

LAW4701 - Commercial Transactions

2. INTRODUCTION AND AGENCY

By the end of this topic students should be able to understand:

- the “survey” nature and overall objective of the course;
- the legal nature of agency;
- the different types of agency and the circumstances in which they arise in a commercial context;
- the legal relationships that arise as between the principal and agent from the various types of agency;
- the legal consequences to the principal, agent and third parties of agency;
- Termination of agency.

SEMINAR: PART 1

In our very first topic, Agency, we direct our focus on agency as a commercial transaction between the principal and the agent (as opposed to that between the agent and the third-party; or the principal and the third party) and the legal risks that come with it.

2.1 What is agency?

ACCC v Flight Centre Travel Group Ltd (2016) CLR 203

- This case involved an action by ACCC against Flight Centre for a breach of s 45 of the Trade Practices Act 1974 (Cth).

- Section 45 prohibited a person from proposing an arrangement, with a competitor, for the purpose of lessening competition (Price fixing).
- Flight Centre proposed, to several airlines, that they do not discount their direct sales.
- A key element of s 45 was that the parties be “in competition”.
- One of the questions before the court was whether the Flight Centre, who was an agent of the airline, could also be in competition with them, for the purpose of s 45.
- The majority of the High Court found that the section had been breached with the French CJ dissenting.
- Although the reasoning for those findings is not directly relevant, to this topic, this case provides a recent analysis, by the High Court, of agency.
- French CJ described agency at [15], as follows:

The word "agent" connotes in law a person who has the authority or capacity to create legal relations between a person who occupies the position of principal and third parties. The legal concept is encapsulated in the maxim quoted in Petersen v Moloney, "[q]ui facit per alium - he who does an act through another does it himself. [footnotes omitted]

- The majority Kiefel and Gageler JJ described agency at [76], as follows:

The term "agency" is "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". An agent is "a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties". [footnotes omitted]

Petersen v Moloney (1951) 84 CLR 91

- Petersen v Moloney was one of the earlier cases referred to by the High Court in ACCC v Flight Centre.
- Petersen instructed an estate agent (Pulbrook) to find a purchaser for her house. Pulbrook found Moloney (the purchaser) who paid Pulbrook the full purchase prices for the house and was issued a receipt by Pulbrook.
- Pulbrook did not pay the money to Petersen.

- Petersen sued both Moloney and Pulbrook. Pulbrook was bankrupt.
- Moloney's defence was that Pulbrook was Petersen's agent and that by paying the money to him, Moloney had discharged his obligation under the contract of sale.
- In finding that Pulbrook was not Petersen's agent and therefore Moloney had not discharged his obligation to pay the purchase price, Dixon, Fullagar and Kitto JJ stated as follows at page 94:

In connection with sales and purchases of property the word "agent" is apt to be used in a misleading way. The legal conception of agency is expressed in the maxim "Qui facit per alium facit per se", and an "agent" is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties. When a person is employed to find a buyer of property, he is commonly said to be employed as an agent, and the term "estate agent" is a common description of a class of persons whose business is to find buyers for owners who wish to sell property. But the mere employment of such a person under the designation of agent does not, apart from the general rule that the employer will be responsible for misrepresentations made by him, necessarily create any authority to do anything which will affect the legal position of his employer. [emphasis added]

- The court held that Maloney had failed to show that Pulbrook had either express or implied authority to receive money.
- Furthermore, Maloney had failed to show that purchaser had ratified Pulbrook's actions; or that Pulbrook had any ostensible (apparent) authority.

Section 31(3)- Sale of Land Act 1962

A notice under subsection (2) must, within 3 clear business days after the purchaser has signed the contract—

- (a) be given to one of the following persons—
 - (i) the vendor;
 - (ii) an agent of the vendor;
 - (iii) an estate agent engaged or appointed by the vendor to sell the land;

or

- (b) be left at one of the following addresses—

- (i) the address for service of the vendor specified in the contract;
- (ii) the address of the vendor's agent;
- (iii) the address of the estate agent engaged or appointed by the vendor to sell the land.

Section 31(3)(a)(iii)- Sale of Land Act 1962

This section was amended as a consequence of a matter that came before the Supreme Court and appealed to the Court of Appeal; [Cheng Lo and Eng Kiat Tan v Thomas John Russell \[2016\] VSCA 323](#)

The trial judge and the Court of Appeal found that an agent of the vendor did not include the vendor's estate agent, and that it should be given its general law meaning (i.e. authorised agent who has either express or implied authority).

[International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co \(1958\) 100 CLR 644](#)

- International Harvester was another case referred to by the High Court in *ACCC v Flight Centre*.
- While at the Sydney Agricultural Show Carrigan, a farmer, was handed a pamphlet describing the benefits of a baler manufactured by International Harvester (IH).
- Carrigan bought a baler from Hassan & Kensell Pty Ltd (HK). HK conducted a business under the description of machinery and general agents and also described itself as a dealer for the principal's products.
- The baler was defective. HK had gone into liquidation. Carrigan sued IH.
- The question before the court was whether the HK was acting as an agent for IH or as an independent dealer.
- In finding that HK was not acting as agent for IH, and therefore IH had no liability for the defective baler, the courts said as follows:
- Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in the business world its significance is by no means thus restricted. [emphasis added]...
- No word is more commonly and constantly abused than the word 'agent'. A person may be spoken of as an 'agent', and no doubt in the popular sense of the

word may properly be said to be an 'agent', although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only mis-leading"

- No one supposes that the "distributing agent" or "exclusive agent" in a particular territory " for a proprietary commodity or specific kind of article or machine is there to put a "consumer" into contractual relations with the manufacturer. ...In the present case it appears clear enough that the transaction was carried through on the basis that [HL] sold the baler to the plaintiff company and that the defendant company was not the contracting party.
- The legal definition of agency is well established and understood by lawyers.
- Other relationships, which are equally well established and understood, may be mistaken for agency.
- The commercial framework in which an agency may or may not arise.

What do we learn from these decisions

- Legal definition of agency is well established; can be called agent but not one
- Need authority to have agency
 - *The legal conception of agency is expressed in the maxim "Qui facit per alium facit per se", and an "agent" is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties.* - from Peterson v Moloney

Similar but different

- Employer/employee
- This relationship may include an agency:
 - expressly given under the employment contract
 - expressly implied by the nature of the employment
 - by a holding out to the third party, by the employer
- Independent contractor
- This relationship may include an agency:
 - expressly given under the contract engaging the independent contractor (rare)
 - expressly implied by the nature of the employment (rare)
 - by a holding out to the third party, by the employer