6 Relations between principal and agent

- The duties of an agent
- The rights of an agent

INTRODUCTION

Having discussed how an agency relationship can be created and the authority of an agent, Chapters 6, 7, and 8 examine the legal relationships that can exist between the three parties involved in a typical legal relationship, namely the relationship between principal and agent, the relationship between principal and third party, and the relationship between agent and third party.

This chapter discusses the legal relationship that exists between the principal and agent and, in particular, focuses on the duties that each party owes the other, with Figure 6.1 providing an overview of the various duties. The precise scope and content of these duties will depend upon a number of factors, including whether the agency is contractual or gratuitous, whether the agent is acting within the scope of his authority, whether the agent is a specific type of agent upon whom extra duties are placed (e.g. a company director or a solicitor), and whether the agent is a commercial agent or not. This chapter begins by discussing the duties that an agent owes to his principal.

The duties of an agent

In the case of *Armstrong v Jackson*,[1] McCardie J stated that '[t]he position of principal and agent gives rise to particular and onerous duties on the part of the agent, and the high standard of conduct required of him springs from the fiduciary relationship

1. [1917] 2 KB 822 (KB).

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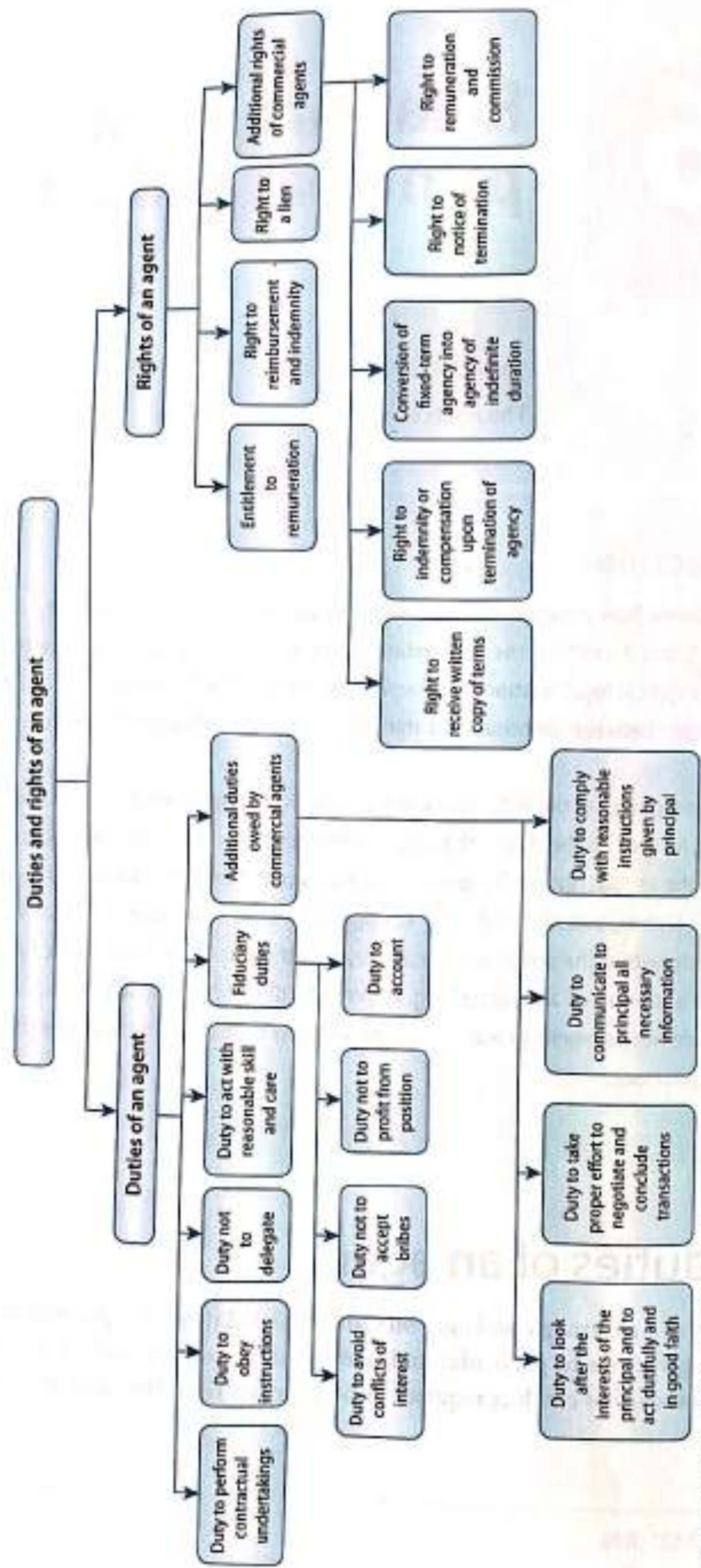

FIGURE 6.1 Duties and rights of an agent

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between his employer and himself'.[2] Although the fiduciary duties of an agent are fundamental, an agent will also be subject to a number of duties that can derive from different sources:

- If the agency is contractual, then the contract of agency between the agent and principal will be likely to impose specific duties upon the agent.
- Certain types of agent are subject to specific duties. For example, company directors (who are agents of their company) are subject to the general duties found in ss 171–177 of the Companies Act 2006. Letting agents are subject to a duty to publicize their fees.[3]
- Commercial agents are subject to specific statutory duties found in reg 3 of the Commercial Agents (Council Directive) Regulations 1993.

The law of agency also imposes a number of additional duties upon agents, but this gives rise to a problem. Agents come in numerous forms and the sheer breadth of agency relationships makes it difficult to draft specific duties applicable to agents. Accordingly, as will be seen, the duties imposed upon agents by the law of agency are couched in very general terms. The common law duties of agents can be split into two broad classifications, as demonstrated in Table 6.1.

TABLE 6.1 The duties of an agent

Duties of performance	Fiduciary duties
• Duty to perform contractual undertakings • Duty to obey instructions • Duty not to delegate • Duty to act with reasonable skill and care	• Duty to avoid conflicts of interest • Duty not to profit from position • Duty not to accept bribes • Duty to account

All of these duties are discussed, along with the specific duties that commercial agents owe, beginning with perhaps the most fundamental duty of a contractual agent, namely the duty to perform his contractual undertakings.

Duty to perform contractual undertakings

An agent who has entered into a bilateral contract with his principal is under a duty to comply with the terms of that contract, and, if he fails to perform or performs inadequately, he will be in breach of contract.

Fraser v BN Furman (Productions) Ltd [1967] 1 WLR 898 (CA)

FACTS: BN Furman (Productions) Ltd ('BNF', the principal) engaged Miller Smith & Partners ('Miller', the agent) to replace its various insurances. Subsequently, one of BNF's employees (Fraser) sustained serious injuries during the course of her employment and successfully

2. ibid 826.

3. Consumer Rights Act 2015, ss 83–88.

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sued BNF in negligence for damages. Had the required insurances been in place, BNF would have been covered for the loss, but Miller had failed to obtain the relevant insurances. Accordingly, BNF sought an indemnity from Miller for the damages and legal costs it had paid to Fraser.

HELD: In failing to obtain the required insurances, Miller was found to be acting in breach of contract, and so was ordered to indemnify BNF for the amounts it had paid to Fraser.

COMMENT: An interesting point arose in this case. It was accepted by BNF and Miller that if the insurances had been taken out, the relevant policy would contain a term stating that the principal would 'take reasonable precautions to prevent accidents and disease'. Miller argued that, as BNF had acted negligently, this term would have been breached, and the insurance company would not have paid out. Consequently, it was argued that BNF did not actually sustain a loss due to Miller's failure to perform. This argument failed because the court did not believe that the insurance company would have refused to pay out, but the Court did not dismiss the idea that there had to be a causal connection between the failure to perform and the loss sustained by the principal.

The duty to perform contractual undertakings will also be breached if the agent exceeds his authority. Thus, a breach of duty occurred where a solicitor was instructed not to compromise a legal action, but did so anyway on the ground that it was in his client's interests to do so.[4]

As this duty is based upon the contractual obligations that exist between the principal and agent, it follows that the duty will not apply where the agency is gratuitous or where the contract of agency is unilateral. In both cases, the agent will not be under a duty to do anything at all, unless the agent assumes the responsibility to act, in which case liability could arise in tort.[5] If a gratuitous agent decides to perform, but performs inadequately, then liability can be imposed, as the following case demonstrates.

Wilkinson v Coverdale (1793) 1 Esp 74

FACTS: Coverdale (the agent) had agreed to obtain, for no payment,[6] insurance for Wilkinson's (the principal) premises. Coverdale purported to effect the insurance, but due to his negligence, he failed to comply with the relevant formalities, and so the insurance was invalid. The premises subsequently burned down and Wilkinson was precluded from claiming on the policy. Wilkinson commenced proceedings against Coverdale.

HELD: Where a gratuitous agent does not act at all, liability cannot be imposed upon him. However, where a gratuitous agent voluntarily chooses to act, but does so negligently, liability can be imposed. Accordingly, Wilkinson's action succeeded.

4. *Fray v Voules* (1859) 1 E&E 839.
5. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).
6. As there was no payment, the agency was gratuitous.

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Duty to obey instructions

Consider the following example:

Eg COMCORP LTD

ComCorp turns a healthy profit, and its directors are paid a hefty bonus. Lawrence, one of ComCorp's directors, decides to invest his bonus in the stock market and so instructs Andrew, a stockbroker, to purchase £10,000 worth of shares in OmniTech plc. Andrew considers this to be an extremely unwise decision, as OmniTech has not made a profit for several years, and is close to insolvency. Andrew, therefore, invests Lawrence's money in another company. Several days later, OmniTech enters insolvent liquidation and is dissolved.

The question that arises is whether Andrew has breached his duty as an agent. It is well established that an agent has to act in his principal's interests, but does this mean that an agent is free to disregard his principal's unwise instructions? To answer this question, the scope of the agent's duty to obey the instructions of his principal must be discussed, with the first important point to note being that the scope of this duty will depend upon whether the agency is contractual or gratuitous:

- Where the agency is gratuitous, then the agent is not under a duty to act at all (as discussed earlier), and so will not be under a duty to obey the principal's instructions.[7] However, if the agent does act on the principal's instructions, he can be liable if he exceeds his authority or if he acts in a negligent manner.
- Where the agency is contractual, then the agent is contractually obliged to obey his principal's instructions[8] and a failure to do so will amount to a breach of contract, thereby allowing the principal to obtain damages, as occurred in the following case.

Turpin v Bilton **(1843) 5 Man & G 455**[9]

FACTS: Turpin (the principal) instructed an insurance broker, Bilton (the agent), to insure a ship against losses caused by 'the perils of the sea'. Bilton failed to obtain insurance. The uninsured ship, whilst in transit from Newcastle to Rio de Janeiro, encountered a storm and was lost. Turpin sued Bilton and claimed damages.

HELD: Bilton had failed to obey Turpin's instructions and was therefore in breach of the agency agreement. Bilton was ordered to pay damages to Turpin for the loss sustained.

The duty to obey the principal's instructions is strict, so a breach of duty cannot be avoided on the grounds that disobeying the principal's instructions was a reasonable course of action,[10] or that the instructions were disobeyed because they were improvident.[11] It follows that an agent will not be liable for losses caused as a result of obeying his principal's imprudent instructions.

7. *Coggs v Bernard* (1703) 2 Ld Raym 909.
8. Unless the agency contract is unilateral.
9. See also *Dufresne v Hutchinson* (1810) 3 Taunt 117.
10. *Fray v Voules* (1859) 1 E&E 839 (solicitor entered into compromise agreement, despite instructions to not do so).
11. *RH Deacon & Co Ltd v Varga* (1972) 20 DLR (3d) 653.

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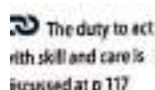
Overend & Gurney Co v Gibb (1871–72) LR 5 HL 480 (HL)

FACTS: Overend & Gurney Co (the principal) was formed for the express purpose of acquiring a particular partnership, and its directors (the agents) were granted express powers to acquire that partnership. The directors acquired the partnership on behalf of Overend, even though the partnership was heavily in debt. The acquisition proved to be disastrous and Overend sustained heavy losses. Overend issued proceedings against its directors for the losses sustained, alleging that in proceeding with the acquisition, the directors had acted negligently.

HELD: The claim failed, as the directors were merely carrying out their principal's instructions. The principal ought to have realized the imprudence of the acquisition or, as Lord Westbury put it, '[t]he vice that has occurred was in the very creation of the company, the evil that is complained of was the very thing for the purpose of accomplishing which the company was created and called into existence'.[12]

COMMENT: The *ratio* of *Overend* is that agents cannot be held liable for losses sustained as a result of following their principal's imprudent instructions, unless the imprudence is so great as to amount to gross negligence. However, certain agents (especially professionals) who feel that their principal's instructions lack prudence might need to warn their principals of this, lest they be in breach of the duty to act with skill and care.


The duty to act with skill and care is discussed at p 117

As the following case demonstrates, an agent will not be in breach of duty if he refuses to engage in acts that are illegal or would result in the creation of a void and unenforceable contract.

Cohen v Kittell (1889) 22 QBD 680 (QB)[13]

FACTS: Cohen (the principal) instructed Kittell (the agent) to place bets on certain horses at Sandown Park and Newmarket races, even though such transactions were void under the Gaming Act 1845. Kittell did not place the bets and Cohen sued for the profits that he would have won had the bets been placed.

HELD: Cohen's action failed. Huddleston B stated:

> The contract of agency . . . is one by which the plaintiff employed the defendant to enter into contracts which, if made, would have been null and void, and the performance of which could not have been enforced by any legal proceeding taken by the defendant for the benefit of the plaintiff. The breach of such a contract by the agent can give no right of action to the principal.[14]

COMMENT: Would Cohen be entitled to the winnings if Kittell had placed the bets, and would Cohen be liable for the lost bets made on his behalf? Manisty J stated that the principal could recoup any winnings, and the Court of Appeal had previously held that the principal could not avoid paying out any lost bets.[15]

12. (1871–72) LR 5 HL 480 (HL) 503.
13. See also *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486 (CA) and *Association of British Travel Agents Ltd v British Airways plc* [2000] 1 Lloyd's Rep 169 (QB).
14. (1889) 22 QBD 680 (QB) 682–3.
15. *Read v Anderson* (1883–84) 13 QBD 779 (CA).

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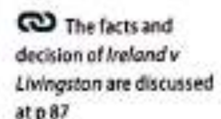
Similarly, if the agent is a professional and the principal's instructions would require the agent to breach his profession's standards or rules of professional conduct, then no breach of duty will occur if the agent refuses to carry out the instructions.[16]

Ambiguous instructions

Where the principal's instructions are ambiguous (i.e. they are capable of being interpreted in multiple ways), then what should the agent do? The answer was provided for in the case of *Ireland v Livingston*,[17] where Lord Chelmsford stated:


The facts and decision of *Ireland v Livingston* are discussed at p 87

> [I]f a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it is equally capable.[18]

Accordingly, an agent will not breach the duty to obey instructions if the instructions are capable of multiple interpretations, and the agent honestly and fairly acts in accordance with one of those interpretations. However, the agent will be expected to seek clarification before acting. As Robert Goff LJ stated:

> If instructions are given to an agent, it is understandable that he should expect to act on those instructions without more; but if, for example, the ambiguity is patent on the face of the document it may well be right (especially with the facilities of modern communications available to him) to have his instructions clarified by his principal, if time permits, before acting on them.[19]

Time limits

Not only must an agent obey the instructions of his principal, he must also obey them in a timely manner. Where the agency agreement specifies that performance must be completed within a specified period, then the agent must carry out his instructions within that period, but what if the agency agreement is silent regarding the time of performance? General contract law provides that where the contract is silent regarding the time for performance, then performance must occur within a reasonable time.[20] The same principle applies in relation to agency agreements so, if no period has been specified, then the agent must carry out his principal's instructions within a reasonable time, having regard to the circumstances of the case.

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16. *Hawkins v Pearse* (1903) 9 Com Cas 87 (stockbroker refused to follow instructions that violated stock exchange rules).

17. (1871–72) LR 5 HL 395 (HL).

18. ibid 416.

19. *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 1 WLR 642 (CA) 656.

20. *Pantland Hick v Raymond & Reid* [1893] AC 22 (HL). In certain circumstances, statute imposes a similar rule. For example, s 29(3) of the Sale of Goods Act 1979 (discussed at p 321) provides that where a seller is bound to send goods to the buyer, but no time is specified for the goods to be sent by, then the seller must send the goods within a reasonable time. In relation to consumer contracts, s 28(3) of the Consumer Rights Act 2015 (also discussed at p 321) provides that, if a delivery date has not been agreed, then delivery must take place without undue delay and no more than 30 days after the contract was entered into.

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Barber v Taylor (1839) 5 M&W 527

FACTS: Taylor (the principal) instructed Barber (the agent) to purchase 150 bales of cotton on his behalf and to deliver them to Liverpool, and to forward to him the **bill of lading** (although no time limit was specified). Barber purchased 152 bales of cotton and shipped them to Liverpool, but did not forward the bill of lading to Taylor until four days after the goods had arrived at their destination.

HELD: The court held that Barber should have forwarded the bill of lading to Taylor within a reasonable time, which, having regard to the circumstances of the case, was within 24 hours of the goods' arrival in Liverpool. The failure to send the bill of lading within this period amounted to a breach of contract on Barber's part.

→ **bill of lading:** a document signed and delivered by the master of a ship acknowledging receipt of goods to be delivered

Inability to carry out instructions

If an agent is unable to carry out his principal's instructions, or is unable to carry them out within the specified time (or within a reasonable time if no time is specified), then he may be in breach of duty if he does not inform the principal of this.

Callander v Oelrichs (1838) 5 Bing NC 58

FACTS: Callander (the principal) instructed Oelrichs (the agent) to insure a cargo of wheat, with the insurance to be effected based upon certain special terms. Oelrichs could not obtain insurance on these special terms, and so obtained insurance on standard terms, but did not inform Callander of this. Due to poor weather, the wheat was damaged while in transit and, due to Oelrichs's inability to insure the wheat on the specified terms, Callander could not claim on the insurance policy. Callander sued Oelrichs.

HELD: Oelrichs was in breach of duty. Vaughan J stated that:

> there was no express stipulation for the Defendants to give notice in case they failed to effect the insurance: but it is a necessary inference, from the nature of the business in which they had engaged, that it was their duty to give that information.[21]

Duty not to delegate

Consider the following example:

Eg COMCORP LTD

ComCorp requires renovation work to be carried out on one of its factories and it engages QuickBuild Ltd to carry out the renovation work. The renovation work will require the factory's electrical wiring to be replaced, but QuickBuild lacks expertise in this area. Accordingly, QuickBuild engages Christoph, an electrical engineer, to carry out the rewiring of the factory. The work is completed and the factory is reopened. Christoph invoices QuickBuild for the electrical work, and QuickBuild forwards the invoice to ComCorp, stating that it is liable to pay Christoph. ComCorp refuses to pay Christoph as it did not authorize QuickBuild to engage other persons to carry out the renovation work.

21. (1838) 5 Bing NC 58, 64–5.

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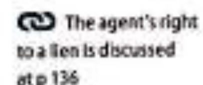
The issue that arises here is, where a principal authorizes an agent to perform a task, is that agent permitted to delegate that authority to another person (known as the sub-agent), and authorize that person to perform all, or part of, the task? In answering this question, the courts have adopted the Latin maxim *delegatus non potest delegare*, which translates as 'a delegate cannot delegate'. The result of this is that 'an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil'.[22] There is a sound rationale for this—the principal will have chosen the agent to act on his behalf due to the characteristics of that agent, and so it is only right that that agent perform the required functions. Again quoting Thesiger LJ, 'confidence in the particular person employed is at the root of agency'.[23] Accordingly, if an agent wrongfully delegates his authority to a sub-agent, then several consequences can follow:

- There will be no privity of contract between the principal and sub-agent and so the actions of the sub-agent will not bind the principal.[24] However, the principal will be bound if he ratifies the agent's act of delegation,[25] and he may be bound if the agent has apparent authority to delegate.
- The agent will be acting in breach of duty and will be liable for all obligations arising under the transaction.[26]
- The principal will not be obliged to pay the sub-agent,[27] nor will the sub-agent have the right to a lien over the principal's goods.[28]


The agent's right to a lien is discussed at p 136

When is delegation permissible?

It is important to note that the rule that an agent cannot delegate is a general one only and, in a number of circumstances, an agent can validly delegate his authority. Again, Thesiger LJ provides the rationale behind validating delegation in certain cases:

> [T]he exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed 'a sub-agent' or 'substitute' . . . and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute.[29]

Delegation will be effective where the principal expressly authorizes the agent to delegate (either beforehand or subsequently through ratification). Express authorization is quite commonplace, with Bradgate providing a notable example of express authorization:

> [I]n corporate business structures, where authority to act on behalf of the company is vested in the board of directors, the directors will generally have authority to appoint sub-agents, such as senior executives, who in turn will generally have authority to appoint sub-sub-agents as employees of the business with some agency function.[30]

Delegation will also be valid where the principal impliedly authorizes it. Implied authorization can arise in several situations. The authority to delegate may be

22. *De Bussche v Alt* (1878) LR 8 ChD 286 (CA) 310 (Thesiger LJ). 23. ibid.
24. *Caitlin v Bell* (1815) 4 Camp 183. 25. *Keay v Fenwick* (1876) 1 CPD 745.
26. *Caitlin v Bell* (1815) 4 Camp 183. 27. *John McCann & Co v Pow* [1974] 1 WLR 1643 (CA).
28. *Solly v Rathbone* (1814) 2 M&S 298. 29. *De Bussche v Alt* (1878) LR 8 ChD 286 (CA) 310.
30. Robert Bradgate, *Commercial Law* (3rd edn, OUP 2000) 191.

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implied where the facts of the case indicate that delegation is necessary. For example, a body corporate (such as a company or limited liability partnership) can only act through human intermediaries and so delegation will be necessary.[31] It may be the case that an unforeseen circumstance arises that necessitates delegation.[32]

Authority to delegate may be implied where the act that is delegated is purely 'ministerial' and does not require the agent to exercise a discretion. Whether an act is ministerial or not will depend upon the facts of the case, with the following case providing an example of an act that was deemed ministerial.

Allam & Co Ltd v Europa Poster Services Ltd [1968] 1 WLR 638 (Ch)

FACTS: Allam & Co Ltd ('Allam'), an outdoor advertising contractor, obtained licences from a number of site owners, allowing Allam to place advertisements on hoardings at those sites. Europa Poster Services Ltd ('Europa', the agent), a rival outdoor advertising contractor, subsequently obtained from some of the same site owners (the principals) the exclusive right to place advertisements at the sites. Europa's solicitor (the sub-agents) wrote a letter to Allam, which purported to give notice of the termination of the relevant licences held by Allam. Allam sued Europa, claiming that the notices to terminate were not valid because, *inter alia*, Europa was not authorized to delegate authority to its solicitor.

HELD: The delegation was impliedly authorized and the notices of termination were valid. Buckley J stated:

> If the agent personally performs all that part of his function which involves any confidence conferred upon him or reposed in him by the principal, it is . . . immaterial that he employs another person to carry out some purely ministerial act on his behalf, in completing the transaction . . . [T]he substance of the letter itself . . . had been determined upon by the defendants, and that the firm of solicitors were in truth no more than an amanuensis of the defendants in transmitting the notice in written form.[33]

Other circumstances where authority to delegate may be implied include (i) where, at the time the principal appointed the agent, he knew that, and agreed to, the agent delegating his authority;[34] (ii) where the particular circumstances surrounding the case, or the conduct of the parties, implies that delegation is permitted;[35] and (iii) where it is usual practice within a trade or profession to delegate authority.[36]

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31. In practice, delegation in such cases will almost always be express, usually through a provision within the company's articles (with art 3 of the Model Articles delegating managerial power to the board of directors).

32. The possibility of unforeseen circumstances resulting in implied authority to delegate was stated by Thesiger LJ in *De Bussche v Alt* (1878) LR 8 ChD 286 (CA) 311, but it should be noted that there appear to have been no cases as yet where this has been applied in practice.

33. [1968] 1 WLR 638 (Ch) 642–3.

34. *Quebec & Richmond Rly Co v Quinn* (1858) 12 Moo PC 232.

35. *De Bussche v Alt* (1878) LR 8 ChD 286 (CA).

36. *Solley v Wood* (1852) 16 Beav 370 (customary practice for provincial solicitors to appoint London-based solicitors to represent them in the High Court).

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Effects of authorized delegation

Consider the following example:

Eg COMCORP LTD

The articles of ComCorp Ltd expressly confer authority upon the company's directors to delegate performance of their functions to other persons. The directors of ComCorp delegate certain managerial functions to several senior managers within the company, with these managers in turn being authorized to delegate certain functions.

In this example, ComCorp Ltd is the principal, its directors are agents, and the senior managers to whom the directors have delegated their managerial functions are sub-agents (if these managers delegate further, there will also be sub-sub-agents). There is no doubt that, as the delegation of authority is authorized, ComCorp will be liable for the acts of the sub-agents.[37] The question that arises is whether a contractual relationship exists between ComCorp and the sub-agents. The answer depends on whether there is privity of contract between the principal and the sub-agent, which will depend upon the intentions of the parties. The approach currently adopted by the courts was established in the following case.

***Calico Printers' Association Ltd v Barclays Bank Ltd* (1930) 36 Com Cas 71 (KB)[38]**

FACTS: Calico Printers' Association Ltd ('Calico', the principal) sold cotton to a consignee in Beirut and instructed Barclays Bank (the agent) to insure the goods. Barclays did not have an office in Beirut and so, with the knowledge of Calico, it appointed the Anglo-Palestine Bank (the sub-agent) to effect the insurance. The Anglo-Palestine Bank failed to effect the insurance and the cotton was subsequently destroyed in a fire. Calico sued both banks, but Barclays avoided liability due to the presence of a valid exclusion clause. Accordingly, Calico sought damages from the Anglo-Palestine Bank.

HELD: The claim failed as there was no privity of contract between Calico and the Anglo-Palestine Bank. Wright J stated that the courts have generally:

> applied the rule that even where the sub-agent is properly employed, there is still no privity between him and the principal; the latter is entitled to hold the agent liable for breach of the mandate, which he has accepted, and cannot in general claim against the sub-agent for negligence or breach of duty.[39]

The result is that, generally, there will be no privity of contract between the principal and the sub-agent, even where the principal has authorized the agent to appoint a sub-agent. Accordingly, if the sub-agent fails to perform, or performs

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37. Note that this is not because the sub-agent is regarded as the agent of the principal, but because the principal is bound by the authorized act of his agent.

38. The Court of Appeal upheld the decision ((1931) 145 LT 51 (CA)), but the relevant section of the High Court judgment relating to delegation of authority was not part of the appeal.

39. (1930) 36 Com Cas 71 (KB) 77.

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inadequately, then the principal may sue the agent (the agent in turn may be able to sue the sub-agent) but cannot directly sue the sub-agent.[40] The benefit of such a rule is that it 'emphasises the importance of the contractual chain. It is natural for each agent in the chain to give credit to the party known to him, rather than to perhaps someone unknown.'[41] If the sub-agent has, or has had, any monies from the principal, then such monies can be recovered from the agent by the principal.[42] It should also be noted that, even if privity cannot be established between the principal and the sub-agent, the sub-agent may still owe fiduciary duties to the principal.[43]

The question that arises is when will privity of contract be established between a principal and sub-agent? Once again, the answer was provided by Wright J in *Calico*, who stated that:

> [t]o create privity it must be established not only that the principal contemplated that a sub-agent would form part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof.[44]

If a party can establish privity between the principal and sub-agent, then the sub-agent will be regarded as an agent of the principal with all the consequences of agency that ensue[45] (e.g. the sub-agent is subject to the rights and duties of an agent). In such a case, if the sub-agent fails to perform, or performs inadequately, then the principal can sue the sub-agent, but he cannot sue the agent.[46] Finally, it should be noted that the fact that privity exists between the principal and the sub-agent will not automatically negate the existence of a contractual relationship between the agent and the sub-agent.[47]

Liability in tort

Even if a contractual relationship does not exist between the principal and the sub-agent, the sub-agent may still be liable to the principal in tort (notably under the tort of negligence) if it can be established that the sub-agent owed the principal a duty of care, as occurred in the following case.

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40. The principal may be able to enforce a term of the contract against the sub-agent if he can bring himself within the exception to the privity rule found in s 1(1) of the Contracts (Rights of Third Parties) Act 1999. In order to do this, the principal will need to show that either (i) the contract expressly provided him with a right to enforce a term; or (ii) the term purported to confer a benefit on him and there is nothing in the contract indicating that the parties did not intend for the contract to be enforceable by a third party.

41. *Prentis Donegan & Partners Ltd v Leeds & Leeds Co Inc* [1998] 2 Lloyd's Rep 326 (QB) 334 (Rix J).

42. *Matthews v Haydon* (1786) 2 Esp 509.

43. *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11 (CA) (sub-agent made to account to principal for secret profit made).

44. (1930) 36 Com Cas 71 (KB) 78.

45. Given this, Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [5-010] contends that the sub-agent is not actually a sub-agent, but is in fact a co-agent.

46. *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 WLR 1281 (QB). As part of the duty to exercise skill and care, the agent will, however, be expected to exercise reasonable skill and care when appointing a sub-agent (*Thomas Cheshire & Co v Vaughan Bros & Co* [1920] 3 KB 240 (CA)).

47. *Prentis Donegan & Partners Ltd v Leeds & Leeds Co Inc* [1998] 2 Lloyd's Rep 326 (QB).

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Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 (HL)

FACTS: This case was one of many pieces of litigation that arose out of the collapse of the Lloyds insurance market. Investors known as 'Names' (the principals) had invested money in the Lloyds insurance market. These Names had engaged members' agents (the agents) and these members' agents had in turn engaged managing agents (the sub-agents). The various contracts expressly stated that the managing agents were to be regarded as agents of the members' agents, and so there was no direct contractual relationship between the managing agents and the Names. A major issue in the case was therefore whether, following the collapse of the market, the managing agents owed a tortious duty of care to the Names, and could therefore be held liable in negligence.

HELD: The managing agents did indeed owe a duty of care to the Names, as the criteria for a duty of care, as set out in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[48] were met. Lord Goff stated:

> [T]here is in my opinion plainly an assumption of responsibility in the relevant sense by the managing agents towards the Names in their syndicates . . . They obviously hold themselves out as possessing a special expertise to advise the Names on the suitability of risks to be underwritten . . . The Names, as the managing agents well knew, placed implicit reliance on that expertise, in that they gave authority to the managing agents to bind them to contracts of insurance and reinsurance and to the settlement of claims. I can see no escape from the conclusion that, in these circumstances, prima facie a duty of care is owed in tort by the managing agents to such Names.[49]

COMMENT: This case does not establish that a sub-agent will always owe a duty of care to the principal. In many cases, no duty of care will be owed, with Lord Goff noting that the situation that arose in *Henderson* was 'most unusual',[50] before going on to state that '[i]t cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort'.[51]

See JD Heydon, 'The Negligent Fiduciary' (1995) 111 LQR 1

Duty to act with reasonable care and skill

All agents owe a duty of care to their principals to exercise reasonable care and skill in the carrying out of their agency. However, the source of this duty differs depending on whether the agency is contractual or gratuitous and so each will be considered separately.

Contractual agencies

Where the agency is contractual, then the common law will imply into the agency agreement a term requiring the agent to exercise reasonable care and skill. Similar terms are implied into certain contracts by statute.[52] The agent will also owe a tortious duty of care and can therefore be liable in contract and tort if he fails to exercise reasonable care and skill.[53] The primary remedy will usually be to commence proceedings for breach of contract but, depending on the facts, it might be more advantageous to

48. [1964] AC 465 (HL). 49. [1995] 2 AC 145 (HL) 182. 50. ibid 195. 51. ibid.
52. See e.g. s 13 of the Supply of Goods and Services Act 1982, and s 49 of the Consumer Rights Act 2015.
53. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA).

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base the action in tort.[54] It should be noted that a contractual agent can exclude or limit liability for breach of duty through a disclaimer or exclusion clause, but clear words will need to be used if liability under tort is to be excluded or limited.[55] Such an exclusion clause would also be subject to the safeguards found in the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.

Irrespective of whether the action is brought in contract or tort, the standard of care expected is the same, namely the agent must exercise a standard of care that is reasonable in all the circumstances. Although the standard is objective, it will be largely dependent on the facts of the case. For example, if the agent was exercising any trade, profession, or calling, then 'he is required to exercise the degree of skill and diligence reasonably to be expected of a person exercising such trade, profession or calling, irrespective of the degree of skill he may possess'.[56] From this, it follows that a solicitor should act with a degree of skill that a member of the public would reasonably expect to see from a solicitor.[57] Certain circumstances may cause the standard expected of the agent to be raised (e.g. if the agent professes to have some form of special skill, which he fails to use).[58]

Gratuitous agencies

For obvious reasons, gratuitous agents do not owe a contractual duty of care to exercise due care and skill, but they do owe a tortious duty of care. The question that arises is whether the standard of care expected of a gratuitous agent differs from that of a contractual agent. Historically, there was little doubt that they did differ, with gratuitous agents being expected to display such care and skill as would be exercised in the conduct of their own affairs.[59] This highly subjective standard of care was clearly inconsistent with the more objective standards being adopted by the modern law of negligence and so, in the following seminal case, a more objective standard was established.

***Chaudhry v Prabhakar* [1989] 1 WLR 29 (CA)**

FACTS: Chaudhry (the principal) wished to purchase a car. Her knowledge of cars was lacking, so she asked Prabhakar (the agent), a friend of hers, to locate for her a second-hand car, stipulating that the car should not have been involved in any prior accidents. Prabhakar was not a mechanic, but he was a keen amateur enthusiast. He located a car and noticed that the bonnet had been repaired or replaced, but did not enquire as to whether the car had been involved in an accident. He recommended the car to Chaudhry and so she purchased it. Subsequently, it was discovered that the car had been involved in an accident and, due to the poor repair work undertaken, it was a valueless insurance write-off. Chaudhry sued Prabhakar, who contended that, as he was only a gratuitous agent, he only had to display the skill that would be exercised in the conduct of

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54. The key difference relates to the more generous limitation periods in tort cases. In contract cases, the limitation period commences as soon as the contract is breached, whereas in tort, the period does not commence until the damage is sustained.

55. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

56. *Chaudhry v Prabhakar* [1989] 1 WLR 29 (CA) 34 (Stuart-Smith LJ).

57. *Simmons v Pennington* [1955] 1 WLR 183 (CA).

58. *Duchess of Argyll v Beusalinck* [1972] 2 Lloyd's Rep 172 (Ch).

59. *Coggs v Bernard* (1703) 2 Ld Raym 909.

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his own affairs. He claimed that he would have purchased the car himself and so had therefore not breached the standard of care.

HELD: The Court refused to accept Prabhakar's account of the standard of care and established a more objective standard, namely that a gratuitous agent has a duty to exercise such care and skill as may be reasonably expected of him in all the circumstances. As Prabhakar had failed to ask the seller whether the car had been involved in an accident, he had not exercised reasonable care and was therefore ordered to pay damages to Chaudhry.

COMMENT: Counsel for Prabhakar conceded that he was a gratuitous agent and therefore owed Chaudhry a duty of care, but it is arguable that Prabhakar was not actually an agent. May LJ stated:

> I for my part respectfully doubt whether counsel's concession in the instant case was rightly made in law. I do not find the conclusion that one must impose upon a family friend looking out for a first car for a girl of 26 a Donoghue v Stevenson duty of care in and about his quest, enforceable with all the formalities of the law of tort, entirely attractive.[60]

Numerous academics have expressed support for May LJ's comment,[61] with several contending that liability should not have been imposed upon agency principles, but through finding that Prabhakar had provided negligent advice.[62]

See Ian Brown, 'The Gratuitous Agent's Liability' (1989) 2 LMCLQ 148

The result of *Chaudhry* is that the standard of care for both paid agents and gratuitous agents is the same, namely to exercise such care as is reasonable in all the circumstances. However, the circumstances of the case will affect the standard of care expected, with Stuart-Smith LJ in *Chaudhry* stating that 'one of the relevant circumstances is whether or not the agent is paid'.[63] He went on to state:

> Where the agent is unpaid, any duty of care arises in tort. Relevant circumstances would be the actual skill and experience that the agent had, though, if he has represented such skill and experience to be greater than it in fact is and the principal has relied on such representation, it seems to me to be reasonable to expect him to show that standard of skill and experience which he claims he possesses. Moreover, the fact that principal and agent are friends does not in my judgment affect the existence of the duty of care, though conceivably it may be a relevant circumstance in considering the degree or standard of care.[64]

Fiduciary duties

In addition to the duties already discussed, and any duties imposed by the agency agreement, the agent is also subject to a number of duties that arise due to his position as a fiduciary. It is important to note at the outset that fiduciary duties arise due to equity, and exist independently of any agency agreement (although they can be incorporated into, or excluded by,[65] the agency agreement). Accordingly, both contractual and gratuitous agents are subject to these fiduciary duties.

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60. [1989] 1 WLR 29 (CA) 38.
61. See e.g. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [6-031].
62. See e.g. NE Palmer [1992] SPTL Reporter 35, 36.
63. [1989] 1 WLR 29 (CA) 34. 64. ibid.
65. *Kelly v Cooper* [1993] AC 205 (PC). Contractual terms that aim to exclude the fiduciary obligations of the agent will be subject to strict common law and statutory safeguards, notably those found within the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.

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Definitively defining what a fiduciary is can be difficult, but an often-cited definition is that offered by Millett LJ, who stated that '[a] fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence'.[66] From this simple definition alone, it is clear that, in the vast majority of cases,[67] an agent is to be regarded as a fiduciary, but identifying the agent as a fiduciary is only a starting point. As Frankfurter J stated, '[t]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?'[68]

The answer to the first question is simple—the agent occupies a fiduciary position in relation to his principal. The second question is the important one, namely what fiduciary obligations will the agent owe towards the principal. Again, Millett LJ provides an often-quoted answer:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.[69]

Four principal fiduciary duties can be identified, namely (i) the duty to avoid conflicts of interest; (ii) the duty not to profit from the agent's position; (iii) the duty not to accept bribes; and (iv) the duty to account. As Millett J indicated, this list cannot be regarded as exhaustive, and significant overlaps do exist between the duties (e.g. the duty not to accept bribes could be regarded as a specific aspect of the duty to avoid conflicts of interest).

Duty to avoid conflicts of interest

In *Aberdeen Railway Co v Blaikie Bros*,[70] Lord Cranworth LC stated that:

> [n]o one having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect.[71]

Accordingly, an agent cannot allow his interests to conflict with those of his principal, unless the principal has full knowledge of the conflict[72] and has consented to it.[73] Jacob LJ stated the rationale behind this rule:

> The law imposes on agents high standards . . . . An agent's own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100% body

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66. *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18.

67. An agent may not always be a fiduciary, or may not be always acting in a fiduciary capacity. As FE Dowrick, 'The Relationship of Principal and Agent' (1954) 17 MLR 24 notes, if a principal engages an agent to carry out a task that does not involve placing any particular trust in the agent, then this will not give rise to a fiduciary relationship between the two parties.

68. *SEC v Chenery Corp* (1943) 318 US 80 (US Supreme Court) 85–6.

69. *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18.

70. (1854) 1 Macq 461.

71. ibid 471.

72. *Fullwood v Hurley* [1928] 1 KB 498 (CA).

73. *Bray v Ford* [1896] AC 44 (HL). Disclosure and consent need not occur immediately, but must occur prior to the principal entering into binding commitments with the third party (*Harrods Ltd v Lemon* [1931] 2 KB 157 (CA)).

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and soul, for him. You must act as if you were him. You must not allow your own interest to get in the way without telling him.[74]

The no-conflict duty is a strict one—it therefore does not matter that the agent acted in good faith or had no dishonest motive. The duty can be breached providing that there is an actual conflict or 'a real sensible possibility of conflict'.[75] Where such a conflict is alleged, the burden of proof is placed upon the agent to prove that there was no conflict[76] or that the principal consented to the conflict. If the agent cannot do this, then the duty will be breached and the principal will be able to rescind the contract, as occurred in the following case.

Armstrong v Jackson [1917] 2 KB 822 (KB)

FACTS: Armstrong (the principal) instructed a stockbroker, Jackson (the agent), to purchase 600 shares in a certain company. Jackson wrote to Armstrong and stated that his instructions had been complied with and the shares had been purchased. However, the shares that Armstrong bought were actually purchased from Jackson himself, but Jackson did not disclose this. Several years later, Armstrong discovered the truth and commenced proceedings against Jackson to have the transaction set aside.

HELD: Armstrong's claim succeeded and so Jackson was ordered to repay to Armstrong the amount paid for the shares. McCardie J stated:

> Now a broker who secretly sells his own shares is in a wholly false position. As vendor it is to his interest to sell his shares at the highest price. As broker it is his clear duty to the principal to buy at the lowest price and to give unbiased and independent advice . . . as to the time when and the price at which shares shall be bought, or whether they shall be bought at all. The law has ever required a high measure of good faith from an agent. He departs from good faith when he secretly sells his own property to the principal.[77]

Examples of instances where the courts have found a breach of the no-conflict rule to have occurred include the following:

- where an agent who is instructed to purchase property for the principal, sells to the principal his own property (as in *Armstrong*), or property in which he has an interest (e.g. a company director sells to his company products that are manufactured by another company, of which he is also a director);[78]
- where an agent is instructed to sell a piece of the principal's property, and the agent purchases the property himself,[79] or arranges for a third party to purchase it on the agent's behalf;[80]
- where an agent receives a secret commission from persons with whom he is entering into transactions on the principal's behalf;[81]
- where a third party agrees to provide an agent with business if the agent leaves the employment of the principal and sets up business on his own.[82]

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74. *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, [2009] 1 Lloyd's Rep 436 [6].
75. *Boardman v Phipps* [1967] 2 AC 46 (HL) 124 (Lord Upjohn).
76. *Collins v Hare* (1828) 2 Bli (NS) 106.
77. [1917] 2 KB 822 (KB) 824.
78. *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461.
79. *McPherson v Watt* (1877) 3 App Cas 254.
80. ibid.
81. *Boston Deep Sea Fishing v Ansell* (1888) 39 ChD 339 (CA).
82. *Sanders v Parry* [1967] 1 WLR 753.

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These examples relate to situations where the interests of the agent directly conflict with the interests of the principal. However, a breach of the no-conflict duty can also arise where an agent is acting on behalf of a principal, and the agent puts himself in a position where he owes a duty to a third party which is inconsistent with his duty to his principal. This tends to arise where an agent is acting on behalf of multiple principals, and the courts have stated that an agent cannot act for both parties to a single transaction, unless both parties have consented to the agent acting in such a way. So, for example, an agent who is engaged to sell a hotel by the owner of the hotel and who also acts on behalf of the buyer that purchases that hotel, cannot claim commission from both the seller and buyer, unless they have consented to the agent representing them both.[83] However, this principle is not absolute and in the controversial case of *Kelly v Cooper*, the Privy Council held that the duty not to compete could, depending upon the circumstances of the case, be impliedly excluded.

Kelly v Cooper [1993] AC 205 (PC)

FACTS: Kelly (the first principal) instructed Coopers Associates ('Coopers', the agent), a firm of estate agents, to sell his house (the house was named 'Caliban'). Brant (the second principal), the owner of a nearby house (named 'Vertigo') also instructed Coopers to sell his house. Coopers showed both houses to Perot, who offered to purchase Vertigo. Brant accepted the offer and Coopers was paid commission for the sale. Shortly after the offer was accepted, Perot also offered to buy Caliban. Kelly accepted this offer, but he was unaware that Perot had also agreed to buy Vertigo. When Kelly found out that Perot had also agreed to purchase Vertigo, he refused to pay Coopers any commission. Kelly argued that it was clear that Perot wanted to buy both houses and, if Coopers had informed Kelly that Perot had already agreed to buy Vertigo, then Kelly could have negotiated a higher price for Caliban. Accordingly, he claimed that Coopers had placed itself in a position where its duties to the two principals conflicted. Kelly sued for damages for breach of duty, and Coopers counterclaimed for the commission owed.

HELD: Kelly's claim failed and Coopers' counterclaim succeeded. The Board agreed that the fact that Perot wanted to purchase both houses was a material fact that could have impacted upon the price of Caliban. The Board then went on to state that the scope of an agent's fiduciary duties will depend upon the express and implied terms of the agency agreement. Bearing this in mind, Lord Browne-Wilkinson stated:

> In the case of estate agents, it is their business to act for numerous principals: where properties are of a similar description, there will be a conflict of interest between the principals each of whom will be concerned to attract potential purchasers to their property rather than that of another. Yet, despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they will be unable to perform their function ... In the course of acting for each of their principals, estate agents will acquire information confidential to that principal. It cannot be sensibly suggested that an estate agent is contractually bound to disclose to any one of his principals information which is confidential to another of his principals.[84]

83. *Fullwood v Hurley* [1928] 1 KB 498 (CA).
84. [1993] AC 205 (PC) 214.

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COMMENT: The decision and reasoning of the Board has proven controversial. Some critics have applauded the decision, stating that it helps 'refashion the law of fiduciary duties in a manner that takes greater account of modern commercial pressures and practice'.[85] Other commentators have been more critical, stating that the case 'seems to deny fiduciary obligations to all and to leave everything to express and even implied terms of the contract'.[86] What should an agent in such a difficult position do? Brown, in criticizing the decision in *Kelly*, provides a more acceptable and clear answer than that offered by the Board in *Kelly*:

> Once such a conflict arises between competing principals and the agent continues to act for both it must surely be with the certainty that he will breach his duties to one or the other. An agent owes a duty to communicate facts to his principal with due diligence and the defendant's dilemma in *Kelly* should have been resolved by his seeking the consent of both principals to reveal Perot's interest to the other. In the absence of dual consent it is suggested that the defendant should have terminated both agencies, or at least one of them.[87]

Despite the academic criticism levelled at *Kelly*, it has been cited with approval by the Law Commission[88] and in several subsequent cases.[89] It should, however, be noted that the agent in *Kelly* was acting for two different principals in two different transactions. It is highly unlikely that the courts would adopt the same view had the agent been working for two different principals in the same transaction (especially if the two principals were competitors).

See Ian Brown, 'Divided Loyalties in the Law of Agency' (1993) 109 LQR 206

Duty not to profit from position

An agent is not permitted to profit from his position as agent, unless the principal knows of the profit and consents to the agent retaining it. The duty is applied extremely strictly, as the following case demonstrates.

Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134 (HL)

FACTS: Regal (Hastings) Ltd ('RH', the principal) owned a cinema, and it decided to acquire two other nearby cinemas and sell all three cinemas as a going concern. In order to effect this, a subsidiary company, Hastings Amalgamated Cinemas Ltd (HAC), was created, with an issued share capital of £5,000. The landlord of the two cinemas would only let HAC acquire the cinemas if the company's paid-up share capital was £5,000. RH could only purchase £2,000 worth of shares in HAC, so it was decided that the directors of RH (the agents) would between them take up the remaining shares. Several weeks later, the entire scheme was abandoned and a new agreement was entered into whereby the directors would sell their shares in RH and HAC to the purchasers who were originally going to buy the cinemas. The shares in HAC had increased in value and so the directors made a profit of £2.80 per share. RH, now under the control of the new purchaser, commenced proceedings against the former directors to recover the profit made through the sale of the shares.

85. Richard C Nolan, 'Conflicts of Duty: Helping Hands From the Privy Council?' (1994) 15 Co Law 58, 58.
86. FMB Reynolds, 'Fiduciary Duties of Estate Agents' [1994] JBL 147, 149.
87. Ian Brown, 'Divided Loyalties in the Law of Agency' (1993) 109 LQR 206, 208.
88. Law Commission, *Fiduciary Duties and Regulatory Rules* (Law Com No 236, 1995).
89. See e.g. *Clark-Boyce v Mouat* [1994] 1 AC 428 (PC) 436, and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 206.

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HELD: The House held that RH could recover the profit from its former directors, on the ground that the former directors had profited from their position as agents. The fact that the directors acted in good faith to help RH secure an opportunity that, due to its lack of funds, it could not undertake on its own was irrelevant. Lord Russell stated:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides ... The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.[90]

In the Court of Appeal decision in *Boardman v Phipps*,[91] Lord Denning MR highlighted the three principal ways in which a breach of duty can arise. First, 'if [the agent] uses a position of authority, to which he has been appointed by his principal, so as to gain money for himself, then he is accountable to the principal for it'.[92] The following case demonstrates this type of breach.

Industrial Development Consultants Ltd v Cooley [1972] 1 WLR 443

FACTS: Cooley (the agent) was managing director of Industrial Development Consultants Ltd ('IDC', the principal). IDC had sought to acquire business from another company, EGB, but EGB refused to do business with IDC. The deputy chairman of EGB approached Cooley and indicated that EGB would be willing to contract with Cooley personally if he left the employment of IDC. Cooley then left the employment of IDC by falsely claiming that he was ill. Subsequently, Cooley entered into a contract with EGB. IDC commenced proceedings against Cooley.

HELD: IDC's action succeeded and it was able to claim from Cooley the profit that he received from the contract with EGB. Roskill J stated that Cooley was 'guilty of putting himself into the position in which his duty to his employers ... and his own private interests conflicted and conflicted grievously'.[93]

See Harry Rajak, '[F]iduciary Duty of a [M]anaging Director' [(1]972) 35 MLR 655

Second, the duty will be breached where 'the agent uses property, with which he has been entrusted by his principal, so as to make a profit for himself out of it, without his principal's consent'.[94]

Shallcross v Oldham (1862) 2 Johns & H 609

FACTS: Oldham (the agent) was engaged as the master of a ship by the ship's owner, Shallcross (the principal). Oldham was instructed to employ the ship to the best advantage. Oldham could not procure freight for the ship, so he loaded it with his own cargo, sailed the ship to Hong Kong, and sold the cargo. Upon discovering this, Shallcross commenced proceedings against Oldham.

90. [1967] 2 AC 134 (HL) 144–5. 91. [1965] Ch 992 (CA). 92. ibid 1018.
93. [1972] 1 WLR 443, 453. 94. *Boardman v Phipps* [1965] Ch 992 (CA) 1018 (Lord Denning MR).

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HELD: Oldham was ordered to pay to Shallcross the profit that he made through the sale of the cargo. Sir William Page-Wood VC stated that 'where a chattel is entrusted to an agent to be used for the owner's benefit, all the profits which the agent may make by using that chattel belong to the owner'.[95]

Third, an agent who acquires information or knowledge from the principal, and uses it for personal gain, will be in breach of duty.

Lamb v Evans [1893] 1 Ch 218 (CA)

FACTS: Lamb (the principal) was the proprietor and publisher of a business directory. Lamb employed a number of canvassers (the agents) whose job was to obtain advertisements from businesses that would be placed within the directory. In return, the canvassers would earn commission. Lamb discovered that a number of the canvassers were proposing to canvass advertisements for a rival publication once their agreement with Lamb had ended. Lamb commenced proceedings.

HELD: Lamb's action succeeded and an injunction was granted preventing the canvassers from providing advertisements to the rival publication. Lindley LJ stated that 'an agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency',[96] with the materials in this case being the information that was to be placed in the directory published by Lamb.

If an agent breaches the duty not to profit, then the principal may, depending on the facts, have access to several remedies:

- The principal can recover the profit from the agent. Where the profit was made through the use of the principal's property or through the use of confidential information, then the profit will be held on trust, with the advantage that the principal can recover any increase to the value of the profit (e.g. if the agent used the profit to purchase shares that have subsequently increased in value).
- The principal may be able to obtain an injunction, preventing the agent from profiting from his position (as in *Lamb v Evans*). This is especially useful if the agent has profited through the use of confidential information.
- If the agent's actions amount to a breach of contract, then the principal may be able to obtain damages.

Duty not to accept bribes

As Stone has stated, 'a bribed agent cannot be expected to put the interests of his or her principal first'[97] and so the agent's fiduciary position places him under a duty not to accept bribes. A bribe is simply 'a commission or other inducement which is given by a third party to an agent as such, which is secret from his principal'.[98] The courts take an extremely dim view of bribery, with Lord Templeman stating that '[b]ribery is

95. (1862) 2 Johns & H 609, 616. 96. [1893] 1 Ch 218 (CA) 226.
97. Richard Stone, *Law of Agency* (Cavendish 1996) 65.
98. *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Ltd* [1990] 1 Lloyd's Rep 167 (QB) 171 (Leggatt J).

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an evil practice which threatens the foundations of any civilised society'.[99] Given the grave nature of bribery, the courts adopt a broad approach when determining whether a payment amounts to a bribe, as the following case demonstrates.

Industries & General Mortgage Co Ltd v Lewis [1949] 2 All ER 573 (KB)

FACTS: Lewis (the principal) instructed Vermont (the agent) to find someone who could provide him with a loan. Vermont obtained, on Lewis's behalf, a loan from Industries & General Mortgage Co Ltd ('IGM') and Lewis paid IGM a fee for providing the loan. However, unknown to Lewis, IGM had agreed to pay half of this fee to Vermont. IGM was unaware that Lewis did not know of this payment, and it was accepted that IGM had no dishonest intentions in making the payment.

HELD: Slade J stated that a payment amounts to a bribe if three elements are present, namely:

> (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.[100]

Applying this, it was clear that the payment made by IGM to Vermont amounted to a bribe. The fact that IGM had no dishonest motive for making the payment was irrelevant, as 'proof of corruptness or corrupt motive is unnecessary in a civil action'[101] because 'once the bribe is established, there is an irrebuttable presumption that it was given with an intention to induce the agent to act favourably to the payer and, thereafter, unfavourably to the principal'.[102] Accordingly, Vermont had breached the duty not to accept a bribe and the amount of the bribe was recoverable by Lewis.

The agent becomes liable through the mere acceptance of, or agreeing to accept, the bribe—it is therefore not necessary to establish that the bribe actually influenced the agent.[103] It is also not necessary to show that the agent actively concealed the existence of the bribe[104]—the agent breaches his duty if he receives, or agrees to receive, a bribe that the principal is unaware of. It follows from this that the duty will not be breached where the principal knows of the payment and consents to it being given. That disclosure can legitimate a payment that would otherwise be a bribe is reflective of the view that 'the real evil is not the payment of money, but the secrecy attending it'.[105] The burden of proof for establishing disclosure is on the agent, who must disclose enough detail to enable the principal to fully understand the implications of the payment. If the disclosure is insufficient, then the duty not to accept bribes may still be breached or, depending on the extent of the disclosure, the agent may instead be found to have breached the duty to avoid a conflict of interest.[106]

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99. *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 (PC) 330.
100. [1949] 2 All ER 573 (KB) 575. 101. ibid. 102. ibid 576.
103. *Shipway v Broadwood* [1899] 1 QB 369 (CA).
104. *Temperley v Blackrod Mfg Co Ltd* (1907) 71 JP 341.
105. *Shipway v Broadwood* [1899] 1 QB 369 (CA) 373 (Chitty LJ).
106. *Hurstanger v Wilson* [2007] EWCA Civ 299, [2007] 2 All ER (Comm) 1037.

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The grave nature of bribery is reflected in the wide-ranging civil remedies that are available to the principal:

- The principal can, without notice, terminate the contract of agency and dismiss the agent.[107]
- The agent will lose the right to any remuneration/commission that he was entitled to,[108] and will also lose the right to claim an indemnity.[109]
- The agent and the briber are jointly and severally liable under the tort of deceit for any loss suffered by the principal in respect of the transaction under which the bribe was taken.[110] Originally, the Court of Appeal held that the principal could recover the bribe and claim damages under the tort of deceit,[111] but the Privy Council has since stated that the principal must elect between the two remedies on the ground that to claim both would result in double recovery.[112] It has, however, been contended that there is no reason why the principal cannot recover the bribe and also be awarded damages in deceit for any excess loss sustained.[113]
- Where the bribe is made, any resultant contract entered into between the principal and third party is voidable and can be rescinded at the principal's instance.[114] Bowstead & Reynolds contend that where 'the bribed agent knows that the proposed contract is contrary to his principal's interests, or is reckless on that issue' then the contract will be void on the ground that the agent has acted without authority.[115]
- The principal can commence a restitutionary claim to recover the amount of the bribe from either the agent[116] or the briber[117] (i.e. the agent and the briber are jointly and severally liable). As noted previously, an agent who profits from his position will, in certain circumstances, hold that profit on trust for the principal, who can then recover that profit in full (incusing any increase in value of the profit). However, until recently, the courts have struggled to determine whether this rule also applies to bribes. Originally, the Court of Appeal in *Lister & Co v Stubbs*[118] stated that a principal's claim to recover the bribe was personal, and not proprietary, with the result that the bribe was not held on trust for the principal, and so the principal could not recover any profits made by the agent through the use of the bribe (e.g. if the agent invests the bribe money and makes a profit, or if bribe property increases in value). This view was criticized strongly,[119] and in the case of *Attorney General for Hong Kong v Reid*,[120] the Privy Council held that the bribe property was held on trust. However, the decision in *Reid* also attracted

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107. *Bulfield v Fournier* (1895) 11 TLR 282.

108. *Andrews v Ramsay & Co* [1902] 2 KB 635 (KB). The principal can also recover commission already paid before the existence of the bribe was discovered.

109. *Stange & Co v Lowitz* (1898) 14 TLR 468.

110. *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643 (QB).

111. *Salford Corp v Lever (No 2)* [1891] 1 QB 168 (CA).

112. *Mahesan S/O Thambiah v Malaysia Government Officers' Cooperative Housing Society* [1979] AC 374 (PC). For contrasting views on this case, see Andrew Tettenborn, 'Bribery, Corruption and Restitution: The Strange Case of Mr Mahesan' (1979) 95 LQR 68 and Caroline Needham, 'Recovering the Profits of Bribery' (1979) 95 LQR 536.

113. Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Materials* (4th edn, OUP 2009) 224.

114. *Taylor v Walker* [1958] 1 Lloyd's Rep 490 (QB). The right to rescind the contract is in addition to the other remedies discussed, so, for example, the principal may rescind the contract and recover the value of the bribe (*Logicrose Ltd v Southend United Football Club Ltd (No 2)* [1988] 1 WLR 1256 (Ch)).

115. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [6-087].

116. *Morison v Thompson* (1874) LR 9 QB 480.

117. *Mahesan S/O Thambiah v Malaysia Government Officers' Cooperative Housing Society* [1979] AC 374 (PC).

118. (1890) 45 ChD 1 (CA).

119. See e.g. Sir Peter Millett, 'Bribes and Secret Commissions' [1993] RLR 7.

120. [1994] 1 AC 324 (PC).

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considerable academic[121] and judicial[122] criticism, largely based around the powerful remedy that it provided the principal.[123] Accordingly, in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*,[124] the Court of Appeal declined to follow *Reid* and followed its earlier decision in *Lister*. Fortunately, in the following case, the Supreme Court has now provided some much-needed certainty and, in overruling *Sinclair*, has established that the bribe is held on trust.

FHR European Ventures LLP v Cedar Capital Partners LLC [2014] UKSC 45

FACTS: FHR European Ventures LLP ('FHR', the principal) wished to purchase the share capital in a hotel company based in Monte Carlo. FHR engaged Cedar Capital Partners LLC ('Cedar', the agent) to negotiate with the owner of the share capital, Monte Carlo Grand Hotel Ltd ('MCGH'). On 22 December 2004, FHR purchased the share capital for €211.5 million. Unknown to FHR, Cedar had entered into an agreement with MCGH, which provided that MCGH would pay Cedar €10 million if the purchase went ahead—this payment was made in January 2005. Upon discovering this, FHR sought to recover the €10 million from Cedar. At first instance, it was held that Cedar had acted in breach of duty, but that the €10 million was not held on trust for Cedar.[125] FHR appealed and its appeal was allowed and the Court held that the €10 million was held on trust for FHR.[126] Cedar appealed on the ground that a proprietary remedy such as this is not suitable as the €10 million could not be said to be FHR's property. FHR argued that a proprietary remedy was appropriate as it was well established that an agent who obtains a bribe holds it for the behalf of his principal.

HELD: The appeal was dismissed and the Supreme Court held that the FHR had a personal and proprietary remedy against FHR, and it could elect which to proceed with. Lord Neuberger stated that FHR's argument 'has the merit of simplicity: any benefit acquired by an agent as a result of his agency and in breach of his fiduciary duty is held on trust for the principal.'[127] Lord Neuberger also cited wider policy considerations, noting that payments such as that made by MCGH to Cedar 'tend to undermine trust in the commercial world'[128] especially as 'concern about bribery and corruption generally has never been greater than it is now'.[129]

COMMENT: This is a key decision that is significant for several reasons. First, it means that the principal can not only recover the amount of the bribe, but also any increases in value. Second, as the principal's remedy is proprietary, it follows that, in the event of the agent becoming insolvent, the principal's claim will rank ahead of unsecured creditors. Lord Neuberger did note that this could prejudice unsecured creditors, but went on to argue that this argument had little force in relation to bribes as the bribe usually 'consists of property which should not be in the agent's estate at all'.[130] Third, as the claim is proprietary, the principal can trace the assets of the agent to third parties. Finally, it should be noted that the *ratio* of this case is not confined to relationships of agency and will also apply to other relationships, such as employer and employee, and a company and its directors.

See The Hon William Gummow AC, 'Bribes and Constructive Trusts' (2015) 131 LQR 21

121. See e.g. Keith Uff, 'The Remedies of the Defrauded Principal After *A-G for Hong Kong v Reid*' in David Feldman and Frank Meisel (eds), *Corporate and Commercial Law: Modern Developments* (Lloyds of London Press 1996) ch 13.
122. See e.g. the judgment of Lord Neuberger MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2011] 3 WLR 1153.
123. For example, if the agent becomes insolvent, then the principal's claim to the proceeds of the bribe will rank ahead of the claims of any unsecured creditors.
124. [2011] EWCA Civ 347, [2012] Ch 453.
125. [2011] EWHC 2999 (Ch).
126. [2013] EWCA Civ 17, [2014] Ch 1.
127. [2014] UKSC 45, [2015] AC 250 [35].
128. ibid [42].
129. ibid.
130. ibid [43].

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The payment of a bribe can also result in criminal penalties being imposed under the common law (e.g. for conspiracy) and under statute, notably the Bribery Act 2010.[131] Prior to July 2011 (when the 2010 Act came into force), the law in this area was complex and inconsistent, with the various bribery offences being found in a mass of case law and several pieces of legislation.[132] The Law Commission[133] recommended that all bribery offences (both statutory and common law) be repealed and replaced by a number of general bribery offences. In implementing the Law Commission's recommendations, the Bribery Act 2010 provides for four general categories of offences:

1. Section 1 of the 2010 Act provides for two offences related to the paying of bribes, namely (a) where a person offers, promises, or gives a financial or other advantage to another person and intends the advantage to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or duty;[134] and (b) where a person offers, promises, or gives a financial or other advantage to another person and knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.[135]
2. Section 2 provides for several criminal offences relating to the taking of bribes (e.g. it is an offence to request, agree to receive, or accept a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly).[136]
3. Section 6 provides that it is an offence to bribe a foreign official.
4. The offences in ss 1, 2, and 6 are broadly similar to offences that existed before the enactment of the 2010 Act. The fourth offence, found in s 7, has no prior counterpart and is a brand new and potentially wide-ranging offence. Section 7(1) provides that a relevant commercial organization[137] commits an offence if a person associated with that organization bribes another person, intending to obtain or retain business for the organization, or to obtain or retain an advantage in the conduct of business for that organization.

Duty to account

The duty to account is the collective term for several obligations imposed upon the agent. First, the agent will be under a duty to keep the principal's money or property separate from his own and that of other persons.[138] If the agent breaches this duty and mixes the principal's money/property with his own, then the principal will be entitled to the whole mixed fund, unless the agent can establish which parts were his own property.[139] It should be noted that this duty arises only in relation to money/property that is beneficially owned by the principal and, in such a case, the agent is regarded as a

131. For a more detailed discussion of the 2010 Act, see G Sullivan, 'The Bribery Act 2010: Part 1: An Overview' (2001) 2 Crim LR 87 and Stephen Gentle, 'The Bribery Act 2010: Part 2: The Corporate Offence' (2011) 2 Crim LR 101.

132. Notably, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916.

133. Law Commission, *Reforming Bribery* (Law Com No 313, 2008).

134. Bribery Act 2010, s 1(2).

135. ibid s 1(3).

136. ibid s 2(2).

137. Section 7(5) of the 2010 Act provides that relevant commercial organizations are bodies corporate and partnerships that are either (a) created in the UK and conduct business (whether in the UK or elsewhere); or (b) created outside the UK, but conduct business in the UK. It is clear that this is an extremely broad definition that will cover the vast majority of businesses that are created, or operate, within the UK.

138. *Gray v Haig* (1855) 20 Beav 219.

139. *Lupton v White* (1808) 15 Ves 432.

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trustee of such property.[140] Where the money/property is not beneficially owned by the principal, or where it can be shown that the principal has consented to the agent mixing his money/property with that of the principal, then the duty to account will not be a fiduciary one and the agent will be regarded as a simple debtor of the principal, and not as a trustee.[141]

Second, an agent who holds or receives money on behalf of his principal is under a duty to provide that money to the principal upon demand.[142] This duty applies even if the money in question is subject to a claim from a third party, or where the principal receives money in respect of a transaction that is void or illegal.[143]

Third, an agent must keep accurate accounts of all transactions entered into on behalf of his principal,[144] and must also be prepared to render those accounts to the principal upon demand.[145] This aspect of the duty can continue even after the contract between the principal and the agent has come to an end.[146]

If an agent breaches this duty, then the court will be 'compelled to ... presume everything most unfavourable to him, which is consistent with the rest of the facts which are admitted or proved'.[147] Thus, if the agent contends that the accounts are not accurate (e.g. because they indicate the agent owes money to the principal, when the agent claims to have already paid the sum in question), the courts will be likely to uphold the information in the accounts, unless the agent can adduce evidence indicating the true state of affairs.[148]

Duties owed by commercial agents

Commercial agents are subject to additional duties as set out by reg 3 of the Commercial Agents (Council Directive) Regulations 1993, although it will be seen that these duties are rather similar to some of the common law duties discussed earlier. Regulation 3(1) sets out the general duty of a commercial agent, namely to 'look after the interests of his principal and act dutifully and in good faith'. Regulation 3(2) then goes on to establish three more specific duties:

1. A commercial agent must take proper effort to negotiate and, where appropriate, conclude the transactions he is instructed to take care of.
2. A commercial agent must communicate to his principal all the necessary information available to him. Whilst the common law requires agents to disclose conflicts of interest, secret commissions, and bribes, there is no general requirement placed upon an agent to disclose information to the principal. Accordingly, the disclosure obligations of commercial agents are more extensive than those of a general agent.

140. *Burdick v Garrick* (1870) LR 5 Ch App 233.
141. *Henry v Hammond* [1913] 2 KB 515 (KB).
142. *Edgell v Day* (1865–66) LR 1 CP 80.
143. *De Mattos v Benjamin* (1894) 63 LJ QB 248 (agent required to provide principal with winnings derived from illegal bets made on principal's behalf).
144. *Chedworth v Edwards* (1802) 8 Ves 46. Certain agents are also required by statute to maintain specific forms of accounts (see e.g. s 21A of the Estate Agents Act 1979).
145. *Pearse v Green* (1819) 1 J&W 135.
146. *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 (QB). This case is discussed in more detail on p 190.
147. *Gray v Haig* (1855) 20 Beav 219, 226 (Romilly MR).
148. *Shaw v Dartnall* (1826) 6 B&C 56.

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3. A commercial agent must comply with reasonable instructions given by his principal.

Whereas the additional duties of a commercial agent strongly resemble the common law duties, there is a notable difference, namely that the common law duties can be contractually excluded or limited,[149] whereas the duties found in reg 3 cannot be derogated from.[150]

The rights of an agent

As the discussion thus far indicates, an agent owes a considerable number of duties to his principal. Conversely, the rights of an agent against his principal are much fewer in number. Bowstead & Reynolds contend that this is because 'English law ... has traditionally viewed the principal as the person requiring protection, against wrongful use of the agent's powers, and have paid little attention to the position of the agent'.[151] Despite this, the common law does provide agents with a number of important rights, with commercial agents being afforded further rights under the Commercial Agents (Council Directive) Regulations 1993.

Entitlement to remuneration

The common law does not provide agents with a right to be remunerated. Generally, an agent will only be entitled to remuneration if the agency agreement contains an express or implied term to that effect, or if the agent has the restitutionary right to claim a ***quantum meruit***.

→ *quantum meruit*: 'as much as he has deserved'—a reasonable sum based on services provided

Where the agency agreement contains an express term providing for the agent to be remunerated, then the issue is largely straightforward and the agent will be entitled to remuneration in accordance with the express terms. Where no express term is present, the courts may be willing to imply a term, but, in practice, this occurs rarely. Lord Hoffmann stated the reason behind this:

> The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed.[152]

Whether or not a term providing for remuneration will be implied will depend upon the normal contractual rules relating to the implication of terms. Notably, the courts will not imply a term if such a term is inconsistent with the express terms of the contract.[153] Clearly, whether a term will be implied will be heavily dependent upon the facts of the case, but the courts have stated that it is highly likely that a term will be implied if it was obvious from the facts that the agent would be remunerated,[154] or where

149. *Kelly v Cooper* [1993] AC 205 (PC).

150. Commercial Agents (Council Directive) Regulations 1993, reg 5(1).

151. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [7-001].

152. *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 [17].

153. *Broad v Thomas* (1830) 7 Bing 99.

154. *Way v Latilla* [1937] 3 All ER 759 (HL).

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the agent was acting in a professional capacity.[155] Where a term is implied, then the agent will receive a reasonable sum.

Way v Latilla [1937] 3 All ER 759 (HL)

FACTS: Way (the agent) agreed to send to Latilla (the principal) information relating to gold mines in South Africa, and, in return, Way would receive a concession in any gold mines that Latilla obtained. However, the agency agreement was silent in relation to the remuneration that Way would receive and Latilla denied offering Way a concession.

HELD: The House concluded that there was no completed contract between Way and Latilla providing for Way to be remunerated. There was, however, a contract of employment between the two parties 'under which Mr Way was engaged to do work for Mr Latilla in circumstances which clearly indicated that the work was not to be gratuitous'.[156] Accordingly, a term was implied into the contract, providing for Way to receive a *quantum meruit* of £5,000.

COMMENT: Compare the result in this case to that of *Kofi Sunkersette Obu v A Strauss & Co Ltd*,[157] in which the court distinguished *Way v Latilla* and refused to award a *quantum meruit* on the ground that the agency agreement contained an express term providing that the amount of commission paid would be determined by the principal.

Where the agency is gratuitous, then the agent may still be entitled to claim a *quantum meruit* if both principal and agent believed that a contract would come into being, but it ultimately did not.[158]

The Supreme Court in *Benedetti v Sawiris*[159] has confirmed the award of a *quantum meruit* is calculated on the basis of unjust enrichment, so it will be based on the benefit unjustly gained by the defendant at the expense of the claimant.[160] Where, as in most agency cases, the benefit takes the form of a service, then the starting point will be the objective market value of the services concerned.[161]

Effective cause

Often, an agency agreement will provide that an agent will only receive remuneration or commission if a particular event occurs or if he brings about a specified result. In such a case, the agent will not be entitled to remuneration or commission if that event or result does not occur, or, in other words, 'they get paid for results and not for effort'.[162] Further, unless the contract provides otherwise, the agent will only be entitled to remuneration or commission if he was the 'effective cause' of the relevant event or result.

Millar, Son & Co v Radford (1903) 19 TLR 575 (CA)

FACTS: Radford (the principal) instructed a firm of estate agents, Millar, Son & Co ('Millar', the agents), to find a purchaser for his property or, if a purchaser could not be found, a tenant. Millar could not find a purchaser, but did find a tenant, who undertook a lease on the property. Fifteen

155. *Miller v Beal* (1879) 27 WR 403.
156. [1937] 3 All ER 759 (HL) 763 (Lord Atkin).
157. [1951] AC 243 (PC).
158. *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932 (QB).
159. [2013] UKSC 50, [2014] AC 938.
160. ibid [13] (Lord Clarke).
161. ibid [15].
162. *Bentley's Estate Agents Ltd v Granix Ltd* [1989] 2 EGLR 21 (QB) 23 (Phillips J).

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months later, without the involvement of Millar, the tenant purchased the property from Radford. Millar claimed commission on the sale, but Radford refused to pay. Millar commenced proceedings.

HELD: Collins MR stated that 'the right to commission does not arise out of the mere fact that agents have introduced a tenant or purchaser... It is necessary to show that the introduction was an efficient cause in bringing about the letting or the sale.' As Millar clearly was not the effective cause, its claim failed.

It will be noted that, in the above passage of Collins MR, it is stated that the agent must be *an* effective cause. This has resulted in a measure of uncertainly as the courts have not consistently stated whether the agent need be *the* effective cause, or merely *an* effective cause. A number of cases have expressed a preference for the agent being an effective cause,[163] but this approach was criticized by Woolf LJ who stated that in some cases it could 'create problems where there are two or more effective causes, each of which could be the subject of a claim for commission'.[164] A definitive ruling is needed.

Deprivation of opportunity to earn commission

In a number of cases, the courts have had to determine whether or not a principal is liable if he acts in a manner that prevents his agent from earning commission. The courts have repeatedly stated that a principal who prevents his agent from earning commission will only be liable if the agency agreement contains an express or implied term prohibiting the principal from acting in such a way. As the following case demonstrates, the courts are reluctant to imply such a term, especially where such a term would restrict the principal's ability to deal with his own property.

***Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 (HL)**

FACTS: Two companies, Luxor and Regal (the principals), engaged Cooper (the agent) and instructed him to find a purchaser for their four cinemas. Luxor and Regal agreed to pay Cooper commission of £10,000 if he found them a purchaser who was willing to pay not less than £185,000 for the cinemas. Cooper found a purchaser who was willing to pay £185,000, and entered into negotiations with Luxor and Regal. However, Luxor and Regal then pulled out of the negotiations and so Cooper could not earn the commission. Cooper sued, alleging that it was an implied term of the agency agreement that Luxor and Regal would not do anything to prevent him from earning commission.

HELD: Cooper's action failed and the House refused to imply a term preventing Luxor and Regal from withdrawing from the negotiations. Lord Wright stated:

> If the commission agent has a right to claim commission or damages if the vendor abandons the negotiations and does not complete the sale, his doing so is a breach of contract vis-à-vis the agent and it is immaterial to the agent how sensible or reasonable the vendor's conduct may be from his own point of view. Such a qualified implication seems to me too complicated and artificial. The parties cannot properly be supposed to have intended it, nor can it be taken to be necessary to give business efficacy to the transaction.[165]

163. See e.g. *Nahum v Royal Holloway and Bedford New College* [1999] EMLR 252 (CA); *Harding Maughan Hambly Ltd v CECAR* [2000] 1 Lloyd's Rep 316.
164. *Brian Cooper & Co v Fairview Estates (Investments)* [1987] 1 EGLR 18 (CA) 20.
165. [1941] AC 108 (HL) 140.

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Accordingly, a principal is free to prevent his agent from earning commission, unless there is an express or implied term in the agency agreement that provides that the principal will not act in such a way. In *Luxor*, the actions of the agent had not yet resulted in the creation of a contract between the principal and third party. The court may be more willing to imply a term prohibiting the principal from preventing the agent from earning commission where the agent has effected a binding contract between the principal and third party, especially if the principal is in breach of that contract.

Alpha Trading Ltd v Dunnshaw-Patten Ltd [1981] QB 290 (CA)

FACTS: Dunnshaw-Patten Ltd ('Dunnshaw', the principal) instructed Alpha Trading Ltd ('Alpha', the agent) to locate a purchaser for a large quantity of cement, in return for which Alpha would receive commission based on the amount sold. Alpha located a purchaser and introduced it to Dunnshaw. A contract of sale to purchase 10,000 tonnes was entered into, but Dunnshaw failed to perform and so Alpha did not receive commission. Alpha commenced proceedings against Dunnshaw.

HELD: Alpha was entitled to the commission and was awarded damages of $25,000 plus interest. Brandon LJ stated that:

> [t]he defendants did make a contract of sale with that buyer on the basis that, if the contract was performed, the agent would receive substantial remuneration. The only reason the contract was not performed was that the defendants were either unwilling or unable to perform it. It seems to me that, in a case of that kind, it is right for the court to imply a term that the defendants will not fail to perform their contract with the buyer so as to deprive the agent of the remuneration due to him under the agency contract.[166]

COMMENT: At first glance, it would appear that this decision is contrary to *Luxor*, but this is not the case, as Brandon and Templeman LJJ were strongly influenced by the following statement of Lord Wright in *Luxor*:

> [I]f the negotiations between the vendor and the purchaser have been duly concluded and a binding executory agreement has been achieved, different considerations may arise. The vendor is then no longer free to dispose of his property . . . If he refuses to complete he would be guilty of a breach of agreement vis-à-vis the purchaser. I think . . . that it ought then to be held that he is also in breach of his contract with the commission agent, that is, of some term which can properly be implied.[167]

See JW Carter, 'The Life of an Agent in Commerce is a Precarious One' (1982) 45 MLR 220

Loss of the right to remuneration/commission

An agent is not entitled to commission for transactions that occur after his agency agreement has come to an end, unless the agency agreement provides otherwise.[168] The agent will also lose the right to remuneration in several other situations, including:

- Where the agent commits a serious breach of his duties, he may lose his right to commission.[169] However, any remuneration due at the date of the breach will still be payable;[170]

166. [1981] QB 290 (CA) 304.
167. *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 (HL) 142.
168. *Crocker Horlock Ltd v B Lang & Co Ltd* [1949] 1 All ER 526 (KB).
169. *Salomons v Pender* (1865) 3 H&C 639.
170. *Boston Deep Sea Fishing v Ansell* (1888) 39 ChD 339 (CA).

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- The agent will not be entitled to remuneration in respect of transactions that are outside the scope of his authority,[171] unless the principal ratifies the unauthorized acts;
- An agent may not be able to recover remuneration in respect of transactions entered into for which he was unqualified or lacked capacity; so, for example, a person, purporting to act as a solicitor, could not recover remuneration for transactions entered into as a solicitor if he was not qualified under s 1 of the Solicitors Act 1974;
- An agent loses the right to remuneration if he knew, or ought to have known, that he was acting in an unlawful[172] or dishonest[173] manner.

Right to reimbursement and indemnity

Aside from several exceptions, which are discussed later in this section, every agent has the right to be reimbursed for any expenses, and to be indemnified for any losses or liabilities incurred by him during the execution of his agency. The source of this right, and its precise scope, will depend upon whether the agency is contractual or gratuitous.

Where the agency is contractual, there may be an express term providing the agent with the right to claim reimbursement and an indemnity. Where no express term is present, then the courts will imply such a term, unless it is clear from the contract that the implication of such a term has been excluded. A contractual agent can claim a full indemnity for all payments made, and losses and liabilities incurred, during the execution of the agency. This will not only include payments which the principal is legally bound to make, but also includes:

- **(i)** payments which the principal is not legally bound to make, but which are binding upon the agent;[174]
- **(ii)** payments which the agent is morally pressured to make; and[175]
- **(iii)** payments which the agent has mistakenly made, but which are nonetheless reasonable.[176]

Where the agency is gratuitous, then the right is clearly not based in contract, but is instead based in restitution. In this case, the scope of the right to reimbursement is narrower and the agent will only be entitled to recover those payments that the agent was compelled to make, the principal would ultimately be liable for, and were for the principal's benefit.[177]

Loss of the right

The agent will lose the right to reimbursement and indemnity in certain circumstances:

- where the contract expressly excludes the agent from having such a right;
- where the agent had acted outside the scope of his express or implied actual authority;[178] the agent will regain the right if the principal subsequently ratifies the unauthorized acts;

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171. *Mason v Clifton* (1863) 3 F&F 899.
172. *Josephs v Preber* (1825) 3 B&C 639.
173. *Kelly v Cooper* [1993] AC 205 (PC).
174. *Adams v Morgan & Co* [1924] 1 KB 751 (CA).
175. *Rhodes v Fielder, Jones and Harrison* (1919) 89 LJ KB 159 (KB).
176. *Pettman v Kebble* (1850) 9 CB 701.
177. *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (CA).
178. *Barron v Fitzgerald* (1840) 6 Bing NC 201.

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- where the loss or liability incurred is due to the agent's own negligence, default, insolvency, or breach of duty;[179]
- where the agent knows, or ought to know, that the transaction he is undertaking is unlawful.[180]

Right to a lien

Consider the following example.

Eg COMCORP LTD

ComCorp instructs an agent, Ben, to sell five pieces of machinery that the company no longer needs. Ben takes possession of the machinery. The agency agreement provides that Ben should claim for reasonable expenses as and when they occur, and that Ben will be reimbursed for these expenses within one week of him submitting a claim. Ben sells two of the pieces of machinery and submits a claim for the expenses he incurs. Two weeks later, Ben has still not been paid and ComCorp informs Ben that it will not be paying his expenses and that Ben should return the remaining three machines to ComCorp. Ben informs ComCorp that he will not return the remaining machines until his expenses have been reimbursed.

Is Ben entitled to retain possession of the machines? Generally, the answer is yes. If an agent or sub-agent[181] is not provided with the remuneration, reimbursement, or indemnity that he is entitled to, then the agent or sub-agent is granted a 'remedy of self-help'[182] in the form of a lien. A lien is simply a right to retain possession of the goods of another as security until that other person satisfies some debt or other obligation. Accordingly, if the principal refuses to provide an agent with the remuneration, reimbursement, or indemnity that he is entitled to, then the agent can retain possession of the principal's goods until the principal makes good on his obligations to the agent. It should be noted at the outset that there are two types of lien:

1. An agent entitled to a general lien can retain possession of any goods belonging to the principal until such time as the relevant obligation is met.
2. A person entitled to a particular lien can only retain possession of those goods of the principal to which the particular obligation relates.

Generally, the agent has only the right to a particular lien and the courts are very reluctant to provide an agent with a general lien.[183] However, the agent may acquire a

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179. *Thacker v Hardy* (1878) 4 QBD 685.

180. *Re Parker* (1882) 21 ChD 408. The agent may be able to obtain a contribution from the principal under s 1 of the Civil Liability (Contribution) Act 1978.

181. The sub-agent's right to a lien will only arise if the appointment of the sub-agent is authorized (*Solly v Rathbone* (1814) 2 M&S 298). If this is the case, then a sub-agent may have a lien over the principal's goods, even though the sub-agent's claim for remuneration, reimbursement, or indemnity is against the agent who appointed him.

182. *Compania Financiera 'Soleada' SA v Hamoor Tanker Corporation Inc (The Borag)* [1980] 1 Lloyd's Rep 111 (QB) 122 (Mustill J).

183. See Lord Campbell LC in *Bock v Gorrissen* (1860) 2 De G, F&J 434, 443, who stated that '[t]he law of England does not favour general liens'.

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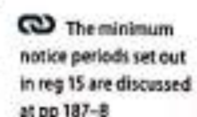
general lien if the terms of the agency agreement provide for one, or the right to a general lien is recognized within a particular trade or custom.[184]

The agent's right to a lien is conditional upon four requirements being satisfied. First, the agent can only exercise a lien over goods that are already in his possession.[185] Second, the agent must have acquired possession of the goods through lawful means, so, for example, if an agent, without the authorization of his principal, removes the principal's goods from a third party's premises, then no lien will lie over those goods, as they were acquired unlawfully by the agent.[186] Third, the agent must have acquired the goods in his capacity as an agent.[187] Fourth, a lien will only be effective if it is not excluded by the express or implied terms of the agency agreement.[188]

Rights of commercial agents

Just as the Commercial Agents (Council Directive) Regulations 1993 impose duties upon commercial agents, so too do they provide them with certain rights. The principal must act dutifully and in good faith towards his commercial agent[189] and, in particular he must (i) provide his commercial agent with the necessary documentation relating to the goods concerned; and (ii) obtain for his commercial agent the information necessary for the performance of the agency contract.[190] Other rights include the following:

- The commercial agent has the right to receive from the principal, on request, a signed written document setting out the terms of the agency contract, including any terms subsequently agreed.[191]
- An agency contract for a fixed period that continues to be performed by both parties after the period has expired shall be converted into an agency contract for an indefinite period.[192]
- If the principal wishes to terminate the agreement, then he must provide the commercial agent with notice as stipulated in reg 15.
- Upon the termination of the agency agreement, the commercial agent is entitled to an indemnity or compensation.[193]


The minimum notice periods set out in reg 15 are discussed at pp 187–8

Remuneration

Part III of the 1993 Regulations provides the commercial agent with notable rights in relation to remuneration, with reg 6(1) providing that, where no agreement as to remuneration exists between the parties, then the commercial agent will be entitled to 'the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities'. If no such practice exists, the commercial agent will be entitled to 'reasonable remuneration taking into account all the aspects of the transaction'. It has been contended that the common law principles discussed in relation to standard agents could also operate

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184. As a result of custom, general liens have been provided to specific agents, such as solicitors, stockbrokers, bankers, and marine insurance brokers.
185. *Shaw v Neale* (1858) 6 HL Cas 581 (HL).
186. *Taylor v Robinson* (1818) 8 Taunt 648.
187. *Muir v Fleming* (1822) Dow & Ry NP 29 (goods left with agent merely for safekeeping not deemed to be acquired by the agent in his capacity as an agent).
188. *Wolstenholm v Sheffield Union Banking Co* (1886) 54 LT 746.
189. Commercial Agents (Council Directive) Regulations 1993, reg 4(1).
190. ibid reg 4(2).
191. ibid reg 13(1).
192. ibid reg 14.
193. ibid reg 17.

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within the scope of reg 6(1),[194] and so little needs to be said of reg 6(1) except to note that the presumption that the commercial agent will receive an amount of remuneration that is customary does not have a counterpart in relation to the general law of agency.

The noteworthy provisions (namely those found in regs 7–12) relate to a commercial agent's right to commission, with 'commission' referring to 'any part of the remuneration of a commercial agent which varies with the number or value of business transactions'.[195] To see why the provisions contained in regs 7–12 are so noteworthy, consider the following example.

Eg COMCORP LTD

ComCorp is looking to expand its customer base. Accordingly, it engages Marie (the commercial agent) and instructs her to locate potential customers and, if possible, to negotiate and enter into contracts of sale on ComCorp's behalf. The agency agreement is to last one year and commences in February 2016. In March 2016, Marie successfully negotiates a contract of sale on behalf of ComCorp with TechCorp plc. In May 2016, ComCorp negotiates directly with TechCorp and enters into a contract of sale that is identical to the one entered into in March. Marie is seeking commission for both contracts, but ComCorp refuses to pay her commission for the second contract of sale, as it negotiated directly with TechCorp itself.

To what extent is Marie entitled to commission for the first contract and for future contracts that ComCorp enters into with TechCorp? The answer is found in reg 7(1).

Commercial Agents (Council Directive) Regulations 1993, reg 7(1)

A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract—

(a) where the transaction has been concluded as a result of his action; or

(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

Regulation 7(1)(a) is straightforward and simply states that an agent is entitled to commission for any contracts that are concluded as a result of his action (such as the contract concluded by Marie in March in the ComCorp example). The phrase 'as a result of his action' is the 1993 Regulations' equivalent of the 'effective cause' requirement imposed upon standard agents, although the language used would appear to indicate a less strict standard.

The effective cause requirement is discussed at p 132

Regulation 7(1)(b) is more noteworthy, and basically provides that an agent is entitled to commission for repeat orders, even if he is not involved in negotiating and concluding such orders. Accordingly, if an agent introduced a customer to the principal and a contract ensued, the agent would be entitled to commission under

194. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [11-027].
195. Commercial Agents (Council Directive) Regulations 1993, reg 2(1).

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reg 7(1)(a)—if the principal subsequently deals directly with the customer without the agent's involvement and a contract ensues, the agent will be entitled to commission again under reg 7(1)(b). Therefore, in the ComCorp example, Marie would also be entitled to commission for the contract entered into in May.

It will be noted that reg 7 only applies to transactions that are concluded during the period of the agency agreement (accordingly, in the ComCorp example, reg 7 would not apply to transactions concluded after February 2017). Regulation 8 provides a commercial agent with the right to commission in relation to transactions that occur after that agency agreement has ended. However, this right will only arise if:

(i) the transaction is mainly attributable to his efforts during the period covered by the agency contract and the transaction was entered into within a reasonable period after that contract terminated; or

(ii) in accordance with the conditions mentioned in reg 7, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

The provisions just discussed relate to whether commission is due. Regulation 10 relates to when commission is due and provides that commission will become due in one of three situations, namely:

(i) where the principal has executed the transaction; or

(ii) where the principal should, according to his agreement with the third party, have executed the transaction; or

(iii) where the third party has executed the transaction.[196]

CONCLUSION

As this chapter has demonstrated, the legal relationship between principal and agent can be complex, with each party owing the other a number of vital duties (although, as has been noted, the agent owes considerably more duties to the principal than the principal owes the agent). Breach of duty can have significant effects upon the agency relationship, but it is important to note that the actions of the principal and agent can also affect the position of third parties. Accordingly, Chapters 7 and 8 look at the position of third parties in relation to the principal and agent, with Chapter 7 discussing the relationship that exists between the principal and the third party.

PRACTICE QUESTIONS

1. 'The fiduciary duties placed upon agents are overly strict and fail to reflect the realities of modern commerce.'

   Do you agree with this statement? Provide reasons for your answer.

2. The machinery in one of ComCorp's factories is nearing the end of its operational lifespan and needs to be replaced. The machinery, if sold for scrap, would raise £5,000. Accordingly, ComCorp instructs Bruce, the manager of the factory, to sell the machinery for scrap and to 'make every effort to ensure that suitable replacement machinery is purchased and installed'. However, Bruce sells the machinery to MultiTech Ltd, a company of which his brother is the managing director. MultiTech pays £6,000 for the machinery and installs it into one of its factories. It also pays Bruce commission of £500.

   Bruce is not confident that he can purchase the correct replacement machinery and so he engages the services of an expert, Oliver, whom he instructs to locate and purchase suitable

196. Ibid reg 10(1).

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