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An introduction to the law of agency

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INTRODUCTION

As has been correctly stated, '[c]ommerce would literally grind to a halt if businessmen and merchants could not employ the services of factors, brokers, forwarding agents, estate agents, auctioneers and the like and were expected to do everything themselves'.¹ For many businesses, the use of agents is invaluable, and significant areas of commercial activity could not continue without the existence of agency. The law of agency is a complex, subtle, and often misunderstood subject, but an understanding of its operation is vital, especially given the extent to which the law of agency can affect all areas of the law, commercial or otherwise. It should also be noted that the law of agency is not only important in relation to business-to-business transactions, but can be of crucial importance in relation to consumer transactions, as consumers will often bargain and enter into contracts with agents.

Chapters 3 to 9 will provide readers with a thorough understanding of the law of agency, with this chapter discussing several basic foundation issues relating to the law of agency, such as the sources of agency law and the various types of agent that exist. However, before any aspects of the law of agency can be discussed, it is vital that students understand exactly what the specific legal meaning of 'agency' is.

1. Basil S Markesinis and Roderick Munday, *An Outline of the Law of Agency* (4th edn, Butterworths 1998) 4.

What is agency?

As Bowstead & Reynolds state, '[i]t is customary to begin a systematic treatise with some sort of definition of its subject-matter'.² Unfortunately, whilst many definitions of agency exist, the concept is 'notoriously slippery, and difficult to define'.³ The words 'agent' and 'agency' are used in common parlance (e.g. estate agent, travel agent, recruitment agency, etc), but they have a specific legal meaning that is often at odds with their everyday usage. As Lord Herschell stated, '[n]o word is more commonly and constantly abused than the word "agent"'.⁴ The following two definitions provide clear and succinct accounts of the concept of agency:

★ Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.⁵

Agency is the relationship arising where one person, the principal, ... appoints another, the agent, ... to bring about, modify, or terminate legal relations between the principal and one or more third parties.⁶

From these definitions, it can be seen that a typical agency relationship will involve three parties, namely:

1. the principal;
2. the agent; and
3. a third party (or third parties).

Figure 3.1 demonstrates the operation of a typical agency relationship.

In order to better understand the relationship between these three parties, consider the example of ComCorp.

Eg

COMCORP LTD

In order to raise capital, the directors of ComCorp decide that a rare painting that belongs to ComCorp (the principal) will be sold at auction. The auctioneer, David (the agent), is instructed not to sell the painting for less than £50,000. David will receive commission of 2 per cent of the sale price. The highest bid is made by Tom (the third party), a local antique dealer, who bids £57,000. The hammer falls and the sale is made. David receives his commission of £1,140, and drops out of the transaction. A binding contract of sale exists between ComCorp and Tom.

This discussion indicates that a number of key characteristics will usually be present in a typical agency relationship:

- A relationship of agency will usually arise due to the express consent of the principal and agent, and the relationship will usually be a contractual one. However, implied and non-consensual agency relationships can exist, and it is not normally necessary for a contract to exist for a relationship of agency to arise.

2. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [1-002].

3. Roderick Munday, *Agency: Law and Principles* (2nd edn, OUP 2013) 1.

4. *Kennedy v De Trafford* [1897] AC 180 (HL) 188.

5. American Law Institute, *Restatement of the Law*...

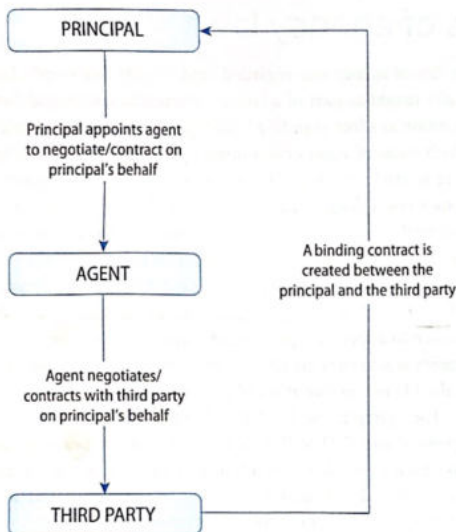


FIGURE 3.1 A typical agency relationship

- The agent will be appointed to act on behalf of his principal. The activities involved will differ from agent to agent, but will usually involve the agent affecting the legal position of the principal (e.g. by entering into contacts on his behalf with third parties).
- The agent's ability to affect the legal position of his principal will usually be limited in some way (in the ComCorp example, the reserve price attached to the painting constituted a limitation). This is known as the agent's authority and it is central to the agency relationship.
- An agency relationship is a fiduciary one, meaning that the principal and agent will owe each other a number of duties and obligations. The agent will also usually be remunerated for his services.
- Once the agent has completed his task, he will usually drop out of the transaction, leaving a binding agreement in place between his principal and the third party. It may be the case that the agency agreement will also then terminate, along with the actual authority of the agent.

All of the above characteristics are discussed in detail in subsequent chapters. It should be noted that the use of the word 'agent' in a person's job title or description will not necessarily mean that the person is an agent within the strict legal meaning of the term. Similarly, a person without the term 'agent' in his job description may still be an agent—for example, a company director will be an agent for the company for which he works, and a partner in a partnership will act as an agent for the firm.⁷

Sources of agency law

Historically, the law of agency was regarded (and taught) as a stand-alone legal topic. Today, it is usually taught as part of a larger commercial law course, but it is still deserving of recognition as a free-standing legal topic due to the prevalence of agents and the extent to which issues of agency can impact upon cases involving other areas of the law. It is therefore worth briefly explaining the various sources of agency law.

Domestic agency law is dominated by case law, with many of the fundamental principles established by the courts in the eighteenth and nineteenth centuries (which may explain why many students find agency cases difficult to understand). However, statute does have a role to play, with perhaps the most recent development of note being the enactment of the Commercial Agents (Council Directive) Regulations 1993,⁸ which aims to provide protection to a specific type of agent, namely the commercial agent.

The law of agency is also strongly affected by supranational laws and rules. The UK's membership of the EU means that it is obliged to enforce and implement EU laws relating to agents. For example, the 1993 Regulations mentioned earlier were enacted in order to implement an EC Directive that aimed to offer greater protection to self-employed agents.⁹ Such laws will also result in a harmonization of agency law amongst EU Member States (indeed, the agency laws of many countries have notable similarities). In 1983, UNIDROIT¹⁰ adopted the Convention on Agency in the International Sale of Goods, which aimed to harmonize the rules relating to agency contracts that involved the international sale of goods. At the time of writing, the Convention is not in force, as it does not have the required number of ratifications.¹¹ The UK has not ratified the Convention, so its provisions currently have no domestic force.

Finally, it should be noted that although the law of agency constitutes a legal topic in its own right, many other areas of the law also affect the activities of agents. As relationships of agency are commonly created via contract and the agent often has the power to contractually bind his principal to a third party, it follows that the law of contract has a strong role to play. An agent whose acts are negligent may find himself liable in tort. It may even be the case that the acts of an agent can result in criminal liability being imposed upon himself and/or his principal. An understanding of the law of agency can help in obtaining a more complete understanding of many other areas of the law.

Types of agent

There are several special classes and classifications of agent that will be encountered in this text and in agency cases and legislation. It is therefore important to understand the function of these agents and their role within a commercial organization.

8. SI 1993/3053.

9. Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [2006] OJ L382/17.

10. UNIDROIT (the International Institute for the Unification of Private Law) is an independent inter-governmental body that aims to study methods to modernize and harmonize private laws (notably commercial laws) between states and groups of states.

11. Ten states are required to ratify the Convention for it to come into effect. At the time of writing, only five states (France, Italy, Mexico, The Netherlands, and South Africa) have ratified it.

It should be noted that several of these classes and classifications of agent have fallen out of usage and are no longer relevant to modern commercial agencies but, as they are referred to in many of the key agency cases, understanding their function is still useful.

General and special agents

A general agent is vested with authority to act for the principal in relation to the general business of the principal, or is vested with general authority to act on behalf of the principal in relation to certain trades or transactions. Conversely, a special agent's authority is usually narrower and is limited to a single subject matter or transaction. Although the distinction between general and special agents has lost much of its importance today, it has still been used occasionally to determine the scope of an agent's apparent authority.¹²

↪ An agent's apparent authority is discussed at p 92

Factors and brokers

The term 'factor', which was used regularly in nineteenth-century legislation and case law, refers to an agent who is engaged to sell goods on behalf of his principal, with the crucial characteristic being that the factor would hold or control the goods in question and would often sell them in his own name without disclosing the name of his principal.¹³ This non-disclosure meant that the factor was often invested with apparent authority to sell the goods, even if the sale had not been authorized by the principal. Today, the term 'factor' is rarely used in its original sense¹⁴ and has been replaced by the broader term 'mercantile agent', which is defined as an 'agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods'.¹⁵

↪ Sales of goods by mercantile agents are discussed in more detail on p 276

A broker is similar to a factor, in that he negotiates contracts for the sale of goods between his principal and third parties. The difference lies in the fact that the broker will not usually have control or possession of the goods (he is unlikely ever to see the goods) and he should not sell the goods in his own name.¹⁶

Del credere agents

Like a factor or broker, a *del credere* agent will negotiate contracts between his principal and third parties. In addition, a *del credere* agent will, in return for increased commission/remuneration, also act as guarantor for the obligations of the third party. Thus, if a *del credere* agent negotiates a contract for the sale of goods between his principal and a third party, and the third party fails to pay for the goods (e.g. because it becomes insolvent), the *del credere* agent will become liable to pay the purchase price to the principal.

↪ *del credere*: Italian for 'of belief' or 'of trust'

12. See e.g. *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717 (HL).

13. *Baring v Corrie* (1818) 2 B & Ald 137. The factor will not cease to be a factor if he sells the goods in the name of his principal (*Stevens v Biller* (1884) 25 ChD 31 (CA)).

14. Indeed, today the term is used more commonly to describe the process by which a person or business (the 'factor') purchases receivables from another. Factoring is discussed in Chapter 26.

15. Factors Act 1889, s 1(1).

16. *Baring v Corrie* (1818) 2 B & Ald 137.

Confirming houses

Confirming houses are of considerable importance in relation to international trade, where they can engage in a number of activities. A confirming house may act as agent for an overseas buyer who wishes to purchase goods in a country where the confirming house is based. In such a case, the confirming house may simply arrange for a contract of sale to be created between the overseas buyer and a domestic seller. Alternatively, the confirming house may buy the goods from the domestic seller and sell them on to its overseas principal.¹⁷ Domestic sellers may often be reluctant to deal with overseas buyers, especially if they have never done business before, or little is known about the buyer. In such cases, the confirming house may act as agent for the overseas buyer, but will also enter into a separate collateral contract with the seller, under which it guarantees (or 'confirms') that the buyer will perform its obligations. If the overseas buyer does not perform its obligations, the confirming house will become liable, which will usually involve it having to pay the seller the contractual price of the goods.

Commercial agents

Commercial agents are often appointed to help develop and increase the principal's customer base by locating new customers, introducing them to the principal, and/or helping to effect transactions between them. The principal's revenue increases and, in return, the agent is paid commission for any transactions that take place. However, principals may attempt to exploit the situation at the expense of their agents, as the following example demonstrates.

Eg

COMCORP LTD

The directors of ComCorp Ltd are keen to expand the company's base. Accordingly, ComCorp (the principal) engages Charles (the agent) to locate potential new customers, introduce those customers to ComCorp, and facilitate contracts of sale between ComCorp and these new customers. In return, Charles will be paid commission for each sale made. Charles introduces the directors of ComCorp to a number of new potential customers (the third parties). ComCorp decides to terminate Charles's contract and deal directly with the potential customers, thereby avoiding the need to pay commission to Charles.

That agents may be vulnerable to exploitation by their principals has long been recognized by the courts. For example, Staughton LJ stated 'commercial agents are a down-trodden race, and need and should be afforded protection against their principals'.¹⁸ Such protection was granted with the adoption of EC Directive 86/653,¹⁹ which was implemented by the Commercial Agents (Council Directive) Regulations 1993.

Regulation 1(2) states that '(t)hese Regulations govern the relations between commercial agents and their principals'. It is therefore clear that the Regulations are concerned only with the principal/agent relationship, and

Regulations is to provide certain protections to the commercial agent, although the Regulations do also impose obligations upon commercial agents. These protections and obligations are discussed in Chapter 6. Here, the focus will be on the definition of a 'commercial agent', with reg 2(1) providing that a commercial agent is:



Commercial Agents (Council Directive) Regulations 1993, reg 2(1)

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 and in the name of that principal ...



This seemingly straightforward definition contains a number of key words and phrases that significantly restrict the scope of the Regulations.

'Self-employed'

In order to qualify as a commercial agent, the person must be 'self-employed' (usually referred to in case law as an 'independent contractor'). It follows from this that a person who is an agent by virtue of his employment will not be a commercial agent.

'Continuing authority'

A commercial agent must have *continuing* authority to negotiate on behalf of another person. This does not mean that a commercial agent's authority cannot be subject to any form of time limit, as regs 14 and 15 clearly envisage the possibility of fixed-term commercial agency contracts. However, as the *Poseidon* case demonstrates, the inclusion of the word 'continuing' would appear to indicate that an agent who is engaged to effect a one-off transaction would not have continuing authority, and so would not constitute a commercial agent.



Case C-3/04 *Poseidon Chartering BV v Marianne Zeeschip VOF* [2007] Bus LR 446

FACTS: Poseidon Chartering BV ('Poseidon', the agent) was engaged by Marianne Zeeschip VOF ('Marianne', the principal) to negotiate the charter of a ship from a third party. Poseidon successfully negotiated a charterparty between Marianne and the third party, and received 2.5 per cent of the charter price as commission. From 1994 to 2000, Poseidon also acted as intermediary for the annual renewal of the charterparty and, upon each renewal, received commission. The parties fell out and Marianne terminated the contract between it and Poseidon. Poseidon initiated proceedings, claiming unpaid commission and damages that were owed to it as a commercial agent. Marianne contended that, as Poseidon had only negotiated one contract, it lacked continuing authority and so was not a commercial agent. A preliminary reference was sought from the European Court of Justice.

HELD: Advocate General Geelhoed, delivering the judgment of the Court, stated that:


it is in my view important to distinguish between a situation in which an independent agent has been tasked by its principal to negotiate just one contract, and a situation in

which such an agent has been tasked by its principal to negotiate a contract as well as numerous renewals of the contract. It is clear that the former situation cannot sensibly be interpreted as 'continuing authority'. If an agent responsible for the negotiation of a single contract were to fall within that concept, it would deprive the notion of 'continuing' of all meaning. In contrast, in my view the latter situation . . . must, as a matter of logic, fall within the concept. To my mind, the idea of 'continuing' authority requires simply that the agent be responsible either for negotiating more than one type of contract, or for (re-)negotiating the same contract on more than one occasion.²⁰

'Sale or purchase of goods'

Regulation 2(1) specifies that an agent must have continuing authority to negotiate and/or conclude the sale or purchase of *goods* in order to qualify as a commercial agent. It follows that an agent whose function is to negotiate and/or conclude a contract of services will not be a commercial agent. However, where the agent's activities involve the provision of goods and services, then he may still qualify as a commercial agent, providing that the provision of goods is not considered to be a secondary activity.

The Regulations do not define what constitutes 'goods', but it is clear that the word is to be given a wide interpretation. In certain cases, the lack of a statutory definition has proved problematic, such as in cases involving contracts for the provision of software, where the approach adopted by the courts has been strongly criticized.

 What constitutes a secondary activity is discussed at p 55




St Albans City and District Council v International Computers Ltd [1997] FSR 251 (CA)²¹

FACTS: St Albans City and District Council ('St Albans') purchased from International Computers Ltd ('ICL') a software system that was designed to administer the collection of poll tax. The software incorrectly estimated the population of the local authority's area, with the result that the poll tax rate was set too low and St Albans received £484,000 less than it ought to have. St Albans also had to pay an additional £685,000 in precept payments to Hertfordshire County Council. St Albans sought compensation from ICL.

HELD: The Court considered whether or not software amounted to goods in order to determine whether ICL had breached the implied term that goods should be reasonably fit for their purpose. Sir Iain Glidewell stated that, as discs were certainly goods, software that was delivered on a disc would also amount to goods. He also stated that a software program, in itself, does not amount to goods.

 See Sarah Green and Djakhongir Saidov, 'Software as Goods' [2007] JBL 161

 The implied term that goods should be reasonably fit for purpose is discussed at p 361

'Negotiate on behalf of the principal'

An agent who does not have authority to enter into contracts on behalf of his principal can still qualify as a commercial agent, as reg 2(1) covers those who have 'continuing authority to negotiate the sale or purchase of goods on behalf of another person (the "principal")'. Unfortunately, neither the Regulations nor the Directive define what type of activities amount to 'negotiation'. Bearing this in mind, consider this scenario.

20. [2007] Bus LR 446, 452.

21. It should be noted that this case related to the direct sale of goods under the Sale of Goods Act 1979 and not to contracts of sale effected through an agent. However, the principles established would also apply to cases involving the sale of goods effected through an agent.

ComCorp engages an agent, Claire, to locate potential new customers and introduce them to ComCorp. ComCorp will then negotiate directly with these potential customers with a view to entering into contracts with them. A dispute arises and ComCorp terminates its contract with Claire. Claire contends that she is due commission as a commercial agent, but ComCorp contends that, as she did not have the authority to negotiate (merely to introduce), she is not a commercial agent.

Do agents who have authority merely to make introductions (usually known as canvassing or marketing agents) fall within the definition in reg 2(1), or does the agent need to have authority to engage in actual bargaining? The issue has not been conclusively settled. Early cases adopted a rather restrictive approach based on the dictionary definition of the word 'negotiate',²² but more recent cases appear to favour the wider view that an agent need not have the authority to engage in actual bargaining in order to constitute a commercial agent.



***PJ Pipe & Valve Co Ltd v Audco India Ltd* [2005] EWHC 1904 (QB)²³**

FACTS: Audco India Ltd ('Audco', the principal) engaged PJ Pipe & Valve Co Ltd ('PJ', the agent) (i) to promote Audco's capability and reputation as a valve manufacturer; (ii) to promote Audco to potential customers to ensure that Audco would be designated as an approved vendor; and (iii) to introduce potential customers to Audco and provide advice to Audco on the preparation of quotations. PJ did not have authority to agree prices or terms with any potential customers—potential customers would deal directly with Audco. A dispute arose and PJ sought commission owed under the 1993 Regulations. Audco argued that, as PJ could not bargain or agree terms, it did not have the authority to negotiate and so was not a commercial agent.

HELD: PJ was a commercial agent. Fulford J, referring to the Directive that was implemented by the 1993 Regulations, stated that:

The purpose of the Directive . . . was to provide protection to agents by giving them a stake in the goodwill which they have generated for the principal, and as a result the courts should avoid a limited or restricted interpretation of the word 'negotiate' that would exclude agents who have been engaged to develop the principal's business in this way, and who successfully generated goodwill for the manufacturer, to the latter's benefit after the agency terminated. In the result, I conclude PJV acted as a commercial agent for the purposes of the Regulations, notwithstanding their lack of authority to progress agreement on commercial terms or prices.²⁴

COMMENT: The wider approach evidenced in *PJ Pipe* has been widely welcomed as giving effect to the purpose of the Directive. However, the lack of a uniform definition of 'negotiate' is still problematic. As one commentator has stated:

the failure to define the term 'negotiate' in the Directive has led to divergences in the interpretation of Community law before the national courts. The courts have encountered

22. See *Parks v Esso Petroleum Co Ltd* [2000] ECC 45 (CA).

23. See also *Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd* [2000] CLC 1397 (QB); *Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd* [2008] EWHC 767 (Ch), [2008] 2 Lloyd's Rep 108; *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), [2009] 2 Lloyd's Rep 599.

24. [2005] EWHC 1904 (QB), [2006] EU L.R. 368 [155].

difficulties when faced with different types of commercial arrangements to reach decisions on the scope of the Directive and implementing regulations. This has resulted in a degree of uncertainty in commercial practice which, it is submitted, could have been avoided had the Directive included a definition of the term.²⁵

Not only must the agent have authority to negotiate, but he must also negotiate on behalf of another person, namely the principal. It follows that if a person acts on his own behalf, he will not be a commercial agent, as the following case demonstrates.



**AMB Imballaggi Plastici SRL v Pacflex Ltd [1999]
CLC 1391 (CA)**

FACTS: AMB Imballaggi Plastici SRL ('AMB', the principal) manufactured products that were sold in England by Pacflex (the agent). Pacflex could have sold the products on a commission basis, but instead chose to purchase the products from AMB, mark them up, and sell them on. AMB issued proceedings against Pacflex for non-payment of goods and Pacflex counterclaimed that it was owed commission under the 1993 Regulations.

HELD: Pacflex was not a commercial agent under the 1993 Regulations, and so its counterclaim was dismissed. Waller LJ stated:

If a person buys or sells himself as principal he is outside the ambit of the regulations. That is so because in negotiating that sale or purchase he is acting on his own behalf and not on behalf of another. All the regulations point in the direction of the words 'on behalf of' meaning what an English court would naturally construe them as meaning. The other person on whose behalf the intermediary has authority to negotiate the sale or purchase of goods is called the 'principal'; the duties are consistent with true agency and not with a buying and reselling; 'remuneration' is quite inconsistent with 'mark-up', particularly 'mark-up' within the total discretion of the reseller. Accordingly, as it seems to me, Pacflex never in fact acted as an agent negotiating on behalf of another at all.²⁶

COMMENT: Where a person (such as a distributor) purchases goods from another, marks them up, and sells them on, he is unlikely to be acting as a commercial agent. However, the presence of a mark-up will not, in itself, deny the existence of a commercial agency relationship.²⁷

'Negotiate and conclude on behalf of and in the name of the principal'

Regulation 2(1) differentiates between (i) an agent who is granted authority to negotiate on behalf of his principal, but not to enter into contracts; and (ii) an agent who has authority to 'negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal'. The issues concerning the terms 'negotiation' and 'on behalf of' discussed in the previous section will apply to both types of agents, but in relation to agents who have authority to negotiate and conclude contracts, a further requirement exists, namely that the agent must be acting 'in the name of' the principal.

25. Caterina Gardiner, 'The EC (Commercial Agents) Directive: Twenty Years After its Introduction: Divergent Approaches Still Emerge From Irish and UK Courts' [2007] JBL 412, 420.

26. [1999] CLC 1391 (CA) 1394.

27. *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd* [2002] EWCA Civ 288. [2002] CLC 913 [36]-[37].

A person who has authority to negotiate and conclude contracts will not be a commercial agent if he does not do so in the name of his principal.

Where the agent acts on behalf of a principal whose existence and identity have been disclosed to the third party at or before the time of the transaction,²⁸ then no problem arises and the agent will most likely be acting in the name of his principal. Can the same be said of an agent who does not disclose the existence and/or identity of his principal? If an agent has not disclosed the existence of a principal,²⁹ then it cannot be said that the agent is acting in the principal's name. Difficulties arise when the agent has disclosed the existence of a principal, but has not disclosed the principal's identity.³⁰ No clear authoritative answer exists, but it has been suggested that, in such a case, the agent will be acting in the principal's name, providing that the agent has not undertaken personal liability on the contract.³¹

Exclusions

Regulation 2(1) specifies that three types of person will not be classified as a commercial agent. First, 'a person who, in his capacity as an officer of a company or association, is empowered to enter into commitments binding on that company or association' will not be a commercial agent. It follows that directors or company secretaries acting on behalf of their companies will not be acting as commercial agents, although the company itself can act as a commercial agent, providing that it is an independent contractor.³² Second, 'a partner who is lawfully authorized to enter into commitments binding on his partners' will not be a commercial agent.³³ Third, 'a person who acts as an insolvency practitioner' will not be a commercial agent.

Even if a person is a commercial agent within the meaning of reg 2(1), he may still be excluded from the scope of the Regulations. For example, reg 2(2) provides that the Regulations will not apply to (i) commercial agents whose activities are unpaid; (ii) commercial agents when they operate on commodity exchanges, or in the commodity market; and (iii) the Crown Agents for Overseas Governments and Administrations.

Finally, reg 2(3) and (4) provide that the Regulations will not apply to persons 'whose activities as commercial agents are to be considered secondary'.³⁴ In order to understand whether a commercial agent's activities are secondary, recourse should be first had to Sch 1, para 2 of the Regulations, which describes an arrangement between principal and agent by reference to three criteria:

1. the business of the principal is the sale or purchase of goods of a particular kind; and
2. the goods concerned are such that are (i) normally individually negotiated and concluded on a commercial basis, and (ii) procuring a transaction on one occasion is likely to lead to further transactions in those goods with that customer on future occasions, or to transactions in those goods with other customers in the same geographical area or among the same group of customers; and

28. Such a principal is usually known as a 'named principal'.

29. Such a principal is usually known as an 'undisclosed principal'.

30. Such a principal is usually known as an 'unnamed principal'.

31. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [11-019].

32. *Bell Electrical Ltd v Aweco Appliance Systems GmbH & Co KG* [2002] EWHC 872 (QB), [2002] CLC 1246.

33. Like a company, a partnership may act as a commercial agent, providing that it is an independent contractor.

34. Commercial Agents (Council Directive) Regulations 1993, reg 2(3). For a more detailed discussion on when activities are secondary, see Roderick Munday, *Agency: Laws and Principles* (OUP 2010) 27-33.

3. accordingly, it is in the commercial interests of the principal in developing the market in those goods to appoint a representative to such customers with a view to the representative devoting effort, skill, and expenditure from his own resources to that end.

Where it can reasonably be taken that the primary purpose of the arrangement between the agent and principal does not meet these three criteria, then the activities of the commercial agent will be considered secondary and the Regulations will not apply.³⁵ Schedule 1, paras 3 and 4 then provide indicative factors that could indicate whether an arrangement falls within Sch 1, para 2, and Sch 2, para 5 provides a rebuttable presumption that certain persons (e.g. consumer credit agents) will not fall within para 2.

Moore-Bick LJ provided a more accessible overview of the purpose of the paragraphs in Schs 1 and 2, namely to:

distinguish between those persons falling within the definition of commercial agent in reg 2(1) who are engaged primarily to carry out the functions of a commercial agent, that is, generating customers, obtaining repeat orders, and creating and developing a market for their principal's goods, and those who are primarily engaged for some other purpose but who incidentally provide some or all of those services. In the latter case, their activities can properly be described as secondary.³⁶

CONCLUSION

Despite its importance, the law of agency is an often-misunderstood subject and its importance is often not appreciated. Put simply, many areas of business would find it impossible to continue without the ability to engage agents, whilst commerce overall would become significantly more burdensome and inefficient. An understanding of commercial law cannot be complete without a firm appreciation and sound grasp of the law of agency.

There are many types of agents engaging in countless forms of activity, but, in recent years, one type of agent has acquired a new-found importance, namely the commercial agent. Commercial agents have long been recognized in continental Europe, and the UK's formal recognition of commercial agents through the Commercial Agents (Council Directive) Regulations 1993 was a significant development in the law of agency. As is discussed in subsequent chapters, the 1993 Regulations pervade many areas of the law of agency.

Having discussed what agency is and how a typical agency relationship might operate, Chapter 4 moves on to consider the various ways through which an agency relationship can be created.

PRACTICE QUESTIONS

1. Define the following terms:

- agency;
- principal;
- factor;
- broker;
- *del credere* agent;
- canvassing agent.

35. *ibid* Sch 1, para 1.

36. *Edwards v International Connection (UK) Ltd* [2006] EWCA Civ 662 [17].