4 The creation of the agency relationsh

- Capacity
- Formality
- Agency by agreement
- Agency by ratification
- Agency by operation of law
- Agency arising due to estoppel

INTRODUCTION

Having discussed what agency is and the various types of agent that exist, this chapter moves on to consider the various methods by which a relationship of agency can be created, namely:

- agency by agreement;
- agency by ratification;
- agency by operation of law; and
- agency arising due to estoppel.

It is worth noting at the outset that the fact that the parties describe themselves as 'principal' and 'agent' will not conclusively establish that a relationship of agency exists, and the courts will disregard such labels if the realities of the relationship indicate that it is not one of agency. Similarly, an agency relationship might be held to exist, even though the parties (or one of the parties) do not wish for such a relationship to exist, or have expressly declared that such a relationship does not exist. Agency relationship can therefore be created consensually or non-consensually, as Table 4.1 indicates:

TABLE 4.1 Consensual and non-consensual agencies

Consensual agencies	Non-consensual agencies
• Agency by agreement (express and implied) • Agency by ratification • Agency by operation of the law	• Agency arising due to estoppel

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All of these forms of agency are discussed in this chapter. However, before the methods of creation can be discussed, it is important to answer two preliminary questions:

1. How does the contractual capacity of the principal and/or agent affect the creation of an agency relationship?
2. What formalities are required in order to create an agency relationship?

Figure 4.1 provides an overview of all the major issues discussed in this chapter.

Capacity

In many cases, a relationship of agency will arise via contract and the agent will have the ability to affect the contractual position of his principal. In such cases, the **contractual capacity** of the principal and agent are of fundamental importance and, if either of the parties lacks capacity, any resulting contracts (including the contract of agency itself) may be void or voidable.

→ **contractual capacity:** the ability and extent to which a person can enter into contractual arrangements

Capacity of the principal

The general rule is that a principal can appoint an agent to engage in any act that the principal himself has capacity to engage in, or to put it more simply, 'whatever a party himself may do, he may do through the intermediary of an agent'.[1] It follows that an agent who lacks capacity to enter into a transaction in his own name may nevertheless enter into that transaction on behalf of his principal, providing that the principal has capacity to enter into that transaction. Bearing this in mind, consider the following example:

Eg COMCORP LTD

ComCorp appoints an agent, Oliver, to negotiate and enter into a number of contracts on its behalf. Oliver carries out his instructions and creates a number of contracts between ComCorp and several third parties. ComCorp then discovers that Oliver is only 17 years old.

In this example, Oliver is a minor (i.e. a person under the age of 18).[2] A minor will lack the capacity to make many types of contract and can only enter into binding contracts in limited circumstances.[3] Where the minor lacks capacity, the contract will not normally be void, but will be voidable at the minor's instance. However, in cases of agency, a minor who is acting as agent can enter into binding contracts providing that his principal has capacity to enter into such contracts. Accordingly, in this example, Oliver's lack of capacity will not be an issue (although the contract of agency between

1. Roderick Munday, *Agency: Law and Principles* (2nd edn, OUP 2013) 39.
2. Family Law Reform Act 1969, s 1.
3. Namely, where the contract is one for necessaries, or is a contract of service (e.g. employment or apprenticeship).

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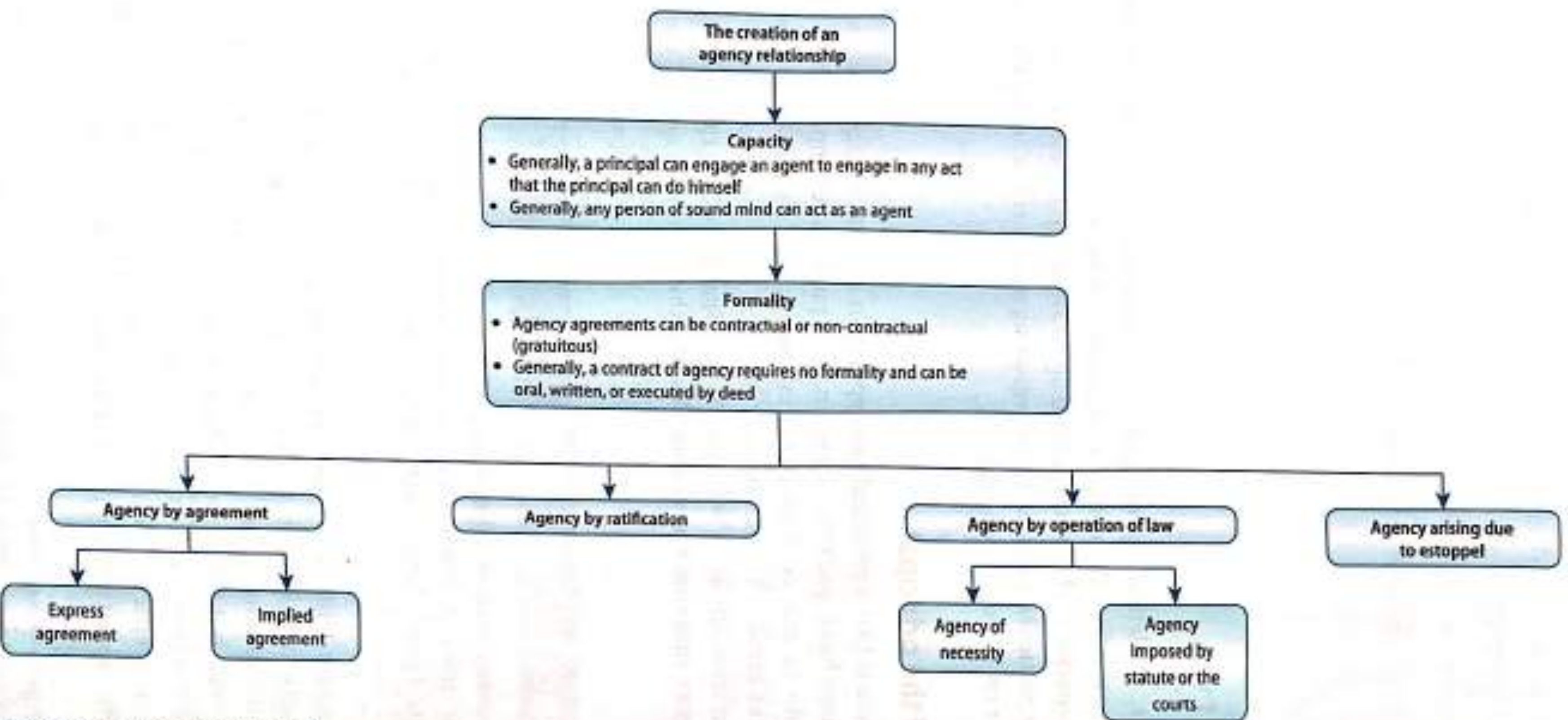

FIGURE 4.1 The creation of agency

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ComCorp and Oliver might be voidable). The general rule regarding capacity also applies to a minor that acts as principal, namely that '[w]henever a minor can lawfully do an act for his own behalf, so as to bind himself, he can instead appoint an agent to do it for him'.[4] From this, it follows that:

- a contract that would bind a minor if he were to enter into it himself will also bind him if he enters into it via an agent;
- a contract that would not be binding on a person because he is a minor will not become binding simply because it is entered into by an adult agent acting on the minor's behalf.

Where a principal is mentally incapacitated, the issue is more complex. The law presumes that a person has mental capacity unless the contrary is established.[5] A person will lack mental capacity if 'at the material time he is unable to make a decision for himself in relation to a matter because of an impairment of, or a disturbance of the functioning of, the mind or brain'.[6] Even if a mentally incapacitated person does enter into a contract, general contract law provides that the contract will be binding unless the other party knew of the incapacity, in which case the contract will be voidable at the instance of the incapacitated person.[7] In relation to the contract of agency itself, it has been contended that this general contractual rule will apply,[8] but will it apply to any contracts entered into by the agent with third parties on the principal's behalf? Where the contract was entered into based upon the agent's actual authority, then it seems clear that the incapacitated principal will not be bound, irrespective of whether the third party knew of the incapacity.[9] In cases involving the agent's apparent authority, two contentions have been advanced:

1. Where the principal is mentally incapacitated at the time that he made the representation as to the agent's authority, then that principal will not be bound, irrespective of whether the third party knew of the incapacity.[10]
2. Where the principal becomes mentally incapacitated after the initial representation is made, then any contracts entered into by the agent on behalf of the principal will be binding on the principal, providing that the third party had no knowledge of the principal's incapacity.[11]

Capacity of the agent

As noted, an agent who lacks capacity to enter into a contract on his own behalf may nevertheless be able to enter into a contract on behalf of a principal who does have capacity to enter into such a contract. It follows that, in many cases, the capacity of the agent is irrelevant. The only general requirement that the law imposes is that the agent be of sound mind and if, due to mental incapacity, the agent cannot understand the nature of the acts he is required to undertake, then he will not be able to affect the legal

4. *G(A) v G(T)* [1970] 2 QB 643 (CA) 652 (Lord Denning MR).
5. Mental Capacity Act 2005, s 1(2). 6. ibid s 2(1).
7. *Molton v Camroux* (1849) 4 Ex 17; *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599 (CA).
8. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-009].
9. *Yonge v Toynbee* [1910] 1 KB 215 (CA). In such a case, the agent will be liable to the third party for breach of warranty of authority (discussed at p 168).
10. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-009].
11. *Drew v Nunn* (1878–79) LR 4 QBD 661 (CA).

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position of his principal. The actual contract of agency between the principal and the agent would remain valid, unless the principal knew of the incapacity, in which case it would be voidable at the incapacitated agent's instance.[12]

Formality

Generally, the law imposes no formalities upon those who wish to enter into an agency relationship. Thus, an agency relationship can be brought into existence orally, in writing, or by executing a deed. This lack of formality even extends to situations where the agent is appointed to enter into contracts on the principal's behalf that are required to be in writing, or evidenced in writing.[13] This principle is subject to exceptions, however, and, in certain cases, the law will impose stipulations as to formality, with examples including:

- if the agent is appointed to execute a deed on behalf of the principal, then generally the agent will need to be appointed via a deed;[14]
- if an agent is engaged to create or dispose of an interest in land, then he must be authorized to do so in writing.[15]

Having discussed capacity and formality, the chapter will now look at how a relationship of agency can be created.

Agency by agreement

The vast majority of agency relationships are created through an agreement between the principal and agent (i.e. both parties consent to an agency relationship coming into existence). In many cases (especially in commercial agencies), the agreement will be established contractually, either orally, in writing, or via the execution of a deed. However, there is no requirement that a relationship of agency be contractual, and where no contract of agency exists or where a contract purports to exist but lacks validity,[16] then the agency is said to be 'gratuitous'. Agency by agreement is founded upon consent, not on the existence of a contract. As Colman J stated:

> Although in modern commercial transactions agencies are almost invariably founded upon a contract between the principal and agent, there is no necessity for such a contract to exist. It is sufficient if there is consent by the principal to the exercise by the agent of authority and consent by the agent to his exercising such authority on behalf of the principal.[17]

Whilst both contractual and gratuitous agencies are equally valid, there are two noteworthy differences between them. First, where an agency is gratuitous, the parties

12. *Molton v Camroux* (1849) 4 Ex 17; *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599 (CA).

13. *Heard v Pilley* (1869) LR 4 Ch App 548 (agent orally appointed to enter into contract that must be in writing).

14. *Berkeley v Hardy* (1826) 5 B&C 335. Note that this stipulation will not apply where the deed is signed at the direction of and in the presence of the principal, and two witnesses attest the signature (Law of Property (Miscellaneous Provisions) Act 1989, s 1(3)).

15. Law of Property Act 1925, s 53(1)(a).

16. For example, because sufficient consideration is not present, or because one/both of the parties lack the requisite contractual capacity.

17. *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 (QB) 185.

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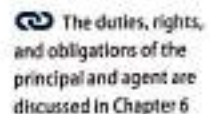
need not provide consideration for the agency agreement, whereas consideration must be present in the case of a contractual agency agreement. Second, where the agency is contractual, the duties, rights, and obligations of the principal and agent will be stated in the contract and can be defeated or enforced by either party via the normal laws of contract. In the case of gratuitous agencies, the duties, rights, and obligations of the parties are set out in law (although the law does also provide for certain rights and obligations in cases involving contractual agencies).


The duties, rights, and obligations of the principal and agent are discussed in Chapter 6

Most agency agreements are express, but the courts might also find that an agreement can be implied based upon the conduct of the parties.

Express agreement

The paradigm method of creating an agency relationship occurs where the principal and agent expressly agree to enter into an agency relationship (i.e. the principal expressly appoints the agent, and the agent expressly agrees to act on the principal's behalf). This agreement will usually be contractual (either in writing or oral), but need not be. The appointment can normally be made informally, even if the agent is to transact contracts that must be made, or evidenced, in writing.[18] All that is necessary is a desire to appoint *A* as agent and *A*'s consent to act as such. Where an agent is appointed as a commercial agent, he is entitled to receive, on request, a signed, written contract setting out the terms of the agency agreement and any terms subsequently agreed.[19]

Implied agreement

A relationship of agency might be implied based upon the words or conduct of the principal or agent. Bowstead & Reynolds state that an agency agreement between the principal and agent will be implied 'where one party has conducted himself towards another in such a way that it is reasonable from that other to infer from that conduct assent to an agency relationship',[20] and the Court of Appeal has confirmed that this is the correct test to apply when determining whether an agency agreement should be implied.[21] The use of the word 'reasonable' indicates that the courts are not concerned with the subjective intentions of the parties, but with what a reasonable person would infer based on the words and conduct of the other person. Implied agency agreements can be contractual or gratuitous.

The key requirement is mutual consent (or 'assent' as Bowstead & Reynolds state)—one party (*A*) acts in such a way towards another party (*B*), that it is reasonable for *B* to infer that *A* consents to an agency relationship arising between them. This could occur in numerous ways, including:

- The principal (*A*) might appoint the agent (*B*) to a position which would usually result in *B* having the authority to act on *A*'s behalf.[22] By being appointed to that position, *B* reasonably infers that he has *A*'s consent to act on *A*'s behalf.

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18. *Heard v Pilley* (1869) LR 4 Ch 548.
19. Commercial Agents (Council Directive) Regulations 1993, reg 13(1). The principal has a similar right against the agent.
20. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-030].
21. *Marine Blast Ltd v Targe Towing Ltd* [2004] EWCA Civ 346, [2004] 1 Lloyd's Rep 721 [21] (Mance LJ).
22. *Pole v Leask* (1863) 33 LJ Ch 155.

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- The principal may acquiesce to another person acting as his agent. However, it should be noted that there will need to be an indication that the principal has acquiesced and acquiescence will not be presumed merely because the principal remained silent.[23]
- The agent (*B*) may act on behalf of the principal (*A*).[24] From this, *A* might reasonably infer that *B* has consented to act as his agent. However, it should be noted that merely carrying out the principal's instructions will not, in itself, result in the implication of an agency relationship, and that there must be some indication present that *B* was acting on *A*'s behalf.[25]

Agency by ratification

Consider the following example:

Eg COMCORP LTD

ComCorp is looking to acquire several pieces of art to display in the lobby of its corporate headquarters. Daniella, an art dealer, purchases a number of paintings from an art gallery. She informs the gallery that she is purchasing the paintings on behalf of ComCorp, but this is not the case—she has not been appointed as ComCorp's agent and has no authority to act on ComCorp's behalf. Upon discovering this, the gallery seeks to repudiate the contracts of sale. ComCorp, however, upon discovering that Daniella has falsely been claiming to be its agent, wishes for the sale to go ahead and so ratifies Daniella's actions. The art gallery refuses to sell the paintings to ComCorp.

The question that arises is whether an agent must be imbued with authority before she acts, or whether ComCorp can retroactively authorize Daniella to act on its behalf, thereby holding the art gallery to the contracts of sale. Where an agent acts without any authority (as is the case in this example), or acts beyond the scope of his authority, then the principal can validate the agent's actions by a process known as 'ratification'. The basic effect of ratification is to retroactively authorize the agent to engage in the relevant acts. Where no relationship of agency exists, the effect is to create a relationship of agency and retroactively provide the agent with authority.

Requirements for ratification

As the effect of ratification is to alter retroactively the legal consequences of actions that have already taken place, it is a concept that must be watched closely. Accordingly, in order for a principal to effectively ratify the actions of his agent, a number of requirements will need to be satisfied.

Principal must exist at time of contract

In order for a principal to be able to effectively ratify the acts of the agent, the principal must exist at the time the agent undertook the act in question. This

23. *Burnside v Dayrell* (1849) 3 Ex 224.
24. *Roberts v Ogilby* (1821) 9 Price 269.
25. *Kennedy v De Trafford* [1897] AC 180 (HL).

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requirement arises primarily in relation to legal persons, notably bodies corporate such as companies and limited liability partnerships. Accordingly, if a company has not been fully incorporated at the time the agent's act was undertaken then, upon its incorporation, the company cannot ratify the act, as the following case demonstrates.

Kelner v Baxter and Others (1866–67) LR 2 CP 174

FACTS: It was agreed that a company (the Gravesend Royal Alexandria Hotel Co Ltd) would be set up to run a hotel and Kelner (a wine merchant) would become one of its directors. On 27 January, Kelner agreed to sell a quantity of wine to the company, and this agreement was signed by the other directors 'on behalf of the Gravesend Royal Alexandria Hotel Co Ltd'. The company was incorporated on 20 February, but collapsed soon after, having not paid Kelner for the wine. Kelner initiated proceedings, claiming that, as the company did not exist at the time of the contract, the other directors were personally liable. The other directors contended that the company had ratified the contract upon its incorporation, and so it was liable for the price of the wine.

HELD: The company's purported ratification of the contract was ineffective, as it did not exist at the time the contract was entered into. Erle CJ stated that 'where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby'.[26] Accordingly, the directors who signed the contract were personally liable to compensate Kelner for the price of the wine.

COMMENT: The rule that the **promoters** of a company are personally liable for contracts entered into on behalf of a company that does not yet exist has been codified in s 51 of the Companies Act 2006.[27] The company cannot ratify the contract and take the benefit of it—if the company wishes to benefit from the contract, the original contract must be discharged and a new contract must be created with the company on the same terms.[28] It can be argued that this is commercially inconvenient, especially as the EC Directive that led to the enactment of s 51 did permit the company to 'assume the obligations' arising under the contract.[29]

→ **promoter:** a person who undertakes and enters into the process of setting up a company

Agent must purport to act for a disclosed principal

A principal can only ratify those acts that the agent purported to carry out on behalf of that principal. It follows that ratification cannot take place where the agent purports to act on his own behalf, even if the agent is in fact acting on behalf of a principal.

26. (1866–67) LR 2 CP 174, 183.

27. Although not stated by s 51, it has been established that the promoter can also enforce the contract against the third party (*Braymist Ltd v Wise Finance Co Ltd* [2002] EWCA Civ 127, [2002] Ch 273). Section 51 is discussed in more detail on p 165.

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

29. First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ L65/8, Art 7.

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Keighley, Maxsted & Co v Durant [1901] AC 240 (HL)

FACTS: Keighley, Maxsted & Co ('KM', the principal) instructed Roberts (the agent) to purchase a quantity of wheat at a certain price. Roberts could not obtain the wheat at this price and, in breach of his authority, agreed to purchase the wheat at a higher price from Durant. Although the wheat was actually being bought on behalf of KM and Roberts, Roberts did not disclose this, and so it appeared that he was buying it purely on his own account. KM then purported to ratify Roberts' actions, but KM and Roberts then failed to take delivery of the wheat, resulting in Durant having to sell it elsewhere at a loss. Durant initiated proceedings against KM and Roberts for the amount lost. At first instance, the court held that KM's ratification was invalid, and so only Roberts was liable. On appeal, it was held that KM's ratification was valid, and so it could be liable. KM appealed.

HELD: The House held that KM's ratification was invalid because Roberts had not purported to act on behalf of a principal. Lord Macnaghten stated that it was 'a well-established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed intentions'.[30] Accordingly, Durant could recover the amount lost from Roberts.

COMMENT: The result of this case is that an undisclosed principal can never ratify the unauthorized acts of his agent. This rule has been strongly criticized, with *Keighley* being described as a 'short-sighted decision'.[31] Roberts was already KM's agent, and he had merely exceeded his authority as regards the price of the wheat. KM then ratified his actions and Durant, in initiating proceedings, was merely trying to hold KM to its decision to ratify. Accordingly, it has been contended that 'a principal who ratifies should be liable in the situation where the person who is already an agent exceeds his authority'.[32]

The agent need only *purport* to act on behalf of another. From this, it follows that if an agent falsely purports to act on behalf of another person, that person can still ratify the acts of the agent, as the following case demonstrates.

Re Tiedemann and Ledermann Freres [1899] 2 QB 66 (DC)

FACTS: Tiedemann (the principal) authorized Vilmar (the agent) to sell wheat on his behalf. Vilmar sold quantities of wheat to third parties, but, after seeing that the price of wheat began to rise, he purchased the wheat back from the third parties and re-sold it later that same day for a higher price, thereby making a profit. Vilmar was engaging in these sales on his own behalf, but falsely claimed that he was doing so on behalf of Tiedemann. The price of wheat began to fall and the third parties began to suspect that Vilmar was purchasing the wheat on his own account. Accordingly, they sought to repudiate the contracts of sale. Tiedemann, unsurprisingly, sought to ratify Vilmar's unauthorized activities and recover the profits for himself.

HELD: Tiedemann's ratification was valid. Channell J stated that 'the contracts could be validly ratified by the person in whose name they purported to be made, even although they were in fact made without his actual authority, and although [the agent] had in his mind some fraudulent intent'.[33] Channell J did state that if the principal was also acting fraudulently, then ratification would not have been permitted, but this was not the case here.

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30. [1901] AC 240 (HL) 247.
31. Ian Brown, 'The Significance of General and Special Authority in the Development of the Agent's External Authority in English Law' [2004] JBL 391, 394.
32. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-061].
33. [1899] 2 QB 66 (DC) 71.

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The final issue to discuss is whether the agent needs to identify the principal he is acting for, as opposed to merely disclosing his existence. The answer is no, but it would appear that the agent must do more than simply state that he is acting as an agent, as the following statement of Willes J indicates:

> The law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract.[34]

Principal must be competent

The effect of ratification is to treat the agent's act as being authorized at the time it was undertaken (i.e. authority is granted retroactively). It follows from this that, in order for ratification to be effective, the law requires that 'at the time the act was done the agent must have had a competent principal'[35] (this is a corollary of the rule discussed at p 59, namely that a principal can, through an agent, undertake any act that he has competence to undertake personally). Where, at the time of the agent's act, the principal lacked competence to engage in such an act himself, then ratification cannot occur.

***Boston Deep Sea Fishing and Ice Co Ltd v Farnham (Inspector of Taxes)* [1957] 1 WLR 1051 (Ch)**

FACTS: In 1940, a trawler belonging to a French company named Pêcheries de la Morinie ('PM', the principal) was docked at an English harbour. Whilst at the harbour, France was occupied by German forces, resulting in PM becoming an alien enemy. Boston Deep Sea Fishing and Ice Co Ltd ('Boston', the agent), which owned 49 per cent of the shares in PM, took control of the trawler and continued to use it, despite the fact that PM had not granted it authority to do so. Once the hostilities had ended, PM purported to ratify the acts of Boston. In order to correctly calculate the amount of tax owed by Boston as a result of profits gained through the use of the trawler, it became necessary to determine whether or not PM's ratification was valid.

HELD: Harman J stated that '[a]t the time the acts were done the French company was an alien enemy at common law. It was therefore not a competent principal because it could not have done the act itself.'[36] Accordingly, as PM lacked the competence to undertake the acts itself, it could not subsequently ratify those acts when undertaken by Boston.

The law not only requires competence at the time of the agent's act, it also requires that 'at the time of the ratification the principal must have been legally capable of doing the act himself'.[37] So, to use an example similar to *Boston Deep Sea Fishing*, if an English

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34. *Watson v Swann* (1862) 11 CBNS 756, 771.

35. *Firth v Staines* [1897] 2 QB 70 (QB) 75 (Wright J).

36. [1957] 1 WLR 1051 (Ch) 1058. It is a long-held common law principle that a person does not have capacity to contract with an enemy of the state, and an enemy cannot appoint an agent to engage in acts that might benefit that enemy (*Stevenson & Sons Ltd v Aktiengesellschaft für Cartonnagen-Industrie* [1918] AC 239 (HL)). Further, s 1 of the Trading with the Enemy Act 1939 made it a criminal offence to trade with the enemy.

37. *Firth v Staines* [1897] 2 QB 70 (QB) 75 (Wright J).

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company acted as agent for a principal based in a friendly state that subsequently became an enemy, then the principal could not ratify the acts of the English company until hostilities ceased.

It would appear that not only must the principal be legally capable of doing the act himself, he must also be actually capable of doing the act himself at the time of ratification.

Grover & Grover Ltd v Mathews [1910] 2 KB 401 (KB)

FACTS: Grover & Grover Ltd ('Grover', the principal) instructed Brows (the agent) to take out an insurance policy over one of its factories. Upon the expiration of the insurance policy, Brows contacted the insurers to renew the policy, although he was not authorized to do so by Grover. The insurers sent renewal details but, before the renewal premium could be paid, the factory burned down. Grover sought to ratify Brows' act (i.e. the renewal) by paying the premium, but the insurers refused to accept the premium, on the ground that it was sent after the loss had occurred.

HELD: Whilst Grover had capacity to enter into the contract of insurance, it could not actually do so in this case, as a contract of insurance cannot be entered into after the event causing the loss has occurred.[38] Accordingly, the purported ratification was invalid.

Principal must have knowledge of material circumstances

Bowstead & Reynolds state:

> In order that a person may be held to have ratified an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify the act and take the risk whatever the circumstances might have been.[39]

In *Suncorp Insurance and Finance v Milano Assicurazioni SpA*,[40] Waller J approved this passage and went on to state that the requirement of full knowledge existed in order to protect principals from being found to have ratified too early. Quite what amounts to 'full knowledge' is difficult to predict because it is 'necessarily dependent upon the specific circumstances of any case',[41] but where the principal is aware of 'the essentials of what happened as between the agent and the third party',[42] then the requirement of full knowledge will most likely be satisfied.

Limitations on ratification

The courts have stated that, in certain cases, ratification will not be effective, even if the requirements outlined in the previous section have been satisfied.

38. It should be noted that this principle is not absolute. For example, s 86 of the Marine Insurance Act 1906 states that a contract of marine insurance can be ratified by a person who is aware of the loss.
39. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-069].
40. [1993] 2 Lloyd's Rep 225 (QB).
41. *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm), [2005] 2 Lloyd's Rep 129 [133] (Gloster J).
42. *ING Re (UK) Ltd v R&V Versicherung AG* [2006] EWHC 1544 (Comm), [2006] 2 All ER (Comm) 870 [153] (Toulson J).

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Acts which are void ab initio

Not all acts can be ratified. In the following case, the court drew a distinction between voidable acts and acts that are void *ab initio*, with the latter being incapable of ratification.

Brook v Hook (1870–71) LR 6 Ex 89

FACTS: Jones (the agent) forged the signature of Hook (the principal) on a **promissory note.** In an attempt to prevent Jones from being prosecuted, Hook purported to ratify Jones's actions. However, the promissory note was not honoured and Brook (the third party in whose favour the note had been granted) initiated proceedings against Hook.

→ **promissory note:** an unconditional promise by one person to pay another person a sum of money

HELD: The ratification was ineffective. Kelly CB stated that 'although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void'.[43] The forged signature rendered the note a nullity and so Brook could not recover the proceeds of the note from Hook.

COMMENT: The distinction drawn by Kelly CB between voidable acts (which can be ratified) and void acts (which cannot be ratified) has been described as 'unsatisfactory'[44] on the ground that unauthorized acts cannot properly be described as voidable and, if anything, are better described as being void. It has been argued that a better way of explaining the result in *Brook* is that an agent who forges his principal's signature is not in fact acting on his principal's behalf, and so the issue of ratification does not arise.[45]

Ratification must not unfairly prejudice a third party

Bowstead & Reynolds state that '[r]atification is not effective where to permit it would unfairly prejudice a third party'.[46] This principle has been judicially accepted,[47] but the case law in this area is extremely confusing and is rife with inconsistent interpretations. For example, consider the following case.

Bird v Brown (1850) 4 Exch 786

FACTS: Bird (the agent), purportedly acting on behalf of Illins (the principal and consignor of goods), ordered the stoppage of those goods, after discovering that the consignee had become bankrupt. In fact, Bird had no authority to order such a stoppage. The goods eventually reached their destination where the consignee's trustee in bankruptcy made a formal demand for them. The goods were to be shipped to the consignee, but the shipmaster refused to deliver the goods on the basis they had been stopped in transit. Illins sought to ratify the stoppage in transit.

43. (1870–71) LR 6 Ex 89, 99.

44. See e.g. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-057]; Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Materials* (4th edn, OUP 2009) 144.

45. See Edwin Peel, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015). *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 (CA) 378–9 (Scrutton LJ).

46. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-087].

47. *The Owners of the Ship 'Borvigilant' v The Owners of the Ship 'Romina G'* [2003] EWCA Civ 935, [2003] 2 All ER (Comm) 736, [70] (Clarke LJ).

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HELD: The ratification was ineffective.

COMMENT: The reasoning behind the decision has been a topic of considerable debate. In *Bird*, Rolfe B stated that 'the goods had already become the property of the [consignee], free from all rights of stoppage',[48] leading certain judges[49] to contend that the decision was based on the notion that ratification cannot occur where it would divest the vested proprietary rights of a third party. Other judges, however, contend that the *ratio* in *Bird* is that 'if a time is fixed for doing an act, whether by statute or by agreement, the doctrine of ratification cannot be allowed to apply if it would have the effect of extending that time'.[50] It has even been argued that *Bird* is not adequate authority for either of these views and 'should no longer be regarded as the basis for determining cases where ratification takes place after property or contractual rights have vested, or cases where ratification takes place after a time limit provided for has been exceeded'.[51]

See Tan Cheng-Han, 'The Principle in Bird v Brown Revisited' (2001) 117 LQR 626

More recent cases have moved away from attempting to determine the precise reasoning behind *Bird* and instead state that these cases should be regarded as examples 'of the general rationale identified in *Bowstead & Reynolds'* Art 19, that is, unfair prejudice'.[52] It would therefore appear that the current approach of the courts, when determining whether to permit ratification, is to determine whether ratification would unfairly prejudice the third party, and not to place limitations on the instances when ratification may be rendered ineffective due to such unfair prejudice.

Ratification must take place within a reasonable time

In order for ratification to be effective, the principal must ratify the agent's act within a reasonable time, as established in the following case.

Metropolitan Asylums Board v Kingham & Sons (1890) 6 TLR 217 (QB)

FACTS: Metropolitan Asylums Board ('MAB', the principal) invited suppliers to submit tenders for the supply of eggs, with supply due to begin on 30 September. Kingham & Sons ('Kingham') was notified on 22 September that its tender had been accepted by MAB's managers (the agents), but the acceptance was invalid as MAB's seal had not been affixed to the tender. On 24 September, Kingham informed the managers that the price stated in the tender was incorrect, and purported to withdraw the tender. On 6 October, MAB sought to ratify the acts of its managers by affixing the corporate seal to the tender, thereby holding Kingham to the tendered price. Kingham refused to perform, and so MAB commenced proceedings.

HELD: The purported ratification was ineffective, as it was too late. Fry LJ stated *obiter* that 'if ratification is to bind, it must be made within a reasonable time after acceptance by an

48. (1850) 4 Exch 786, 800.
49. See e.g. Cotton LJ in *Bolton Partners v Lambert* (1899) LR 41 ChD 295 (CA) 307. This view was confirmed by Roch LJ in *Presentaciones Musicales SA v Secunda* [1994] Ch 271 (CA) 284.
50. *Presentaciones Musicales SA v Secunda* [1994] Ch 271 (CA) 279 (Dillon LJ). This view was confirmed by Clarke LJ in *The Owners of the Ship 'Borvigilant' v The Owners of the Ship 'Romina G'* [2003] EWCA Civ 935, [2003] 2 All ER (Comm) 736 [84].
51. Tan Cheng-Han, 'The Principle in Bird v Brown Revisited' (2001) 117 LQR 626, 643–4.
52. *Smith v Henniker-Major & Co* [2002] EWCA Civ 762, [2003] Ch 182 [71] (Robert Walker LJ).

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unauthorised person. That reasonable time can never extend after the time at which the contract is to commence.[53]

COMMENT: The requirement that ratification must take place within a reasonable time is a logical limitation designed to provide a measure of certainty, especially in cases where a third party has entered into agreements with an agent who lacks authority. In such a case, the third party will want to know quickly whether the agreement will continue or can be enforced. The second part of Fry LJ's dictum (namely that ratification cannot take place after the time when the contract was due to commence) has been doubted academically[54] and judicially[55] and so cannot be regarded as good law.

Who can ratify?

Once the requirements for ratification have been met, the next issue to discuss is who has the ability to ratify the agent's acts. In *Jones v Hope*,[56] Brett LJ stated that 'nobody can ratify a contract purporting to be made by an agent except the party on whose behalf the agent purported to act'.[57] Accordingly, only the principal on whose behalf the agent purported to act can ratify. However, the principal need not personally ratify the agent's acts—he can authorize an agent to ratify the unauthorized acts on his behalf. In such a case, all the agent requires is the authority to ratify the act—he will not require authority to engage in the acts that are being ratified.[58]

Methods of ratification

In limited instances, the law will state that ratification must occur in a certain way. For example, an agent authorized to execute a deed must be appointed by deed, and it follows from this that the ratification of such an act must also be by deed.[59] Generally, however, the law does not specify the method by which ratification takes place—it can be express or implied, and by words or by conduct. Express ratification occurs where the principal expressly manifests an intention to ratify the agent's act (e.g. by expressly stating that he intends to ratify). Implied ratification is less straightforward and occurs where:

the conduct of the person in whose name or on whose behalf the act or transaction is done or entered into is such as to amount to clear evidence that he adopts or recognises such act or transaction: and may be implied from the mere acquiescence or inactivity of the principal.[60]

This formulation has, on numerous occasions, been confirmed by the courts as an accurate account of the law.[61] As stated, there will need to be 'clear evidence' that the

53. (1890) 6 TLR 217 (QB) 218.
54. See e.g. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-090].
55. See e.g. *Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil* [1985] QB 966 (QB) 987.
56. (1880) 3 TLR 247.
57. ibid 251.
58. *Re Portuguese Consolidated Copper Mines Ltd* (1890) LR 45 ChD 16 (CA).
59. *Hunter v Parker* (1840) 7 M&W 322.
60. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [2-072].
61. See e.g. *Suncorp Insurance and Finance v Milano Assicurazioni SpA* [1993] 2 Lloyd's Rep 225 (QB) 234; *Sea Emerald SA v Prominvestbank—Joint Stockpoint Commercial Industrial & Investment Bank* [2008] EWHC 1979 (Comm) [103]–[104]; *Norwich Union Life & Pensions Ltd v Strand Street Properties Ltd* [2009] EWHC 1109 (Ch) [237].

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purported principal ratifies the act or transaction—if the purported ratification is vague and could be interpreted to mean something else, it will be ineffective. Whether or not implied ratification has occurred is usually a question of fact based upon the circumstances of the case. The following case provides an example of the type of act that can amount to implied ratification.

***Hogan and Others v London Irish Football Rugby Club Trading Ltd* (QB, 20 December 1999)**

FACTS: The principal, London Irish Football Rugby Club Trading Ltd ('the Club'), employed Anderson (the agent) as the director of rugby. His job was to coach the first fifteen and set up a recruitment programme to ensure the Club's long-term success. The Club's board of directors expressly informed Anderson that he did not have the authority to enter into binding agreements with players. Despite this, he entered into negotiations with four players and offered each of them a two-year contract. These players attended training sessions, represented the Club, and were paid their contractual rate of remuneration. A few months later, these players were informed that their services were not required. They alleged that this amounted to a breach of their employment contracts, while the Club contended that the contracts were invalid, as Anderson had no authority to enter into binding contracts with players.

HELD: By allowing the players to attend training sessions and represent the Club, and by continuing to pay them their salaries, the Club had impliedly ratified Anderson's actions. Accordingly, the termination of the players' contracts amounted to a breach of contract, for which they were entitled to damages.

Acquiescence or inactivity

As Rowlatt J stated, '[r]atification is a unilateral act of the will'.[62] Accordingly, the principal is not required to communicate his intention to ratify to the agent or third party, providing that the intention to ratify is (expressly or impliedly) manifested in some way. From this, it follows that acquiescence or inactivity can amount to ratification, as stated by Moore-Bick J:

> [Ratification] does not . . . depend on communication with or representation to the third party . . . but since the intention to ratify must be manifested in some way it will in practice often be communicated to and relied upon by the other party to the transaction. Ratification can no doubt be inferred without difficulty from silence or inactivity in cases where the principal, by failing to disown the transaction, allows a state of affairs to come about which is inconsistent with treating the transaction as unauthorized.[63]

However, where the principal has not manifested an intention to ratify, then it is less likely that acquiescence or inactivity will amount to ratification and will instead be regarded as 'an unwillingness or inability on the part of the principal to commit himself'.[64]

Partial ratification

It is not possible for the principal to ratify part of the agent's actions and reject the rest or, as Robert Walker LJ stated, '[a] party wishing to ratify a transaction must adopt

62. *Harrison & Crossfield Ltd v London & North-Western Railway Co* [1917] 2 KB 755 (KB) 758.
63. *Yona International Ltd v La Reunion Française SA* [1996] 2 Lloyd's Rep 84 (QB) 106. 64. ibid.

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it in its entirety'.[65] The rationale behind this limitation is that, if partial ratification were permitted, a third party would be bound to the principal in a way that he did not intend. Accordingly, the general rule is that if the principal has not ratified the agent's act in its entirety, then ratification cannot be said to have occurred. However, the courts have also stated that, in certain cases, 'adoption of part of a transaction may be held to amount to ratification of the whole'.[66]

Revocation of ratification

Once a principal has ratified the acts of his agent, he cannot then change his mind and revoke his ratification.[67] However, a principal who originally declined to ratify can change his mind and ratify the act,[68] providing that such ratification is made within a reasonable time,[69] and does not unfairly prejudice any third parties.[70]

Effects of ratification

Where a principal validly ratifies an act of his agent, then the law will regard this ratification as being 'equivalent to antecedent authority'.[71] In other words, the law will regard the agent's actions as being authorized when they were undertaken, with the result that the contract between the principal and the third party will be enforceable by both parties. As the following controversial case demonstrates, this will even be the case where the third party purports to withdraw from the contract prior to ratification occurring.

***Bolton Partners Ltd v Lambert* (1889) LR 41 ChD 295 (CA)**

FACTS: Lambert offered to buy a factory that belonged to Bolton Partners Ltd ('Bolton', the principal). Lambert made the offer to Scratchley (the agent), who was Bolton's managing director. Scratchley purported to accept the offer, but he lacked the authority to do so. On 13 January, a dispute arose and Lambert purported to revoke his offer. On 17 January, Bolton commenced proceedings against Lambert for breach of contract, and sought specific performance to enforce the agreement. On 28 January, Bolton sought to ratify Scratchley's acceptance of Lambert's offer. Lambert contended that, as Scratchley's acceptance was invalid, he was free to revoke the offer and, as the offer had been revoked, Bolton could not ratify Scratchley's purported acceptance.

HELD: The ratification was valid, and the order for specific performance was granted. Cotton LJ stated that:

> [t]he rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had had authority to do the act at the time the act was done by him.[72]

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65. *Smith v Henniker-Major & Co* [2002] EWCA Civ 762, [2003] Ch 182 [56].
66. ibid. For an example of this occurring, see *Re Mawcon Ltd* [1969] 1 WLR 78 (Ch).
67. *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm), [2005] 2 Lloyd's Rep 129.
68. *Soames v Spencer* (1822) 1 D&R 32.
69. *Metropolitan Asylums Board v Kingham & Sons* (1890) 6 TLR 217 (QB). This case is discussed at p 70.
70. *McEvoy v Belfast Banking Co Ltd* [1935] AC 24 (HL).
71. *Koenigsblatt v Sweet* [1923] 2 Ch 314 (CA) 325 (Lord Sterndale MR).
72. (1889) LR 41 ChD 295 (CA) 306.

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Applying this, Scratchley was authorized to accept Lambert's offer at the time he accepted it. It follows that a valid contract came into existence at that point, and so Lambert could not subsequently revoke his offer.

Unsurprisingly, the decision has been criticized for several reasons. First, the rule strongly favours the principal, but places the third party in an 'invidious position in that he cannot withdraw from the obligation before ratification, yet the principal may elect not to ratify without legal consequence'.[73] Second, it has been contended that, where a third party is trying to escape the contract prior to ratification occurring (as in *Bolton*), then ratification should be ineffective as 'until ratification takes place, there is no contract enforceable either by the agent or the principal'.[74] Third, many countries have moved away from *Bolton* and held ratification to be ineffective in such cases. As far back as 1920, one commentator stated '[w]here [the third party] did not know of the lack of authority . . . fairness . . . would allow him an option to withdraw . . . Most of the American courts have reached this decision in cases dealing with ratification. The English cases to the contrary must be wrong.'[75] The American Law Institute's *Restatement* also rejects the rule in *Bolton*,[76] and Article 15(2) of the Convention on Agency in the International Sale of Goods states that:

> [w]here, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, he shall not be liable to the principal if, at any time before ratification, he gives notice of his refusal to become bound by a ratification.

Despite this criticism, it has been argued that the decision in *Bolton* is justifiable for two reasons. First, it has been contended that 'if the principal ratifies the contract, the third party gets what he bargained for'.[77] From Lambert's perspective, a valid contract existed the moment Scratchley accepted his offer, and so any attempt at revocation would have predictably been regarded as a breach of contract on Lambert's part. Second, the rule in *Bolton* is not absolute and will not operate in many instances, as is demonstrated by the numerous requirements and limitations that exist upon a principal's ability to ratify.

In addition to providing antecedent authority, ratification may also entitle the agent to receive remuneration/commission,[78] or to be indemnified for any expenses incurred in the course of the ratified agency.[79]

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Agreements subject to ratification

Where a contract is entered into subject to ratification by the principal, then the rule in *Bolton* will not apply as, in such a case, the act of ratification creates the contract. In such a case, the third party is free to withdraw at any time before ratification, as demonstrated in the following case.

73. Ian Brown, 'Ratification, Retroactivity and Reasonableness' (1994) 110 LQR 531, 531.
74. Tan Cheng-Han, 'The Principle in Bird v Brown Revisited' (2001) 117 LQR 626, 628–9.
75. WA Seavey, 'The Rationale of Agency' (1920) 29 Yale LJ 859, 891.
76. American Law Institute, *Restatement of the Law—Agency* (American Law Institute 2006) § 4.05.
77. Len S Sealy and Richard JA Hooley, *Commercial Law: Text, Cases and Materials* (4th edn, OUP 2009) 148.
78. *Keay v Fenwick* (1876) LR 1 CPC 745 (CA).
79. *Hartas v Ribbons* (1889) LR 22 QBD 254 (CA).

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Watson v Davies [1931] 1 Ch 455 (Ch)

FACTS: Davies offered to sell a piece of property to a charity (the principal). The charity arranged for an inspection of the property to be carried out by several of its board members. This inspection team (the agents) told Davies that they had resolved to buy the property, and so accepted the offer subject to a formal meeting of the board (i.e. their acceptance was subject to ratification). The charity's secretary informed the board that the inspection team was inquorate and so had no authority to accept Davies's offer. A meeting of the full board was convened in order to ratify the inspection team's acceptance, but before the meeting took place, Davies withdrew the offer. Despite this, the board meeting went ahead, where it purported to ratify the acceptance of Davies's offer. Davies refused to proceed with the sale and Watson, the charity's managing director, sought an order for specific performance.

HELD: The High Court refused to grant specific performance. Maugham J stated that:

> [a]n acceptance by an agent subject in express terms to ratification by his principal is legally a nullity until ratification, and is no more binding on the other party than an unaccepted offer which can, of course, be withdrawn before acceptance.[80]

Accordingly, as Davies had withdrawn the offer prior to ratification, it could no longer be accepted.

Liability of the agent

The final issue to discuss is whether ratification exonerates the agent of all liability for breach of authority. Such liability can arise in two ways. First, the agent can be liable to the principal for exceeding his authority. If the principal ratifies the agent's act, does the principal also give up any right to sue the agent for exceeding his authority? In many cases, the principal will obtain an advantage from ratifying the agent's act, and so will not seek to commence proceedings against the agent (especially if he wishes to work with the agent again in the future). However, the courts have acknowledged that ratification will not automatically exonerate the agent of his breach of authority, and the issue should be considered in two stages:

> First, is there ratification of the contract which the agent purported to make. Second, has the principal waived the breach of duty if any vis-à-vis the agent. Often the facts will lead to ratification and exoneration, but not always.[81]

Second, the agent can be liable to the third party for breach of warranty of authority, and the general rule is that ratification does not exonerate the agent's liability for such a breach. However, as the measure of damages for such a breach is based on the loss which the parties should reasonably have contemplated would result from the breach (i.e. the loss incurred as a result of the contract not coming into operation), and as the act of ratification will normally avoid such loss (by bringing the contract into operation), it follows that that the third party will not normally be able to recover damages. If, however, the third party has incurred costs due to the unauthorized acts of the agent, then these may be recoverable.

Breach of warranty of authority is discussed at p 168

80. [1931] 1 Ch 455 (Ch) 469.

81. *Suncorp Insurance and Finance v Milano Assicurazioni SpA* [1993] 2 Lloyd's Rep 225 (QB) 234–5 (Waller J).

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Agency by operation of law

In several cases, an agency relationship may be imposed upon the parties by the operation of law. In such cases, the fact that the parties do not intend or wish for an agency relationship to arise is irrelevant. It does not follow, however, that the agency relationship is not consensual, as the law will deem that the parties consented, even if they did, in fact, not do so.

Agency of necessity

Agency of necessity arises where there is some pressing need for action to safeguard the interests of another. In such a case, the courts might be willing to deem that the person acted as an agent to safeguard the interests of a principal, as the following example demonstrates.

Eg COMCORP LTD

ComCorp agrees to purchase a quantity of apples from a company based in Portugal. ComCorp enters into an agreement with FreightSafe Ltd to transport the apples by sea. The apples are loaded onto one of FreightSafe's ships but, due to poor weather conditions, the ship is forced to remain in dock at a port in Portugal until the weather improves. Due to the delay, the apples begin to deteriorate and so the shipmaster decides to sell the goods on behalf of ComCorp, but, given their state, the price obtained is half what ComCorp paid for them. ComCorp states that the shipmaster had no legal right to sell the goods and initiates legal proceedings. The shipmaster contends that he was acting as ComCorp's agent.

The shipmaster was not appointed as ComCorp's agent (and even if he was, he was not authorized to sell the apples), nor did ComCorp ratify his actions, so on what basis can he claim to be an agent? The shipmaster would likely argue that the agency relationship arose through necessity. Unlike agency by agreement or agency by ratification, agency of necessity is not based upon the consent of the parties, and usually arises in cases where a relationship of agency is not desired by the principal.

Where agency of necessity is established, the effect will usually be to increase the authority of an existing agent, but it can also create a relationship of agency where none previously existed. It is important to note that, in the following case, the House of Lords indicated that only certain types of case would amount to 'true' cases of agency of necessity.

***China-Pacific SA v Food Corporation of India (The Winson)* [1982] AC 939 (HL)**

FACTS: Food Corporation of India ('FCI') chartered a ship to transport a cargo of wheat from the USA to Bombay (now Mumbai). En route, the ship became stranded on a reef. The shipmaster entered into a contract with China Pacific SA ('CP'), a firm of professional **salvors**. CP managed to salvage 15,429 tonnes of wheat and, to protect it from deteriorating, stored it at its own expense. CP then sought to recover these storage expenses from FCI, but FCI refused to pay.

HELD: The House held that CP could recover the storage expenses from FCI.

→ salvor: a person engaged in the salvaging of a ship, or of items lost at sea

See FD Rose, 'From Necessary to Restitution' [1982] 45 MLR 568

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The decision in *The Winson* was not actually determined through agency principles, but was instead based on the law relating to salvage, bailment, and liens. However, as the case clearly involved a situation in which a relationship of agency might be found to exist, Lord Diplock decided to provide guidance regarding the scope of agency of necessity by distinguishing between two different types of case:

1. Cases where 'circumstances exist which in law have the effect of conferring on [a person] authority to create contractual rights and obligations between [another person] and a third party that are directly enforceable by each against the other';[82]
2. Cases where 'the only relevant question is whether a person who, without obtaining instructions from the owner of goods incurs expenses in taking steps that are reasonably necessary for their preservation is in law entitled to recover from the owner of the goods the reasonable expenses incurred by him in taking those steps'.[83]

In the second type of case, the ability of the 'agent' to legally bind his 'principal' to a third party is not a key issue—the only issue is whether the 'agent' can recover expenses for costs incurred, and so it could be argued that, strictly, no relationship of agency arises. Lord Diplock appeared to agree with this argument, and stated that only the first type of case provides a true example of agency of necessity, with the second type of case being more appropriately regarded as a form of restitution. Accordingly, this section will focus on the first type of case only.

Requirements for agency of necessity

In order for agency of necessity to arise, four requirements must be satisfied. It is worth noting that in *The Winson* (discussed earlier), Lord Diplock was of the opinion that these requirements might only apply to cases of true agency, and might not apply in their entirety to cases where the agent is simply seeking to recover his expenses.

The first requirement is that the actions of the agent must be necessary for the benefit of the principal. The test is an objective one, meaning that it does not matter whether the agent honestly believed that his actions were necessary—what matters is whether a reasonable person would regard the action taken as necessary.[84] The inevitable issue that arises is how is necessity to be determined. The courts have provided some specific guidance—for example, the Court of Appeal has stated that acting in order to avoid mere inconvenience will not be enough to establish necessity.[85] Overall, however, the scope of necessity is rather vague. Perhaps the best indication comes from Sir Montague Smith, who stated that the concept of necessity refers to:

> the force of circumstances which determine the course a man ought to take. Thus, when by the force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it.[86]

The second requirement is that it is not reasonably practicable for the agent to communicate with the principal. The exact scope of this test is unclear, as the following case demonstrates.

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82. [1982] AC 939 (HL) 958. 83. ibid.
84. *Tetley & Co v British Trade Corp* (1922) 10 Ll L Rep 678 (KB).
85. *Sachs v Miklos* [1948] 2 KB 23 (CA).
86. *The Australasian Steam Navigation Co v Morse* (1871–73) LR 4 PC 222 (PC) 230.

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Springer v Great Western Railway Co [1921] 1 KB 257 (CA)

FACTS: A quantity of tomatoes belonging to Springer was delivered to the Great Western Railway Co ('GWR'), who would then deliver them to Springer. The tomatoes were placed on a ship for delivery but, due to bad weather, their arrival was delayed. Upon arrival, GWR's dockworkers went on strike, further delaying the delivery of the tomatoes. By this time, the tomatoes had started to deteriorate and so GWR's traffic agent decided to sell the tomatoes locally, without first discussing this with Springer, which he could have done. Springer sought damages for breach of carriage, and GWR contended that the sale was justified because it was necessary.

HELD: GWR had 'time to communicate with [Springer] and it was commercially possible to do so and to ask him what he wished should be done with the tomatoes'.[87] The failure to do so meant that a relationship of agency based on necessity had not arisen and so Springer's action succeeded.

COMMENT: Debate arose as to how impracticable communication must be in order to satisfy this requirement. Scrutton LJ stated that communication had to be 'commercially impossible',[88] whereas Bankes LJ stated that communication had to be 'practically impossible'.[89] McCardie J, in a different case, went further and stated that 'agency of necessity does not arise if the agent can communicate with his principal',[90] indicating that actual impossibility is required. It is contended that Scrutton LJ's less stringent formulation is preferable on the ground that it would include situations where communication was actually possible, but would not be commercially realistic (e.g. where an agent is acting on behalf of many principals simultaneously). In any event, with the advent of modern telecommunications, this requirement has become increasingly difficult to satisfy, resulting in a significant reduction in the number of actual cases of agency of necessity.

The third requirement is that the agent's actions were reasonable and prudent, and that he acted bona fide in the interests of the principal, with the following case providing an example of a situation where this requirement was not satisfied.

Prager v Blatspiel, Stamp and Heacock Ltd [1924] 1 KB 566 (KB)

FACTS: Blatspiel, Stamp and Heacock Ltd ('BSH', the agent), a London-based company, purchased fur skins on behalf of Prager (the principal), a Bucharest-based fur merchant, and was to despatch them to Romania. Prager paid for the skins, but, before they could be despatched, German forces occupied Romania and it became impossible for BSH to send the skins to, or contact, Prager. Subsequently, BSH sold the skins, by which time they had increased in value. When the war ended, Prager requested that BSH send the skins. When Prager discovered that the skins had been sold, he initiated proceedings against BSH. BSH contended that it was necessary to sell the skins quickly as they were getting 'stale', and so authority was granted to it via agency of necessity.

HELD: As the furs deteriorated very slowly and any loss in value caused by this was easily offset by the increase in the value of the furs, McCardie J emphatically rejected BSH's claim that the

87. [1921] 1 KB 257 (CA) 268 (Scrutton LJ). 88. ibid 267. 89. ibid 266.
90. *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566 (KB) 571.

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sale was necessary. He stated that 'I decide, without hesitation, that the defendants did not act bona fide . . . I hold that the defendants were not in fact agents of necessity, that the sales of the plaintiff's goods were not justified, and that the defendants acted dishonestly.'[91] Accordingly, BSH was ordered to compensate Prager for the price of the skins.

Little difficulty arises where, as in *Prager*, the agent has a single motive (namely to sell the skins and make a profit for itself). Problems can arise, however, where the agent acts for a variety of motives, some of which may be bona fide and others not so. The law has yet to provide an adequate solution to such instances. Lord Diplock has stated that 'it may well be that the court will look to the interest mainly served or to the dominant motive',[92] but which of these two tests is preferable is not clear.

The fourth, and final, requirement is that the principal was competent at the time of the agent's act. So, for example, if at the time of the agent's act, the principal was an alien enemy,[93] or a company that had not been fully incorporated or had been dissolved,[94] then a relationship of agency by necessity would not arise.

Scope of agency of necessity

As can be seen from the cases discussed, virtually all of the cases in this area involve goods being transported by sea. The question that arises is whether agency of necessity is limited to maritime cases, or whether it can apply to any case involving some form of necessity. Unfortunately, the issue is unclear. Limiting the doctrine to maritime cases would appear illogical as 'an agent may be faced with the same necessity to act whether he finds himself on foreign waters or on land'.[95] Indeed, there have been a number of non-maritime cases involving perishable goods where the courts have found an agency of necessity to exist.[96] Despite this, the courts appear reluctant to extend the doctrine to non-maritime cases. For example, Bowen LJ, referring to the doctrine of agency of necessity stated that '[n]o similar doctrine applies to anything lost upon land, nor to anything except ships or goods in peril at sea'.[97]

Agency imposed by statute or the courts

An agency relationship may be imposed upon certain parties by statute. Examples include:

- Every partner in an ordinary partnership is an agent of the firm and of his fellow partners for the purposes of the business of the partnership.[98] Similarly, every member of a limited liability partnership is an agent of the limited liability partnership.[99]

91. ibid 574.
92. *China-Pacific SA v Food Corporation of India (The Winson)* [1982] AC 939 (HL) 966.
93. *Jebara v Ottoman Bank* [1927] 2 KB 254 (CA).
94. *Re Banque des Marchands de Moscou (No 1)* [1952] 1 All ER 1269 (Ch).
95. Samuel J Stoljar, *The Law of Agency* (Sweet & Maxwell 1961) 154.
96. See e.g. *Sims & Co v Midland Railway Co* [1913] 1 KB 103 (KB).
97. *Falcke v Scottish Imperial Insurance Co* (1887) LR 34 ChD 234 (CA) 249.
98. Partnership Act 1890, s 5.
99. Limited Liability Partnerships Act 2000, s 6(1).

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- The administrator of a company is an agent of the company,[100] as are a receiver[101] and an administrative receiver.[102]
- In certain regulated consumer credit agreements, the person negotiating with the debtor will be deemed to be acting as an agent for the creditor.[103]

A relationship of agency may also, based upon the particular facts of the case, be imposed upon certain parties by the courts. For example, it is well established that while the directors of a company are agents of the company, they are not normally agents of the company's members.[104] However, in limited situations (e.g. where the directors act for the members in selling their shares),[105] the courts have held that the directors can be acting as agents of the members.

Agency arising due to estoppel

Apparent authority discussed at p 92

An agent may be imbued with authority where his principal represents to a third party that the agent has authority to act in a particular way. In such a case, the agent may be imbued with apparent authority, and the principal may be estopped from denying that an agency relationship exists. The use of estoppel as the theoretical basis of apparent authority has been described as 'shaky'[106] and 'artificial',[107] principally on the ground that many cases of apparent authority do not fully satisfy the requirements for estoppel. Despite this, it is now generally accepted that estoppel does form the basis of apparent authority, albeit a form of estoppel 'with weak requirements, special to agency'.[108] Apparent authority and its basis in estoppel are discussed in detail in Chapter 5. All that need be noted here is that estoppel can serve to extend an agent's authority or to create a relationship of agency where none previously existed.

CONCLUSION

Given that the actions of an agent can affect the legal position of the principal, it is vital for all parties involved to be confident that a relationship of agency does in fact exist, and so businesses should have a sound grasp of the methods by which a relationship of agency can be created. As discussed, it may even be the case that a relationship of agency may be imposed upon two parties who did not wish, or who had no desire, for such a relationship to arise. Such parties should be careful not to act in a manner that could lead the courts to rule that a relationship of agency does in fact exist.

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100. Insolvency Act 1986, Sch B1, para 69.
101. ibid s 57(1). The receiver will only be an agent in relation to the property that is attached to the floating charge by which he was appointed.
102. ibid s 44(1)(a). Note that an administrative receiver will not be an agent of the company if the company is in liquidation.
103. Consumer Credit Act 1974, s 56(2).
104. *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 (CA).
105. *Allen v Hyatt* (1914) 30 TLR 444 (PC).
106. Roderick Munday, *Agency: Law and Principles* (2nd edn, OUP 2013) 63.
107. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [8-028].
108. ibid [2-100].

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