

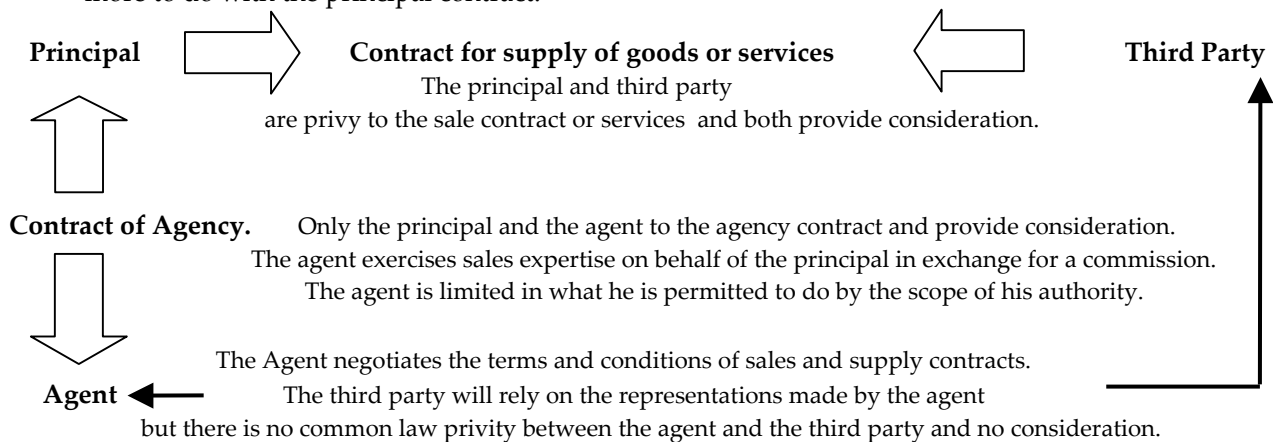
THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

THE LAW OF AGENCY

Introduction : Agency is the relationship that arises where one person is appointed to act as the representative of another in order to form a legally binding contract on that person's behalf, such as a purchase or sale of goods or land or the supply of services. There are a wide variety of circumstances in International Trade where agents are involved. In particular, import and export agents make contracts of carriage, stevedoring and storage on behalf of clients and carriers may act as agents for stevedores as in **The Eurymedon**. Even there the agency relationship is not fully established, as in the employer / employee situation, notions regarding the scope of duties of employment and the scope of authority discussed in agency are relevant, in particular in relation to the authority of a ship's master to bind a shipowner or charterer to statements within a bill of lading in respect of the date of shipment of goods, the quantity and quality of goods shipped. Many relationships do not however involve agency. Thus independent contractors and consecutive providers of goods and services, such as second carriers and warehousemen are often outside the scope of the relationship.

General Principles of Agency. Agency is governed by the general principles of the law of contract. The Agent establishes privity of contract between himself, his Principal and a third party. The result is :-

- 1). An obligation between Principal and Agent, which in itself is a special kind of contract, under an agency contract.
- 2). Privity of contract between principal and third party. The principal contract between the principal and the third party is enforceable both by and against the principal and has exactly the same consequences as if the principal had made the contract himself.
- 3). There is no privity of contract between the agent and the third party. The agent steps aside and has no more to do with the principal contract.



The essential legal characteristic of the agency relationship is the ability of one party (the agent) to bring another (his principal) into legally binding contractual relations with a third party. Once a contractual relationship has come into existence, as a general rule, the agent drops out of the picture and has no rights or liabilities under the contract.

Agency is an important exception to the doctrine of the privity of contract. The reason for the development of the concept of agency lies in commercial convenience. Contracts are frequently made by middlemen, who then drop out of the picture, and modern commerce cannot function without the law of agency. International trade, carriage of goods, marine insurance and the finance of international sales in particular frequently involve agency relationships.

Definitions of Agency.

Agency and consent. According to Bowstead agency is " the relationship that exists between two persons, one of whom expressly consents that the other should impliedly act on his behalf." According to Cheshire & Fifoot 'Agency is the relationship that arises when one man is appointed to act as the representative of another'.

CHAPTER TWO

The definition has been criticised because

- i). An agency relationship can come into existence contrary to the wishes of the parties, eg where the agent appears to have "apparent authority" i.e. where it appears to the third party that the agent has the authority to act as an agent of the Principal, then an agency relationship will exist in law.
- ii) It suggests that whether or not a relationship is one of agency is a matter of fact, whereas in reality it is a question of law. i.e. the courts look at the facts and decide if those facts give rise to an agency relationship.

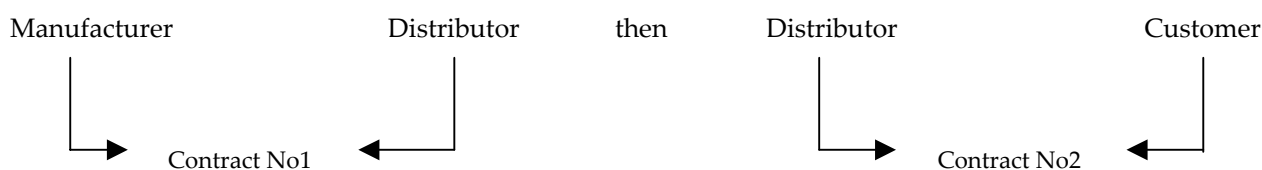
Agency and Authority. Agency is explained in terms of the agent having the authority to bind his principal eg Anson on Contract (Guest) defines an agent as a person who may represent or act on behalf of another with that other's authority, for the purpose of bringing him into legal relations with a third party."

It is possible for an agent to affect the legal relationship of another person even though he has no actual authority to represent him, or if he does so have, where he exceeds it. In **Lloyd v Grace Smith & Co.**¹ a widow owned two cottages and a sum of money which she had secured by a mortgage. She wanted to increase the income from these two sources and sought the advice of a firm of solicitors. She saw the managing clerk, who conducted without supervision, the conveyancing business of the firm. The clerk advised her to sell the properties and call in the mortgage money and for this purpose she gave him the title deeds to the properties. The clerk fraudulently got her to sign some documents conveying the cottages to, and transferring the mortgage to him. The House of Lords held the firm of solicitors, (the clerk's principal), liable for the fraud. This is an example of apparent authority, though he exceeded his actual authority. It appeared to the widow that he had the authority, and so in law he bound his employer, the firm of solicitors.

Agency as a power liability relationship. This stresses that agency is a legal concept, and not a factual concept. Authority is essentially a factual situation. In the case of **Lloyd v Grace Smith** there was no factual authority but apparent authority is law. The key point being therefore that the essential characteristic of an agent is that he has the power to alter his principal's legal relations with third parties and that power is conferred by the law.

Distinction between legal & commercial uses of the term 'agent'. Frequently in commerce people are described as agents who in law are not agents. Thus a car manufacturer may describe a car dealer as his agent, but he is not an agent because he does not bring the manufacturer into contractual relations with the customer.

Chain contracts.



A person who is given sole selling rights is not an agent, as illustrated by **Lamb (WT) & Sons v Goring Brick Co. Ltd.**² where the defendant appointed the plaintiff as sole agents for goods for a fixed period. Before that period was up the defendants decided they wished to sell the goods themselves. The court held that there was a breach of contract, which meant that the relationship between the defendant and the plaintiff was not based on agency. If it had been, the defendants could have sold the goods themselves.

Agents, servants or independent contractors ? The distinction between servants and independent contractors is important in tort. A servant is one who gives his service to another and there is a contract of employment between the two parties and thus a master / servant or Employer / Employee relationship. An independent contractor provides services for another. An agent may be either a servant or an independent contractor.

¹ **Lloyd v Grace Smith & Co** [1912] A.C. 716.

² **Lamb (WT) & Sons v Goring Brick Co. Ltd** [1932] 1 KB 710

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

Types of agent.

Universal Agent. This is someone appointed to handle all the affairs of his principal and such an agent has unlimited authority to so act, in any capacity. It must be created by deed, ie a Power of Attorney. It may be used for example if a person is ill, or incapacitated.

General Agent. A general agent has authority to represent his principal in all business of a certain kind, for example, the manager of a pub owned by a brewery is a general agent of the brewery. The agent binds his principal if he acts within his apparent authority.

Special Agent. Someone who has authority to act only on a particular occasion or for a particular purpose, eg signing a cheque on the principals account. A special agent can only bind his principal if he acts within the express instructions of the principal.

Professional agents such as solicitors, estate agents and auctioneers should be distinguished from agents at law. Exactly what their source of authority is is questionable, and so they are distinct from the other categories of agent.

The Formation Of Agency

- 1). By agreement. The Agent has actual authority,
- 2). By operation of law.
 - a) Apparent authority or
 - b) Necessity and
- 3). Ratification.

Formation by Agreement : Authority of an Agent. Actual authority may be either express or implied.

Express Actual Authority. Express actual authority is the authority actually conferred on an agent by agreement, and the extent of the express actual authority will depend on the construction of the words of appointment. No formality is required to appoint an agent. If the agency agreement is oral the actual boundaries of the authority will be a question of oral evidence. There is one exception to this in that the authority of an agent to execute a deed on behalf of the principal requires a power of attorney and must be in writing. Express authority arises from the express instructions given by the Principal. The only problem here is if the express instructions are ambiguous. In **Ireland v Livingstone**³ an agent was authorised to buy 500 tons of sugar in Mauritius. Did this mean 500 tons exactly or to buy as close to 500 tons as possible ? The court held that the agent acted bona fide in purchasing as near to 500 tons as possible and the principal could not get out of the contract.

Implied Actual Authority. This is the authority that an agent has to do everything that is necessary for or reasonably incidental to the effective execution of his duties as in **Hely-Hutchinson v Brayhead**⁴ where the board of directors of a company appointed a managing director, impliedly authorising him to do all those things which fall within the usual scope of a managing directorship. Implied actual authority may be implied from the conduct of the parties or from their relationship. Express authority already exists but the agent may have implied authority to carry out those things normally incidental to the express instructions.

Usual Authority. This looks at those acts that are not within express or implied actual authority, but are within the class of acts usually associated with agents of that character. It is the authority to do whatever an agent of the type in question or employee in a particular post would usually have the authority to do. In **Watteau v Fenwick**⁵ the court held that it was within the usual authority of the manager of a public house to buy cigars for resale to customers. The manager had been forbidden by the brewery from doing so, but since the seller was unaware of the restriction then usual authority applied.

In **Panorama Ltd. v Furnishing Fabrics Ltd.**⁶ the Secretary of Furnishing Fabrics Ltd in his capacity as company secretary hired some cars from Panorama Ltd. He had no Express Actual Authority to do that, but

³ **Ireland v Livingstone** (1872) 5HL 395

⁴ **Hely-Hutchinson v Brayhead** [1968] 1 Q.B. 549. Per Denning.

⁵ **Watteau v Fenwick** (1893).

⁶ **Panorama Ltd. v Furnishing Fabrics Ltd.** [1971] 2 Q.B. 711.

CHAPTER TWO

the court held that it was part of the Usual Authority of a company secretary to act for a company in questions of administration, such as car hire, and the company was therefore liable for the car hire charges. The Agency was in fact disclosed to Panorama Ltd. in that the secretary had said that he was acting for Furnishing Fabrics Ltd. Compare this with **Watteau v Fenwick** and **Edmunds v Bushell & Jones**.⁷ In both these cases the agency was undisclosed in that the agent did not say that he was acting as an agent, so that it appeared to the third party that the agent was in fact the principal party. Anson on Contract criticises the decision. The finding should not have been explained in terms of usual authority. The proper place for the decision lies in the law of Tort. The employer could then be held vicariously liable for the actions of his employees.

Formation by operation of law.

Apparent or ostensible authority : Agent by, or authority by. estoppel. This was defined in **Hely-Hutchinson v Brayhead** as "the authority of an agent as it appears to others". Denning J provides the following as an example of apparent authority. If a board of directors appoints a managing director they may state expressly that he is not to order goods over £500 in value. His apparent authority however includes all the usual authority of a managing director. If it is usual for a managing director in that type of company to order goods up to a value of £1,000, and he makes a contract up to that value then the company would be bound, (unless of course the third party knew of the limitation) even though the Managing Director has in fact exceeded his actual authority.

If a principal by words or conduct indicates that a person has authority to act on his behalf, the third party contracts with the agent on that basis. In **Rama Corp v Proved Tin Ltd.**⁸ Slade J stated that "Apparent authority was really a form of estoppel". The principal represents to the third party by words or conduct that the agent has authority, and so the principal is later estopped from denying that authority. There are three requirements :- i). Representation, ii) Reliance on the representation and iii) An alteration in the third parties position - resulting from the reliance.

Representation. In **Summers v Soloman**,⁹ a nephew acted as a buyer for a jeweller. Later he left his employment and ordered some jewellery. The court held that the defendant had to pay. The representation does not have to be express. It may be implied from conduct. The appointment of a managing director implies the granting of the usual authority of a managing director.¹⁰ Compare **Hely-Hutchinson v Brayhead** with **Freeman & Lockyear v Buckhurst Park Properties Ltd.**¹¹ B.P.P. was a company set up to purchase a particular estate and to sell it again. The company's articles of association stated that the company would only be bound by decisions of all four directors. In practice they allowed one particular director to act as the managing director, though he was never actually appointed as such. The company none the less honoured all the contracts formed by him on their behalf. He then engaged a firm of architects to apply for planning permission for the estate. The company refused to be bound by the contract. The court held that B.P.P. should be estopped from denying that he was a managing director. It was within the usual authority of a managing director to make such contracts and so the company was bound.

Reliance. This is illustrated by **Overbrooke Estates Ltd. v Glencombe Properties**.¹² The owner of property put it in the hands of an auctioneer to sell it. The auctioneer's catalogue contained the following conditions of sale :- That the seller of the property gave no authority to the auctioneer or his employees to make representations or give warranties in respect of the property, a "No Authority Clause". The auctioneer passed on incorrect information about the property to the buyer and the buyer later sought to have the contract set aside. He failed. He was informed of the No Authority Clause regarding representations before the purchase was made.

⁷ **Edmunds v Bushell & Jones** (1865)

⁸ **Rama Corp v Proved Tin Ltd.** [1952] 2 QB 147.

⁹ **Summers v Soloman** (1857).

¹⁰ . See **Spiro v Linton, Waugh v Clifford** [1982] and **Hely-Hutchinson v Brayhead**

¹¹ **Freeman & Lockyear v Buckhurst Park Properties Ltd.** [1964] 2 QB 480.

¹² **Overbrooke Estates Ltd. v Glencombe Properties.** [1974] 3 All ER 511

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

In **Freeman & Lockyer v Buckhurst Park Properties**¹³ directors of Buckhurst Ltd allowed K, a director to act as if he were Managing Director, although he had never been appointed to that position. Whilst it is usual for a managing director to be entitled to make contracts on the company's behalf, it is not usual for an ordinary non executive director of a company to have such powers. K applied for and received planning permission. The planning authority sent the company the bill but the company refused to pay stating that K had no authority to apply for the planning permission. Directors had previously honoured contracts made by K but now claimed not to be bound. The court held that a) Buckhurst Ltd was estopped from denying that K was managing director & b) it was within the usual authority of a manager to make contracts such as the present one.

In **Spiro v Linton** a wife sold a house on behalf of her husband. H was an undisclosed principal. W permitted a prospective purchaser to enter the property to do some interior decorating and gardening in readiness for the expected move. Did W have authority to sell to the purchaser? The court held that she did and that an agency by estoppel existed.

In **Waugh v Clifford** builders agreed to repurchase houses from buyers at current value, the value to be fixed by an independent valuer. The builder's solicitors informed their clients (the builders) of this proposal and stated they were appointed valuers unless they received contrary instructions. The builders telephoned but the instructions did not reach the relevant partners in the Solicitors until after the agreement was made. The builders claimed the agreement was not binding. The court held that the solicitors had ostensible authority to agree terms of compromise between the opposing litigants.

As far as alterations in the third party's position are concerned, it is not entirely clear whether or not a third party does in actual fact have to have acted to his detriment or not.

Agency of Necessity. An agency of necessity may arise if an agent is compelled by some emergency to exceed his authority in order to protect his principal's property. Four conditions must be satisfied for an agency of necessity to arise :-

- 1 The agent must have been in control of the principal's property, for example as a bailee.
- 2 It must be impossible for the agent to obtain his principal's instructions. **Springer v G.W.R.**¹⁴ a consignment of tomatoes arrived at Weymouth after a delay at sea. A rail strike threatened a further delay. The railway company sold the tomatoes. The court held that there was no agency of necessity. The railway company could have contacted the consignees to obtain instructions. The rules regarding Bailment show that the bailment relationship can come into being without recourse to agency. Breach then gives rights to actions in conversion. Whilst the Tort Interference with Goods Act 1977 deals with problems regarding consent where an owner cannot be contacted to get instructions the Act only covers an established bailment relationship. Where goods arrive and no one collects them at the appointed time then the agency of necessity may arise.
- 3 There must be actual and commercial necessity, a genuine emergency e.g. involving perishable goods or live stock that need to be cared for. In **Prager v Blatspiel. Stamp & Heacock Ltd.**¹⁵ where, during the first world war an agent of a fur merchant in Bucharest bought £1,900 worth of skins. The merchant paid for the skins but owing to the war the agent couldn't dispatch the skins to him. The skins increased in value and the agent sold them. There was no agency of necessity the court held. The skins were not likely to drop in value and could be preserved by proper storage. In **G.N.R. v Swaffield**¹⁶ a horse being carried commercially for its owner needed to be fed and stabled. In **Munro v Willmott**¹⁷ a car was left in a pub car park, and the owner left the district. The publican sold the car claiming he had a right to do so as an agent of necessity. The court held there was no necessity. He sold it merely for his own convenience to clear the car park.

¹³ **Freeman & Lockyer v Buckhurst Park Properties** [1964] 1 All.E.R. 630.

¹⁴ **Springer v G.W.R.** [1921] 1 K.B.257.

¹⁵ **Prager v Blatspiel. Stamp & Heacock Ltd** [1924] 1 K.B. 566.

¹⁶ **G.N.R. v Swaffield** (1874) L.R

¹⁷ **Munro v Willmott** [1949] All.E.R.

CHAPTER TWO

4 An agent of necessity must act bona fide in the interests of all the parties.¹⁸ These prerequisites mean that in practice it is difficult to establish an agency of necessity. Historically the doctrine arose with the difficulties of master's of ships when communications were difficult before the 20th century. A modern court is reluctant to create new classes of agent of necessity. e.g. **Sachs v Miklos**¹⁹ per Goddard C.J. " Courts should be slow to increase the classes which should be looked upon as agents of necessity." Such an agency will generally only be implied where there is an existing agency which requires extending to provide for unforeseen events not generally provided for in the original contract.

Formation of Agency by Ratification. A disclosed principal can choose to adopt and ratify transactions which were made without his authority. Agency of ratification arises where a principal subsequently ratifies i.e. affirms an unauthorised act, done on his behalf by someone who purports to be his agent.

The operation of the doctrine is illustrated by **Bolton Partners v Lambert**.²⁰ Lambert made an offer to an agent of Bolton. The agent acted without authority and purported to accept the offer on Bolton's behalf. Lambert then tried to revoke his offer but after this attempted revocation Bolton ratified his agent's act. The court held that Lambert was bound by the contract, because Bolton's ratification related back to the agent's acceptance and therefore revocation was too late. There are several exceptions to this rule and conditions that must be fulfilled.

1. **The Principal must be named or identifiable from the outset** An undisclosed principal cannot ratify an unauthorised act by an agent according to **Keighly Maxted v Durant**²¹ This rule is justified in that if it appears to a third party that he is dealing with a principal then it is not justifiable for the real Principal latter to ratify the agent's actions. The C.A. thought the principal should be able to ratify, but the House of Lords disagreed. The case involved the purchase of wheat at a price higher than the agent had authority to pay. The principal having refused to ratify refused to take delivery. It was held that he was not bound to do so.
2. **The contract must not be void.** If the director of a company purports to make a contract which is ultra vires the company's memorandum of association, it was held that the shareholders could not subsequently ratify the contract. The doctrine has been diminished by **s9(1) European Communities Act 1972**.²² This provides that in favour of a person dealing with a company in good faith any transaction decided on by the directors shall be deemed to be one which it is within the capacity of the company to enter into. The old ultra vires rule protected shareholders to the prejudice of innocent third parties.
3. **An illegal or void act cannot be ratified. Brook v Hook.**²³ A forged signature cannot be ratified. **Greenwood v Martin's Bank.**²⁴ The principal may be estopped from pleading forgery as a means of escaping liability if, knowing of the forgery he fails to complain quickly enough. A husband knew for some time that his wife was forging his signature on cheques but paid up on them nonetheless. He was estopped from later changing his mind and rejecting a cheque.
4. **The principal must be in existence at the date of the contract.** In **Kelner v Baxter**²⁵ the promoters of a company entered into a contract on behalf of a company not yet formed. Held: the company could not ratify that contract and the promoters were held personally liable on it.²⁶
5. **The principal must have contractual capacity at the date of the contract and at the time of the ratification.** In **Boston Deep Sea Fishing Co v Farnham (H.M.I. Taxes)**²⁷ the principal was an enemy alien , when the contract was made by his agent. After the war the principal sought to ratify the

¹⁸ See **Prager** above.

¹⁹ **Sachs v Miklos** [1948] 2K.B. 23 at 34 per Goddard C.J.

²⁰ **Bolton Partners v Lambert.** [1889] 41 Ch D 295 , 302.

²¹ **Keighly Maxted & Co & Bryan. Durant & Co, Re.** [1894] 70 L.T. 155. (1901) A.C. 240

²² <http://www.hmsso.gov.uk/acts/acts1972/20068--c.htm#11> See alsos35 Companies Act 1985

²³ **Brook v Hook.** (1871) L.R. 6 Exch 89.

²⁴ **Greenwood v Martin's Bank** [1933] A.C.

²⁵ **Kelner v Baxter** (1866) L.R.2 C.P. 174.

²⁶ See also s36(4) Companies Act 1985 and **Phonogram v Lane** 1981

²⁷ **Boston Deep Sea Fishing Co v Farnham (H.M.I. Taxes)** [1957] 3 All E.R. 203.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

contract held. Ratification ineffective. Similarly in **Kelner v Baxter**²⁸ three co-promoters of a company bought goods (wine) on the company's behalf before the company had been incorporated. When it was formed the company purported to ratify. The court held that the company could not do so.

In **Newborne v Sensolid**²⁹ a person who purported to sell goods on behalf of a company that had not yet been formed could not be held personally liable as an agent of the company. The company once formed was not able to ratify the contract and then sue the purchaser for breach of contract when he refused to go through with the contract. However since s9(2) European Communities Act 1972³⁰ promoters will be held personally liable for contracts made on behalf of unformed companies.

6 Principal at the time of ratification must have been aware of all the material facts in order to protect the principal. In **Marsh v Joseph**.³¹ a solicitor's clerk acted fraudulently on behalf of his employer. The solicitor discovered certain aspects of the fraud. The clerk gave a partial account of the fraudulent actions, which the solicitor believed to be a full account. The solicitor then ratified the clerk's actions. But the full story then came out and the court held that the ratification was inoperative.

7 The principal must ratify in time. A principal cannot ratify a contract if the time fixed for its performance has passed, and if no time is fixed then it must be ratified within a reasonable time.

Insurance contracts. In **Grover v Mathews**³² a principal purported to ratify an insurance contract after the premises had been destroyed by fire.

The rule in Watson v Davies.³³ One cannot have contracts expressly made subject to ratification. In reality it amounts to an offer awaiting acceptance. The contract does not come into being until ratification takes place. The offer can be revoked at any time before ratification.

The effect of Agent's acts in relation to Third Parties : The general rule is that the Agent drops out as soon as the contract is made. The agent incurs no liability nor can he create liabilities on the third party towards him either. Even where an Agent has authority and is known to be an agent and the principal is named, the general rule above can be excluded by express or implied agreement. The Agent is then made liable personally on the contract or in addition to the principal. **Fisher v Marsh**³⁴ A wrote 'I for my own self contract.' The principal will also be liable as well.

Regarding implied liability Brandon J stated in **The Swan**³⁵ that the court looks for an objective intention of both parties, based on what two businessmen making a contract of that nature in those terms and those surrounding circumstances must be taken to have intended.

Where the principal is not named the general rule is that the agent drops out. Essentially it is a question of intention of the parties or trade usage as to whether or not he incurs personal liability. **Southwell v Bowditch**³⁶ A broker issued the following note "*Messrs. Southwell. I have this day sold your order to my principals etc 1% brokerage. Signed W.A. Bowditch*". Held : The agent was not personally liable, even though the contract was signed in his own name. Jessel MR stated that there was 'Nothing in the contract to show that the agent intended to act otherwise than as broker.'

Special rules apply to the following :-

- a) Contracts under seal eg **Schack v Anthony**³⁷ a master of a ship entered into a charterparty by deed as Agent for the owners. The principal was not named in the contract and so he could not sue on it.
- b) Negotiable instruments eg **More v Charles**.³⁸
- c). Trade usage eg **Reet v Murton**.³⁹

²⁸ **Kelner v Baxter** (1866).

²⁹ **Newborne v Sensolid** [1954]

³⁰ <http://www.hms.gov.uk/acts/acts1972/20068--c.htm#11>

³¹ **Marsh v Joseph**. 1897 1 Ch 213.

³² **Grover v Mathews** (1910) 2 K.B.

³³ **Watson v Davies** (1930) 1 Ch. 455.

³⁴ **Fisher v Marsh** (1865)

³⁵ **The Swan** [1968]

³⁶ **Southwell v Bowditch** (1876) 1 CPD

³⁷ **Schack v Anthony** [1815]

³⁸ **More v Charles** (1856).

CHAPTER TWO

d). Foreign principals.

The Undisclosed principal : The agent appears to the third party to be acting on his own behalf. The general rule does not apply and the agent does not drop out. The third party can sue either the agent or the principal, but not both since he cannot recover twice for the same wrong. The Principal can sue the Third Party unless this works an injustice. The principal cannot sue where the terms of the contract are inconsistent with the existence of an agency relationship. Such an inconsistent term might be express or implied from either the wording of the contract or from the nature of the contract. In **Humble v Hunter** ⁴⁰ H chartered a ship from X (an undisclosed agent) who described himself as 'owner'. In fact X was not the owner and the undisclosed principal of X (the agent) could not sue when freight on charter was unpaid by H. Similarly in **Formby Bros v Formby C.A.**⁴¹ an agent contracted as 'proprietor' implying there was no hidden principal behind him.

In **Archer v Stone** ⁴² a third party owned a house and was approached by an agent posing as purchaser, but in fact acting for an undisclosed principal. The Third Party seller asked him if he was acting for an undisclosed principal but the agent said 'no'. The third party signed the contract on the faith of this misrepresentation. The court held that the third party could repudiate the entire contract. Similarly in **Said v Butt** ⁴³ A critic who had quarrelled with the theatre management was unable to get a ticket for the first night of a play. A friend bought a ticket in his own name and gave it to the critic who appeared on the night. The management refused admission. The court held that there was no contract. There was a fundamental mistake of identity.

In **Nash v Dix** ⁴⁴ Dix sought to resist Nash's claim for specific performance of a contract to sell a congregational chapel on the grounds that the plaintiff secretly acting as agent for a committee of Roman Catholics, who proposed using the building for Roman Catholic worship and whose earlier and more direct overtures had already been rejected by the defendant vendors. However, what in fact happened was that Nash, realised that if he were to buy the chapel he could make a quick profit by reselling it to the Catholics. It was held that the defendant had to sell it to the plaintiff, who was a purchaser in his own right and not an agent of undisclosed catholic principals.

The doctrine of election and the undisclosed principal. Where a third party has the choice of taking an action against the agent or the undisclosed principal then once he has conclusively elected who to proceed against he cannot then proceed against the other party where the other party has relied on that election. In **Clarkson Booker Ltd v Andjel** ⁴⁵ Clarkson supplied air tickets valued at £728.7.6d to the defendant (a travel agent) with whom on several occasions in the past they had dealt as principal. Later P Co, also operating as travel agents, disclosed that Andjel had in fact acted solely as their agent. Clarkson wrote separate letters to Andjel and to P.Co (the undisclosed principal) threatening proceedings if payment were not made. 5 weeks later Clarkson issued a writ against P.Co, but on hearing of the company's insolvency proceeded no further with the action. Clarkson then issued a writ against Andjel and judgement was given at first instance. Andjel appealed on the ground that by serving the earlier writ on P.Co, Clarkson had elected to exonerate the agent. Held : There was no conclusive election by the plaintiff and therefore he could sue Andjel, the agent. Andjel had not been lulled into a false sense of security by the plaintiff suing P.Co.

If judgement had been obtained against the defendant then the matter would have been different since one cannot have two judgements in respect of the same debt or cause of action.⁴⁶ Under **s3 Civil Liability (Contribution) Act 1978** whilst there is only one debt, if one party out of a potential two liable parties is sued, that party may recover part of his liability from the other party who has not been sued.

³⁹ **Reet v Murton** (1871) L.R.

⁴⁰ **Humble v Hunter** (1848) 12 Q.B.

⁴¹ **Formby Bros v Formby C.A.** [1910].

⁴² **Archer v Stone** (1898).

⁴³ **Said v Butt** [1920] 3 K.B.

⁴⁴ **Nash v Dix** [1898] 78 L.T.

⁴⁵ **Clarkson Booker Ltd v Andjel** (1964) 2 Q.B.

⁴⁶ See **Kendall v Hamilton**

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

Much controversy has surrounded the doctrine of the undisclosed principal. Pollock proclaimed⁴⁷ that '*It allows one person to sue another on a contract not really made with the person suing*'.

Payment to Agents by the Principal or Third Party. Two situations

1) The principal instructs an Agent to buy goods, pays the purchase price to the Agent but the Agent fails to pay the money over to the Third Party. **Irvine v Watson**⁴⁸. A principal employed an agent broker to buy oil for him. The agent bought from the seller on behalf of an unnamed principal, payment to be 'by cash on or before delivery.' The seller delivered the oil without receiving payment. The principal, unaware that the seller had not yet paid, in good faith paid the agent. The agent became insolvent and the seller sued the principal. It was held that it was no defence for the principal to assume that the seller would not have made delivery without receipt of the cash and therefore P was liable.

If the principal is an undisclosed principal see **Heald v Kenworthy**⁴⁹ where it was held that the principal would be liable to pay unless after the principal had been disclosed, the third party induced the principal to pay the agent on the basis that the Third Party and the Agent had come to an agreement about payment by the Agent to the Third Party and **Armstrong v Stokes**⁵⁰ where it was held that the principal was not liable to pay. *Armstrong v Stokes* has been much criticised since the agents in that case were not normal agents but commission merchants and Bramwell J indicated in **Irvine v Watson** that the case would not be likely to be followed in future..

2) The agent sells goods to a third party but fails to give the money to the principal. This will depend on whether or not the agent had authority to receive the money from the third party. If he had authority, then the third party cannot be sued. If he hasn't the authority then the Third Party is still liable to pay the principal. He has to then recover the money from the agent if he can.

The relationship between the Principal and the Agent. This is a fiduciary relationship analogous with that of trustee and beneficiary. Can an agent delegate? The general rule is 'delegatus non potest delegare' an agent cannot delegate. There are exceptions a) if the agent is a minor or b) if the agent has authority from the principal to delegate.

In the case of an unauthorised delegation the Agent will have to pay the subagent commission and the Agent will be liable to the Principal if the appointment of the sub-agent damages the Principal in any way. If there is an authorised delegation then the Agent drops out of the picture. **D Busshe v Alt**⁵¹ held that a sub-agent had to pay the profits to the Principal.

The fiduciary relationship. An agent must not take bribes or make secret profits. The bribe usually comes from the Third Party. The agent himself generates the secret profit. See **Phipps v Boardman**⁵² where an Agent had to disgorge secret profits of £75,000. He was allowed to keep £8,000 because he had acted in good faith.

The principal can recover the bribe and damages i.e. he has 2 remedies,⁵³ though the Salford decision has since been doubted in **Mahesan v Malaysian Government**,⁵⁴ where it was held that the remedies were not cumulative but alternative.

The agent must not allow a conflict of interest and duty between his own self interest and his duty to his principal. See **Phipps v Boardman** and **Keppel v Wheeler**.⁵⁵ In **Lucifero v Castel**⁵⁶ an agent was asked to buy a yacht for a Principal. The Agent bought a yacht for himself and resold it to the Principal for a profit.

⁴⁷ in 3 LQR 359

⁴⁸ **Irvine v Watson** (1879).

⁴⁹ **Heald v Kenworthy** (1855)

⁵⁰ **Armstrong v Stokes** (1872)

⁵¹ **D Busshe v Alt** (1878) 8 Ch.D. 286

⁵² **Phipps v Boardman** [1965] 1 All.E.R. 849, CA.

⁵³ See **Salford Corp v Wheeler** (1891) 1 QB 168

⁵⁴ **Mahesan v Malaysian Government** (1978) Privy Council

⁵⁵ **Keppel v Wheeler** (1927) 1 KB 577.

⁵⁶ **Lucifero v Castel** (1887)

CHAPTER TWO

The Principal didn't know that he was buying the Agent's profit. It was held that the Agent had to give up his secret profit but he could retain commission.

The Rights and duties of an agent :

The law implies into the contract of agency rights and duties between the principal and the agent. These are enforceable as long as they do not contradict any express term in the agency contract.

The Agent's Duties.

To obey instructions. If the agency is a contractual one and the agent agrees to bring about a certain contract for his principal but fails to do so, he is in breach of his contract. In **Turpin v Bilton**,⁵⁷ an insurance broker agreed to arrange for the insurance of Principal's ship. He failed to do so. The ship was lost. The agent was held liable to the Principal.

If the agency is a gratuitous one then the agent is not liable if he fails to embark on the agency. If he does embark on the agency he must obey the principal's lawful instructions as in the case of a contractual agency.

To exercise due care & skill. All agents whether contractual or gratuitous owe a duty of care and skill to the principal. If the agent does not exercise the required degree of care and skill he is liable to the principal in negligence. In **Kepple v Wheeler**, it was held that an Estate Agent has a duty to obtain the best price reasonably obtainable. Estate Agents were employed to sell a block of flats. They received an offer which the owners accepted subject to contract. The agent then received a higher offer from someone else. They did not inform the owner of the higher offer, but instead arranged a re sale between the first and second offeror. Held: liable for breach of duty to obtain the best price obtainable and the damages payable was the difference between the two offers.

The standard of care expected of an agent is that of the ordinary member of the trade or profession. A gratuitous agent's duty is to show the degree of care and skill that people ordinarily exercise in the conduct of their affairs.

The duty to act personally. See **D Bussche v Alt**, which shows that an agent cannot delegate his duties except where the circumstances of the case and the conduct of the parties show that the agent was intended to have power to delegate. It is a question of fact whether the agent has the implied authority to delegate eg trade usage.

McCann (John) & Co v Pow.⁵⁸ The court held that an estate agent employed by a seller of premises cannot normally delegate his function to another firm of estate agents. If they do so without the Principal's authority they will not be entitled to claim commission on any sale which the sub agent manages to arrange.

Where the principal does agree to the agent delegating his responsibilities i.e. in cases of authorisation of the sub-agency by the principal the sub-agent is the agent's agent and there is no privity of contract between the sub agent and the principal. If the sub agent is negligent there is no action against him for breach of contract by the principal.

Calico Printers Association v Barclays Bank⁵⁹ (1931) 145 L.T. 51. B.B. was employed by C.P. to collect the proceeds of goods sold abroad. B.B. employed the Anglo Palestinian Bank in Beirut as sub agents. The goods were not insured and were destroyed by fire. B.B. were protected by an exclusion clause so C.P. tried to sue A. BB.Failed. No privity of contract.

Mario v Balsano ⁶⁰ There is no **Hedley - Byrne v Heller** action for negligent misstatement by a sub agent.

The Duty to act in good faith. An agent stands in a fiduciary position to the principal. Implications

- a) The agent must not permit a conflict of interest eg an estate agent employed to sell a principal's house must not buy the house himself. The fiduciary position of an estate agent is emphasised in the Estate Agent Act 1979, s21. If an estate agent has a personal interest in land he must not enter into

⁵⁷ **Turpin v Bilton** (1843) 5 Man & G 455.

⁵⁸ **McCann (John) & Co v Pow**. [1975] 1 All E.R. 129.

⁵⁹ **Calico Printers Association v Barclays Bank** (1931) 145 L.T. 51

⁶⁰ **Mario v Balsano** [1984]. A.E.R.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

negotiations with any person with respect to the acquisition or disposal of that interest without disclosing the nature of his personal interest.

- b). An agent must not make a secret profit, or take a bribe. Any gain which an agent makes in the course of carrying out the agency and keeps secret from the principal is a secret profit and can be recovered by the principal. In **Lucifero v Castel**.⁶¹ an agent was asked to buy a yacht for a principal. The agent bought a yacht for himself and then sold it to the principal for a profit. The principal did not know that he was buying the agent's profit. The court held that the agent had to give up his secret profit but could retain commission.

A bribe is a particular kind of secret profit. In **Industries & General Mortgage Co v Lewis**.⁶² it was held that a bribe can be constituted by a payment by the third party to the agent who knows that the agent is acting as an agent and the payment is kept secret from the principal. Likewise in **Andrews v Ramsay**.⁶³ the owner of property instructed an estate agent to sell the property for £2,500 and agreed that if a purchaser was found the agent would have a commission of £50. The agent arranged a sale at £2,100. The third party made a secret payment of £20 to the agent. The principal paid the £50 commission before discovering the secret payment. The court held the owner could recover the commission (£50) and the secret payment (£20).

The remedies available to the principal therefore, regarding a secret profit, is to recover the profit, or in a bribe to recover the commission and the bribe. The principal has an alternative remedy in damages for the tort of deceit, for any loss he may have sustained by entering into a contract as a result of the bribe to the agent. But, he must chose between the claim for a bribe or damages for deceit.

In **Maheson v Malaysian Government Officers' Co-op**.⁶⁴ the director (an employee) of the Malaysian Housing Society came to an agreement with Maheson whereby for a bribe of \$122,000 Maheson would sell the society for \$944,000 land whose market value was only \$501,000. Thus the Co - op overpaid an excess payment over market value of \$443,000. The Privy Council held: the Housing association could not recover the loss and the bribe. They had to elect.

In the event of a bribe the principal can dismiss the agent summarily.⁶⁵ Corrupt sanctions by agents is a criminal offence.

The Duty to Account. There is a duty to keep a record of transactions and the agent must keep separate accounts for money belonging to the principal. See **Brown v I.R.C.**⁶⁶ If an agent holds money belonging to the principal then unless otherwise agreed the interest belongs to the principal.

The Rights of an Agent.

The right to Commission & Remuneration. Whether an agent is entitled to commission depends on the agreement. In commercial agreements the courts will imply a right to payment. The agent in order to receive commission must have brought about the transaction which he was employed to bring about. In **Toulmin v Millar**.⁶⁷ a.n agent was employed to find a tenant for a house. This meant that when he sold the house instead of renting it out he was not entitled to any commission on the sale. It is not clear why the courts did not imply a right to a sale's commission. It was clarified in **Luxor (Eastbourne) Ltd v Cooper**⁶⁸ that under the contract of estate agency the general rule is that there is no commission payable till the sale of the property is completed. The seller is always entitled to withdraw from a sale up to the exchange of contracts. It is possible to introduce terms stating that if the agent produces a client able and willing to purchase then if the principal withdraws he is still liable for commission. but in **Boots v Christopher** ⁶⁹ it was claimed that the

⁶¹ **Lucifero v Castel**. (1887)

⁶² **Industries & General Mortgage Co v Lewis** [1949] 2 All E.R. 573.

⁶³ **Andrews v Ramsay** (1903) 2 K.B. 635.

⁶⁴ **Maheson v Malaysian Government Officers' Co-op**. [1979] A.C.374. P.C.

⁶⁵ See **Boston Deep Sea Fishing & Ice Co v Ansel** (1888).and Prevention of Corruption Acts. 1906 & 1916.

⁶⁶ **Brown v I.R.C.** (1964) 3 All E.R. 119

⁶⁷ **Toulmin v Millar**. (1887).

⁶⁸ **Luxor (Eastbourne) Ltd v Cooper**. [1941] A.C.

⁶⁹ **Boots v Christopher** (1951) 2 All E.R. 1045.

CHAPTER TWO

commission was payable at an earlier stage, ie before the conveyance, since a client able & willing had been found. The court disagreed. Until the contracts are exchanged then no purchaser can be said to be able and willing & ready to purchase. This may not be the position under a "Sole Agency". The principal agrees not to sell under another agent. If he does the first agent is still entitled to his commission. What if the principal withdraws from the sale - having appointed an agent under a sole agency agreement ? He may then be liable to the agent for the commission.⁷⁰

The right to Indemnity. A principal must indemnify an agent for expenses which the agent reasonably incurs - in the course of his agency : But not for expenses incurred for unauthorised acts unless subsequently ratified.

The Rights of The Third Party

Disclosed Agency. As long as the agent acts within his authority then direct contractual relations are established between the principal & the 3rd party. If the agent acts outside his authority and the principal does not ratify the agent's actions then the principle will not be liable to the third party.

Exceptions to the general rule

- 1 **Negotiable Instruments.** s23 Bills of Exchange Act. A principal cannot be held liable on any negotiable instrument unless his signature appears on it. s91(1). B.E.A. The principal doesn't have to sign the instrument, it can be written on by an agent, with the principal's authority.⁷¹
- 2 **Contract by deed.** A principal cannot sue or be sued under a contract made by deed unless he is named as a party to it, and it is executed in his name. **Schack v Anthony**⁷². The master of a ship entered into a charter party by deed as agent for the owners. The principal was not named in the contract and therefore it was held that he could not sue on it.
- 3 **Trade Usage.** See **Fleet v Murton**.⁷³

Exceptions to the Contract by Deed Rule :

- i If the agent contracts as a trustee for the principal, the principal can sue on the contract in equity.
- ii If the Agent is appointed as an attorney: Under s7(1) Powers of Attorney Act. 1971, the Principal may sue and be sued on the deed. The agent must have acted within his authority.
- iii **s56.L.P.A. 1925.** A person may take an immediate interest in land or other property or the benefit of any condition, right of entry, covenant or agreement, over or respecting land or other property, even though he has not been named in the deed.

The Undisclosed Principal. If an agent concludes a contract for an undisclosed principal then provided he acts within his authority , evidence can subsequently be produced to show that the undisclosed principal was the real principal ; and that undisclosed principal can sue and be sued on the contract ie the Doctrine of the Undisclosed Principal.

Exceptions to the Undisclosed Principal Doctrine. An undisclosed principal cannot ratify an unauthorised act by the agent **Keighly Maxted v Durant**.⁷⁴ An undisclosed principal cannot intervene on a contract made by his agent if this would contradict an express or implied term of the contract. **Humble v Hunter**⁷⁵ An agent entered into a charter party (ie the hire of a ship). The agent described himself as the owner. The principal wanted to sue on the contract. The court held oral evidence was inadmissible to show he was in fact an agent. However, in **Drughorn v Rederiaktiebolaget Trans - Atlantic**⁷⁶ the agent of an undisclosed principal described himself as the charterer. The court allowed oral evidence to show that the agent was an agent. The distinction between the two cases is that for an agent to describe himself as a charterer is not inconsistent

⁷⁰ Murdock L.Q.R. 1975.357. discusses cases of sole agency where the principal liable courts estimate damages on the prospect of sale and give awards accordingly.

⁷¹ See **More v Charles**

⁷² **Schack v Anthony** (1813).

⁷³ **Fleet v Murton** (1971) Lloyds Rep.

⁷⁴ **Keighly Maxted v Durant** [1901] A.C. 240.

⁷⁵ **Humble v Hunter** (1848) 12 Q.B. 310.

⁷⁶ **Drughorn v Rederiaktiebolaget Trans - Atlantic** 1919 A.C. 203.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

with the intervention of a principal. But in **Humble v Hunter** the description of the agent as principal was a term of the contract.

An undisclosed principal cannot intervene where the third party clearly intended to contract with the agent only and no - one else. **Said v Butt**⁷⁷ A dramatic critic was refused a ticket to a theatre performance so he got an agent to acquire a ticket for him. The agent did not disclose that he was an agent. On arrival at the theatre the critic was refused entry. The judge upheld the theatre's action on the ground that there had been a mistake as to the identity : ie void for mistake. The reasoning has been criticised but not the result. None the less the decision stands. The case is still quoted as authority for saying that where the personal element is strikingly present between the third party and the agent an undisclosed principal cannot intervene.

Legal Effects of the failure to disclose the existence of a principal. The agent of an undisclosed principal can be sued personally on the contract. The third party has a choice. He can either sue the principal when he discovers his existence OR he can sue the agent. The third party therefore has a Right of Election. What amounts to an election ? **Clarkson Booker v Andiel**⁷⁸ The issue of a writ against the principal did not then prevent the third party from issuing a writ against the agent when the principal went into liquidation. The facts of the case show that the third party had written to both the agent and the principal requesting payment and the request to the agent had never been withdrawn.

The third party's right of set off. Where the agent owes a personal debt to the third party, if the undisclosed principal intervenes requesting payment from the third party, then the third party can set off this debt against the principal's request. This is based on the justification that when an undisclosed principal intervenes he does so subject to all the equities and defences available to the third party if he had been sued by the agent.

Cooke v Eshelby⁷⁹ suggests that the third party can only claim his right of set off where the undisclosed principal's conduct raises an estoppel. This limitation can possibly be restricted to the facts of the particular case. It involved a firm of brokers who sometimes acted as agents and sometimes as principals. In this case they sold cotton to the third party not disclosing that they were acting as agents. The third party knew that the brokers were sometimes principals and sometimes agents, though in this case he did not know in which way they were acting. The undisclosed principal sued for the purchase price. The third party claimed a set off for money owed by the brokers. The claim failed. The House of Lords held that simply for the third party to show that the agent had acted as a principal was not enough. The third party also had to show that the agent was made to appear as the principal by the authority or real conduct of the principal.

Where the third party settles with the agent. If the third party pays the agent, who then fails to account to the principal then the third party is not discharged unless the agent had authority to receive the money. **Coates v Lewes**.⁸⁰ Where the principal is undisclosed then if the third party pays the agent before discovering the existence of the principal then his liability is discharged.

Settlement of Principal to an agent. If the principal is disclosed then payment by the principal to the agent will not discharge his liability to the third party. **Irvine v Watson**.⁸¹ Where according to **Armstrong v Stokes**.⁸² the principal is disclosed a bona fide payment by the principal to the agent will discharge the principal's liability to the third party.

Contractual Liability of an Agent. The general rule as propounded by **Montgomerie v U.K. Mutual S.S.Association**.⁸³ When a person contracts as agent for a principal the only person who can sue and be sued on it is the principal.

Exceptions. In **Montgomerie** certain circumstances were recognised where an agent can be liable on a

⁷⁷ **Said v Butt** [1920] 3 K.B. 497.

⁷⁸ **Clarkson Booker v Andiel** (1964) 3 All E.R. 260.

⁷⁹ **Cooke v Eshelby** (1887). 12 App. Cas. 271.

⁸⁰ **Coates v Lewes**. (1808) 1 Camp 444.

⁸¹ **Irvine v Watson**. 1880.

⁸² **Armstrong v Stokes**. (1872) L.R. 7 Q.B. 598. Markensinis & Munday claim it is an illogical distinction.

⁸³ **Montgomerie v U.K. Mutual S.S.Association**. [1891]. 1 Q.B.370.

CHAPTER TWO

contract between the principal and the third party e.g. where the agent undertakes personal liability as in **The Swan**⁸⁴ Both the principal and the agent are liable under the contract. This also applies where the agent impliedly undertakes personal liability by custom of the trade.

If an agent contracts on behalf of an undisclosed principal the agent is personally liable to third parties because the third party is unaware of the principal's existence. If the principal intervenes then the agent's liability MAY end. Cases where the principal cannot intervene, and therefore the agent remains liable, eg **Humble v Hunter**. The agent described himself as the owner of a ship. Held: the principal's existence was thereby impliedly excluded.

U.K. Mutual S.S. Assurance v Nevill⁸⁵ The rules of the association were such that only members of it could insure their ships under the associations' policies. A co - owner of a ship who was a member of the association entered into an assurance contract with the association. The association then tried to sue the other co - owner, for unpaid contributions outstanding to the association, even though he was not a member. Tully the association's member had become bankrupt so an action against him for unpaid contributions was a waste of time. Held: that they could not do so. Only the agent would be liable, ie the association's member.

Fictitious principals. Where an agent contracts on behalf of a fictitious or non-existent principal the courts will hold the agent liable if on a true construction of the contract it is possible to reach that result see **Kelner v Baxter**.⁸⁶ If the purported principal is a company not yet formed then under s36(4) Company Act 1985 the agent will be considered to have contracted personally with the third party unless he has clearly expressed a contrary intention to the third party.

Distinguish this from the situation where the agent is in fact the principal. Here the agent is clearly liable. **Schmaltz v Avery**.⁸⁷ He described himself as the agent for a principal in a charter party when he was in fact the freighter and therefore he was personally liable.

Contracts made by the agent under seal. If an agent makes a contract under seal in his own name he is personally liable on it even if he describes himself on the document as an agent. **Hancock v Hodgson**.⁸⁸ The directors of a company purchased a copper and tin mine and a contract under seal to pay the purchase price out of payments to be made by subscribers or shareholders in the said company was executed. It expressly stated in the deed that they acted on behalf of the company but they were still held personally liable to the seller on the purchase price.

Negotiable instruments. s26(1) Bills of Exchange Act If an agent signs a negotiable instrument then he will be liable on it unless he makes it quite clear when signing it that he is an agent.

Contracts in writing. Where an agent signs a contract in his own name without any qualification he is deemed to have contracted personally. To escape this personal liability an agent must add to his signature words which clearly indicate that he is making the contract as an agent. It is not enough for the agent to describe himself in a contract as an agent because that may only indicate that he was employed as an agent, and is not conclusive that he is contracting as an agent. **Universal S.S. Co Ltd v J.McKelvie & Co**.⁸⁹ A charter party signed "For and on behalf of J.McKelvie & Co (as agents) J.A.McKelvie." The H of L : the words clearly showed that the agent did not intend to be personally bound by the contract.

Foreign Principals. Where the agent acts for a foreign principal, there used to be a presumption that a third party in this country contracted with the agent. The doctrine arose during the era of poor communications & sail power. Now it is of less importance. **Tehran - Europe Co Ltd. v ST Belton (Tractors) Ltd**.⁹⁰ Diplock suggested that an agent acting for a foreign principal may be held liable in addition to the principal. The third party has a right of election.

⁸⁴ **The Swan** [1968]. 1 Lloyd's p5.

⁸⁵ **U.K. Mutual S.S. Assurance v Nevill** (1887) 19 Q.B.D. 110.

⁸⁶ **Kelner v Baxter** (1886). L.R. 2 C.P. 174.

⁸⁷ **Schmaltz v Avery**. (1851). 16 Q.B.D. 655.

⁸⁸ **Hancock v Hodgson**. (1827) 4 BING 269.

⁸⁹ **Universal S.S. Co Ltd v J.McKelvie & Co** [1923] A.C.492.

⁹⁰ **Tehran - Europe Co Ltd. v ST Belton (Tractors) Ltd**. [1968] 2 All E.R. 886.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

Misrepresentations. If the agent makes a misrepresentation to the third party, the agent can be held personally liable under **Hedley Byrne v Heller**. In **Dodds & Dodds v Milman**.⁹¹ an estate agent was held liable to the third party for negligent misstatements regarding the principal's property.

Termination of Agency. The same rules as for the general law of contract apply, namely Agreement, Performance, Breach and Frustration.

Termination by act of one or both of the parties. Essentially it rests upon the construction of the contract and can be by one of the following :-

- a) By Mutual agreement,
- b) By the agent renouncing his employment or
- c) By the principal revoking the agent's authority.

Termination by Notice. An agency relationship may be ended by serving notice following the terms of the contract. If the principal has expressly agreed not to revoke but he never the less does revoke it, then he will be liable in damages for refusing the agent his opportunity to earn commission. **Luxor (Eastbourne) v Cooper**. illustrates that the courts will not generally imply a term into a contract of agency that the agency is irrevocable. It may be that in cases where Estate Agents are employed under a sole agency agreement that if the seller withdraws the property from the market then he **MAY** be liable in damages to the agent.⁹²

If there is a term in the contract regarding the period of notice then that must be complied with. If there is no reference in the contract to a period of notice and the contract of agency is analogous to an employer / employee relationship then the law will imply a term that the agency must be terminated by reasonable notice. See **Martin Baker v Canadian Flight** ⁹³ where it was held that a contract could be terminated on the giving of reasonable notice, in that case 12 months. However, if a bribe is accepted then the contract terminates without notice. The contracts of commission agents, that is to say, those employed to do a specific act, terminate without notice when the act is done.

The special role of commission contracts. This is also one of the potential rights of an agent, depending on what the terms of the contract between the principal and the agent are. There is no general rule and each contract must be read to determine its effect. **Luxor v Cooper** ⁹⁴ Per Lord Russel "Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. No general rule can be laid down by which the rights of A or the liability of P under commission contracts are to be determined. Each case depends on the exact terms of the contract in question & the true construction of these terms." In **Luxor v Cooper** a principal authorised his agent to negotiate for the sale of certain properties and promised to pay him a commission of £10,000 'on completion of the sale' if a price of £175,000 were procured. The Agent obtained an offer to purchase at this price and the offer was accepted by the Principal. The offer and acceptance however were made 'subject to contract', a formula which proposes the creation of a binding contract. The Principal then refused to proceed further with the contract and the Agent sued for his commission. The court held that the Agent was unable to recover the £10,000 commission since the Principal had not gone on to complete the sale. The action was brought therefore to recover damages for breach of an implied term alleged to be contained in the agency contract to the effect that the principal had promised that he 'would do nothing to prevent the satisfactory completion of the transaction so as to deprive A of the agreed commission.' The action failed. Unlike the decision in **The Moorcock** there was no need to imply such a term to give the agency contract business efficacy.

Dennis Reed v Goody.⁹⁵ An estate agent had a 'person ready able and willing to purchase'. This willingness was proved in **Christie Owen Davies v Rapaccioli** ⁹⁶ where the purchaser signed his part of the conveyance

⁹¹ **Dodds & Dodds v Milman**. [1964] 45 D.L.R. (2d)

⁹² . See the Murdoch article. L.Q.R.

⁹³ **Martin Baker v Canadian Flight** (1958)

⁹⁴ **Luxor v Cooper** (1941) A.C. 108. Per Lord Russel

⁹⁵ **Dennis Reed v Goody** (1950) 2 K.B.

⁹⁶ **Christie Owen Davies v Rapaccioli** [1974] 2 All.E.R. 311

CHAPTER TWO

but the seller refused to complete the contract. Thus in **Midgely v Hand**,⁹⁷ it was held that the estate agent was entitled to commission. The terms of the contract stated that the commission was to be payable as soon as a purchaser introduced by the agent 'should have signed a legally binding contract'.

Irrevocable authority s4 Powers of Attorney Act 1971 : A power of attorney expressed to be irrevocable, and given to secure a proprietary interest of the donee of the power cannot be revoked by the donor of that power without the consent of the donee nor by the death, insanity or bankruptcy of the donor.

Termination by operation of law.

- a) If an event occurs which makes the continuance of the agency unlawful eg the principal becomes an enemy alien.
- b) Death of the principal or the agent terminates the agency.
- c) Insanity.
- d) The principal's bankruptcy.

Can acts of either the principal or the agent be deemed to have terminated the agency where for instance the principal does what the agent was engaged to do or prevents the agent doing what he is supposed to do ?

Rhodes v Forwood.⁹⁸ An agent was employed for 7 years to sell all coal which the owner of a colliery elected to send to Liverpool. 4 years later the owner sold the colliery. The agent unsuccessfully sued for loss of future commission.

In **Turner v Goldsmith** ⁹⁹ an agent successfully sued for loss of commission when a 5 year agency contract was prematurely terminated by the principal. Whether one can sue for loss of commission depends upon the terms of the agency contract. Thus in some commission contracts there is no entitlement to commission for the specified period and the contract can be terminated by conduct without involving breach. In **Treach v Leeston Shipping** ¹⁰⁰ an agent negotiated the charter of a ship for 18 months and was paid commission on the hire period. The owners sold the ship to the charterers after 4 months. The court held that the agent would not have been entitled to further commission even if the hire had lasted another 14 months.

Commercial Agents. The EC Commercial Agents Directive ¹⁰¹ hereinafter referred to as C.A.D. 1986 has now been incorporated in English Law by The Commercial (Council Directive) Agents Regulations¹⁰² hereinafter referred to as C.A.R. 1993 and came into force on the 1.1.1994.

All commercial agency relationships relating to agents operating, subject to English Law, in the E.C. are affected by C.A.R. 1993. Agents operating outside the E.C. whether the principal or third parties are based in the E.C. or not are not affected. Agents operating in other E.C. member states and subject to the laws of that state are covered by that states version of C.A.D. 1986.

This is important because the Directive is imprecise in its terminology and the versions of the Directive incorporated into a number of member states differ significantly. Ultimately, if these differences are litigated and questioned, findings of the E.C.3. on application of the various sections of the Directive may ultimately result in a harmonised and uniform code but for the time being there are serious problems with interpretation and there is much uncertainty in this area of the law.

Some of the terms used have no English Law equivalent. The C.A.D. 1986 does not have a definitions section. Some of the terms have English equivalents but it would appear that the English law state of art definitions are not the meanings envisaged by the draftsmen. The C.A.D. 1986 applies to the whole of the E.C. The C.A.R. 1993 only applies to U.K. law. Self employed in U.K. is synonymous with independent contracts and has been subject to minute definition in the U.K. courts but under E.C. law probably refers to an economically independent entity and could include a company or partnership acting as an agent just as much as an individual operator. ¹⁰³ The regulations operate in three different ways. Some regulations are

⁹⁷ **Midgely v Hand** [1952] 2 QB,

⁹⁸ **Rhodes v Forwood** [1876].

⁹⁹ **Turner v Goldsmith** [1891]

¹⁰⁰ **Treach v Leeston Shipping** [1922]

¹⁰¹ EC Commercial Agents Directive 86/653 EEC 03 1986 L382/17 31.12.1986

¹⁰² The Commercial (Council Directive) Agents Regulations SI 1993/3053 as amended by SI 1993/3173

¹⁰³ See Arts 52 & 57 E.C. Treaty.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

stated to be mandatory. Some regulations apply unless the contract of engagement of the agent specifies otherwise. A third form is where regulations may be specifically derogated from in the contract. The aims of the directive are to protect agents and to enhance competition.

The most significant changes are to the terms for the remuneration of agent, the terms regarding termination of the relationship and contracts in restraint of trade and future employment of agents in competition with the principal. Agents are given a status something akin to an employee in terms of rights of remuneration, minimum periods of notice to end the relationship and provisions for severance pay which mirror employees' rights to notice and redundancy payments. The rules outlined above regarding the authority of agents is unaffected.

The regulations clarify and protect agents in a very important area which was previously uncertain and unsatisfactory. Where an agency relationship is terminated and work carried out prior to termination by the agent results in sales that take place after termination the agent is entitled to remuneration for those sales. Maximum time scales are established for the payment of commission. The duties on both parties to act in good faith are already covered by English law and so there is no significant change in this respect.

The C.A.R. 1993 only affects commercial agents. A commercial agent is defined as 'a self employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person ('the principal') or to negotiate and conclude the sale or purchase of goods on behalf of an in the name of that principal.' Employees are not affected by the regulations. Whether or not a satellite, sister or subsidiary company of a group of companies is covered by the regulations is unclear. Agents providing services, such as loading brokers, shipping agents and insurance brokers are not affected by the regulations. Commodities market operators are excluded in the schedule as are agents carrying out secondary obligations such as catalogue agents, promotional representatives and consumer credit agents.

The regulations require continuing authority so persons negotiating one off sales or purchases are not within the scope of the regulations. As such c.i.f. and f.o.b. sales are unlikely to be affected by the regulations and likewise the servicing element of international sales resulting from the need to transport goods.

Where companies employ agencies on a regular basis to buy or sell on their behalf serious consideration must be paid to these regulations. In fact, there may be little or no significant advantage to employing agents in future. Sales or purchases may be just as effectively organised through employees, branches or subsidiary companies are through distributors. If commercial agents are to be given the same rights as employees one might as well use employees over whom an employer has greater control and where the statutory requirements are far more straight forward and predictable. The complex systems for agents in Germany have already paved the way towards this method of distribution in Germany and perhaps the practices will in future become more widespread.

Insurance : The assured employs a broker as his agent to negotiate the contract of insurance on his behalf with the underwriter. The rights and duties of agent, assured and underwriter, are governed by detailed provisions under the Marine Insurance Act 1906 and there is an extensive body of common law on the relationships.

Agency and tort : Concurrent liability exists in contract and tort and agents can owe duties in tort to the persons with proprietary interests affected by their actions whilst carrying out their agency responsibilities even though there people are third parties to the agency relationship. The governing factors are the existence of a duty of care; the type of activity whether related to supply of goods or services and the distinctions between physical loss, consequential economic loss and pure economic loss.