

Part 1

Agency

Introduction

The first part of this book considers one of most important and traditional aspects of any commercial law undergraduate course, the law of agency. Chapter 1 begins by attempting to define the law of agency by providing several examples from commercial law scholars. Indeed, Part 1 as a whole illustrates the difficulty experienced by the courts in England and Wales in defining the term 'agency'. The next part of Chapter 1 deals with the nature and characteristics of agency, followed by a brief outline of the different types of agents that exist in the United Kingdom. Chapter 2 provides a detailed commentary on the different types of authority that relate to an agency agreement, including actual authority. Chapter 3 seeks to provide an overview of the legal obligations that an agent owes to his principal. These include, for example, the duty to carry out contractual obligations; to obey the principal's instructions; that the agent must not exceed his authority; the performance of contractual duties; that the agent must exercise due care and skill; the duty not to make a secret profit; not to allow any conflict of interest; and the fiduciary duties not to take a bribe or make a secret profit and to account. The chapter also outlines the rights of an agent, beginning with a discussion of the implications of a disclosed agency, a situation where the third party knows of the existence of the principal, and then dealing with an undisclosed agency, a situation where the agent acts for a principal who is not disclosed to the third party.

Part 1 Chapter 1

Agency: An Introduction

Contents

1	Introduction	3
2	What is agency?	3
3	Nature and characteristics of agency	6
4	The different types of agency	8
5	Conclusion	13
6	Recommended reading	13

1 Introduction

Part 1 considers one of most important and traditional aspects of any commercial law undergraduate course, the law of agency. Chapter 1 begins by attempting to define the law of agency by providing several examples from commercial law scholars, illustrating the difficulty experienced by the courts in England and Wales in defining the term ‘agency’. The next part of the chapter deals with the nature and characteristics of agency, followed by a brief outline of the different types of agents that exist in the United Kingdom.

2 What is agency?

It is virtually impossible to provide a clear all-embracing definition of agency.¹ Rather unsurprisingly this has resulted in many commentators arguing that the courts have given it an extremely broad and flexible interpretation.² The breadth of the interpretation of the term ‘agency’ is illustrated by the following quotation from an article by Gorton:

In law the concept of ‘agency’ may have different meanings. Whereas in common law ‘agency’ is a wide concept covering the law related to ‘authority’ and ‘power to

¹ R. Munday, *Agency: Law and Principles* (Oxford University Press, Oxford, 2010) 1.

² R. Bradgate, *Commercial Law* (Oxford University Press, Oxford, 2005) 126.

bind; the agent in, e.g. Scandinavian law is a particular kind of intermediary. In English law the concept of 'agent' may appear in different contexts: 'commercial agent', 'general agent', 'del credere agent', agent of necessity'.³

Professor Bradgate defined an agent as 'a person recognised by law as having power to affect legal rights, liabilities and relationships of another person ("the principal")'.⁴ Similarly, Bowstead, in perhaps the most definitive guide on the law of agency, defined the term as 'the relationship which exists between two persons, one of whom expressly *consents* that the other should impliedly act on his behalf' (emphasis added).⁵ It is important to note here the importance of the term 'consent', as the law of agency is based on this very important concept. The importance of consent in the legal relationships created by the law of agency was highlighted by Brown, who took the view that 'the common law's philosophy is that agency is a *consensual* relationship, with all authority emanating, in some form, from the principal' (emphasis added).⁶ Several commentators have argued that the concept of 'consent' is the central tenant of the law of agency.⁷ Its influence will be outlined throughout the first part of this book. A similar and very useful definition of agency was offered by Billins, who described it as 'the relationship by which a principal entrusts a transaction or aspect of his business to another (without there being a relationship of employer and employee) in which the most important elements of the relationship are the representation by the agent of the principal's interest and the scope of the agent's authority'.⁸

One of the most utilised definitions of agency is provided by the American Law Institute's Restatement of the Law: Agency, which defines agency as 'the fiduciary relationship that arises when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act'.⁹ Halsbury's Laws of England defines an agent as 'an agent primarily means a person employed for the purpose of placing the principal in contractual or other relations with a third party'.¹⁰ Dobson and Stokes defined agency as 'a relationship between one person, the principal, and another, the agent, under which the agent will fulfil the intentions of the principal and act on his behalf, generally through the creation, modification or termination of contracts with a third party'.¹¹

³ L. Gorton, 'Ships management agreements' (1991) *Journal of Business Law* (Nov.) 562 at 563–4.

⁴ Bradgate, above n. 2, at 126.

⁵ *Bowstead on Agency* (15th edn, Sweet and Maxwell, London, 1985) 1.

⁶ I. Brown 'The agent's apparent authority: paradigm or paradox?' (1995) *Journal of Business Law* (Jul.) 360 at 360–1.

⁷ B. Markesinis and R. Munday *An Outline of the Law of Agency* (Butterworths, London, 1992) 4.

⁸ R. Billins, *Agency Law* (Sweet and Maxwell, London, 1993).

⁹ As cited in Munday, above n. 1, at 1.

¹⁰ As cited in Gorton, above n. 3, at 562.

¹¹ P. Dobson and R. Stokes, *Commercial Law* (Sweet and Maxwell, London, 2008) 425.

These academic definitions of agency refer to a number of important points, in particular the existence of a legal agreement that consists of three parties: an agent, a principal and a third party. Furthermore, the definitions often refer to a contractual agreement (often described as an agency agreement) and the scope of an agent's authority. The difficulty of defining the term 'agent' has also been recognised by the judiciary. For example, Lord Herschell took the view in *Kennedy v. De Trafford*:

No word is more commonly and constantly abused than the word 'agent'. A person may be spoken of as an 'agent', and no doubt in the popular sense of the word may properly be said to be an 'agent', although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading.¹²

Further evidence of the problems associated with defining the term 'agency' is provided by the following quote from Sir John Donaldson in *Potter v. Customs and Excise Commissioners*:

The use of the word 'agent' in any mercantile transaction is, of itself, wholly uninformative of the legal relationship between the parties, and the use of the words 'independent agent' takes the matter no further. Either is consistent with a self-employed person acting either as a true agent who puts his principal into a contractual relationship with a third party or with such a person acting as principal.¹³

In the case of *Garnac Grain Co. Inc. v. H. M. F. Faure and Fairclough Ltd*,¹⁴ Lord Pearson stated that 'the relationship of principal and agent ... can only be established by the consent of the principal and agent'. However, Lord Peterson stated they the agent and principal could be deemed to have consented 'if they have agreed to what in law amounts to such a relationship, even if they do not recognise it themselves ... but the consent must have been given by each of them, either expressly or by implication from their words and conduct'.¹⁵ In *Boardman v. Phipps*, the House of Lords stated that an agency agreement existed despite no consent by the principal.¹⁶ *Chitty on Contracts* states 'at common law the word "agency" can be said to represent a body of general rules under which one person, the agent, has the power to change the legal relations of another, the principal'.¹⁷ Therefore, an agency agreement includes three parties: first, the 'principal' who empowers the agent to act on his behalf and follow a particular set of instructions; secondly, the 'agent' who, whilst representing the principal, confers with a third party to agree a contract between the principal and third

¹² [1897] AC 180, 188 as cited in Munday, above n. 1, at 1. For a brief discussion of this case see P. Omar, 'A delicate balance of interests: the power of sale and the duty to maximise asset values' (2005) *Conveyancer and Property Lawyer* (Sep./Oct.) 380.

¹³ [1985] STC 45, 51, as cited in Munday, above n. 1, at 2.

¹⁴ [1968] AC 1130n. ¹⁵ [1968] AC 1130. ¹⁶ [1967] 2 AC 46.

¹⁷ *Chitty on Contracts* (29th edn, Sweet and Maxwell, London, 2004) vol. I, General Principles.

party; thirdly, the ‘third party’, who enters into an agreement with the principal based on representations and negotiations with the principal’s agent. Agency comprises three legal relationships: first, there is the internal relationship between the agent and the principal; secondly, there is the external relationship between the agent and the third party; finally, there is the potential relationship between the principal and the third party.¹⁸ Therefore, agency is the process by which a contractual agreement is arranged between a principal and a third party, based on the actions and representations of the agent. Agents play a very important role in the commercial world,¹⁹ and their role is to ‘negotiate and conclude contracts on behalf of someone else: the principal’.²⁰

Q1 What is agency?

3 Nature and characteristics of agency

An agency can be created by a wide range of legal mechanisms. For example, *Chitty on Contracts* notes that the association between a principal and agent can be established by an express or implied agreement; by ratification of the agent’s actions by the principal; by law; and by the case of agency of necessity. The text adds that ‘the principal may be bound under the doctrines of apparent authority or in some cases under the general doctrine of estoppel’.²¹

Agency can, for example, be created by express formation, which involves a contractual agreement or agency agreement between agent and principal. Munday noted that ‘the agreement between a principal and his agent may either be express or implied. The great majority of agency agreements will in fact be contractual.’²² Nonetheless, the court in *Yasuda Fire & Marine Insurance Co. of Europe Ltd v. Orion Marine Insurance Underwriting Agency Ltd* determined that:

Although in modern commercial transactions agencies are almost invariably founded upon a contract between 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.²³

¹⁸ Dobson and Stokes, above n. 11, at 425.

¹⁹ Bradgate, above n. 2, at 126. ²⁰ *Ibid.*

²¹ *Chitty on Contracts*, above n. 17, Creation of Agency, 31–020.

²² As cited in Munday, above n. 1, at 35.

²³ *Yasuda Fire & Marine Insurance Co. of Europe Ltd v. Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174. For a more detailed discussion of this case see E. Fennell, ‘Yasuda Fire & Marine Insurance Co. of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd and another: case comment’ (1995) 3(4) *Journal of Financial Regulation and Compliance* 391 and S. Honeyball and D. Pearce, ‘Contract, employment and the contract of employment’ (2006) 35(1) *Industrial Law Journal* 30. In this case the court relied on the statement of Lord Pearson in *Garnac Grain Co. Inc. v. H.M.F. Faure & Fairclough Ltd* [1968] AC 1130, 1137.

If a contract or agency agreement exists between the agent and principal, the agent will be granted what is referred to as actual authority. This term will be discussed in greater detail below. An agency can also be created by an agreement which could be classified as an implied agreement. Furthermore, it can also be established by estoppel. Such instances traditionally relate to instances where a principal implies that another person is acting as their agent, which person will then be deemed to be acting with apparent authority.

In order for an agency to be created by estoppel a number of circumstances must exist. These include that there must be a representation that the authority as agent exists. The representation must be of fact and not law, made by the principal to a third party, and must be to the effect that the agent is permitted to operate as an agent. The third party must have authentic knowledge of the representation and depend on the representation from the agent and therefore agree to enter into a contract with the agent.

Ratification is another mechanism by which an agency can be created. Here, the agency is created even if the early actions of the agent were not authorised by the principal and in such instance the principal could acquire rights and be subjected to liabilities by retrospectively endorsing the agency. In order for the unsanctioned actions of the agent to be ratified, several requirements must be met. These include the existence of an agreement between the agent and principal; the principal must have the competence to act and have been in existence at the time of the contract; the principal must ratify the actions within a reasonable time and the ratification must be undeniable.

An agency can also be created under certain statutory provisions including the Consumer Credit Act 1974, Bills of Exchange Act 1882,²⁴ Limitation Act 1980,²⁵ Trustee Delegation Act 1999 and Trustee Act 2000.²⁶

Perhaps the most important and controversial part of the law of agency is the notion or concept of 'authority'. This refers to 'the scope of the agent's ability to affect the legal position'.²⁷ Generally, there are three different types of authority. First, express actual authority, which has been defined as established by the principal on the agent. This type of authority is often supported by a further type of actual authority, which is referred to as 'implied actual authority'.²⁸ The second type of authority is usual authority, which has been defined as meaning 'an agent will be deemed to have the authority that an agent in his position would normally have'.²⁹ Finally, apparent authority has been defined as where 'an agent who acts outside his actual authority will still be able to bind his principal where the principal has made a representation to the third party that the agent is acting within his authority'.³⁰ Each of the different types of authority will be discussed in more detail below.

²⁴ Bills of Exchange Act 1882, ss.22–26.

²⁵ Limitation Act 1980, s.24.

²⁶ Trustee Act 2000, ss.11–23.

²⁷ Dobson and Stokes, above n. 11, at 426.

²⁸ *Ibid.* ²⁹ *Ibid.* ³⁰ *Ibid.*

Q2 Who are the main parties involved in an agency agreement?

4 The different types of agency

Professor Bradgate, in his seminal book *Commercial Law*, stated that there are a wide range of agents who are not specifically referred to as agents by name or title. For example, he refers to company directors, partners, employees, professionals and finance companies. However, he goes on to note that via judicial precedent and commercial practice, a number of specific types of agents have been created.

(a) General and special agents

A general agent, as the title suggests, is appointed by the principal and is given a very broad remit to perform a 'general' set of duties. Conversely, a special agent is often appointed by the principal to perform a very special or specific task. However, Bradgate noted that this distinction is no more than a merely historical difference and the appointment of a special agent is not commercially attractive.³¹

(b) Mercantile agent

A mercantile agent is often associated with the industrialisation that occurred during the Industrial Revolution in the eighteenth and nineteenth centuries in the United Kingdom. This resulted in a significant proportion of the country's trade being processed through agents, who were also called factors, on behalf of their principals. Merrett stated that 'from the eighteenth century onwards, it had become common for merchants wishing to sell goods to entrust them to agents. An agent who was entrusted with possession of goods was often referred to as a factor'.³² In many circumstances, the factor was regarded as a 'professional agent who traded in goods'.³³ The position and role of a factor is succinctly commented on in *Chitty on Contracts*:

The distinction between these was important in nineteenth-century commerce and is still important for the understanding of old cases. A factor was an agent entrusted with the possession and control of goods to be sold by him for his principal. In this respect he differed from a broker, the latter not having generally such possession or control, but being a mere negotiator empowered to effect contracts of sale or purchase for others. A factor was therefore entitled to contract in his own name and to receive payment, and his lien over the goods gave him a special contractual right, which should probably now be explained as based on

³¹ Bradgate, above n. 2, at 413.

³² L. Merrett, 'The importance of delivery and possession in the passing of title' (2008) 67(2) *Cambridge Law Journal* 376 at 379.

³³ Bradgate, above n. 2, at 413.

a collateral contract, entitling him to sue in priority to his principal. He might also sell goods which he had bought; and the third party would not always know whether he was doing this, or selling for his principal. These propositions were not normally true of brokers, who negotiated and often concluded contracts in respect of goods which they did not hold at all, and might be assumed to be dealing for others. The term ‘factor’ is however not used in this sense in England nowadays, and the term ‘broker’ has subsequently been applied to a much wider range of occupations, starting with stockbrokers but extending much further.³⁴

Factors were also referred to as ‘commission agents or commission merchants, although these expressions were frequently used in practice for purchasing agents.’³⁵ Prior to the introduction of the Factors Act 1889, the courts offered some guidance on the definition of a factor. For example, in the case of *Stevens v. Biller*, Cotton LJ defined a factor as ‘an agent, but an agent of a particular kind. He is an agent entrusted with the possession of goods for the purpose of sale. That is the true definition of a factor.’³⁶ As a result of the introduction of a number of Factors Acts which ‘were partly a confirmation and partly an alteration of the law,’³⁷ the first of which was introduced in 1823, a mercantile agent can be defined as follows:

Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.³⁸

Bradgate took the view that mercantile agents are agents ‘whose business is to dispose of goods on behalf of principals and who are given possession of the goods for that purpose.’³⁹ The Factors Act 1889 gave mercantile agents an extensive array of powers to pass title to goods that belong to the principal which are in the agent’s possession.⁴⁰ Munday took the view that the Act ‘confers a wide authority upon certain classes of agent to transfer good title in their principal’s goods to third parties, even though they have no express authority.’⁴¹

(c) Broker

A broker has been referred to as an important historical type of agent, and the term is rarely used in modern commercial practices. Nonetheless, a broker has

³⁴ *Chitty on Contracts*, above n. 17, Factors and Brokers, 31–009.

³⁵ D. Ward and J. Jones, ‘Agents as permanent establishments under the OECD Model Tax Convention’ (1993) 5 *British Tax Review* 341 at 362.

³⁶ (1883) 25 Ch. D 31, 37. ³⁷ Merrett, above n. 32, at 378.

³⁸ Factors Act 1889, s.2(1). ³⁹ Bradgate, above n. 2, at 312.

⁴⁰ As cited in Munday, above n. 1, at 5.

⁴¹ Markesinis and Munday, above n. 7, at 21.

been defined as an agent who ‘negotiates contracts for the sale and purchase of goods and other property but does not have possession of the goods.’⁴²

(d) *Del credere* agent

This type of agent is normally involved with credit insurance and in some cases is an agent who ‘guarantees the price of goods purchased by a third party.’⁴³ Bradgate stated that this type of agent ‘negotiates contracts for a principal and guarantees to the principal that the third party will pay any sums due under that contract; this may be important where the third party is not known to the principal. The *del credere* agent charges the principal an extra commission for providing the guarantee.’⁴⁴ This type of agency traditionally occurs when an agent has consented to a ‘specially agreed commission to undertake to act as surety in respect of due performance of contracts he has entered into on behalf of his principal. *Chitty on Contracts* provides an excellent summary of the role and function of a *del credere* agent:

An agent for the sale of goods sometimes acts under a *del credere* commission; that is, for a special commission, he becomes responsible to his principal for the solvency of the buyer; or, in other words, he guarantees to his principal, in cases of sale, the payment of the price of the goods sold, when ascertained and due. His liability is, however, limited to ascertained sums which become due as debts: the principal may not litigate with a *del credere* agent disputes arising out of contracts made by the agent. Nor does an agent as such become responsible to the third party for due performance by his principal. A *del credere* agency may be implied, or inferred from a course of conduct, and does not need to be evidenced in writing because, being merely incidental to another transaction, it is not a promise to answer for the debt, default or miscarriage of another within s.4 of the Statute of Frauds, i.e. not a guarantee. In modern commerce, such agency could involve enormous liabilities, and it has largely been superseded by credit guarantees, confirmations and the like.⁴⁵

(e) Auctioneer

A very common type of agent is an auctioneer who is to a ‘limited degree an agent of the buyer, he may well have a contractual relationship with him.’⁴⁶

⁴² Bradgate, above n. 2, at 132.

⁴³ *Mercantile International Group plc v. Chuan Soon Huat Industrial Group plc* [2002] 1 All ER (Comm) 788, as cited in Munday, above n. 1, at 5. For a brief discussion of this case see F. Randolph, ‘Recent cases involving the Commercial Agents Regulations’ (2001) 12(4) *International Company and Commercial Law Review* 127 at 129.

⁴⁴ Bradgate, above n. 2 at 132. For an illustration of the approach adopted by the courts to this type of agent see *Dowling and H.G. Hamilton Pty Ltd and Kelly v. Rae* (1927) 39 C.L.R. 363, as cited in A. Phipps, ‘Resurrecting the doctrine of common law forbearance’ (2007) 123 *Law Quarterly Review* (Apr.) 286 at 294.

⁴⁵ *Chitty on Contracts*, above n. 17, *Del Credere Agents*, 31–010.

⁴⁶ F. Meisel, ‘Auctioneers and buyers: a special relationship?’ (2005) 21(4) *Professional Negligence* 250.

An auctioneer has been described as an agent to sell at an open sale, who has, however, no authority to provide a warranty unless the auctioneer has been expressly permitted to do so.

(f) Confirming house

A confirming house is an agent traditionally employed during international contracts, usually to act on behalf of international clients who are keen to import certain goods.⁴⁷ A confirming house acts for a principal by purchasing goods and introducing them into the UK market and then reselling them to its clients.

(g) Estate agent

An estate agent is employed by the seller of a property to find a buyer for the property.⁴⁸ This is a very limited type of agency and the estate agent's authority is limited to merely providing a description of the property and its value to potential purchasers of the property. The duties owed by an estate agent were illustrated in the Privy Council decision in *Kelly v. Cooper*.⁴⁹ The Estate Agents Act 1979, section 1(1) provides a very useful interpretation and definition of an estate agent:

things done by any person in the course of a business (including a business in which he is employed) pursuant to instructions received from another person (in this section referred to as 'the client') who wishes to dispose of or acquire an interest in land:

- (a) for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, dispose of such an interest; and
- (b) after such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be, the acquisition of that interest.⁵⁰

(h) Gratuitous agent

A gratuitous agent can best be described as a non-contractual agent. These types of agencies are in the minority when compared to written agency. In

⁴⁷ For an illustration of the use of a confirming house in an agency agreement see E. Ellinger, 'The drawer's right of subrogation revisited' (1996) *Journal of Business Law* (Sep.) 399.

⁴⁸ For an interesting discussion of the law relating to estate agents see P. Morris, 'The ombudsman for corporate estate agents' (1994) 13 *Civil Justice Quarterly* (Oct.) 337.

⁴⁹ [1992] 3 WLR 936. For a more detailed discussion see I. Brown, 'Divided loyalties in the law of agency' (1993) 109 *Law Quarterly Review* (Apr.) 206.

⁵⁰ Estate Agents Act 1979, s.1(1).