sale by the purchaser (unless the failure to complete is the vendor's fault) and not at the time of the purchaser signing the contract of sale. Accordingly, if in such a case the purchaser fails to complete after entering into the contract of sale, the vendor is not liable to pay commission to the agent
  - Should the vendor refuse to complete the sale, the agent will still be entitled to her or his commission
- **Indemnity and reimbursement** (for all expenses and liabilities reasonably incurred); and
  - Every agent is entitled to be indemnified against all losses and liabilities sustained, and to be reimbursed for all expenses lawfully incurred in the carrying out of the principal's instructions. Attention is drawn to the word "lawfully" for where the agent has acted outside the scope of her or his authority, or has engaged in an unlawful act, or suffered loss through their own negligence or default, the agent has no claim to be reimbursed or indemnified.
  - The agency relationship implies an obligation on P to –
    - reimburse A regarding all expenses, and
    - indemnify A against liabilities and expenses incurred in the reasonable performance of the agency.
  - Of course, if the implied terms contradict the express terms of the agency arrangement, the express terms apply
- **A lien** (any property of P in A's actual or constructive possession is **held as security** for payment of moneys owing to A)
  - A has a lien on the P's goods and chattels regarding all claims against P arising out of A's employment.
  - The lien applies in relation to remuneration for expenses or liabilities incurred by A.

- A can only exercise a lien in relation to goods in his or her actual or constructive possession

## Q6 – REMEDIES

- **Damages** (for breach of contract)
- **Equitable remedies** (for breach of fiduciary duties), including
  - Rescission of agency contract
  - Recovery of commissions and remuneration paid to A
  - Recovery of A's secret profits (account of profits)
  - Injunction, constructive trust or equitable lien

## Q7 – TERMINATION OF AGENCY

- **Agency may be terminated by:**
  - **Performance or completion of agency**
    - Where the agent is appointed either for the performance of one specific act, or for the duration of a definite period, then the authority of the agent will extend only until such act has been done, or the specified period has expired
  - **Mutual Agreement**
  - **Frustration (impossibility of performance, death, insanity or bankruptcy)**
    - Where it becomes impossible for the agent to carry out their obligations, for example where the subject matter of the agency is destroyed, the authority of the agent must cease there and then, for example where the building which an agent has been instructed to sell is destroyed by fire
  - **P revoking A's authority or A renouncing the agency**
    - There exists an implied term that either party may terminate it upon notice. But neither notice of revocation nor notice of renunciation will affect any rights or liabilities which may have been created between the principal and third parties prior to the notice.
    - A may renounce at any time but must compensate the principal for any loss occasioned by such renunciation
  - **Death** of P or A
  - **Insanity** of P or A
  - **Bankruptcy** of A (where it affects their capacity to contract as an agent) or P
- **Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 – Facts** – Toll entered into a signed contract with Richard Thomson Pty Ltd (said to be acting for Alphapharm) to store and transport goods being imported for Alphapharm. Toll performed this contract negligently, causing loss to Alphapharm. Toll sought to escape liability by relying upon an exclusion clause in its contract with Richard Thomson.
- **Colbron v St Bees Island Pty Ltd (1995) 56 FCR 303**

- **Lysaght Brothers and Co Ltd v Falk** (1905) 2 CLR 421 - A contract made by an agent, in fraud of the principal, the other party being privy to the fraud, is not the contract of the principal. The contract is null – not merely voidable at the option of the principal.
- **Donellan v Watson** (1990) 21 NSWLR 335
- **Lintrose Nominees Pty Ltd v King** [1995] VR 574