8 Relations between agent and third party

- Contractual liability
- Tortious liability

INTRODUCTION

Having discussed the legal relationships between the principal and agent and between the principal and third party, it follows that this chapter moves on to consider the relations between the agent and third party. As discussed in Chapter 3, the typical function of an agent is to affect the legal position of his principal in relation to third parties. This is typically achieved by the agent effecting contractual relations between his principal and a third party (or third parties). To this contract, the agent is usually a stranger and it therefore follows that, providing all the parties perform their obligations, there will be no legal relations between the agent and third party, aside from any warranty of authority that might be deemed to exist.

The warranty of authority is discussed at p 168

However, this is not absolute and where the parties fail to properly perform their obligations, legal relations between the agent and third party may come into being which allow one party to sue, or be sued by, the other. This chapter discusses the general rule and also those situations where the agent and third party will acquire a cause of action against the other (as indicated by Figure 8.1). Such liability tends to arise in contract and/or tort, and so this chapter begins by discussing the contractual relationship between the agent and the third party.

Contractual liability

The contractual relationship between the agent and third party, and the extent to which one party can be liable to the other, is complex and depends upon a number of variables, such as:

- whether the principal is disclosed or undisclosed;
- whether or not the principal exists;

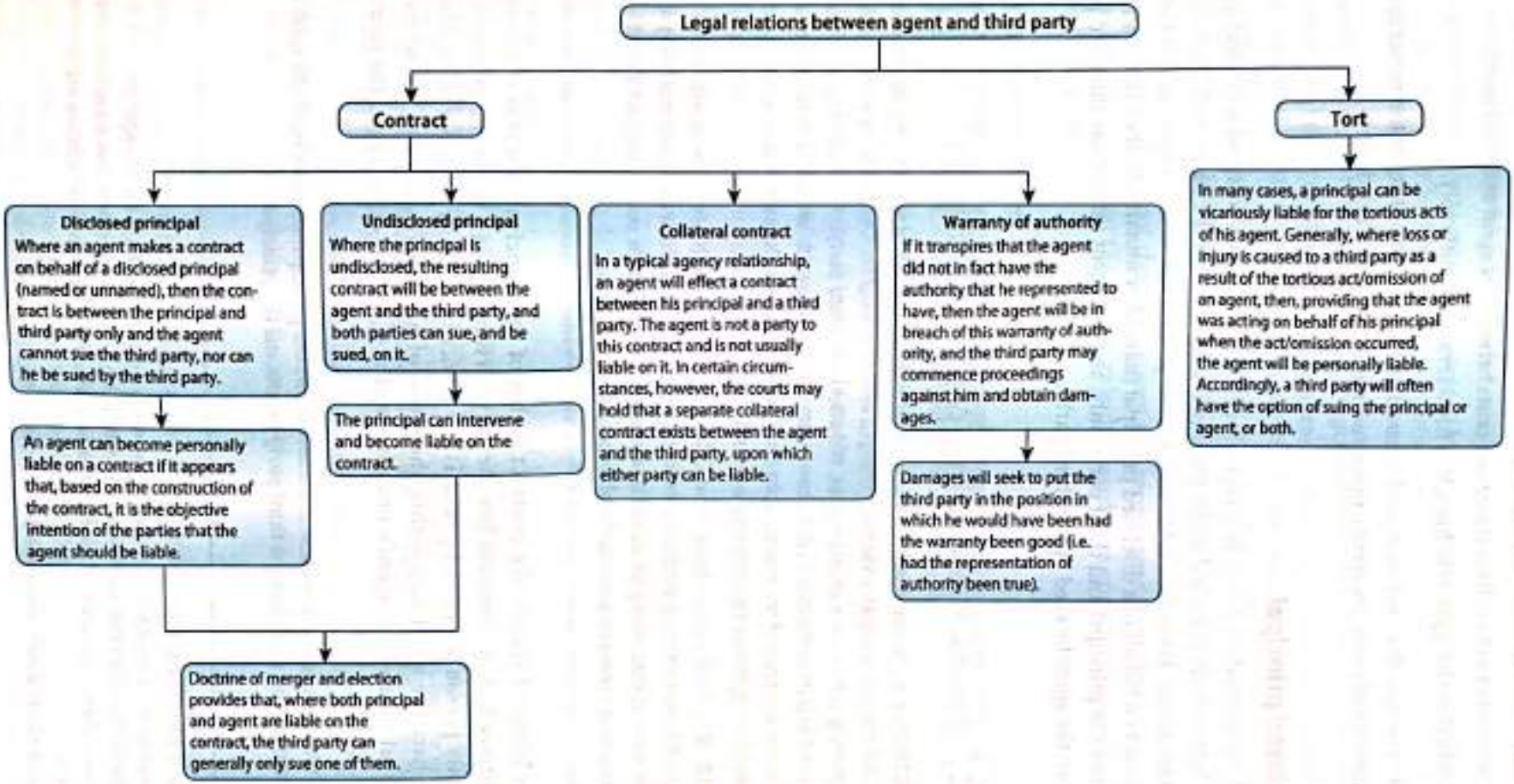

FIGURE 8.1 Legal relations between agent and third party

- whether or not there exists some custom or usage that would indicate that the agent and third party should be liable to one another;
- whether or not a collateral contract exists between the agent and third party;
- whether the agent is in breach of his warranty of authority.

All of these variables will now be discussed, but it is worth noting at the outset that, in the majority of cases, an agent cannot sue, nor be sued by, a third party.

Disclosed principal

It will be remembered that, in a typical agency relationship, an agent will effect a contract between his principal and a third party, after which the agent will 'drop out' of the transaction. From this, it follows that the general rule is that where an agent effects a contract on behalf of a disclosed principal (named or unnamed), then the contract is between the principal and third party only, and the agent cannot sue the third party, nor can the agent be sued by the third party.

Wakefield v Duckworth & Co [1915] 1 KB 218 (KB)

FACTS: Duckworth worked for Duckworth & Co (the agent), a firm of solicitors. He was defending a client (the principal) who had been charged with manslaughter. Duckworth ordered a number of photographs from a photographer, Wakefield (the third party). These photographs would be used as part of the client's defence—a fact that was known to Wakefield. Wakefield sought to obtain the price of the photographs from Duckworth & Co. Duckworth & Co refused and so Wakefield commenced proceedings against the firm.

HELD: Wakefield's action failed. Lord Coleridge J stated that '[t]here is no question that the plaintiff knew that the defendants were solicitors acting on behalf of a client, and that being so ... they were agents acting on behalf of a principal. *Prima facie* in such a contract the plaintiff would have to have recourse to the principal and not the agent.'[1]

As Wright J stated, 'the contract is that of the principal, not that of the agent, and *prima facie* at common law the only person who can sue is the principal and the only person who can be sued is the principal'.[2] This rule generally applies in full where the agent acts within the scope of his actual authority,[3] or where the principal ratifies the agent's unauthorized acts, but in other cases, the rule may be modified:

- Where the agent acts without authority, and the principal does not ratify the agent's unauthorized acts, then the third party cannot sue the principal.[4]

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1. [1915] 1 KB 218 (KB) 220.
2. *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370 (QB) 371.
3. It should be noted that exceptions do exist which will prevent a principal from being party to a contract, even if the agent is acting in an authorized manner—these exceptions are discussed at pp 146–9.
4. *Comerford v Britannic Assurance Co Ltd* (1908) 24 TLR 593 (KB).

- Where the agent has apparent authority only, then the principal is still liable to the third party, but cannot enforce the contract against the third party, unless he first ratifies the agent's actions.
- Where the agent acts outside the scope of his actual authority, then he will be liable to the third party for breach of warranty of authority, unless the principal ratifies his unauthorized actions.

Breach of warranty of authority is discussed at p 168

It is worth noting that the application of the general rule to cases involving unnamed principals has been criticized. Several academics[5] have contended that English law should adopt the position found in the American *Restatement of the Law*, which provides that, where the agent acts for a disclosed principal but, at the time of the contract, the third party does not know of the principal's identity, then the agent should also be personally liable on the contract, unless otherwise agreed by the agent and third party.[6] The courts have not chosen to accept this recommendation, and the Court of Appeal has confirmed that the general rule discussed here applies in cases involving an unnamed principal.[7]

Agent party to the contract

Despite the general rule noted above, an agent can become personally liable on a contract if it appears that, based on the construction of the contract, it is the objective intention of the parties that the agent should be liable.[8] The most obvious way in which this could occur is where the contract expressly states that the agent is to be a party to it, or if it states that the agent is to be liable on the contract, either alongside, or to the exclusion of, the principal.[9] However, an agent can still become party to a contract in the absence of an express provision. It should be noted that cases in this area provide general guidance only, and much turns on the construction of the contract in question and the circumstances surrounding it.

The most significant factor is the language used by the agent when signing the contract. As Rix LJ has stated, 'the way in which a party named in a contract signs that contract may be of particular strength in the overall question of whether he is a party to that contract with personal liability under it'.[10] The case law reveals the following general principles:

- An agent who signs a contract in his own name without any qualification will be a party to the contract,[11] unless other portions of the contract clearly indicate a contrary intention. Thus, where an agent signed a contract of sale in his own name, but the contract stated that the goods were being sold 'on account' of another, the court held that the agent was not a party to it.[12]
- The courts will not presume that an agent is not a party to the contract simply because he is described as an agent, manager, broker, or other similar description. Thus, no intention of avoiding liability will be presumed where the agent signs the contract, but

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5. See e.g. FMB Reynolds [1983] CLP 119; Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [9-016].
6. American Law Institute, *Restatement of the Law—Agency* (American Law Institute 2006) § 6.02.
7. *N&J Vlassopulos Ltd v Ney Shipping Ltd (The Santa Carina)* [1977] 1 Lloyd's Rep 478 (CA).
8. *Bridges & Salmon Ltd v Owner of The Swan (The Swan)* [1968] 1 Lloyd's Rep 5.
9. *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370 (QB).
10. *Internaut Shipping GmbH v Fercometal Sarl* [2003] EWCA Civ 812, [2003] 2 Lloyd's Rep 430 [46].
11. *Parker v Winslow* (1857) 7 E&B 942.
12. *Gadd v Houghton* (1876) 1 ExD 357.

appends his signature with the words 'as solicitor'[13] or 'as director'.[14] Such words are likely to be regarded as merely descriptive, as opposed to indicating that the agent is acting in a representative capacity for another. However, as noted, the words used are merely one factor among many.

- Where the agent signs the contract and indicates that he is acting as an agent,[15] or where he indicates that he is acting on behalf of,[16] or on account of,[17] another person, then the presumption will be that he is not contracting personally, and so will not be a party to the contract, unless other portions of the contract clearly indicate a contrary intention.[18] Note, this will not apply to agents who execute deeds in their own name—such persons will still be liable even if they state within the deed that they are acting on behalf of another.[19]

Depending upon the construction of the contract, an agent may be party to a contract, and may be sued on it by a third party, but may not have the ability to sue the third party (i.e. he may be liable on the contract, but unable to himself enforce it). The opposite is not true—an agent who is not liable on a contract cannot enforce it against a third party.

Merger and election

As noted, where the agent is party to a contract, the third party may have the option of suing the principal or agent—an option that can be extremely useful, especially where either the principal or agent has become bankrupt/insolvent, or is protected by an exclusion clause. In such cases, the liability of the agent and principal is alternate, as indicated by Scrutton LJ:

> When an agent acts for a disclosed principal, it may be that the agent makes himself or herself personally liable as well as the principal. But in such a case the person with whom the contract is made may not get judgment against both. He may get judgment against the principal or he may get judgment against the agent.[20]

Accordingly, in order to prevent double recovery, the third party cannot sue both the principal and agent and must sue one or the other. In practice, this limitation arises in two ways:

1. If the third party has already obtained judgment against the principal, or the agent, then the third party is disbarred from obtaining judgment against the other (e.g. if judgment is obtained against the principal, the third party cannot then sue the agent),[21] even if the judgment is not satisfied. This is based on the doctrine of 'merger', which provides that multiple judgments may not arise out of a single obligation.
2. Where judgment has not already been obtained, the third party may elect to hold one party liable, which then releases the other party from liability (unsurprisingly, this is known as 'election'). In order for election to arise, (i) the third party must clearly and unequivocally elect to sue one party; and (ii) the third party must have full knowledge of the facts, including knowing the identity of the principal.[22]

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13. *Burrell v Jones* (1819) 3 B&Ald 47.
14. *McCollin v Gilpin* (1881) 6 QBD 516.
15. *Redpath v Wigg* (1866) LR 1 Ex 335 (contract signed by the agent 'as agents').
16. *Universal Steam Navigation Co Ltd v J McKelvie & Co* [1923] AC 492 (HL).
17. *Gadd v Houghton* (1876) 1 ExD 357.
18. See e.g. *Young v Schuler* (1883) 11 QBD 651.
19. *Appleton v Binks* (1804) 4 East 148.
20. *Debenham's Ltd v Perkins* [1925] All ER Rep 234 (KB) 237.
21. *LGOC v Pope* (1922) 38 TLR 270.
22. *Thomson v Davenport* (1829) 9 B&C 78.

The doctrines of merger and election will not apply where (i) the claims against the principal and agent arise from separate causes of action; (ii) the principal and agent are jointly and severally liable on the contract; and (iii) where one party is not liable at all. It should be noted that the doctrines of merger and election apply not only to cases involving a disclosed principal, but also to cases where an agent and undisclosed principal are both liable, as is discussed next.

Undisclosed principal

Where the principal is undisclosed, then the third party will be under the impression that he is dealing solely with the agent. In such a case, the resulting contract will be between the agent and the third party, and both parties can sue, and be sued, on it.[23] It should be noted that, in cases involving an undisclosed principal, the principal can usually intervene and sue, and be sued, on the contract.[24] Where the principal does intervene, the agent will lose the ability to enforce the contract against the third party,[25] although the agent will still remain liable to the third party until such time as the third party elects whether to sue the agent or the principal.

An undisclosed principal's ability to intervene on a contract is discussed at p 146

Fictitious or non-existent principal

Special consideration must be given to two cases. The first is where the principal is fictitious, which usually occurs where the agent purports to act on behalf of another, but is in fact acting on his own behalf (i.e. the agent is the principal). The second case occurs where the agent purports to act on behalf of a principal that does not yet exist, which tends to occur where the promoter of a company acts on behalf of a company (or limited liability partnership) that has not yet been incorporated.

Agent acts as principal

As discussed, an agent who acts for a disclosed principal will not normally be liable on the contract, as a contract will exist between the principal and third party, between whom there will be privity. However, is this still the case where the agent purports to act on behalf of another, but is in fact acting on his own behalf? The general rule appears to be that a person who professes to be acting on behalf of another, but is in fact acting on his own behalf, will be personally liable on the contract and can be sued by a third party, as the following case demonstrates.

Railton v Hodgson (1804) 4 Taunt 576n

FACTS: Hodgson, purporting to act on behalf of a firm, ordered goods from Railton. Hodgson had worked for the firm before, but no longer did so—he was in fact ordering the goods for himself, but used the firm's name in order to obtain the goods on credit. Railton delivered the goods to Hodgson and billed the firm for payment. However, the firm was insolvent and so Railton commenced proceedings against Hodgson.

23. *Sims v Bond* (1833) 5 B&A 389.
24. As both the agent and principal can be liable on the contract, the doctrine of election can also apply to a case involving an undisclosed principal.
25. *Atkinson v Cotesworth* (1825) 3 B&C 647.

HELD: Railton succeeded and Hodgson was held liable on the contract, and was therefore obliged to pay for the goods.

COMMENT: This case, and the principle it establishes, have been criticized. It has been argued that an agent who purports to act on behalf of another, but is in fact acting for himself, should not, unless he undertakes personal liability on the contract, be liable on the contract, as such a result is 'contrary to the principle of objective interpretation in contract to establish intentions unknown to the third party'.[26] In such cases, it would appear to be much more appropriate to hold the agent liable for breach of warranty of authority, or in tort.

Breach of warranty of authority is discussed at p 168, while liability in tort is discussed at p 172

Quite why the person incorrectly purporting to act on behalf of another should be liable on the contract is not entirely clear. No coherent justification has been forthcoming, and what justifications have been offered are rather vague, as evidenced by the following statement of Scrutton LJ:

> Why should not a man who contracts with another, thinking he is an agent, sue him when he finds out that he is the real principal? There seems to be no reason why he should not, provided the supposed agent has not expressly contracted as agent so as to exclude his liability as a principal party to that contract . . . I think it is the law. I am sure it is justice. It is probably the law for that reason.[27]

Despite the criticism levelled at *Railton* and cases like it,[28] it remains good law, and the general principle is that an agent who purports to act for another, but is in fact acting for himself, can be sued on the contract by a third party. The question that flows from this is whether the opposite is also true, namely can a third party be sued on the contract by the person who was purporting to be acting on behalf of another, but who was in fact acting for himself. It would be assumed that the answer would be no as, unless the contract indicates that an agent is party to the contract, the agent drops out of the transaction, leaving a contract between the principal and third party, between whom there is privity. One would assume that the person purporting to act as agent cannot subsequently enforce the contract as the *de facto* principal, or, as Lord Ellenborough stated, 'where a man assigns to himself the character of agent to another whom he names, I am not aware that the law will permit him to shift his situation, and to declare himself the principal, and the other to be a mere creature of straw'.[29] Despite this, the courts have held that, in a number of cases, the contract can be enforced against the third party, although it has been argued that such cases provide 'slender authority',[30] and making the third party liable on the contract is 'difficult to justify on principle'.[31]

The following case indicates that an agent who falsely claims to be acting on behalf of another can enforce the contract against the third party if the third party continues with the contract after becoming aware of the true situation.

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26. Peter G Watts, *Bowstead & Reynolds on Agency* (19th edn, Sweet & Maxwell 2010) [9-091].
27. *Gardiner v Heading* [1928] 2 KB 284 (CA) 290.
28. See e.g. *Jenkins v Hutchinson* (1849) 13 QB 744; *Carr v Jackson* (1852) 7 Exch 382; *Gardiner v Heading* [1928] 2 KB 284 (CA).
29. *Bickerton v Burrell* (1816) 5 M&W 383, 386.
30. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [9-089].
31. ibid.

Rayner v Grote (1846) 15 M&W 359

FACTS: Rayner described himself as the agent of Messrs J&T Johnson, and contracted to sell fifty tonnes of soda ash to Grote on their behalf. In fact, the soda ash belonged to Rayner himself. Thirteen tonnes of the fifty were delivered to Grote, who accepted the goods and paid for them in part. Evidence indicated that, at the time Grote accepted the goods, he knew that the goods actually belonged to Rayner (i.e. he knew that Rayner was in fact the principal, and not an agent). Grote refused to accept the remaining thirty-seven tonnes and so Rayner sued.

HELD: The court held that Rayner could sue Grote for his non-acceptance and non-payment of the goods. Alderson B stated that:

> this contract has been in part performed, and that part performance accepted by the defendants with full knowledge that the plaintiff was not the agent, but the real principal… [W]e think that the plaintiff may, after that, very properly say that they cannot refuse to complete the contract by receiving the remainder of the goods and paying the stipulated price for them.[32]

COMMENT: The reasoning of the court is open to criticism. The simple fact is that Grote contracted to purchase goods from Messrs J & T Johnson and, to this contract, Rayner was not a party. No convincing justification has been advanced explaining why the agent should be able to enforce this contract to which he is not a party. It has been contended that the decision cannot be justified on orthodox agency principles and is better regarded as an example of a situation where, following the true situation coming to light, the contract is **novated** so that the agent becomes the seller.[33]

→ **novation:** the act of substituting one contract for another

In *Rayner*, Alderson B was keen to point out that if the identity of the principal was a material factor, then the agent would not be permitted to take over the contract as principal and enforce it. He stated:

> In many cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient to the contract, it is clear that the agent cannot then shew himself to be the real principal, and sue in his own name.[34]

From this, it follows that the courts appear to be more willing to permit the agent to enforce the contract where the identity of the principal is not of importance (e.g. where the principal is unnamed).

Schmaltz v Avery (1851) 16 QB 655

FACTS: Schmaltz had entered a charterparty with Avery, the owner of a ship, under which the ship would be used to transport goods. The charterparty stated that Schmaltz was acting as agent for a **freighter**, but did not identify who the freighter was (i.e. the principal was disclosed, but unnamed). The charterparty contained a cesser clause, which provided that Schmaltz's liability would cease as soon as the cargo had shipped. It transpired that Schmaltz was not

→ **freighter:** a person or vessel that transports cargo and goods

32. (1846) 15 M&W 359, 365–6.
33. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [9-094].
34. *Rayner v Grote* (1846) 15 M&W 359, 365.

acting on behalf of a freighter, and was in fact the freighter himself. Avery, upon discovering this, refused to take on board any cargo. Schmaltz sued to enforce the terms of the charterparty.

HELD: Schmaltz's action succeeded and he was permitted to enforce the charterparty. Patteson J stated:

> [t]here is no contradiction of the charterparty if the plaintiff can be considered as filling two characters, namely those of agent and principal . . . We see no absurdity in saying that he might fill both characters; that he might contract as agent for the freighter whoever that freighter might turn out to be, and might still adopt that character of freighter himself if he chose.[35]

The court was heavily influenced by the fact that the principal was unnamed and Avery did not seek to enquire who the principal was. Based upon this, the court concluded that Avery was not prejudiced by Schmaltz acting as principal and in fact, '[a]ny one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have sued on this charter party'.[36]

COMMENT: By allowing Schmaltz to enforce the charterparty, the court arguably acted in a manner that was inconsistent with the terms of the charterparty itself, given that the charterparty was between Avery and the freighter, and the agent signed the charterparty in such a way as to indicate clearly that he was not the freighter. The fact that the freighter was unnamed does not mean that Avery did not care who the freighter was. As Munday has correctly stated:

> the fact that a third party is indifferent to the party with whom he may have contracted does not necessarily entail that he is content to contract with the 'agent' who, by acting as agent, may have conveyed the impression that he was not in the running to assume the character of the principal.[37]

Despite the criticism levelled at *Schmaltz*, the courts have actually gone further and have held that an agent can enforce a contract against a third party, even where evidence exists which indicates that the third party would not have contracted had he known that the agent was in fact the principal.[38]

Principal does not yet exist

An agent may purport to act on behalf of a principal that does not yet exist. This commonly occurs in the following situation:

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Lee, Eric, and Greg (the directors of ComCorp) decide to set up a subsidiary company. The subsidiary will be called Bastion Ltd and the application for incorporation is duly submitted to the Registrar of Companies. Before the certificate of incorporation is issued, all three promoters are busy preparing for the commencement of business. Lee rents office space, signing the rental agreement 'Lee, on behalf of Bastion Ltd'. Eric purchases office supplies, signing the contract of sale 'Eric, the agent of Bastion Ltd'. Greg hires a number of employees, signing the employment contracts as 'Bastion Ltd'.

35. (1851) 16 QB 655, 663. 36. ibid 662 (Patteson J).
37. Roderick Munday, *Agency: Law and Principles* (2nd edn, OUP 2013) 329.
38. *Harper & Co v Vigers Bros* [1909] 2 KB 549 (KB).

The problem that arises is that Lee, Eric, and Greg (the agents) are all purporting to act, and enter into contracts, on behalf of Bastion Ltd (the principal), but the company does not yet exist and so it has no contractual capacity. Are such pre-incorporation contracts void or, because they are clearly for the benefit of the principal-to-be, are they regarded as valid and enforceable and, if so, who can enforce them? In other words, who is liable where an agent acts on behalf of a principal that does not yet exist? Historically, the common law provided the answer, but it was based on determining the intent of the parties, as revealed in the contract[39]—a process which proved to be notoriously difficult, which resulted in significant confusion in the law and a perception that cases in this area could turn based on complex and technical distinctions. For an example of the distinctions drawn, contrast the cases of *Kelner v Baxter*[40] and *Newborne v Sensolid (Great Britain) Ltd*.[41] In *Kelner*, the promoter signed the contact 'on behalf of' the unformed company (as Lee did in the ComCorp example), and it was held that a binding contract existed between the promoter and the third party.[42] In *Newborne*, the promoter signed the contract using the company's name and added his own signature underneath (as Greg did in the ComCorp example). It was held that the contract was between the promoter and the unformed company, and, as the company had no contractual capacity, no contract existed.

Fortunately, s 51(1) of the Companies Act 2006 has, in the majority of cases,[43] rendered this common law distinction redundant, by providing that:

Companies Act 2006, s 51(1)

A contract that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly.

Accordingly, where s 51(1) applies, an agent who makes a contract by or on behalf of a company that has not yet been incorporated, will be personally liable on that contract. Clearly, s 51(1) benefits third parties, who can now sue the agent, but can an agent sue a third party who refuses to honour a pre-incorporation contract? The wording is unclear, as the phrase 'and he is personally liable on the contract accordingly' appears to indicate that only the agent is liable on the contract. However, the preceding phrase indicates that the contract has effect as between the third party and the agent, which would allow both parties to enforce the contract, a position that has since been confirmed by the Court of Appeal.[44]

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39. *Phonogram Ltd v Lane* [1982] QB 938 (CA). 40. (1866) LR 2 CP 174.
41. [1954] 1 QB 45 (CA).
42. The court also held that a binding contract would exist where the promoter signed the contract as the company's agent (as Eric did in the ComCorp example).
43. The common law position will continue to apply to those cases where s 51(1) is inapplicable, such as where the company existed, but has since been dissolved (*Cotronic (UK) Ltd v Dezonie* [1991] BCC 200 (CA)).
44. *Braymist Ltd v Wise Finance Co Ltd* [2002] EWCA Civ 127, [2002] Ch 273.

It is important to note that the company cannot ratify or adopt the contract once it has been fully incorporated.[45] The only way in which the company can take advantage of a pre-incorporation contract is for the parties to discharge the contract, and the company to then enter into the contract with the third party on the same terms.[46] It has been contended that companies will view this discharge procedure as an undue waste of time and effort, and that companies should be permitted to adopt pre-incorporation contracts.[47]

Foreign principal

Two notable problems can arise where an agent acts on behalf of a foreign principal, especially where contracts are effected between a foreign principal and a domestic third party. First, if a problem arises, the principal or third party may need to commence proceedings against the other but, as they are based in different countries, this can be a protracted, complex, and costly affair. Second, the principal and third party may have very little knowledge of each other and very little reason to trust each other. In order to remedy these problems, the courts developed a strong presumption of fact[48] that provided that where an agent acted on behalf of a foreign principal (disclosed or undisclosed), then only the agent could acquire rights and liabilities under the contract, and the agent did not have authority to establish privity of contract between the principal and a third party.[49] To quote Blackburn J:

> [T]he foreign constituent [the principal] has not authorized the merchants [the agent] to pledge his credit to the contract, to establish privity between him and the home supplier [the third party]. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner.[50]

As this quote indicates, the presumption could be rebutted if there was clear evidence indicating that the principal and third party intended to have direct contractual relations. However, as the riskiness of international trade decreased, the presumption was eventually abandoned,[51] and a new approach established:

> Trade has changed greatly and has increased enormously . . . British firms and companies do not hesitate to make contracts with foreign firms and companies, whether negotiated or not through British agents. British agents are loth to make themselves personally responsible for their foreign principals . . . In my opinion the true view is, whether the foreign principal is a buyer or a seller, that the fact that the principal is a foreigner and that the agent has not disclosed his name are . . . circumstances to be considered, and when the facts are doubtful or, in the case of a verbal contract, in dispute, or when there is a written contract the terms of which

45. Article 7 of the First EU Company Law Directive, which led to the passing of s 51(1), did allow the company to 'assume the obligations' of the pre-incorporation contract. As s 51(1) contains no such power, it could be argued that s 51(1) only partially implements Art 7.

46. *Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 156 (Ch).

47. See e.g. Robert R Pennington, 'The Validation of Pre-Incorporation Contracts' (2002) 23 Co Law 284.

48. In *Armstrong v Stokes* (1872) LR 7 QB 598, 605, Blackburn J stated that the presumption was so strong that 'we are justified in treating it as a matter of law'.

49. *Paterson v Gandasequi* (1812) 15 East 62; *Armstrong v Stokes* (1872) LR 7 QB 598; *Glover v Langford* (1892) 8 TLR 628.

50. *Die Elbinger AG Für Fabrication von Eisenbahn Materiel v Claye* (1873) LR 8 QB 313 (QB) 317.

51. *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 (CA).

are ambiguous, they are of some importance; but when there is a written contract the terms of which are unambiguous they are of no importance, and it is not true to say that there is a presumption of fact or law that the agent for the foreign principal is personally liable.[52]

Custom

An agent may be held personally liable, or acquire the ability to sue, on a contract due to some form of custom or trade usage, as the following case demonstrates.

Pike, Sons & Co v Ongley and Thornton (1887) LR 18 QBD 708 (CA)

FACTS: Ongley and Thornton (the agents) purported to sell 100 bales of hops to Pike, Sons & Co (the third party), with the contract stating that the sale was 'for and on account of the owner' (the principal). The hops were not delivered to Pike and so Pike sued Ongley and Thornton for non-delivery. Ongley and Thornton contended that they made the contract on behalf of their principal and so they were not personally liable. Pike pointed out that it was customary in the hop trade to impose personal liability on a broker if he did not disclose the identity of his principal at the time the contract was made.

HELD: Pike provided clear evidence of the custom within the hop trade, and so the Court enforced it, thereby making Ongley and Thornton personally liable.

COMMENT: The Court imposed a notable limitation on the ability to give effect to a custom that sought to make an agent personally liable, namely 'whether such a custom contradicts the written contract'.[53] If a custom contradicts, or is inconsistent with, the terms of the contract, then the courts will not enforce it.[54]

Collateral contract

In a typical agency relationship, an agent will effect a contract between his principal and a third party. The agent is not a party to this contract and is not usually liable on it. In certain circumstances, however, the courts may hold that a separate collateral contract exists between the agent and the third party, upon which either party can be liable. The following example demonstrates how a collateral contract might arise.

Eg **COMCORP LTD**

ComCorp wishes to purchase a used car, to be used by a newly appointed manager as a company car. Lee, one of ComCorp's directors, is authorized by the board to purchase a car at an upcoming auction. Lee attends the auction, makes the highest bid for a car, and purchases it on behalf of ComCorp.

A binding contract of sale will exist between the seller of the car (the principal) and ComCorp (the third party). The auctioneer (the agent) will not be a party to this contract and normally

52. *Miller, Gibb & Co v Smith & Tyrer Ltd* [1917] 2 KB 141 (CA) 162–3 (Bray J).
53. (1887) LR 18 QBD 708 (CA) 713 (Fry LJ).
54. See e.g. *Barrow & Bros v Dyster, Nalder & Co* (1884) 13 QBD 635.

cannot be held liable on it.[55] However, a collateral contract will exist between the auctioneer and ComCorp, under which the auctioneer warrants that he has the authority to sell the car and that he has no knowledge of any defects in the seller's title.[56] If the auction is without reserve, then a collateral contract will exist between the auctioneer and the highest bidder, under which the auctioneer agrees to accept the highest bid that is made.[57] The collateral contract also provides that the auctioneer can sue ComCorp for price should it subsequently refuse to purchase the car.[58]

There are a number of examples of collateral contracts that exist in specific circumstances (such as where the agent is an auctioneer). There is, however, a general type of collateral contract that arises in many agency cases, namely a collateral contract containing a warranty of authority.

Breach of warranty of authority

Consider the following example:

Eg COMCORP LTD

ComCorp wishes to obtain a piece of machinery that will be installed in one of its factories and used to fulfil a customer order. ComCorp has difficulty locating the machine, but is told by Christoph that he is an agent for MachineCorp Ltd, a company that owns the piece of machinery in question. Christoph also states that he has authority to lease the machinery to ComCorp. An agreement is drawn up between ComCorp and MachineCorp. It transpires that Christoph does not in fact have authority to lease MachineCorp's machinery. Further, MachineCorp has recently entered insolvent liquidation and the liquidator has sold the machine. ComCorp cannot locate a replacement and so is unable fulfil the customer order.

ComCorp cannot sue MachineCorp, as Christoph acted without authority and his actions have not been ratified. Even if ComCorp could sue MachineCorp, such an action would be pointless because (i) MachineCorp no longer has the machine, so specific performance would not be ordered; and (ii) as MachineCorp is insolvent, it is likely that it has no funds to pay any damages should the action succeed. Christoph is unlikely to be liable on the contract, as the principal was disclosed. However, ComCorp could seek to obtain damages from Christoph on the ground that he breached his warranty of authority.

An agent, through words or conduct, may represent that he has authority[59] to act on behalf of another person (as Christoph did in the ComCorp example). A third party may rely on this representation and act upon it (e.g. by entering into a contract with

55. *Elder Smith Goldsbrough Mort Ltd v McBride* [1976] 2 NSWLR 631.
56. *Peto v Blades* (1814) 5 Taut 657.
57. *Barry v Heathcote Ball & Co (Commercial Actions) Ltd* [2001] 1 All ER 944 (CA).
58. *Williams v Millington* (1788) 1 H Bl 81.
59. A breach of warranty of authority can also arise where an agent wrongly represents that another person has authority (*Chapleo v Brunswick Permanent Building Society* (1881) 6 QBD 696).

the agent's principal).[60] In such a case, the agent is deemed to have warranted that he has the level of authority that he represented to have—this is known as the agent's warranty of authority. If it transpires that the agent did not in fact have the authority that he represented to have, then the agent will be in breach of this warranty of authority, and the third party may commence proceedings against him and obtain damages, as occurred in the following case.

Collen v Wright (1857) 8 E & B 647

FACTS: Gardner (the principal) owned a farm. Wright (the agent) wrongly believed that he had authority to lease the farm to third parties, and so purported to lease the farm to Collen (the third party). Gardner refused to lease the farm to Collen, and so Collen attempted to obtain an order for specific performance requiring Gardner to lease the farm to him. When it was discovered that specific performance would not be granted, Collen commenced proceedings against Wright.

HELD: Collen's action succeeded and he could recover from Wright damages for the loss sustained due to the failed action against Gardner and the monies expended on the farm. Willes J stated:

> I am of the opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue.[61]

COMMENT: Prior to *Collen*, it was not clear whether or not liability could be established for an innocent breach of warranty of authority—this case established that it could. Where, as in *Collen*, the agent acts in an entirely innocent manner, then a claim for breach of warranty of authority is the only claim that the third party can bring against the agent. Where the agent knows that he has no authority, then the third party can alternatively bring an action for deceit. Where the agent's statement claiming that he has authority is negligent, then the agent may be held liable under the principles established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[62] Actions in deceit are notoriously difficult to establish, and an action under *Hedley Byrne* would only succeed if the requisite special relationship existed. Accordingly, an action for breach of warranty of authority may be much easier to sustain.

The basis and nature of liability

For a time, the courts struggled to articulate a consistent basis for the imposition of liability for breach of warranty of authority, with some cases basing liability in contract, whilst others based it in tort. Whilst liability can be tortious where the agent's representation is fraudulent or negligent, liability for breach of warranty of authority is usually based in contract.[63] As Bramwell LJ stated:

> [I]f a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose

60. Note that a contract between the principal and third party need not arise in order for breach of warranty of authority to be established (*British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 (CA)).

61. (1857) 8 E&B 647, 657. 62. [1964] AC 465 (HL).

63. *Dickson v Reuter's Telegram Co Ltd* (1877–78) LR 3 CPD 1 (CA); *Allan & Anderson Ltd v AH Basse Rederi A/S (The Piraeus)* [1974] 2 Lloyd's Rep 266 (CA).

authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction.[64]

In other words, by representing that he has authority, the agent brings into existence a unilateral[65] collateral contract between himself and the third party, under which he impliedly promises that the authority that he professes to have actually exists. By entering into the transaction with the agent, the third party provides consideration for the agent's promise.[66] Should the agent not have the requisite authority, he will be in breach of the collateral contract and will be liable to pay damages to the third party.

A consequence of liability being based in contract is that liability is strict (i.e. proof of fault is not required). An agent will breach his warranty of authority simply by representing a level of authority that does not in fact exist. Whether or not the agent acted innocently is completely irrelevant, as was stated by Willes J in *Collen v Wright* (discussed earlier):

> The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains.[67]

The imposition of strict liability can result in decisions that appear unduly harsh on the agent, as in the following case.

Yonge v Toynbee [1910] 1 KB 215 (CA)

FACTS: Yonge (the third party) claimed that Toynbee (the principal) had defamed him. Toynbee engaged a firm of solicitors (the agent) to defend the action. Before the action could commence, and unknown to the solicitors, Toynbee was certified as insane. The action proceeded and the solicitors delivered a defence in interlocutory proceedings. The solicitors and Yonge then discovered that Toynbee had been certified as insane, upon which Yonge applied to have the defence and all subsequent proceedings struck out. Yonge also contended that the solicitors should personally pay his costs as they had acted without authority.

HELD: It was clear that Toynbee's insanity had terminated the solicitors' authority and, as such, the solicitors had breached their warranty of authority and so were liable to pay damages to Yonge. Buckley LJ stated that liability for breach of warranty of authority 'arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not'.[68]

→ **interlocutory proceedings:** proceedings that are incidental to the main object of the cause of action

The effect of the principal becoming incapacitated is discussed at p 61

In practice, the strict liability nature of the warranty of authority is mitigated by the fact that the courts have imposed numerous limitations concerning when the warranty will be implied, including the following:

- The warranty of authority will not be implied where the third party knew, or ought to have known, that the agent lacked authority[69] (e.g. where the agent warned the third party that he may lack authority,[70] or where a trade custom exists which should have put the third party on notice of the agent's lack of authority).[71]

64. *Dickson v Reuter's Telegram Co Ltd* (1877–78) LR 3 CPD 1 (CA) 5.
65. The collateral contract is unilateral because it only imposes obligations upon the agent.
66. *Collen v Wright* (1857) 8 E&B 647, 658. 67. ibid 657.
68. [1910] 1 KB 215 (CA) 227. 69. *Beattie v Ebury* (1872) LR 7 Ch App 777.
70. *Yonge v Toynbee* [1910] 1 KB 215 (CA).
71. *Lilly, Wilson & Co v Smales, Eeles & Co* [1892] 1 QB 456 (QB).

- The agent will not be liable if he disclaims authority.[72]
- Bowstead & Reynolds contend that the law assumes that where the principal ratifies the unauthorized acts of the agent, then no loss arises. They then go on to to state that, in such a case, 'it may be more plausibly argued that there is no breach of warranty at all'.[73]
- *Dicta* exist which indicate that the warranty of authority will not be implied where the agent has apparent authority.[74] However, the validity of these has been doubted,[75] and it appears that a breach of warranty of authority will occur but, as the third party can enforce the contract against the principal, it follows that no loss will be sustained and so only nominal damages can be claimed.
- Historically, the warranty of authority would not be implied in cases involving a representation of law[76]—the representation would need to be one of fact. However, given that this distinction has been abolished in other areas of contract law (e.g. misrepresentation, mistake), it remains to be seen whether this limitation will be upheld in future cases involving warranties of authority.

Measure of damages

As liability for breach of warranty of authority is based in contract, it follows that damages are usually assessed on a contractual basis, namely 'by considering the difference in the position [the third party] would have been in had the representation been true, and the position he is actually in, in consequence of its being untrue'.[77] In other words, damages will seek to put the third party 'in the position in which he would have been had the warranty been good *viz.* had the representation of authority been true'.[78] The following case demonstrates this in practice.

Simons v Patchett (1857) 7 E&B 568

FACTS: Patchett (the agent) purchased a ship from Simons (the third party) for £6,000. Patchett claimed that he was purchasing the ship on behalf of Rostron & Co (the principal) and that he had authority to purchase the ship. It transpired that Patchett did not have authority to purchase the ship, and Rostron & Co refused to honour the sale. Simons sold the ship to another party for £5,500, and then brought an action against Patchett for breach of warranty of authority.

HELD: Simons' action succeeded. Had Patchett's warranty of authority not been breached (i.e. had his representation as to his authority been true), then Simons would have received £6,000. Accordingly, in order to put Simons in this position, Patchett was ordered to pay damages of £500.

In *Simons*, damages were assessed on the date of the breach, but the courts will abandon this rule where it is appropriate to do so, as occurred in the following case.

72. *Halbot v Lens* [1901] 1 Ch 344 (Ch).
73. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [9-072].
74. See e.g. *Rainbow v Howkins* [1904] 2 KB 322 (KB) 326 (Kennedy J). This view is also shared by Edwin Peel, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015).
75. See e.g. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [9-071]; Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Materials* (4th edn, OUP 2009) 178.
76. *Rashdall v Ford* (1866) LR 2 Eq 750.
77. *Firbank's Executors v Humphreys* (1887) LR 18 QBD 54 (CA) 60 (Lord Esher MR).
78. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [9-078], approved by Dyson LJ in *Singh v Sardar Investments* [2002] EWCA Civ 1706, [2002] NPC 134 [50].

Habton Farms v Nimmo [2003] EWCA Civ 68

FACTS: Nimmo was a bloodstock agent (i.e. an agent who purchases and sells horses on behalf of others). He purchased a horse from Habton Farms (the third party) for £70,000, claiming that the purchase was on behalf of a racehorse owner named Williamson (the principal). Nimmo lacked the authority to purchase horses on Williamson's behalf, and so Williamson refused to take delivery of the horse. Habton Farms refused to sell the horse to anyone else and continued to demand payment. Around four weeks after the horse was supposed to be delivered to Williamson, it contracted peritonitis and had to be destroyed. Habton Farms commenced proceedings against Nimmo to recover the £70,000. Nimmo contended that, at the time of the breach of warranty of authority, the horse was still worth £70,000 and so Habton Farms had not sustained any loss, and so damages should be nominal.

HELD: The Court ordered that Nimmo pay damages of £70,000 to Habton Farms. Auld and Clarke LJJ acknowledged that, if damages were assessed in the usual way, then Habton Farms would only be entitled to nominal damages as, at the date of breach, the horse was still worth £70,000.[79] The majority decided that assessing damages at the date of breach was not appropriate in this case. Auld LJ stated that:

> [i]f the contract had proceeded, [Habton Farms] would have divested [itself] of the ownership, possession and risk of harm to the horse in return for the price some four weeks before the horse had to be put down. [Habton Farms] should not be in any worse position than it would have been if there had been a contract simply because it transpires that it is entitled to damages for Mr Nimmo's breach of warranty of authority and not to the notional sale price against Mr Williamson.[80]

COMMENT: The obvious question to ask is why the Court took a different approach to that evidenced in *Simons v Patchett*. Auld LJ stated that where a third party accepts the principal's repudiation and sells the goods to another party (as occurred in *Simons v Patchett*), then damages will be assessed on the usual basis. However, where the third party refuses to accept the principal's repudiation and continues to demand payment (as occurred in *Habton Farms*), then the usual method of assessment may not be appropriate.[81] The majority also stressed that Habton Farms' refusal to sell the racehorse to another buyer was caused by Nimmo's breach of warranty of authority.

See CA Hopkins, 'Damages for Breach of Warranty of Authority' (2003) 62 CLJ 559

Tortious liability

Consider the following example:

Eg **COMCORP LTD**

ComCorp engages an agent, BuildQuick Ltd, to erect a building that will be used as office space for ComCorp's employees. The building is completed, but part of the ceiling falls in and injures Elen, an employee of ComCorp. It transpires that the relevant portion of the ceiling was not correctly fitted.

79. [2003] EWCA Civ 68, [2004] QB 1 [61] (Clarke LJ). 80. ibid [127]. 81. ibid.

It is likely that BuildQuick, in failing to correctly fit the ceiling, has acted in a negligent manner. The question that arises is to what extent BuildQuick is liable. Where an agent commits a tort that causes loss to a third party, is the agent liable, or is the principal liable, or are both parties liable?[82]

In many cases involving the tortious acts of agents (especially agents who are also employees), the principal will be vicariously liable for the tortious acts of the agent, but to what extent is the agent also personally liable? The general rule is that where loss or injury is caused to a third party as a result of the tortious act/omission of an agent, then, providing that the agent was acting on behalf of his principal when the act/omission occurred, the agent will be personally liable. This will be so irrespective of whether he was acting within or outside the scope of his authority—it is no defence for the agent to claim that he was acting under the authority of his principal or, as Lord Hoffmann put it '[n]o one can escape liability for his fraud by saying: "I wish to make it clear that I am committing this fraud on behalf of someone else and that I am not to be personally liable."'[83] However, this is not always the case and there are instances where an agent may avoid liability (e.g. where the principal ratifies the tortious act).[84]

The result is that, in many cases, both the principal and agent can be liable, and the third party has the option of suing either, or both. Accordingly, to use our ComCorp example, Elen could sue ComCorp and/or BuildQuick but, given that ComCorp employs her, she might prefer instead to sue BuildQuick alone. Alternatively, if one of the companies were to become insolvent, or was able to avoid liability via an exclusion clause, she would be able to sue the other and claim damages. However, in the case of certain torts, the issue is more complex and the third party's ability to sue the agent may be more difficult, or it may not even be possible.

The tort of deceit

It is well established that an agent can be liable to a third party if he engages in the tort of deceit. The classic definition of this tort was provided by Lord Herschell, who stated that:

> in order to sustain an action in deceit, there must be proof of fraud, and nothing short of that will suffice . . . [F]raud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false.[85]

From this, it follows that an agent who deliberately or recklessly misrepresents his authority can be liable to a third party in deceit.[86] However, the courts are not quick to conclude that fraud has occurred and clear evidence of fraud will be required—'[f]raud is a serious allegation and therefore the cogency of evidence required to discharge the burden of proof must reflect the seriousness of the charge.'[87] It is also important to note that the principal's knowledge or recklessness will not be projected onto the

82. Many ordinary principles of the law of torts apply to agents in the normal way. Students may therefore wish to consult a textbook on the law of torts for more information on the torts discussed in this section.
83. *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2002] UKHL 43, [2003] 1 AC 959, [22].
84. See e.g. *Hull v Pickersgill* (1819) 1 B&B 282. Note that, clearly, not all tortious acts can be ratified.
85. *Derry v Peek* (1889) 14 App Cas 337 (HL) 374.
86. *Polhill v Walter* (1832) 3 B&Ad 114.
87. *Maersk Sealand v Far East Trading Côte D'Ivoire* [2004] EWHC 2929 (Comm) [8] (Nigel Teare QC).

agent. Accordingly, if an agent repeats a representation made by his principal, and the principal knows the representation to be untrue, but the agent does not, then the agent will not be liable in deceit.[88]

Negligent misrepresentation

It is also clear that an agent can be found liable if he negligently misrepresents his authority. It is important to distinguish between common law negligent misrepresentation (known as negligent misstatement) and statutory negligent misrepresentation under the Misrepresentation Act 1967.

Negligent misstatement

The leading case on negligent misstatement, namely *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[89] established that, in order for negligent misstatement to arise, a duty of care needed to exist. Lord Morris stated that 'if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise'.[90] It follows that an agent will only be liable if he owed a duty of care to the third party and, as Lord Morris' statement indicates and as future courts have made clear, this will depend upon whether the agent has assumed a responsibility towards the third party,[91] as occurred in the following case.

Smith v Bush [1990] 1 AC 831 (HL)

FACTS: Smith (the third party) applied to a building society (the principal) for a mortgage to help her purchase a house. The building society engaged Bush (the agent) to survey the house and report on any issues that might affect its value. Bush failed to notice that the chimneys were not adequately supported and noted in his report that no essential repairs to the property were necessary. The building society provided Smith with a mortgage and she purchased the house. Subsequently, one of the chimneys collapsed and Smith sought damages from Bush.

HELD: The House held that Bush owed Smith a duty of care, which he had breached, and so Bush was liable to pay damages to Smith. Lord Templeman stated:

> [B]y obtaining and disclosing a valuation, a mortgagee does not assume responsibility to the purchaser for that valuation. But in my opinion the valuer assumes responsibility to both mortgagee and purchaser by agreeing to carry out a valuation for mortgage purposes knowing that the valuation fee has been paid by the purchaser and knowing that the valuation will probably be relied upon by the purchaser in order to decide whether or not to enter into a contract to purchase the house.[92]

As the courts will have regard to all the circumstances of the case, it follows that determining and predicting whether or not an agent has assumed a responsibility towards a third party is not always an easy task. The courts have attempted to provide guidance

88. *Armstrong v Strain* [1952] 1 KB 232 (CA). 89. [1964] AC 465 (HL). 90. ibid 502–3.
91. See e.g. *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL); *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL).
92. [1990] 1 AC 831 (HL) 847.

by highlighting certain factors that should be taken into account, and these have been usefully collated by Sir Brian Neill in *BCCI (Overseas) Ltd v Price Waterhouse*:[93]

- The precise relationship between the adviser and advisee.
- The precise circumstances in which the advice or information or other material came into existence. Any contract or other relationship with a third party will be relevant.
- The precise circumstances in which the advice or information or other material was communicated to the advisee, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It will be necessary to consider the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee, and the reliance in fact placed on it.
- The presence or absence of other advisers on whom the advisee would or could rely.
- The opportunity, if any, given to the adviser to issue a disclaimer.

What is clear is that the courts are not quick to find that a duty of care exists between an agent and third party. As Nicholls VC stated:

> [C]aution should be exercised before the law takes the step of concluding, in any particular context, that an agent acting within the scope of his authority on behalf of a known principal, himself owes to third parties a duty of care independent of the duty of care he owes to his principal. There will be cases where it is fair, just and reasonable that there should be such a duty. But, in general, in a case where the principal himself owes a duty of care to the third party, the existence of a further duty of care, owed by the agent to the third party, is not necessary for the reasonable protection of the latter. Good reason, therefore, should exist before the law imposes a duty when the agent already owes to his principal a duty which covers the same ground and the principal is responsible to the third party for his agent's shortcomings.[94]

Misrepresentation Act 1967

Statutory negligent misrepresentation derives from s 2(1) of the Misrepresentation Act 1967. However, s 2(1) only applies where 'a person has entered into a contract after a misrepresentation has been made to him by another party thereto', meaning that liability can only be imposed on the parties to the contract. In the majority of cases, the agent will not be a party to the contract and so no liability under s 2(1) will lie.[95] However, if the agent is a party to the contract, then liability under s 2(1) can be imposed.

Conversion

The tort of conversion occurs where a person intentionally[96] deals with goods in a manner that is inconsistent with another person's possession, or in a way that serves to deny another person's right to immediate possession of the goods. Accordingly, if an agent deals with goods belonging to a third party in a manner that is inconsistent with that third party's rights of possession, then the tort of conversion will have been

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93. [1998] BCC 617 (CA) 634–5.
94. *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560 (Ch) 571.
95. *Resolute Maritime Inc v Nippon Kaiji Kyokai* [1983] 1 WLR 857 (QB).
96. It should be noted that conversion requires an intentional act—it cannot be committed by omission (*Ashby v Tolhurst* [1937] 2 KB 242 (CA)).

committed, unless such dealing has been authorized by that third party. Examples of the types of activity that can amount to conversion include an agent selling goods without the true owner's consent,[97] or an agent refusing to provide goods to a person who has the right to immediate possession of the goods upon demand.[98]

As the following case demonstrates, conversion is a strict liability tort and so an agent can still be liable if he obtained the goods from the principal and reasonably believed that the principal was the true owner of the goods.

Cochrane v Rymill (1879) 40 LT 744 (CA)

FACTS: Peggs (the principal) hired a number of cabs from Cochrane (the third party). Peggs instructed an auctioneer, Rymill (the agent), to sell the cabs at auction. Rymill was unaware that Peggs did not own the goods and had no right to sell them. Rymill took possession of the goods and sold them. He deducted his commission and expenses and gave the balance to Peggs. Cochrane discovered what had occurred and commenced proceedings against Rymill.

HELD: The Court held that Rymill had converted Cochrane's goods and so was ordered to pay damages. The fact that Rymill was unaware of Peggs' lack of title was irrelevant.

COMMENT: This case clearly demonstrates that liability for conversion is strict. However, Bramwell LJ was keen to point out that if Rymill had not held possession or control of the cabs, then conversion would not have occurred. He stated:

> Supposing a man were to come into an auctioneer's yard, holding a horse by the bridle and to say, 'I want to sell my horse: if you will find a purchaser I will pay commission.' And the auctioneer says: 'Here is a man who wants to sell a horse; will anyone buy him?' If he then and there finds him a purchaser and the seller himself hands over the horse, there could be no act on the part of the auctioneer which could render him liable to an action for conversion.[99]

Subsequent cases have further mitigated the strictness of the tort. For example, an agent who, in good faith, receives or holds goods on behalf of the principal, but does not deal with them, will not have committed the tort of conversion.[100] Similarly, conversion will not occur where an agent, who holds goods belonging to another, refuses to hand over the goods until the legal position has been determined.[101]

Defamation

An agent who repeats or passes on a defamatory statement made by his principal will, along with the principal, be liable to the defamed person. For example, s 1(4) of the Defamation Act 1996 provides that '[e]mployees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it'. As defamation is a tort of strict liability, it matters not that the agent (or the principal) was not aware that the statement was defamatory.

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97. *Consolidated Co v Curtis & Son* [1892] 1 QB 495 (QB).
98. *National Mercantile Bank v Rymill* (1881) 44 LT 767 (CA).
99. (1879) 40 LT 744 (CA) 746.
100. *Caxton Publishing Co v Sutherland Publishing Co* [1939] AC 178 (HL).
101. *Alexander v Southey* (1821) 5 B&A 247.

The defences contained within the Defamation Acts of 1952, 1996, and 2013 are available to an agent. Certain defences, notably qualified privilege, will not apply where the statement was made with malice.[102] However, providing that the agent did not act with malice, then these defences will be available to him notwithstanding that his principal did act maliciously.[103]

CONCLUSION

In a typical agency relationship, where the principal is disclosed and where all the parties involved perform their obligations, no legal relationship will generally exist between the agent and third party, save the relationship created by the agent's warranty of authority, which will be of no importance providing that the agent acts within his authority. However, as has been discussed, there are numerous situations where this typical situation is displaced and the agent and/or third party can become liable on the contract and can sue the other. For all parties involved, it is crucial to understand what circumstances can give rise to such liability, so that it can be avoided.

Having discussed the legal relationships between the principal, agent, and third party, Chapter 9, the final chapter on the law of agency, moves on to discuss the various ways that a relationship of agency can be terminated, and the consequences of termination.

PRACTICE QUESTIONS

1. 'The courts have failed to devise a satisfactory justification for the imposition of liability of an agent who purports to act for another, but is in fact acting on his own behalf.'
Discuss.

2. Discuss whether or not the agent can sue, or be sued, in the following cases:

- Lee, a director of ComCorp, enters into a contract of sale under which goods are to be purchased from TechCorp plc. However, Lee does not disclose whether he is acting on behalf of another. He signs the contract 'Lee, a director and agent'. TechCorp discovers that Lee is a director of ComCorp and refuses to provide the goods, as it has had prior business dealings with ComCorp that have soured the relationship between the two companies.
- ComCorp wish to rent some office space. It contracts with John, who tells them that he owns a building that would be suitable. It transpires that John does not own the building, and the building is in fact owned by a company, of which John is managing director. Further, John does not have express actual authority to lease out the building, although he has done so in the past with the board's acquiescence. After discovering this, ComCorp find an alternative building that is more suitable, and informs John that it does not consider itself bound by the contract, and will not be honouring it.
- ComCorp wishes to purchase office furniture. It negotiates with Françoise, an agent based in London who is acting on behalf of OfficeMart SA, a French company that supplies office furniture. A contract of sale is finalized, which Françoise signs 'Françoise, on behalf of OfficeMart SA'. It transpires that Françoise used to act as agent for OfficeMart, but the company was dissolved three months before. Françoise bought up much of OfficeMart's stock and was planning on selling it to ComCorp, without informing them that the company no longer existed.

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102. Defamation Act 1996, s 15(1) and Sch 1.
103. *Egger v Viscount Chelmsford* [1965] 1 QB 248 (CA).