it or to have it repaired or improved without necessarily being the agent of the owner.[16] Nor does the fact that a third party, X, pays the remuneration of Y make Y the agent of X if Y is properly the agent of Z.[17] It is quite common (and not improper if assented to by the principal) for an agent's remuneration to be paid by the third party or some other person. More generally, mere economic interdependence between two parties does not create one the agent of the other.[18]

A focus on the conferral of authority to alter legal relations is also important in determining when one person with two potential principals is agent for one or the other. So an estate agent might be an agent for the vendor in marketing the property but, in receiving a deposit from the purchaser in advance of a binding contract, an agent for the purchaser, or just a stakeholder.[19]

The centrality to agency of the conferral of authority to alter legal relations suggests that at common law being an agent is not a status, but a description of a person while and only so long as the person is exercising such authority. As to status, an agent's status will usually be that of employee or independent contractor (but sometimes a gratuitous actor), and agency is not a separate category. Equally, employees and contractors often have no authority to alter their appointer's legal relations, and if not exercising any authority are not properly described as an agent. Thus, a solicitor is usually a type of independent contractor, and when merely giving advice to a client is not an agent, but while acting for the client in communicating with outside parties would be an agent. An employee while formally on sick leave remains an employee but would not have actual authority as agent during the leave.[20] One of the implications of this is that agency is of limited utility in the application of vicarious liability in tort, which usually operates on the basis of a party's status.[21]

1-005 **Fundamental role of agency** The basic notion behind the common law of agency can be explained along the following lines. The mature law recognises that people need not always personally do things that change their legal relations: they may

be done for P and that could be done by P itself is done by A under some arrangement; rather it is a consensual arrangement, a relationship, whereby A is to be taken as, or as representing, P"; *London Borough of Haringey v Ahmed* [2017] EWCA Civ 1861 at [36]–[38] (husband not agent in procuring rented accommodation for wife and family); *Marme Inversiones 2007 SL v Natixvest Markets Plc* [2019] EWHC 366 (Comm) at [444] (lead arranging bank not acting as agent for other banks in putting together syndicated financing); *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) at [88]–[89] (bank-appointed adviser to receivers not agent of bank); *Zedra Trust Co (Jersey) Ltd v The Hut Group Ltd* [2019] EWHC 2191 (Comm) at [37] (contractual requirement that, if requested by X, Y commission independent report at expense of X does not make Y the agent of X); *Barness v Ingenious Media Ltd* [2019] EWHC 3299 (Ch) at [83] (banks as lenders into tax-driven scheme not principals of promoters of the scheme).

16 See *Foster v Action Aviation Ltd* [2014] EWCA Civ 1368 at [38]. cf. *The Swan* [1968] 1 Lloyd's Rep. 5; Article 98, Illustration 6.

17 See *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 W.L.R. 4222 at [33]. A solicitor paid for by an insurer to represent the insured in litigation is usually the agent of the insured, not the insurer: see *Groom v Crocker* [1939] 1 K.B. 194 at 227–228; *Travelers Insurance Co Ltd v XYZ* [2019] UKSC 48 at [114].

18 See *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [194]–[196]; *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 at [100] (noted P. Kelshiker (2018) 134 L.Q.R. 363); *London Borough of Haringey v Ahmed* [2017] EWCA Civ 1861 at [38].

19 See *Sorrell v Finch* [1977] A.C. 728 at 750.

20 See *Harrisons & Crosfield Ltd v L & NW Ry Co Ltd* [1917] 2 K.B. 755.

21 See below, paras 8-177 and 8-182.

utilise the services of another to change them, or to do something during the course of which their relations may be changed. Thus, where one person, the principal, requests or authorises another, the agent, to act on his behalf, and the other agrees or does so, the law recognises that the agent has power to affect the principal's legal position by acts which, though performed by the agent, are to be treated in certain respects as if they were acts of the principal. This result is not confined to cases where the agent simply has specific instructions to do one thing, e.g. to hand over, or perhaps sign, a document. A person who acts in such a way (sometimes called a *nuntius* or messenger) performs no more than a ministerial function, which is attributable to the person for whom he acts without much stretching of elemental notions.[22] Any developed system must also recognise the more advanced notion of permitting a person to give to another a general authority to act according to his own discretion within certain limits.

1-006 **Basis in unilateral manifestation of will** The basic justification for the agent's power as so far explained seems to be the idea of a unilateral manifestation by the principal of willingness to have his legal position changed by the agent.[23] The conferral of authority is voluntary or consensual. To this conferral any contract between principal and agent is secondary,[24] though there will usually be one, which often provides the reason for the conferral and indeed may contain it. The phrase "consensual agency" used here and below,[25] and "agency by agreement" used later in this book,[26] are to be understood in this sense and not as relating to any supporting contract. There is certainly no conceptual reason which requires a contract between principal and agent to achieve this creation of power, and it is indeed clear that no contract is necessary, for a person without juristic capacity may be an agent.[27] Nor need the agent undertake to act as such. It is sufficient if the principal manifests to the agent that the principal is willing for the agent to act, and the agent does so in circumstances indicating that the agent's acts arise from the principal's manifestation.[28] This is not dissimilar from the formation of a contract, but is notionally separate, as the example of a power of attorney shows. In common with other situations where in the civil law it is important to derive a party's intention, the principal's manifestation of will is generally determined on an objective basis, whether or not the conferral of power meets the requirements of the law of contract.[29]

The phrase "manifestation of assent" is selected by *Restatement, Third* instead

22 See further below, para.1-047.

23 Montrose (1938) 16 Can.B.R. 757 at 779; Müller-Freienfels (1964) 13 Am.J.Comp.L. 193 at 203. See also *Sinfra A-G. v Sinfra Ltd* [1939] 2 All E.R. 675 at 682 (power of attorney a "one-sided instrument").

24 See *HKSAR v Luk Kin* [2016] HKCFA 81 at [29], per Lord Hoffmann; and para.2-003. This point is most obviously exposed in the context of the conflict of laws: see below, para.12-009. It is also noticeable in connection with revocation of authority, which is effective even if it constitutes a breach of any attendant contract: see below, para.10-004.

25 See below, paras 1-012 and 1-025.

26 See Ch.2, Section 2.

27 See Article 5; *Yasuda Fire and Marine Ins. Co v Orion Marine Ins. Underwriting Agency Ltd* [1995] Q.B. 174; *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83 at [29].

28 See Comment to Article 8 for discussion of the specific question whether the *agent* needs to know of the principal's manifestation or whether the manifestation, assuming that it can be proved, is sufficient.

29 See *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 at 502.

of "manifestation of consent" in *Restatement, Second*, seemingly to stress the objective nature of the inquiry.

> "A manifestation is conduct by a person, observable by others, that expresses meaning. It is a broader concept than communication. The relevant state of mind is that of the person who observes or otherwise learns of the manifestation."[30]

1-007 **Not an imposed relationship** It follows from agency's being founded on the principal's consent that agency is paradigmatically not a relationship imposed by law. In 1863, Lord Cranworth said: "No one can become the agent of another person except by the will of that other person".[31] One hundred years later the same starting point was selected by Lord Pearson when he said: "The relationship of principal and agent can only be established by the consent of the principal and the agent".[32] Although the notions of "will" and "consent" are objectively determined, they clearly remain fundamental.

Notwithstanding its voluntary nature, where there is evidence of a conferral of authority to alter a principal's legal relations, the normal incidents of agency are, prima facie, likely to apply even if the parties' contract expressly disavows one being the "agent" of the other.[33] It is one thing, however, to find that a disavowal is not conclusive, it is another for a court to find an agency for purely instrumental reasons without regard to the fact that the relationship of agency is fundamentally an intentional and voluntary one.[34] So, where no authority to alter legal relations is conferred, an express denial of an agency relationship is likely to be effective.[35] Equally, the mere use of a label such as agent or "manager" may not attract the incidents of agency, if there is no authority to alter the other's legal position conferred: "The court should not impose an agency analysis upon a relationship which may better be analysed in other terms".[36] It does not detract from the foregoing propositions to conclude by noting that the words used between the parties will often be important in determining whether there is an agency relationship.[37]

30 *Restatement, Third*, § 1.031 Comment b.

31 *Pole v Leask* (1863) 33 L.J. Ch. 155 at 161 (a dissenting speech).

32 *Garnac Grain Co Inc v H.M.F. Faure & Fairclough Ltd* [1968] A.C. 1130 fn. at 1137; see also *Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose) (No.1)* [1991] 4 All E.R. 769 at 774–775, 779; *ACN 007528207 Pty Ltd v Bird Cameron* (2005) 54 A.C.S.R. 505 at [96] (accountancy firm creates company, using a variant of the firm name, and hives off to it some of its accounting services—company found not to be agent of firm, there being no intention to create an agency); *Fortis Bank SA NV v Indian Overseas Bank* [2011] EWHC 538 (Comm); [2012] 1 All E.R. (Comm) 41 (consignee not principal of shipper though named in bill of lading); *The Lorenz Consultancy Ltd v Fox-Davies Capital Ltd* [2011] EWHC 574 (Ch) (leasing agent could not look to nominee tenant for commission when contract was only with nominator).

33 *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] A.C. 1130 at 1137; *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 A.L.R. 611 at [131] onwards; affirmed (2003) 215 C.L.R. 563; cf. *UBS AG (London Branch) v Kommunale Wasserwerke Peipkiz GmbH* [2017] EWCA Civ 1567 at [82]. For a useful consideration of indicia of agency, see *Serventy v Commonwealth Bank of Australia (No.2)* [2016] WASCA 223 at [29]–[37]. For the converse situation (parties use word "agent" but no agency found), see below, para.1-035.

34 For further discussion, see above, para.1-004, and para.1-026, below.

35 It is on this basis that the common law has routinely upheld provisions that make bank-appointed receivers of companies agents of the company not the bank: for discussion, see Lightman and Moss, *Law of Administrators and Receivers of Companies* (6th edn); and *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) at [73] et seq; *Menon v Pask* [2019] EWHC 2611 (Ch).

36 *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 at [88] and [91]. See too *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2013] FCAFC 29 (no entitlement of one party to a joint venture to demand access to business papers of the other).

1-008 **Extensions of reasoning** The basic idea of agency is extended to cases where the words and conduct of one person towards another are such that the law treats that other as entitled to assume that authorisation has occurred even though the first person cannot be shown to have had, and may indeed not have had, a specific intention of conferring authority (conferral of authority is to be judged objectively); and to cases where a person subsequently approves an act done by another on the former's behalf without prior authority. The paradigm situation, in which the principal intends to confer authority, is in this work referred to as agency by express agreement.[38] The first extension set out above is called agency by implied agreement[39]; and the second is dealt with under the heading of ratification.[40]

1-009 **No requirement that agent purport to act for principal** In some legal systems such reasoning would normally only be accepted in the case of an agent who when acting purported, or at least was understood, to do so on behalf of, or "in the name of", a principal, though usually the principal need not actually be named.[41] The common law, however, has no such requirement: if there is preceding authority to act for the principal, the rules so far set out, other than those as to ratification, will apply despite the fact that the existence of the principal, or his connection with the transaction, is unknown to the third party. Where his existence or connection with the transaction is not known, the principal is referred to as undisclosed,[42] and the rules then applicable are referred to as the doctrine of the undisclosed principal, which can be regarded as a unique feature of common law (though some civil law systems now approach some of its results, and such results were earlier known to the *ius commune*). In addition to the exclusion of ratification, however, the doctrine is limited by other safeguards appropriate to the fact that it in substance involves intervention on a contract by one not contemplated as a party to it.

1-010 **No requirement that agent pursue recognised commercial function** Although the main operation of agency principles is in the commercial sphere, they are in fact absolutely general and may apply to domestic and other non-commercial situations. There is no requirement that the agent pursue a commercial function at all, and certainly none that an agent pursue a commercial function of a recognised type.

1-011 **Apparent authority** By a further extension, the law may treat a third party dealing with a person who appears to have authority from a principal as entitled, by virtue of the principal's manifestations to that party by words or conduct, to assume that the person in question has such authority, regardless of whether anything has occurred from which the law would draw that conclusion if the matter were in issue only between the supposed agent and the supposed principal. This reasoning

37 See *Good v Bruce* [1917] N.Z.L.R. 514 (CA) at 536 (agency not sale): "No doubt acts are sometimes more potent than words, but if the acts are dubious then the words are the more important"; *Pengelly v Business Mortgage Finance 4 Plc* [2020] EWHC 2002 (Ch) at [68].

38 Articles 7 and 24–26.

39 Articles 8 and Articles 27–32.

40 Articles 13–20.

41 See, e.g. French CC, Articles 1119 and 1984. There may be exceptions in some systems for situations where the agent is a "man of straw".

42 See Article 76.

to the value of the transaction: it can be by a mark-up. But the essence of the payment received by the agent is that it is not an independent profit taken by the agent, but rather a fee paid by the principal in return for the agent's acting on the principal's behalf.[55]

1-017 **Duty only one of due diligence** There is a further feature of the relationship between principal and agent which may be taken as typical. It is that the agent owes to the principal, unless there are other indications, only a duty to use due diligence, or, if appropriate, best endeavours to achieve the result required. An agent does not owe the strict duties customarily imposed on, for instance, a seller, who has an adverse commercial relationship with the buyer.[56] To some extent this is of course a feature of contracts for services, as opposed to contracts for the transfer of property, in general; but though no doubt an agent *can* undertake strict liability in some respect,[57] the duty of due diligence is, when combined with the features already referred to, also a typical indication of agency.

1-018 **Control** It is common to regard control by the principal as a defining characteristic of agency. Thus, *Restatement, Third*, defines agency in terms of acting "on the principal's behalf and subject to the principal's control".[58] This notion has obvious relevance in employment law, where it can be treated as an identifying characteristic of the employment relationship, and hence to the vicarious liability of an employer for an employee. In agency in general however it plays a more limited role.[59] A distinction between agent and trustee, and between agent and some bailees, is that control cannot in general be exercised by beneficiaries over trustees, nor by many bailors over their bailees.[60] The same is true of lenders who take powers to act in their own interests in ways which affect the borrower's position.[61] But agents will often not accept control by their principals as to the manner in which they act, and some will only accept instructions to act in accordance with usages of their own market. Others may be authorised only to do specific things. In many such situations the principal's only control lies in his power to revoke the authority, a power which agency law assumes that he has at all times.[62] It might seem therefore that control is not a significant feature of the internal relationship, except in so far as the relationship by definition posits a person, the principal, giving authority, and the agent's duty to obey instructions if the latter wishes to continue as agent. Nevertheless, if the principal gives up all control of his supposed agent the relationship is only doubtfully one of agency.[63] The idea of control may also be relevant where it is contended that a company is an agent of its parent.[64] For this reason the idea requires mention; but if the central notion of agency is not required, as it is not on

[55] Articles 45 and 46.
[56] See below, para.1-035.
[57] e.g. a *del credere* agent: see below, para.1-042.
[58] This feature is, contrary to the approach here adopted, made much of in *Restatement, Third*: see § 1.01, Comments f, g and corresponding reporter's notes.
[59] See *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 A.L.R. 611, at [131] onwards, actual decision affirmed (2003) 215 C.L.R. 563.
[60] See below, paras 1-032 and 1-033.
[61] See Article 118.
[62] See Article 120. This point is further developed in the Comment to Article 37.
[63] This makes some of the usages of Lloyd's difficult to account for. See *CFTO-TV Ltd v Mr Submarine Ltd* (1994) 108 D.L.R. (4th) 517; affirmed (1997) 151 D.L.R. (4th) 382; *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2013] FCAFC 29 at [74].
[64] See the *South Sydney* case, (2000) 177 A.L.R. 611 at [137].

the explanation given in this book, to extend to tort, the idea of control does not seem sufficiently important to be inserted into the formal definition. Control remains an important aspect of vicarious liability in tort (even if recent authority suggests that absence of control does not provide immunity from such liability)[65] and in liability for procuring wrongs.[66]

1-019 **Internal and external aspects of agency** The full reasoning above has been developed to meet the case of a person who may be called an agent in a strict sense, who has the power to affect the principal's legal relations. To such an agent legal rules attach which require the drawing of a distinction between what may be called the internal and external aspects of agency. The *external* aspect is that under which the agent has powers to affect the principal's legal position in relation to third parties. The *internal* aspect is the relationship between principal and agent, which imposes on the agent special duties vis-à-vis the principal, appropriate to the powers which the agent can exercise on the principal's behalf. These may arise in connection with an accompanying contract, but may arise only from the agent's fiduciary liability. They follow from the need to control agents' opportunities to exploit their position. To an agent in the fullest sense, both aspects are relevant. Some persons may, however, be described as agents by virtue of the internal relationship but have no external powers, as appears below.

1-020 **Incomplete agency: internal relationship only—the "canvassing" or "introducing" agent** Article 1(4) seeks to achieve completeness by taking in a well-established type of intermediary who makes no contracts and disposes of no property, but is hired, whether as an employee or independent contractor, to introduce parties desirous of contracting and leaves them to contract between themselves, or otherwise performs some function relevant to a proposed transaction but does not effect a contract between the parties. In effecting and performing such introductions or limited functions the intermediary is often remunerated by commission, which may sometimes be taken from both parties.[67] Such a person is a common figure in most western legal systems and may well be referred to as an agent. The most obvious example of such an intermediary in the English cases is the estate agent, who introduces purchasers to vendors and tenants to lessors of houses, and vice versa.[68] Such persons are sometimes also referred to as brokers, and indeed in some English-speaking countries the estate agent is referred to as a "real estate broker": but this may be misleading since the current practice, at any rate in England, is to use the term "broker" for persons who go beyond introductions and certainly do make contracts for their principals, e.g. commodity brokers, insurance brokers and stockbrokers. Other examples include people whose approval of aspects of the subject-matter of a contract is stipulated for as a condition of the principal committing to the contract.[69] These people may owe the principal fiduciary duties in giving such approval, and hence may attract the law on bribes

[65] For discussion see below, para.8-178.
[66] For discussion in the context of banks giving directions to receivers, see *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) at [75]–[77].
[67] As has been pointed out (see para.1-004), a wider definition of agency such as that adopted in *Restatement, Third*, does not require an exception for this type of agent: but it creates its own difficulties.
[68] There is an elaborate discussion of a statutory definition of a "real estate agent" in *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 C.L.R. 418.
[69] See *Shipway v Broadwood* [1899] 1 Q.B. 369 (veterinarian to certify as to soundness of horses);

and secret commissions if payments or other inducements are given by the third party. But their role is internal only.

Canvassing agents, as they are often called, are a difficult category about which to generalise.[70] Some do little or nothing more than effect an introduction. They have no express authority to alter their principals' legal relations, and advice and loyalty are not things they offer, nor are those things expected of them. Hence, where acting for purchasers, the introducer may be showing other purchasers the same property, hoping in order to maximise commission that the others will pay a higher price. In such circumstances, fiduciary duties are likely to be very limited (but the taking of commission from the vendor could well involve a breach of duty unless consented to).[71] Much turns on the degree of trust that the parties understand and accept is being placed in the intermediary by the principal.[72]

Others, though, may be the main go-between in negotiations on behalf of one of the parties, and certainly trusted by that party to pursue that party's interests. They will usually in so doing have authority to receive and communicate information on their principals' behalf, and thereby have the capacity to alter their principals' legal position. In that respect, such persons fit within the core definition of agency, since without that authority to make and receive communications, the principal may not secure a deal.[73] It is not necessary that an agent have authority to make a contract for the principal. Yet others may be authorised to negotiate and settle all the terms of a contract but do not have authority to complete the formalities. The evidenced intentions of such persons may, for instance, be relevant to the rectification of a written contract should it not accord with the informal consensus that had been reached.[74] Because they act in a capacity which involves the repose of trust and confidence, people in the latter two examples are likely to be fiduciaries.[75] They are also subject of typical rules, largely developed in estate agent cases, as to entitlement to commission, which are normally regarded as part of agency law.[76] They may sometimes hold money (e.g. deposits) for their principals.[77] The rules applicable to the internal relationship between principal and agent will therefore ap-

Alexander v Webber [1922] 1 K.B. 642 (chaffeur to approve of car to be bought); *Taylor v Walker* [1958] 1 Lloyd's Rep. 490 (accident assessor).

70 See Article 30, Illustration 7, for a range of examples.

71 See *Eze v Conway* [2019] EWCA Civ 88; *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [444] (lead arranging bank had no fiduciary relationship with other finance providers); *CH Offshore Ltd v Internaves Consorcio Naviero SA* [2020] EWHC 1710 (Comm) at [86] (shipping broker acting only as conduit between parties).

72 Compare *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83; [2019] 1 W.L.R. 4481 at [32] (introducer to main agent had fiduciary relationship with client, albeit limited); with *Commercial First Business Ltd v Pickup* [2017] CTLC 1 (Ch). See too *Rowland v Chapman* (1901) 17 TLR 669 (agent who was also co-principal had no real conflict of interest).

73 See *Pengelly v Business Mortgage Finance 4 Plc* [2020] EWHC 2002 (Ch) at [68].

74 See, e.g. *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 55; [2012] 2 All E.R. 748 at [41]; *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch) at [198]; *FSHC Group Holdings Ltd v Barclays Bank Plc* [2018] EWHC 1558 (Ch) at [51].

75 See *McWilliam v Norton Finance (UK) Ltd* [2015] EWCA Civ 186; [2015] 1 All E.R. (Comm) 1026 at [44] (mortgage broker); and Article 45, Illustrations 16 and 17. But cf. *Northeast General Corp v Wellington Advertising Inc*, 604 N.Y.S. (2d) 1 (Ct.App.1993) ("Non-exclusive independent investment broker and business consultant for the purposes of finding and presenting candidates for purchase, sale, merger or other business combination" held not to owe fiduciary duty to disclose information regarding persons introduced).

76 Articles 56–58.

77 See Comment to Article 52.

ply as appropriate, and for this reason such persons should certainly be treated in a work on agency even though they lack most of the external powers of the agent. It is an advantage of the formulation of basic agency principle in Article 1, which selects the internal relationship between principal and agent as a distinguishing feature of agency, that it can be taken to cover such persons.[78]

Indirect representation[79] There is another situation that can be said to amount to "incomplete agency": that which may be called indirect representation. In commercial spheres a method of dealing can be adopted whereby a principal appoints a person, who may be called an agent, to deal (especially to buy[80]) on the principal's behalf, on the understanding that when dealing with any third party the agent will deal in the agent's own name as principal. As between principal and agent, however, the relationship is one of agency[81]; viz. the agent: does not promise to achieve a result but only to use best endeavours, so does not answer to the principal on the strict basis appropriate to seller or buyer[82] (though the agent may have some of the rights of a seller, e.g. a lien[83]); is normally remunerated by commission; owes fiduciary duties and thus may not without disclosure take commission from the other party; and is in the above sense under the principal's control. Here, again, the internal aspect of agency is found but not the external. This arrangement is sometimes referred to in civil law countries as indirect representation, and intermediaries operating on such a basis, often by virtue of their professions (such as freight forwarders), may be referred to as operating under a contract of *commission* or the equivalent in other languages (the title referring to the task entrusted to **1-021**

78 For a useful general survey see Yiannopoulos (1959) 19 La.L.Rev. 777 especially at p.799 onwards. In *Vogel v R. & A. Kohnstamm Ltd* [1973] Q.B. 133 an introducer of business was held not to be an agent for the purposes of enforcement of a foreign judgment: see pp.136–137 and 147; and in *Rakusens Ltd v Baser Ambalaj Plastik Sanayi Ticaret AS* [2001] EWCA Civ 1820; [2002] 1 B.C.L.C. 104 the office of such a representative was held not to be the company's "place of business" for the purposes of s.695(2) of the Companies Act 1985 (now Companies Act 2006 s.1139). See also *Okura & Co Ltd v Forsbacka Jernverks A/B* [1914] 1 K.B. 715.

79 See Busch, *Indirect Representation in European Contract Law* (The Hague: Kluwer Law International, 2005); Kortmann and Kortmann, in *Agency Law in Commercial Practice* (Busch, Macgregor and Watts eds, 2016), Ch.6.

80 For analogous arrangements regarding selling, see *Kirkham v Peel* (1880) 44 L.T. 195; *New Zealand and Australian Land Co v Watson* (1881) 7 Q.B.D. 374; and cases on factors generally (below, para.1-046); *Bosanquet v Mofflin* (1906) S.R. (N.S.W.) 617; *Benmag Ltd v Barda* [1955] 2 Lloyd's Rep. 354; *Fleming v London Produce Co Ltd* [1968] 1 W.L.R. 1013.

81 See *Ireland v Livingston* (1872) L.R. 5 H.L. 395 at 407–409; *Armstrong v Stokes* (1872) L.R. 7 Q.B. 598; *Robinson v Mollett* (1875) L.R. 7 H.L. 802 at 809–810; *Cassaboglou v Gibb* (1883) 11 Q.B.D. 797 at 803–804; *Montgomerie v UK Mutual SS Assn* [1891] 1 Q.B. 370 at 372; *Butlers (London) Ltd v Roope* [1922] N.Z.L.R. 549; *Downie Bros v Henry Oakley & Sons* [1923] N.Z.L.R. 734; *Bolus & Co Ltd v Inglis Bros Ltd* [1924] N.Z.L.R. 164 at 175; *Sopwith Aviation & Engineering Co Ltd v Magnus Motors Ltd* [1928] G.L.R. (N.Z.) 380; *Isaac Gundle v Mohanlal Sunderji* (1939) 18 Kenya L.R. 137; *Witt & Scott Ltd v Blumenreich* [1949] N.Z.L.R. 806; *Rusholme & Bolton & Roberts Hadfield Ltd v S.G. Read & Co* [1955] 1 W.L.R. 146 at 152; *J.S. Robertson (Australia) Pty Ltd v Martin* (1956) 94 C.L.R. 30; *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 Q.B. 53 at 59–60; affirmed [1968] 2 Q.B. 545; Hill [1964] J.B.L. 304; [1967] J.B.L. 122; (1968) 31 M.L.R. 623; (1972) 3 J. Maritime Law & Commerce 307; Schmitthoff, 1970 I *Hague Recueil des Cours* 115 at 151–154; Lando [1965] J.B.L. 179 at 374; [1966] J.B.L. 82. For a more modern example, see *Trifit Nurseries v Salads Etcetera Ltd* [1999] 1 All E.R. (Comm) 110 at 115; affirmed [2000] 1 All E.R. (Comm) 737, where such reasoning seems essential and below, para.10-010; and *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm) at [138] (indirect principal able to plead deceit made to agent).

82 See below, para.1-036.

83 See the important material collected in Article 69.

the agent rather than, as might seem more natural to a common lawyer, the method of remuneration).[84] In many such situations the third party may infer, often from the nature of the agent's profession, or may even know that a principal is involved: the principal's name may even be known. Its recognition can lead to a method of expounding agency law on the basis that a person wishing to appoint a representative has the choice of two methods, direct or indirect representation: such an approach is in fact adopted in the PECL and indeed the DCFR, for which a measure of universality is claimed, though the UNIDROIT Principles have abandoned it as a classification.[85] The notion of authority can also be employed in both contexts, in the sense that the indirect agent can be said to be "authorised" to deal in the agent's own name, but for the account and at the risk of the principal.[86] This can be pressed so as to consider other doctrines of direct agency, especially apparent authority and ratification, in the context of indirect representation.[87]

On some views the idea of indirect representation is also applicable where the agent has authority to create direct representation, but for some reason (whether the principal's or his own) does not indicate that that is the case.[88] This is nearer to the common law doctrine of the undisclosed principal, a much narrower doctrine which common lawyers treat as an unusual form of *direct* representation.[89] In civil law countries the "principal" of the indirect agent (or *commissionnaire*) is not usually liable to the third party, though may be so in special situations, and the principal may rather more easily be able to sue.[90] Where that is so, the case for applying doctrines by analogy applicable to direct agency obviously becomes stronger.

1-022 **Is indirect representation accepted at common law?** This dichotomy between direct and indirect representation is unlikely to be attractive to common law systems, which tend to reach the result of direct representation with more facility than the civil law. But this apart, it is difficult to see any doctrinal objection at common law to the setting-up of a situation of indirect representation. Indeed, something like this seems to have been the mode of operation of the nineteenth-century factor,[91] who received goods on consignment and sold them without always making clear whether they were the factor's own goods or those of another. A commercial intermediary operating on this basis is sometimes even referred to in nineteenth-century cases as a "commission agent" or "commission merchant"[92]; and the cases

[84] See, e.g. Hamel, *Le Contrat de Commission* (Paris, 1949); Cohn, *Manual of German Law* (2nd edn), Vol.2, p.40 onwards; Horn, Kötz and Leser, *German Private and Commercial Law* (1982), pp.232–234; Schmitthoff, 1970 I *Hague Recueil des Cours* 115, 122–125; *Müller-Freienfels* (1955) 18 M.L.R. 33 at 36–38; Busch, fn.79 above.

[85] See above, p.xvii.

[86] See Busch, fn.79 above, pp.11 and 14.

[87] See Busch, passim.

[88] See Busch, fn.79 above, pp.13, 23–26, 231 and 234.

[89] See below, Article 76.

[90] In Dutch law the principal is in certain cases liable and entitled: see Busch, pp.44–48; as to German law, see Busch, p.93 onwards.

[91] See below, para.1-046.

[92] As to commission agents, see the leading case of *Ireland v Livingston* (1872) L.R. 5 H.L. 395 at 408; *Armstrong v Stokes* (1872) L.R. 7 Q.B. 598; Story, *Agency* (1839), § 33. The term "commission agent" or "commission merchant" appears in *Taylor v Kymer* (1832) 3 B. & Ad. 320; *Armstrong v Stokes* (1872) L.R. 7 Q.B. 598, Illustration 7 to Article 80; *Elbinger Actien-Gesellschaft v Claye* (1873) L.R. 8 Q.B. 313; *Hutton v Bulloch* (1874) L.R. 9 Q.B. 572; *Maspons y Hermano v Mildred, Goyeneche & Co* (1882) 9 Q.B.D. 530; affirmed (1883) 8 App.Cas. 874; *Cassaboglou v Gibb* (1883) 11 Q.B.D. 797 at 804; *J. N. Lyon & Co Ltd v N. Fuchs* (1920) 2 Lloyd's Rep. 333. See also *Fleming v London Produce Co Ltd* [1968] 1 W.L.R. 1013 as to the term "general commission agent" in connection with tax legislation. See in general Munday (1977) 6 Anglo-Am. L.Rev. 221, esp. at p.232 onwards.

on the old "foreign principal" rule[93] refer to this method of operation. It was most clearly enunciated by Blackburn J when he said:

> "Any person, if he chooses, may give an order to an agent to buy as his agent, not only with an express dispensation from any obligation to establish privity of contract between him and the person from whom the agent buys, but even expressly refusing authority to the agent to establish such privity.
>
> This is the ordinary authority given to a foreign commission merchant who (on account of the great inconvenience which would result from establishing privity of contract between the foreign producer and the home merchant) is not allowed (far less required) to establish privity of contract between them. This, however, in no way interferes with the existence of a fiduciary relation."[94]

But by a unique development of the common law, the factor's principal was held entitled to intervene not only to sue, but also to be liable on the factor's contracts. This is said to be the origin of the common law doctrine of the undisclosed principal, though the case law on that doctrine appears to confine it to situations where the agent has authority to create privity of contract without disclosing that fact.[95] Such an intermediary may therefore sometimes in English law be regarded as creating *direct* representation, at least where no indication is given that the intermediary is acting for a principal and perhaps on occasion even where such indication is given.[96] This seems to have led to an assimilation of this special arrangement with normal agency. Several cases seem therefore to assume, without the point being properly argued, one of two possible interpretations to such a situation. The first is that the intermediary is a normal agent of an undisclosed principal, and that the undisclosed principal rules therefore apply with the result that the principal is liable and entitled whatever the intentions of the parties.[97] The second is that because the agent in such a situation has no external authority to create privity of contract between the principal and the third party, the undisclosed principal rules do not apply at all and the agent must alone be a party to the contract of sale, carriage, or whatever transaction has been performed for the principal, the resulting dealing being principal to principal.[98] If the approach to be derived from such cases is correct, however, this is an area where the breadth of common law agency

[93] See below, para.8-071; Busch, *Indirect Representation in European Contract Law* (2005), pp.168–173.

[94] *Robinson v Mollett* (1875) L.R. 7 H.L. 802 at 809–810 (a dissenting speech). See also his famous speech in *Ireland v Livingston* (1872) L.R. 5 H.L. 395.

[95] See Comment to Article 76.

[96] See, e.g. *Maspons y Hermano v Mildred, Goyeneche & Co* (1882) 9 Q.B.D. 530 (holding the foreign principal rule inapplicable); affirmed on other grounds (1883) 8 App.Cas. 874.

[97] See, e.g. the *Maspons* case, above; and see *Brown & Gracie Ltd v F.W. Green & Co Pty Ltd* [1960] 1 Lloyd's Rep. 289; Reynolds [1983] *Current Legal Problems* 119. It could be said that *Scrimshire v Alderton* (1743) 2 Strange 1182 is an early example of such judicial analysis; see Stoljar, pp.207–208; Chorley (1929) 45 L.Q.R. 221 at 224–225.

[98] See, e.g. the dissenting judgment of Diplock LJ in *Anglo-African Shipping Co of New York Inc v J. Mortner Ltd* [1962] 1 Lloyd's Rep. 610 (which, it is respectfully submitted, presents an analysis which does not accord with commercial reality). See also the same judge in *Garnac Grain Co Inc v H.M.F. Faure & Fairclough Ltd* [1966] 1 Q.B. 650 at 684; affirmed [1968] A.C. 1130; *Limako BV v Hentz & Co Inc* [1979] 2 Lloyd's Rep. 23; *B. & M. Readers' Service Ltd v Anglo Canadian Publishers Ltd* [1950] O.R. 159 (subscription to magazine). But cf. *L/M International Construction Inc (now*

principal's behalf.[111] An estate agent must notify the principal of offers received up to the time of exchange of contracts.[112] A ship's agent must likewise inform the principal of any facts which the principal ought to know in order to make full disclosure to underwriters.[113] Moreover, an insurance broker owes a special duty of disclosure, not only to the principal but to the underwriters. This duty, for breach of which the agent may be liable to the principal, arises from the nature of the insurance contract, which is uberrimae fidei.[114] A solicitor or other agent in a position of conflict of interest cannot normally use the conflict as an excuse for not passing on information relevant to the retainer to a principal.[115] As always, the scope of an agent's duties is governed by the terms and context of any contract between the principal and agent, and there will be cases where mere neglect to pass on information will not create liability.[116] As to duties to keep records of transactions, see below, para.6-093, and as to equitable duties of disclosure, see para.6-054.

6-022 **Special skill** Some agents may be regarded as holding themselves out as possessed of special skills. In such cases it would seem that the standard of care which they owe should be higher. Thus in one case where a provincial auctioneer was held not liable for failure to recognise pictures possibly by Stubbs, the decision was affected by the fact that they were described as "general practitioners"[117]: it would seem that a person offering more specialised skills should be liable if they are not exercised.[118]

6-023 **Illegal conduct** Difficult issues arise where an agent has acted illegally. It will be rare that an agent will have implied authority to act illegally,[119] and without authority the agent may be liable to compensate the principal where the principal is not directly complicit in the illegality but suffers loss as a result of the conduct.[120] The mere fact that the principal is attributed with responsibility for the agent's illegality for some purposes ought not to preclude the principal's suing the agent for

N.Z.L.R. 75 (offensive letter from solicitors acting for other side); *Waimond Pty Ltd v Byrne* (1989) 18 N.S.W.L.R. 642 (failure to guard interests of client when they were prejudiced by another client).

111 *Johnson v Kearley* [1908] 2 K.B. 514. See also *Dampskibsselskab Halla v Catsell & Co* (1928) 30 Lloyd's Rep. 284; *Dunton Properties Ltd v Coles, Knapp & Kennedy* (1959) 174 E.G. 723.

112 *Keppel v Wheeler* [1927] 1 K.B. 577, Illustration 6 to Article 60; see also Estate Agents (Undesirable Practices) (No.2) Order 1991 (SI 1991/1032) Sch.3 para.2.

113 *Proudfoot v Montefiore* (1867) L.R. 2 Q.B. 511.

114 See Marine Insurance Act 1906 s.19; and *Blackburn Low & Co v Vigors* (1887) 12 App.Cas. 531 at 537, 541. A broker may also owe a duty to its client to inform the client of its duties of disclosure to the insurer: *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm) at [318].

115 *Hilton v Barker Booth & Eastwood* [2005] UKHL 8; [2005] 1 W.L.R. 567; *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All E.R. 836; *Goldsmith Williams Solicitors v E.Surv Ltd* [2015] EWCA Civ 1147; [2016] 4 W.L.R. 44. See further below, para.6-048.

116 See, e.g. *National Home Loans Corp Plc v Giffen Couch & Archer* [1998] 1 W.L.R. 207 (default on existing mortgage not reported to client lender but existing credit performance of debtor not within instructions); *Torre Asset Funding Ltd v The Royal Bank of Scotland Plc* [2013] EWHC 2670 (Ch) at [156] (agent in syndicated lending had assumed limited duties, and was not required to assess whether an event of default by a borrower had occurred in order to inform principals).

117 *Luxmoore-May v Messenger May Baverstock* [1990] 1 W.L.R. 1009 at 1020.

118 See *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep. 172 at 183–184; but cf. *Wimpey Construction UK Ltd v Poole* [1984] 2 Lloyd's Rep. 499 at 506.

119 See further above, para.2-026.

120 See *Bilta (UK) Ltd v Nazir* [2015] UKSC 23; [2016] A.C. 1 at [42]–[43], [130], [160] and [191]. See too *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm) (action against directors and employees for causing company to engage in unlawful competitive action), reversed on point of statutory construction: [2010] EWCA Civ 1472; [2011] 1 Lloyd's Rep. 462.

breach of mandate or other breach of contract. Even where there is evidence that a principal has in fact given some discretion to act illegally, the exercise of the discretion without due cause may not preclude an action by the principal against the agent. In cases, however, where there was some colour of right to the action taken by the agent, there may not be the want of due care necessary for liability.[121] Principals may also be taken to have warranted that their instructions are lawful.[122] Further, where the principal or a duly authorised senior agent expressly authorised, or acquiesced in, the agent's illegal conduct then it is unlikely that the agent will be liable for breach of contract because there will not have been a breach. It is possible too that any action brought by the principal against the agent could be barred by the ex turpi maxim.[123] In some circumstances it may be contrary to the policy of the particular rule infringed for the principal to be compensated for loss.[124] Authority, however, holds that an agent who is given money by a principal for the purpose of illegal gaming remains accountable for any winnings.[125] The fact that the principal has engaged in, or former agents of the principal have caused it to engage in and be responsible for, unlawful activity cannot excuse a later agent's unconnected acts of negligence or other breaches of duty.[126]

Where the principal is a company, the company will not automatically be treated as knowing and condoning illegal conduct even where its senior management is apprised of it, especially where the question is the liability to the company of that senior management for engaging in the conduct.[127]

Illustrations

6-024 (1) "[A solicitor's liability] is the same as anybody else's liability; having regard to the degree of skill held out to the public by solicitors, does the conduct of the solicitor fall short of the standard which the public had been led to expect of the solicitor?"[128] A solicitor "is bound to bring a fair and reasonable amount of skill to the performance of his professional duty".[129] A solicitor who is being instructed to draft a contract by an agent of the client should bring to the

121 cf. *Re Vining Sparks Ltd* [2019] EWHC 2885 (Ch); [2020] S.T.C. 410 (tax avoidance by director on legal advice).

122 See *Strongman v Sincock* [1955] 2 Q.B. 525. See also above, para.6-009.

123 See, e.g. *Nayyar v Sapte* [2009] EWHC 3218 (QB) (principal authorises and funds agent to pay bribe). Older case law needs to be reconsidered in the light of *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467. As to the agent's rights against the principal, see Article 61.

124 See *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472; [2011] 1 Lloyd's Rep. 462 (this surprising result is discussed in Watts [2011] J.B.L. 213). cf. *Griffin v Uhy Hacker Young & Partners (a firm)* [2010] EWHC 146 (Ch) (accountants). See further, paras 3-035 and 6-009.

125 *De Mattos v Benjamin* (1894) 63 L.J.Q.B. 248; *Cheshire (Thomas) & Co v Vaughan Bros & Co* [1920] 3 K.B. 240; *Jeffrey v Bamford* [1921] 2 K.B. 351; *Close v Wilson* [2011] EWCA Civ 5. The position may be otherwise where the claimant needs to rely on a contractual claim, the contract being illegal: *Close v Wilson* [2011] EWCA Civ 5.

126 *Sharma v Top Brands Ltd* [2015] EWCA Civ 1140; [2016] P.N.L.R. 12 (liquidator of company the business of which largely involved VAT fraud not excused for negligence in paying away remaining funds); *Stoffel & Co v Grondona* [2018] EWCA Civ 2031. See further, para.6-009.

127 *Bilta (UK) Ltd v Nazir* [2015] UKSC 23; [2016] A.C. 1 at [42]–[43], [130], [160] and [191]; *Crown Prosecution Service v Aquila Advisory Ltd* [2019] EWCA Civ 588 at [25].

128 *Simmons v Pennington* [1955] 1 W.L.R. 183 at 188, per Hodson LJ, citing with approval this dictum from a judgment of Harman J (unreported). See too *Tom Hoskins Plc v EMW Law (a firm)* [2010] EWHC 479 (Ch).

129 *Parker v Rolls* (1854) 14 C.B. 691 at 695, per Talfourd J. See in general Cordery, *Solicitors*, Ch.6. A solicitor may be liable to others than his client: *White v Jones* [1995] 2 A.C. 207 (prospective

client's notice provisions in respect of which the agent has a conflict of interest.[130]

(2) An insurance broker is bound to exercise reasonable and proper care, skill and judgment in obtaining a policy to cover the principal's interests and protecting the principal generally in relation to the underwriters.[131] The expert evidence of other brokers may be called to prove what is the requisite standard of care. A broker is bound to keep up to date on the current developments of the law relating at least to that part of the business of insurance with which the broker is concerned.[132] If a broker does give advice on points of insurance law generally reasonable care must be taken to ensure that such advice is correct.[133] The broker must act with due speed in obtaining insurance cover[134] and if such cover cannot be obtained the broker must at once inform the principal.[135] Liability may arise if the broker erroneously and negligently informs the principal that cover is unobtainable, with the result that the principal does not make further attempts to obtain it.[136] A broker may also be liable in tort to others than the client.[137] A broker may be found to have undertaken ongoing duties to advise as to the suitability of cover earlier obtained if relevant facts come to light.[138] Similar duties are owed by investment brokers who advise and act for clients in the acquisition of investments.[139]

(3) A patent agent is "bound to bring reasonable and ordinary care and knowledge to the performance of his duty as such skilled agent".[140] Such agent is bound to know and keep abreast of the most recent decisions of the courts relating to the business of obtaining patents.[141]

(4) Brokers who are employed to sell goods are bound to employ due care and diligence in obtaining the best available price.[142]

(5) An estate agent was employed to let houses and was paid a commission of 5 per cent for doing so. It was held that the agent was bound to use reasonable care to ascertain the solvency of the tenants[143]:

> "The house agent must use reasonable care and diligence in ascertaining the condition of a person before he introduces him to the landlord as a tenant. It cannot be supposed that the commission of 5 per cent is to be paid for only putting the name of the owner and the particulars of the premises upon the house agent's books for the information of those who may come to make inquiries at his office."[144]

(6) An estate agent suggests a "reasonable asking price" of £100,000 to a prospective seller of land. He is then asked to act for the seller and does not suggest any change to the asking price. The advice was negligent. He is liable for negligent valuation when the seller buys another property at a price which proves ruinous when the original land can only be sold for £36,000.[145]

(7) In the case of an ordinary commercial transaction a freight forwarder will not be negligent by omitting to insure the goods.[146] But in the case of a transaction involving a private individual where the goods are known to be valuable the agent may be negligent if the goods are neither insured nor instructions obtained from the principal.[147] In the former instance the agent may

beneficiary); and if he acts for those on both sides of a transaction (e.g. a conveyance) he may owe duties to both: *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All E.R. 836.

130 *Newcastle International Airport Ltd v Eversheds LLP* [2013] EWCA Civ 1514 at [80].

131 *Chapman v Walton* (1833) 10 Bing. 57; *Osman v J. Ralph Moss Ltd* [1970] 1 Lloyd's Rep. 313; *Claude R. Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Pty Ltd* [1975] 1 Lloyd's Rep. 52; *Fine's Flowers v General Accident Assurance Co of Canada* (1977) 81 D.L.R. (3d) 139; *Warren v Henry Sutton & Co* [1976] 2 Lloyd's Rep. 276; *Cherry v Allied Insurance Brokers Ltd* [1978] 1 Lloyd's Rep. 274; *McNealy v Pennine Insurance Co Ltd* [1978] 2 Lloyd's Rep. 18; cf. *O'Connor v B.D. Kirby & Co* [1972] 1 Q.B. 90; *Provincial Insurance Australia Pty Ltd v Wood Products Pty Ltd* (1991) 25 N.S.W.L.R. 541 at 556 ("go through with the insured the list of exceptions in the policy secured"); *FNCB Ltd v Barnet Devanney & Co Ltd* [1999] 2 All E.R. (Comm) 233; *Ground Gilbey Ltd v Jardine Lloyd Thompson UK Ltd* [2011] EWHC 124 (Comm); [2011] P.N.L.R. 15; [2012] Lloyd's Rep. I.R. 12 at [73]; *Synergy Health (UK) Ltd v CGU Insurance Plc (t/a Norwich Union)* [2010] EWHC 2583 (Comm); [2011] Lloyd's Rep I.R. 500 at [204] (duty to advise principal as to what types of information must be disclosed to insurer to avoid rescission for non-disclosure); *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368 at [235]. A broker cannot be excused from his duty to advise by reason of a conflict of interest: *HIH Casualty & General Insurance Ltd v JLT Risk Solutions Ltd* [2007] EWCA Civ 710; [2007] 2 Lloyd's Rep. 278; [2007] 2 All E.R. (Comm) 1106 (see below, para.6-048).

132 *Park v Hammond* (1816) 6 Taunt. 495; *The Ultra Processor* (1983) Lloyd's Maritime Law Newsletter, September 15, 1983 (SC, BC); *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 N.S.W.L.R. 541 at 556 ("pointing out legal pitfalls").

133 *Sarginson Bros v Keith Moulton & Co* (1942) 73 Ll.Rep. 104. See too *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368 at [238].

134 *Turpin v Bilton* (1843) 5 M. & G. 455. See further above, para.6-014.

135 See Article 61. See also *Youell v Bland Welch & Co Ltd (the Superhulls Cover case) (No.2)* [1990] 2 Lloyd's Rep. 431 at 445. As to insurance brokers generally see *MacGillivray on Insurance Law* (14th edn), Chs 36 and 37; Clarke, *Law of Insurance Contracts* (6th edn), Ch.9; Hodgin, *Insurance Intermediaries: Law and Regulation* (1992).

136 *Sarginson Bros v Keith Moulton & Co* (1942) 73 Ll.Rep. 104; *Markal Investments Ltd v Morley Shafron Agencies Ltd* (1987) 44 D.L.R. (4th) 745.

137 *Punjab National Bank v de Boinville* [1992] 1 W.L.R. 1138 (to assignee of policy).

138 *Ground Gilbey Ltd v Jardine Lloyd Thompson UK Ltd* [2011] EWHC 124 (Comm); [2011] P.N.L.R. 15; [2012] Lloyd's Rep. I.R. 12 at [73].

139 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd* [2012] FCA 1028; (2013) 301 A.L.R. 1 at [787]–[789].

140 *Lee v Walker* (1872) L.R. 7 C.P. 121 at 125, per Brett J. See *Arbiter Group Plc v Gill Jennings & Every* [2001] R.P.C. 67.

141 *Lee v Walker* (1872) L.R. 7 C.P. 121.

142 *Solomon v Barker* (1862) 2 F. & F. 726. See also *Grant v Fletcher* (1826) 5 B. & C. 436; *Sivewright v Richardson* (1852) 19 L.T.(O.S.) 10; *Alexander & Co v Wilson Holgate & Co* (1923) 14 Ll.Rep. 538.

143 *Heys v Tindall* (1861) 1 B. & S. 296; and see *P.G. Prebble & Co v West* (1969) 211 E.G. 831; *Brutton v Alfred Savill, Curtis & Henson* [1971] E.G.D. 497; *Faruk v Wyse* [1988] 2 E.G.L.R. 26; *Messenger v Stanaway Real Estate Ltd* [2015] NZHC 1795; (2015) 16 N.Z. Conv. P.R. 335 (failure to draft for security on sale of land with deferred payment).

144 *Heys v Tindall* (1861) 1 B. & S. 296 at 298, per Cockburn CJ arguendo. As to the liability of an exclusive agent for not trying hard enough, see *Styles v Rogers Realty Ltd* (1987) 43 D.L.R. (4th) 629; *Commissioner of Taxation v Byrne Hotels Queensland Pty Ltd* [2011] FCAFC 127 at [113]. See further as to estate agents Murdoch, *Law of Estate Agency* (5th edn), p.52 onwards.

145 *Kenney v Hall, Pain & Foster* [1976] E.G.D. 629; see Brazier (1977) 41 Conv. 233. The "asking price" may also be too low: *John D. Wood & Co v Knatchbull* [2002] EWHC 2822; [2003] 1 E.G.L.R. 33 (reasonable when set, but agent should have advised of subsequent change in market).

146 *W.L.R. Traders (London) Ltd v British & Northern Shipping Agency and Leftley Ltd* [1955] 1 Lloyd's Rep. 554; *Club Speciality (Overseas) Inc v United Marine (1939) Ltd* [1971] 1 Lloyd's Rep. 482. See also Hill, *Freight Forwarders* (1974); *British Shipping Laws*, Vol.13, 635–656; *Scrutton on Charterparties* (24th edn) at para.4-053 onwards; *Contracts for Carriage of Goods* (Yates ed., 1993), Ch.7, "Freight Forwarders"; Bugden, *Goods in Transit* (4th edn).

147 *Von Traubenberg v Davies, Turner & Co Ltd* [1951] 2 Lloyd's Rep. 462.

expect the principals to have made their own arrangements for insurance. In the latter case the principal may well not have made any such arrangements. The agent may well also be liable if no appropriate claims are lodged by the agent against the carrier.[148]

(8) A contracted to lighter and load certain machinery, and pass it through the customhouse. It was common knowledge that import duties were about to be imposed on machinery, and A might have cleared it in time to escape the taxation, but did not do so, though he cleared it within the time prescribed by the customs regulations. In an action against A for the amount of the duty paid, it was held that there was no evidence to go to the jury of any negligence or breach of duty for which he would be liable.[149]

(9) Stockbrokers who were speculating on P's instructions had to know from P before the end of the accounting period which of P's accounts to close and which to leave open. They were unable to obtain instructions from P and so they closed some and left others open, exercising their discretion in what they considered to be in P's interests. In fact it would have been better to have closed all the accounts, and P sued them for negligence. Held, that they had acted reasonably and in P's best interests[150]:

> "I think brokers so situated were not only entitled but bound to carry through the transaction in the reasonable way they honestly thought most to the advantage of their principal and themselves, and that they did so. These considerations dispose of the case."[151]

(10) Auctioneers who sell goods have no duty to get in the price, even though they have the right to sue for it.[152] An auctioneer asked to express a view on the sale of pictures is liable for the negligence of a valuer whose advice the auctioneer simply transmitted to the client; but the formation of a wrong view may not be negligent.[153]

Article 41

NOT LIABLE TO PRINCIPAL IN RESPECT OF CONTRACTS ENTERED INTO ON PRINCIPAL'S BEHALF

6-025 An agent is in general not liable to the principal on contracts made by the agent between the principal and third parties.[154]

148 *Marbrook Freight Ltd v K.M.I. (London) Ltd* [1979] 2 Lloyd's Rep. 341.

149 *Commonwealth Portland Cement Co v Weber, Lohmann & Co Ltd* [1905] A.C. 66. See also *World Transport Agency Ltd v Royte (England) Ltd* [1957] 1 Lloyd's Rep. 381.

150 *Morten v Hilton, Gibbes & Smith (1908)* [1937] 2 K.B. 176n. HL. See also *Samson v Frazier Jelke & Co* [1937] 2 K.B. 170; *Stafford v Conti Commodity Services Ltd* [1981] 1 All E.R. 691; *Merrill Lynch Futures Inc v York House Trading Ltd, The Times,* May 24, 1984 (losses on commodity market are not of themselves evidence of negligence by broker); *Drexel Burnham Lambert Ltd NV v El Nasr* [1986] 1 Lloyds Rep. 356 at 366–367 (commodity broker).

151 *Morten v Hilson, Gibbes & Smith (1908)* [1937] 2 K.B. 176n. HL at 178, per Lord Loreburn LC.

152 *Fordham v Christie, Manson & Woods* [1977] E.G.D. 94. cf. *Brown v Staton* (1816) 2 Chit. 353.

153 *Luxmoore-May v Messenger May Baverstock* [1990] 1 W.L.R. 1009. As to the duties of auctioneers see further *Alchemy (International) Ltd v Tattersalls Ltd* [1985] 2 E.G.L.R. 17; Murdoch, *Law of Estate Agency and Auctions* (4th edn), Ch.2 (see also more specifically on auctioneers 3rd edn, Ch.9).

154 *Varden v Parker* (1798) 2 Esp. 710; *Alsop v Sylvester* (1823) 1 C. & P. 107; *Risbourg v Bruckner* (1858) 3 C.B.(N.S.) 812.

Comment

6-026 This is the general rule for contracts: an authorised contract is that of the principal. But just as the agent may in some case be liable to, and entitled to sue, the third party,[155] so also the agent may be liable to the principal, by express or implied agreement or by usage. This may occur, for example, when the agent is a *del credere* agent,[156] or where in some other way the agent agrees to answer to the principal in respect of transactions which the agent negotiates; where the agent in some respects deals as principal with a person for whom the agent is in other respects an agent (e.g. an insurance broker[157]); or where the person acts also as agent for the third party and undertakes liability to the first principal as such agent.[158] And of course the entering into of the transaction may be a breach of duty under the principles stated in the previous Articles.

Article 42

LIABILITY OF GRATUITOUS AGENTS

6-027 A gratuitous agent will be liable to the principal if in carrying out the work the agent fails to exercise the degree of care which may reasonably be expected of the agent in all the circumstances.[159]

Comment

6-028 **Liability in tort** There is no general requirement in the law of agency that an agent has a contract with the principal, and the external position between principal and third party can certainly be changed by a gratuitous agent.[160] The internal position between principal and agent however, is, in such a case only imperfectly enforceable. Where there is no contract between principal and agent, it would seem that the alleged agent cannot be liable for pure failure to do what was undertaken without consideration. However, where he assumed responsibility to exercise care and skill, the agent can be liable in tort for negligently failing to complete, or to complete with due care, work that was undertaken and upon which the agent has embarked. The agent must also take care to adhere to the mandate conferred.[161] Thus a person who gratuitously agrees to procure insurance for another may owe a duty of care in respect of the manner in which the policy is obtained.[162] Not all the cases which can be cited as instances of such a duty are necessarily to be regarded as true

155 See Articles 98–103 and 107–109.

156 See above, para.1-040.

157 *Universo Insurance Co of Milan v Merchants Marine Insurance Co* [1897] 2 Q.B. 93; *MacGillivray on Insurance Law* (14th edn), para.37-009 onwards; and see *Wilson v Avec Audio-Visual Equipment Ltd* [1974] 1 Lloyd's Rep. 81. See also Hon. Mrs Justice Gloster [2007] L.M.C.L.Q. 302.

158 e.g. *Queensland Investment Co v O'Connell* (1896) 12 T.L.R. 502 (stockbroker).

159 See Comment. For the position of minors as agents, see above, para.2-015.

160 See Article 3.

161 See further above, para.6-003.

162 *Wilkinson v Coverdale* (1793) 1 Esp. 74; *Norwest Refrigeration Services Pty Ltd v Bain Dawes (W.A.) Pty Ltd* (1984) 157 C.L.R. 149 at 168–170 (Illustration 6); *Veljkovic v Vrybergen* [1985] VR. 419; *Youell v Bland Welch & Co Ltd (the Superhulls Cover case) (No.2)* [1990] 2 Lloyd's Rep. 431. But when his principal is a company, he does not necessarily owe a duty to its directors personally: *Verderame v Commercial Union Ass. Co, The Times,* April 2, 1992.

might come into one or the other category. The question that we have to consider in a case of this kind, if it is necessary to consider negligence, is whether in the circumstances of this particular case a sufficient standard of care has been observed by the defendants or their servants."

This view was subsequently specifically accepted for gratuitous agency. In *Chaudhry v Prabakhar*[179] a person undertook to find a suitable second-hand car for a friend to buy, and negligently recommended a car which had been in an accident. He was held liable in tort. The case was argued as turning on the duty owed by a gratuitous agent, though it is not clear that the defendant was in inspecting the car appropriately described as an agent[180]; indeed it is not clear that he should have been regarded as undertaking any duty at all, though this was expressly conceded and the case decided on the basis of the concession.[181] In substance accepting the view put forward[182] in the Comment (but not the Article itself) in a previous edition of this work, the Court of Appeal can be said to have taken the overall view that the agent's duty is "that which may be reasonably expected of him in all the circumstances".[183] Factors relevant to the determination of the standard owed are whether the agent is paid, and if so whether the agent exercises any trade, profession or calling; and where the agent is unpaid, any skill and experience the agent has represented himself as having.[184]

Illustrations

6-032 (1) A gratuitously undertakes to arrange an insurance policy on P's cargo. He then changes his mind and decides not to do so. P's cargo is lost, but it has been said that P has no claim against A.[185] Sed quaere. If A started to make the necessary arrangements but negligently failed to answer letters from the underwriters so that no policy was effected, or if A obtained a policy but negligently failed to obtain cover against the usual risks, semble, P would have a claim against A for the loss he suffered.

(2) E purchased a motor car from X. It was agreed that X's insurance would be transferred to E. E then arranged with X's insurance brokers for them to arrange the transfer. The insurers were not satisfied with the information given them by the brokers relating to E and in default of any answer to their questions cancelled the temporary insurance which they had granted. The brokers failed to inform E, who later had an accident. Held, the brokers were liable to indemnify E against the sums he had to pay in consequence of the accident. They were liable for their negligence notwithstanding that they were acting gratuitously.[186]

(3) A general merchant undertakes, without reward, to enter a parcel of P's goods at the custom-house together with a parcel of his own. By mistake he enters

[179] *Chaudhry v Prabakhar* [1989] 1 W.L.R. 29.
[180] He subsequently took a cheque for part of the purchase price and passed it to the seller, so could perhaps be regarded as having negotiated, or at least introduced, the sale.
[181] A concession doubted by May LJ at 38–39.
[182] In a passage originally written by Mr Brian Davenport QC.
[183] See Stuart-Smith LJ at 34; see also Stocker LJ at 37.
[184] See at 34.
[185] See Duer, *Law and Practice of Marine Insurance* (1845), Vol. 2, pp.128–130, who comments unfavourably on the hardship inflicted on P, who has trusted A to carry out his promise.
[186] *London Borough of Bromley v Ellis* [1971] 1 Lloyd's Rep. 97.

both parcels under the wrong denomination of goods, and both parcels are, in consequence, seized. He has not held himself out as having any special skill in this respect (i.e. he is not a broker or customs clerk) and is therefore not liable to P, because he has taken as much care with P's goods as with his own.[187]

(4) A writer to the signet was employed to invest money for a client and did so without obtaining adequate security. He charged no fee for his services but was held liable to the lenders for his negligence.[188]

(5) P asked A, a shipping agent, to check with P's bank to ensure that the marine insurance policy on certain of P's goods covered a voyage to Lisbon. A acted gratuitously in accepting this request. He obtained an oral assurance from the bank but did not look at the terms of the policy itself (although he had been requested by P to "see the policy"). A was liable, since he had not shown that care which a reasonably careful man of business would have exercised in his own affairs.[189]

(6) The owner of a fishing vessel is required by his banker to get it insured. He contacts the manager of a fisherman's co-operative which he has recently joined, and which has said that it can obtain insurance for members at a reduced rate. The vessel is added to the co-operative's fleet policy, but the manager fails to tell the owner that the insurance is inoperative if the vessel does not have a certificate of survey. A loss occurs and the insurers repudiate liability because of the absence of such a certificate. The co-operative is liable.[190]

(7) Solicitors make a will for a testatrix and retain it. On her death they make no effort to locate the executor and notify him of the will for six years, during which time the main asset, a house, lies vacant and falls into decay. The solicitors are liable to the executor.[191]

(8) An accountant volunteers to be appointed joint signatory on a bank account operated by an attorney for the claimants. The attorney fraudulently procures the accountant's signature in blank on cheques and proceeds to misappropriate funds from the account. The accountant is liable to the claimants.[192]

2. FIDUCIARY AND OTHER EQUITABLE DUTIES

Article 43 provides an overview of the subject matter of an agent's fiduciary and other equitable duties. Succeeding Articles provide a more detailed treatment of various aspects of those duties.

[187] *Shiells v Blackburne* (1789) 1 Hy.Bl. 158.
[188] *Donaldson v Haldane* (1840) 7 C. & F. 762. See also *Dartnall v Howard & Gibbs* (1825) 4 B. & C. 345; *Whitehead v Greetham* (1825) 2 Bing. 464.
[189] *Gomer v Pitt & Scott* (1922) 12 Ll. L.Rep. 115.
[190] *Norwest Refrigeration Services Pty Ltd v Bain Dawes (W.A.) Pty Ltd* (1984) 157 C.L.R. 149.
[191] *Hawkins v Clayton* (1988) 164 C.L.R. 539.
[192] *Nicholls v Peers* (1993) 4 N.Z.B.L.C. 103,313.

fiduciary at all.[235] Rather than talk of a "non-fiduciary agent" it seems better to say that where an agent does not act in a fiduciary capacity (e.g. because simply carrying out specific instructions), this is a reflection of the scope of the agent's duties and the boundaries of the equitable rules.

Another view is that the approach should rather be to identify the general circumstances in which a fiduciary duty may arise of itself and note these as situations in which agents may sometimes, but do not always, find themselves. Thus in *Boardman v Phipps*,[236] Lord Upjohn said:

> "The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position (see *In Re Coomber*)."

And in the case referred to, *Re Coomber*,[237] Fletcher Moulton LJ said, in a much quoted passage[238]:

> "It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulae. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them. In my opinion there was absolutely nothing in the fiduciary relations of the mother and the son with regard to this house which in any way affected this transaction."

It is certainly true that fiduciary relationships arise in situations other than those of agency. Nevertheless, it is submitted that the fact that an agent in the strictest sense of the word has a power to alter the principal's legal position makes it appropriate and salutary to regard the fiduciary duty as a typical feature of the paradigm agency relationship. To do so will not mislead so long as two things are borne in mind.

The first is that the word "agent" can be used in varying senses, and not all persons to whom the word is applied are agents in the full (or sometimes, any) legal sense. A canvassing, or introducing agent,[239] for instance, may do no more than bring two parties together and thus may in many situations do little involving the

[235] *Coachcraft Ltd v SVP Fruit Co Ltd* (1980) 28 A.L.R. 319 at 328–329 (PC) (proxy but with no obligations to vote as shareholder directed). See too *UBS AG (London Branch) v Kommunale Wasserwerke Peipkiz GmbH* [2017] EWCA Civ 1567 at [92].

[236] *Boardman v Phipps* [1967] 2 A.C. 46 at 127; followed in *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485. See also Article 48.

[237] *Re Coomber* [1911] 1 Ch. 723.

[238] *Re Coomber* [1911] 1 Ch. 723 at 728–729.

[239] See above, para.1-020.

incidence of fiduciary responsibilities at all.[240] But not infrequently the correct conclusion will be that an introducing agent did assume a responsibility to promote the principal's interests, and thereby, in some circumstances become liable for breach of such duties, as when concealing from the principal the existence of further offers.[241] Further, even canvassing agents usually have authority to make and receive communications on behalf of their principals, and can be expected to act loyally in exercising those powers. A distributor or franchisee, though sometimes called an agent, is in most respects in a position commercially adverse, rather than fiduciary, to the person whose goods he distributes: he buys and resells.[242] But again it is conceivable that circumstances might give him knowledge of and power over his principal's affairs which could justify the imposition of some fiduciary duties[243]; and this is quite apart from the possibility that he may also in some circumstances exercise true agency functions, for example as regards complaints concerning the goods, and be subject to fiduciary duties in that respect. There will be other commercial relationships that in general are arm's-length but where in some aspect there is an agency function; to that aspect fiduciary duties can apply.[244]

The second matter which should be borne in mind is that the extent of an agent's equitable duties (a phrase that embraces more than the strictly fiduciary duties to avoid conflicts of interest and not to profit) and also common law duties may vary from situation to situation. For example, a person who is certainly an agent in general, but who is authorised on a particular occasion to carry out an exactly specified act, may on the occasion act in no more than a ministerial capacity, even if in so doing the principal's legal position is altered.[245] Nevertheless, even a messenger may have to decide what to do if the person to whom the message is to be delivered is not there. To take another example, a person otherwise at arm's length with a claimant with whom the person is proposing to contract may have a limited authority to act for the claimant, for example in filling out the blanks in the document recording the contract.[246] In so doing the person may be required both to adhere to the mandate given and to exercise it in good faith. In many situations the

[240] See, e.g. *Eze v Conway* [2019] EWCA Civ 88.

[241] *Keppel v Wheeler* [1927] 1 K.B. 577, Illustration 6 to Article 60; *Jackson v Packham Real Estate Ltd* (1980) 109 D.L.R. (3d) 277; and see *Regier v Campbell-Stuart* [1939] Ch. 766, Illustration 16 to Article 45; *Premium Real Estate Ltd v Stevens* [2009] N.Z.L.R. 384. Or if he gives information to third parties about those he has introduced. But cf. *Knoch Estate v John Picken Ltd* (1991) 83 D.L.R. (4th) 447.

[242] See *Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 D.L.R. (3d) 639; affirmed (1973) 40 D.L.R. (3d) 303; see also *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 C.L.R. 342; *Lothian v Jenolite Ltd* 1969 S.C. 11; *Hospital Products Ltd v US Surgical Corp* (1984) 156 C.L.R. 41 (a leading case on this point, where the court was divided)—see in this context the judgment of Mason J; cf. *Watson v Dolmark Industries Ltd* [1992] 3 N.Z.L.R. 311. See also *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 S.C.R. 142; (1999) 167 D.L.R. (4th) 577; above, paras 1-032 and 6-015.

[243] This might even be so of the franchisor's position vis-à-vis the franchisee: cf. *Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 D.L.R. (3d) 639.

[244] See *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 W.L.R. 1126 PC at 1130; *Hospital Products Ltd v US Surgical Corp* (1984) 156 C.L.R. 41 at 98; *Amaltal Corp v Maruha Corp* [2007] 3 N.Z.L.R. 192 at [21].

[245] See, e.g. *Volkers v Midland Doherty* (1985) 17 D.L.R. (4th) 343, Illustration 4 to Article 39; see also *R.H. Deacon & Co v Varga* (1972) 30 D.L.R. (3d) 653; affirmed (1973) 41 D.L.R. (4th) 767n.

[246] For the engagement of agency law in such circumstances, see *Colonial Bank v Hepworth* (1884) 36 Ch.D. 36; *Koch v Dicks* [1933] 1 K.B. 307; *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 S.A.S.R. 259; and *Wright v Gasweld Pty Ltd* (1991) 22 N.S.W.L.R. 317. See too *Barrett v Bem* [2012] EWCA Civ 52; [2012] Ch. 573 (signature of will on behalf of testator).

Much of this learning, in England, seems to be in the process of being swept away, and replaced by a general concept of equitable compensation.

The modern origin of a compensation remedy is usually supported by reference to the speech of Lord Haldane in *Nocton v Ashburton*,[336] though what is said in that case is not easy to follow.[337] However, since the decision of the House of Lords in *Target Holdings Ltd v Redferns*,[338] the concept of damages in equity has become generalised, almost to the point where the stricter approach taken in the accounting process, just described, has been supplanted. The court there favoured an approach analogous to that taken to damages in tort, looking to see what position the beneficiary would have been in had no breach of trust occurred.[339] If the beneficiary would have suffered the same loss even had there been no breach there would be no liability. Lord Browne-Wilkinson stated:

> "Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach."[340]

In fact, Lord Browne-Wilkinson did not altogether rule out the older restitutionary approach.[341] The facts of the case, a case of a bare trust of intended loan moneys where the moneys had been released by the trustee (the lender's solicitor) without the required mortgage being in place, fitted with the older remedy of the common account. But, that remedy ceased to be applicable, his Lordship said, when the trustee had got in the required mortgage after the event. That may have been all that was needed for deciding the case.[342] However, the broader approach, based on analogies with common law damages, which formed the heart of his judgment, has now been taken up and affirmed by the Supreme Court in *AIB Group (UK) Plc v Mark Redler*,[343] a case on similar facts to *Target Holdings*. Lord Toulson, who gave the lead judgment, favoured a broad remedy of equitable compensation being available for all honest breaches of trust, one that mimicked the expectation remedy in contract.[344] Lord Reed's judgment was more cautious about assimilating remedies for breach of trust with tort or contract damages, but accepted much of the reasoning of *Target Holdings*, including the notion that equitable remedies are designed to put the beneficiaries in the position they would have been in had the trustee correctly performed his duties.[345] As with *Target Holdings*, it is probable that the same result could have been reached in *AIB Group* using the older learning. While this was not a case where the solicitors' breach of instructions was cured, it was arguable that the client had ratified what had happened (without prejudice to a claim for damages) and therefore could not falsify the disbursal of the loan.[346]

It appears that some other jurisdictions, most notably Australia and Hong Kong, are not yet willing to abandon the older, stricter, approach where what is in question is the disbursal by a trustee of trust funds in breach of instructions or in the exercise of a discretion incautiously exercised.[347] Even in England and Wales there are signs that the older view may yet survive.[348] The older view is most compelling in cases where the conditions for releasing funds were simply not met at the time of the release. It has been noted earlier (above, para.6-003) that even at common law it is not usually a defence for an agent to say that had the conditions been met the money would still have been lost. Within the general law of contract, a promisee is not confined to expectation damages but can call for restitution when there has been a total failure of consideration. It might be thought remarkable, for instance, if a solicitor holding trust moneys earmarked for a loan accidentally released them to a complete stranger and was then permitted to set up an argument that even had they been sent to the correct borrower they would not have been recoverable. Such a solicitor may have been authorised to send the funds to the insolvent borrower but could not vis-à-vis the client claim a *right* to do so.

Where what is at issue is loss caused by breach of fiduciary duty unrelated to misapplication of the principal's moneys, issues of causation do become relevant, as they do with the account on the basis of wilful default.[349] Further restraints on recovery may result if the loss was not within the risk created by the default, or was caused by the claimant personally.[350] But where actual disloyalty has been proven, the fiduciary can be liable for resulting loss even if a careful and loyal agent might have made the same choice of action,[351] and the onus of proving that loss would

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336 *Nocton v Ashburton* [1914] A.C. 398, Illustration 7. For cases before *Nocton*, see Conaglen (2016) 40 Melb. U.L.R. 126 at 146–150. cf. *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 204–205, per Lord Browne-Wilkinson. See Meagher, *Gummow and Lehane's Equity Doctrines and Remedies* (5th edn); cf. Getzler, in *Restitution and Equity* (Birks and Rose eds, 2000), Vol.1, p.251.

337 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 at 530.

338 *Target Holdings Ltd v Redferns* [1996] A.C. 421.

339 *Target Holdings Ltd v Redferns* [1996] A.C. 421 at 432.

340 *Target Holdings Ltd v Redferns* [1996] A.C. 421 at 439, per Lord Browne-Wilkinson, following dicta of McLachlin J in *Canson Enterprises Ltd v Boughton & Co* [1991] 3 S.C.R. 335. See also *Beach Petroleum NV v Kennedy* (1999) 48 N.S.W.L.R. 1 at 91–94.

341 *Target Holdings Ltd v Redferns* [1996] A.C. 421 at 436.

342 See the Rt Hon. Lord Millett (1998) 114 L.Q.R. 214; Conaglen (2010) 4 J.Eq. 288 (trustee's continuing authority to act as such is key to ability to rectify earlier wrongful disbursement).

343 *AIB Group (UK) Plc v Mark Redler* [2014] UKSC 58; [2015] A.C. 1503 (noted Hon. W. Gummow (2015) 41 Aust. Bar Rev. 5; Rt Hon. Lord Millett (2015) UK Supreme Ct Yearbook 193; (2018) 32 T.L.I. 44; Turner [2015] C.L.J. 188; Davies (2015) 78 M.L.R. 681).

344 *AIB Group (UK) Plc v Mark Redler* [2014] UKSC 58; [2015] A.C. 1503 at [71].

345 *AIB Group (UK) Plc v Mark Redler* [2014] UKSC 58; [2015] A.C. 1503 at [134].

346 For elaboration, see Watts [2016] L.M.C.L.Q. 118.

347 See *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 C.L.R. 484 at [39] and [42]; *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7; (2004) 216 C.L.R. 109 at [46] and [59]; *Agricultural Land Management Ltd v Jackson (No.2)* [2014] WASC 102; (2014) 285 F.L.R. 121 at [344] and [368]; *Libertarian Investments Ltd v Hall* [2013] HKCFA 93 at [90] and [168].

348 See *Main v Giambrone & Law (a firm)* [2017] EWCA Civ 1193; and *Interactive Technology Corp Ltd v Ferster* [2018] EWCA Civ 1594 at [16]. Cf. *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291.

349 See *Swindle v Harrison* [1997] 4 All E.R. 705, Illustration 12; *Nationwide BS v Balmer Radmore* [1999] Lloyd's Rep. P.N. 241; *Collins v Brebner* [2000] Lloyd's Rep. P.N. 587. But cf. *Bristol & West BS v May, May & Merrimans* [1996] 2 All E.R. 801, where there were positive misrepresentations by the fiduciary. See also *Gilbert v Shanahan* [1998] 3 N.Z.L.R. 528; *Mantonella Pty Ltd v Thompson* (2009) 255 A.L.R. 367; *Rawleigh v Tait* [2008] NZCA 525; [2009] N.Z. Family L.R. 802. For discussion of *Swindle* and later cases, see Conaglen (2010) 126 L.Q.R. 72 at 81–86.

350 See, e.g. *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; [2018] A.C. 599 (contractual negligence). In so far as a breach of duty is deliberate, it does not seem appropriate to permit a contributory negligence argument: see *Nationwide BS v Balmer Radmore* [1999] Lloyd's Rep. P.N. 241 at 281, per Blackburne J. See too Conaglen (2010) 126 L.Q.R. 72 at 96–100. Contributory negligence cannot be pleaded against fraud: *Standard Chartered Bank v Pakistan National Shipping Corp (No.4)* [2002] UKHL 43; [2003] 1 A.C. 959.

351 See *Bishopsgate Investment Management Ltd v Maxwell (No.2)* [1994] 1 All E.R. 261; *Permanent Building Society v Wheeler* (1994) 14 A.C.S.R. 109 (Illustration 13); *Bairstow v Queens Moat Houses Plc* [2001] EWCA Civ 712; [2001] 2 B.C.L.C. 531 (recovery from directors of amount of

have resulted irrespective of the agent's action is likely to lie on the agent.[352] The general position has been stated as follows:

> "the Court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party whose actions have made an accurate determination so problematic."[353]

Nothing in the foregoing addresses the situation where an agent acts carelessly in a way which does not involve the handling of trust moneys. In such case the duties of care may arise only at common law, or if they arise in equity they are governed by similar principles.[354] Attempts to label a breach of a duty of care as a breach of fiduciary duty in order to argue for the special equitable rules, whatever they may be, whether as to damages, or limitation of actions (where the Limitation Act does not apply to claims for money held on trust[355]) have generally met with little sympathy from English courts,[356] and the common law rules have been applied where they would justify the claim. In the area of confidential information considerable flexibility has been employed in the award of remedies, and there seems to be some tendency to extend this to the area of breach of fiduciary duty generally.[357]

6-044 **Other remedies: rescission, injunction, and declaration** The principal other remedy is rescission of the transaction with the agent (as where the agent deals with the principal without disclosing the fact[358]); or, where a third party is involved in the transaction, against the third party, as in the case of transactions obtained by

improper dividend dishonestly made, whether or not a lawful dividend could have been properly authorised at the time). But cf. *Murray Vernon Holdings Ltd v Hassall* [2010] EWHC 7 (Ch) at [65] (director acted honestly and dividend could lawfully have been made, hence no causation). See too *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291.

352 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 N.Z.L.R. 664 at 687. See too *Condliffe v Sheingold* [2007] EWCA Civ 1043 at [23] (measure of value of mis-sold goodwill belonging to claimant company); *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 at [94]; *Libertarian Investments Ltd v Hall* [2013] HKCFA 93; (2013) 16 H.K.C.F.A.R. 681 at [93] (noted Turner [2014] C.L.J. 257) (agent who misspends funds given him for the purpose of buying shares bears onus of proving that it was not possible to acquire the shares).

353 *Houghton v Immer* (1997) 44 N.S.W.L.R. 46, per Handley JA. See too *Libertarian Investments Ltd v Hall* [2013] HKCFA 93 at [139].

354 See, e.g. *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392 at 435–437; *The Borag* [1980] 1 Lloyd's Rep. 111 at 125; *Bristol and West BS v Mothew* [1998] Ch. 1, Illustration 11; *Nationwide BS v Balmer Radmore* [1999] Lloyd's Rep. P.N. 241; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 N.Z.L.R. 213; *Forsta AP-Fonden v Bank of New York Mellon SA/NV* [2013] EWHC 3127 (Comm) at [185]. For a contrary view, see Heydon, in *Equity in Commercial Law* (Degeling and Edelman eds, 2005), Ch.9; and *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 C.L.R. 484 at [39].

355 Limitation Act s.21(1). The doctrine of laches would still apply. But the Act may in any case apply by analogy to certain types of constructive trustee: see s.35(1) and *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 W.L.R. 113, where the equitable claims were identical with common law claims in tort or contract: following *Coulthard v Disco Mix Club Ltd* [2000] 1 W.L.R. 707. See also *Clarke v Marlborough Fine Art (London) Ltd*, *The Times*, July 5, 2001; and in general *Lewin on Trusts* (20th edn), Ch.5.

356 See the cases cited above and *Paragon Finance Plc v D.B. Thakerar & Co* [1999] 1 All E.R. 400 (amendment of pleadings); *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189. See too *Halton International Inc v Guernroy Ltd* [2006] EWCA Civ 801.

357 See below, para.6-077; Abdullah and Tey (1999) 115 L.Q.R. 376; *Corp Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 1 W.L.R. 1396.

358 e.g. *Maguire v Makaronis* (1997) 188 C.L.R. 449. For more detailed discussion, see Article 45 and

bribery or other conflict of interest on the part of the agent.[359] But other remedies such as declaration and injunction are possible.[360] The injunction is often used to prevent agents, particularly solicitors, from continuing to act where there is a conflict of interest or risk of disclosure of confidential information.[361]

Illustrations

6-045

(1) An agent in London had a power of attorney from his principal in America to sell his English property and invest the proceeds as he thought fit. The agent, who was a solicitor, paid the interest received from the investments into the account of his firm. Held, he was a trustee of the profits and must account for them. Accordingly the Statute of Limitations did not run against the principal.[362]

(2) A selling agent agrees to sell goods in India against an advance. He pays 85 per cent of the price to the principal and then sells the goods. He uses the balance of the price to buy goods in India and sell them in England, which is very profitable to him. Held, the agent does not have to account to the principal for the profit but only for the balance of the price, since he is not in a fiduciary position in relation to the money.[363]

(3) An agent was employed to buy timber lands for a company. All these had already been bought up and he recommended the company to buy prairie land instead. The company agreed and sent the agent money for that specific purpose. It was later discovered that the agent had charged the company more than he had himself paid for the land. Held, as the money had been sent to the agent for investment in a specified manner, he was a trustee of the improper profit and so could not plead the Statute of Limitations.[364]

(4) An agent is employed to sell cargo from a wrecked ship for average adjusters. After deducting claims for salvage and other expenses, £96 remains in his hands. He is not bound to keep the proceeds of sale of the cargo in a separate fund, and he is not a trustee of the £96 but only a debtor to his principal.[365]

(5) Shipping agents are placed in funds by shipowners from time to time to enable them to discharge jetty and river dues, pilotage and towage, berth fees and similar expenses on ships which visit the local port, and for their agency fee. They do not hold the money in trust, but in their insolvency and in respect

para.6-068 in particular.

359 See Articles 49.

360 In *Yasuda Fire and Marine Insurance Ltd v Orion Marine Insurance Underwriting Ltd* [1995] Q.B. 174 declarations and an order of specific performance were granted to permit the principal to inspect the agent's records. As to the injunction, see *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 80 (QB) (injunction to prevent competition by former management employees who, amongst other breaches of duty, solicited colleagues to join them in leaving to compete with their employer); *Forse v Secarma Ltd* [2019] EWCA Civ 215.

361 *Prince Jefri Bolkiah v KPMG* [1999] 2 A.C. 222 at 235–236 (the case itself is concerned with confidential information). See too *PCCW-HKT Telephone Ltd v Aitken* [2009] HKCFA 11.

362 *Burdick v Garrick* (1870) L.R. 5 Ch. App. 233.

363 *Kirkham v Peel* (1880) 43 L.T. 171; affirmed (1880) 44 L.T. 195.

364 *North American Land and Timber Co v Watkins* [1904] 1 Ch. 242; [1904] 2 Ch. 233.

365 *Henry v Hammond* [1913] 2 K.B. 515. See also *Wilsons and Furness-Leyland Line v British and Continental Shipping Co* (1907) 23 T.L.R. 397.

ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance."[146]

The main difficulties with this approach have already been referred to. They are, first, the fact that the representation giving rise to the estoppel is in this area permitted to be very general indeed,[147] and second, that the detriment incurred by the representee may be small.[148] Of these, the first is clearly the more important. The idea that by allowing the agent to act in certain ways the principal is making representations to third parties is an artificial one, especially where the "representation" simply amounts to putting someone in a position which carries usual authority, or using the services of a professional person whose activities carry a usual authority.[149] If a genuine estoppel is looked for, the category would indeed be even narrower than that marked off above as "genuine apparent authority".[150] In the editions of this work edited by Bowstead himself it can be said that a distinction between two types of case was in fact made, though later writings have enabled it to be more clearly stated. The Article above, which now stands for all apparent authority, by its reference to "representations" may be regarded as having been intended to refer to "genuine" estoppel cases. The broader notion was dealt with in Article 80 of the eighth edition of 1932 (the last edited by Bowstead himself) as follows:

"Every act done by an agent in the course of his employment on behalf of his principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice that in doing such act he is exceeding his authority."[151]

It will be noted that this last formulation approaches the terminology now reserved for the liability of an employer for the torts of his employee. Though it can be connected with the notion of usual authority,[152] it is not in accord with current thinking in contract law.

8-028 **Alternative analyses** Those common lawyers who reject the idea of estoppel have indeed mostly argued for some sort of extension of the tort principles of this

146 *Rama Corp v Proved Tin and General Investments* [1952] 2 Q.B. 147 at 149–150, per Slade J; see also *R. v Charles* [1977] A.C. 177 at 183; *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd (The Raffaella)* [1985] 2 Lloyd's Rep. 36 at 41; *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] A.C. 717 at 777; *Lloyd's Bank v Independent Insurance* [2000] Q.B. 110 at 122; *The Starsin* [2000] 1 Lloyd's Rep. 85 at 95 (unconscionability: final proceedings [2004] 1 A.C. 715); *AMB Generali, etc. v SEB Trygg, etc.* [2005] EWCA Civ 1237; [2006] 1 Lloyd's Rep. 318 at [31]; Ewart, *Estoppel* (1900), Ch.XXVI; *Spencer Bower: Reliance-Based Estoppel* (5th edn), para.9.2 onwards; Mechem, *Outlines of Agency* (4th edn), §§ 86 onwards; Tan Cheng Han (2020) 136 L.Q.R. 315.

147 See above, para.8-014.

148 See above, para.8-023; Dal Pont, pp.549–550.

149 See Articles 29 and 30; e.g. *Waugh v H.B. Clifford & Sons Ltd* [1982] Ch. 374, Illustration 16, where the dicta go some way towards attributing an independent position to the agent.

150 See above, para.8-014.

151 cf. Partnership Act 1890 s.5. This Article, in the form in which it appeared in the 4th edn, was relied on by counsel in *Lloyd v Grace, Smith & Co* [1912] A.C. 716. It was also cited with approval by the Court of Appeal in *Navarro v Moregrand Ltd* [1951] 2 T.L.R. 674; and *Ryan v Pilkington* [1959] 1 W.L.R. 403. But it was severely criticised by Falconbridge in (1939) 17 Can. B.R. 248 at 255–256; and see *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] A.C. 717 at 779 onwards; cf. Brown [2004] J.B.L. 391.

152 See above, para.3-005.

type[153]; or based themselves on the objective analysis applicable to the formation of contract and argued that it applies equally to the formation of contracts through agents.[154] The former view is certainly one that could be adopted, but is not in accord with the present accepted approach to common law agency, at least in England.[155] The latter has much to commend it. It explains the weak requirements as to representation and reliance in respect of authority, which are difficult to reconcile with the requirements of common law estoppel by representation as normally stated, which are usually taken to require an unequivocal representation[156] and action in reliance on it.[157] Recent developments in estoppel have also tended to stress that the consequences of the estoppel should only be sufficient to satisfy the equity raised[158] which if applied to apparent authority would create serious uncertainties in a doctrine designed to satisfy commercial certainty. Finally, to explain apparent authority in a different way would enable true estoppel situations, which can certainly be found in this area and are discussed under Article 21, to be separated off.[159] The distinction between objective interpretation and estoppel is in fact made in connection with formation of contract situations, where sometimes the normal objective interpretation techniques, which were themselves once attributed to estoppel,[160] give way to true estoppel reasoning.[161] In the US the distinction was taken in *Restatement, Second*[162] and is emphasised in *Restatement, Third*.[163]

As to English law, it is certainly true that cases on master and servant and cases on principal and agent have not always been clearly separated, that some of the old cases on what is now called apparent authority reached their results without reference to estoppel, on broader notions such as that of the implied authority of a general agent.[164] But cases on agency and the related notion of apparent ownership which use what would now be called estoppel reasoning can also be traced back many years, and indeed some of them even seem to figure among the origins of the general doctrine of estoppel.[165] There can be little doubt that the prevailing approach in England has been in terms of representation and estoppel, at any rate as regards the agent's contracts.

153 Wright (1935) 1 U. Toronto L.J. 40; Mearns (1962) 48 Va.L.Rev. 50; Bester (1972) 89 S.A.L.J. 49; Comment to Article 22.

154 Cook (1905) 5 Col.L.R. 36; (1906) 6 Col.L.R. 34; Conant (1968) 47 Neb.L.Rev. 678; Krebs, in *Contract Formation and Parties* (Burrows and Peel eds, 2010), Ch.10.

155 See above, para.1-026.

156 *Low v Bouverie* [1891] 3 Ch. 82 at 106.

157 *Carr v L & NW Ry* (1875) L.R. 10 C.P. 307 at 317.

158 See, e.g. *Commonwealth v Verwayen* (1990) 170 C.L.R. 394, per Brennan J; Dal Pont, pp.520–521 (paras 20.12–20.13).

159 See para.2-105 above. Contra, Mechem, *Outlines of Agency* (4th edn), § 90.

160 See, e.g. Hughes (1930) 54 L.Q.R. 370. See also Lord Bingham in *The Starsin* [2003] UKHL 12; [2004] 1 A.C. 715 at [8], suggesting that in commercial contracts a process of reasoning similar to that used for interpretation should be used for questions of who was a contracting party.

161 See Treitel, *Law of Contract* (15th edn), paras 2-044–2-046 (estoppel where offer met by silence).

162 See §§ 140 and 141; 8 and Comment *d*; 8B and Comment.

163 § 2.05, Comment *d* ("Estoppel does not require as close a fit between affirmative acts of the principal and the third party's belief"). Contra, Mechem, *Outlines of Agency* (4th edn), § 90 ("The distinction is relatively unimportant").

164 See *Smith v M'Guire* (1858) 3 H. & N. 554; Stoljar, Ch.3. See also Partnership Act 1890 s.5; Thomas (1971) 6 Victoria U. of Wellington L.Rev. 1. Development on the continent of Europe was certainly not based on any principle like that of estoppel: Müller-Freienfels (1964) 13 Am.J.Comp.L. 193 at 341. See also Articles 2 and 29.

165 See, e.g. *Pickering v Busk* (1812) 15 East 38 (a case on actual authority); *Pickard v Sears* (1837) 6 A. & E. 469; *Freeman v Cooke* (1848) 2 Exch. 654. See also *VLM Holdings Ltd v Ravensworth*

outside those for which the corporation was formed.[180] This has turned the original ultra vires doctrine on its head, where the focus had been not (principally) on absence of powers but the use of them to divert the corporation's business from the ends stipulated in its founding documents. This misunderstanding of the ultra vires doctrine seems, however, to have cemented itself into English law. The practical effect may not be great, since as a result of implementing the EC First Directive on Company Law,[181] very few trading companies now have any limits on the objects that they can pursue. Where there are limits to a corporation's powers or objects, the directors or other officers will lack actual authority, even under the modern approach.[182]

8-032 **Constructive notice of company's public documents** There was also a doctrine, of rather uncertain scope, under which a person dealing with a company was deemed to have constructive notice of what appeared in its public documents. It was not clear exactly what these documents were, but they certainly included its memorandum and articles. Thus the third party might in particular be deemed to know not only of limitations on the company's authorised activities but also of restrictions on delegation contained in its articles. As stated above, sometimes such matters of delegation had been taken into the ultra vires rule; but if it was wrong to do so, the significance of the constructive notice rule for such situations became greater. The third party might not be able to rely on what would otherwise be apparent authority under agency law because that party was deemed to have constructive notice of the company's objects and of restrictions on the power to delegate to agents. The rule only applied against the third party: it did not apply in in that party's favour.[183]

8-033 **Common law: the rule in Turquand's case** The public documents of a company may provide that a power can be delegated: but they may require some special procedure, for example a resolution of a general meeting; or special procedures may be laid down by the directors for the exercise of ordinary powers, for example a requirement that a cheque on the company's account needs signatures of persons authorised in particular ways.[184] The third party may have no way of finding out whether or not these procedures may have been followed. This problem was dealt with, after the introduction of the system of incorporation by registration, by judicial decision. Under the rule in *Royal British Bank v Turquand*[185] a third party acting in good faith is entitled to assume that the relevant procedures of "indoor management", the details of which were not available to that party, have been complied with. The third party is not, however, entitled to assume from the mere fact that

[180] *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch. 246; *Charles Terence Estates Ltd v Cornwall Council* [2012] EWCA Civ 1439; [2013] 1 W.L.R. 466 at [47]. For criticism, see P. Watts, "The *Rolled Steel* Case and the Memorandum of Association" [1986] N.Z.L.J. 270.

[181] Directive 68/151 art.9.

[182] For the residual relevance of lack of corporate capacity, see above, para.2-021.

[183] *Rama Corp Ltd v Proved Tin & General Investments Ltd* [1952] 2 Q.B. 147 at 149; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 at 504, 508.

[184] e.g. *Mahony v East Holyford Mining Co* (1875) L.R. 7 H.L. 869.

[185] *Royal British Bank v Turquand* (1856) 6 El. & Bl. 327, Illustration 27; *Mahony v East Holyford Mining Co* (1875) L.R. 7 H.L. 869. A director might in some circumstances rank as a third party for the purposes of this rule: *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549; affirmed on other grounds [1968] 1 Q.B. 549 at 573.

authority was possible that it had actually been conferred.[186] This could only be assumed where under the general principles of agency there would normally be apparent authority. This requires that the company, by a representation traceable back to an authorised officer,[187] has held out the agent as having authority: either by appointing the agent to a position which would normally carry such authority, or by representing that the agent has been appointed to it, or by some more specific holding out.[188] If this was so, compliance with internal procedures might be assumed. In other words, the rule is not designed to eliminate the need to deal with persons of sufficient standing to make the relevant contract, but only to protect against failure by such persons to comply with procedural rules.[189]

8-034 **No need for actual or apparent authority if contract in attested deed form?** The actual holding in *Turquand*'s case was not concerned with ordinary contracts but with those in deed form.[190] The case, applying ancient law, supports the conclusion that a deed, when correct in its manner of execution (i.e. the sealing, if required, is genuine, and the correct witnesses by number and identity have signed the document), can be relied upon by an outside party for what it provides even if that party has not attempted to establish that entry into the deed was properly authorised, so long as there was nothing to put that party on notice of irregularity.[191] That is not the position for dealings that are not in deed form; there, as seen above, actual or apparent authority has first to be established by the third party, before advantage can be taken of any presumption of regularity (or presumption against knowledge of irregularity) in respect of procedural requirements. The result is that *Turquand* has become relevant to two different sets of circumstances, ordinary contracts and deeds. This aspect of the common law has been reinforced by the provisions of the Companies Act 2006.[192] It seems that trust deeds can create in favour of third parties a similar presumption of regularity in their dealings with a trustee.[193]

8-035 **Statutory reforms: ultra vires** Limited provisions protecting third parties dealing with companies in s.9(1) of the European Communities Act 1972, later re-enacted as s.35 of the Companies Act 1985, proved inadequate to abolish the ultra

[186] See *Houghton & Co v Nothard, Lowe & Wills Ltd* [1927] 1 K.B. 246 at 266–267; affirmed on other grounds [1928] A.C. 1; *Northside Developments Ltd v Registrar-General* (1990) 170 C.L.R. 146 at 195–198; *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30 at [64]–[65].

[187] *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 at 504, 508 at 506 (representation) must be made by person possessing "actual authority to manage the affairs of the company generally or with respect to the matter to which the contract relates". See also below, para.8-040.

[188] cf. above, para.8-014.

[189] *Northside Developments Pty Ltd v Registrar-General* (1990) 170 C.L.R. 146 at 198; *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30 at [64]. This paragraph was approved in *Business Mortgage Finance 6 Plc v Roundstone Technologies Ltd* [2019] EWHC 2917 (Ch) at [55].

[190] See P. Watts, "Deeds and the Principles of Authority in Agency Law" (2002) 2 O.U.C.L.J. 93.

[191] See *Royal British Bank v Turquand* (1855) 5 El. & Bl. 248 at 260, per Lord Campbell CJ; and (1856) 6 El. & Bl. 327 (ExCh) at 332, per Jervis CJ. See too *Agar v Athenaeum Life-Assurance Society* (1858) 1 C.B. (NS) 729 at 749–750, 756; *South Yorkshire Railway and River Dun Co v Great Northern Railway* (1853) 9 Ex. 55 at 84; *Burkinshaw v Nicolls* (1878) 3 App.Cas. 1004 at 1026–1027; *County of Gloucester Bank v Rudry Merthyr Steam & House Coal Colliery Co* [1895] 1 Ch. 629; *Northside Developments Ltd v Registrar-General* (1990) 170 C.L.R. 146 at 164, per Mason CJ. But cf. the majority view in the *Northside* case.

[192] See Companies Act 2006 ss.44 and 46, discussed below, para.8-040.

[193] See *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817; [2019] 3 All E.R. 419 at [106].

so as to cover any transaction or other act to which the company is a party.[205] However, it has been held that a bonus issue of shares did not constitute a dealing as there was no bilateral transaction.[206] The definition of good faith is not so straightforward. First, a person will be presumed to be acting in good faith.[207] Secondly, a person will not be regarded as acting in bad faith by reason only of knowing that the act is beyond the powers of the directors.[208] The adverb "only" is critical. It is intended to distinguish situations where the directors are exceeding their authority from those where they are actually abusing it, a not altogether easy dichotomy. In the first situation mere knowledge of this fact will not result in a person dealing with the company being unable to enforce the transaction; and this goes further than the normal rules of apparent authority. But where the third party knows or is to be taken to know that the directors are abusing their authority, there will be no such protection.[209] There are also provisions curtailing a shareholder's internal right to enforce the memorandum and articles against the directors.[210] However, if one of the third parties is a director of the company or its holding company, or is associated with such a director, or is a company with which such a director is associated, the transaction is in certain circumstances voidable against that party.[211] In this respect, it can be said that the ultra vires doctrine survives. This provision gives effect to a policy that the protection against ultra vires given to third parties in general should normally not be extended to third parties who are also directors or otherwise involved with the company.

8-038 **The overall position: dealing with directors** Where the third party deals with the board of directors, or with a person actually authorised by it, the transaction will usually be effective. The default position under the 2006 Act is that the board is given "the management of the company's business, for which purpose they may exercise all the powers of the company."[212] The board's powers of delegation are also virtually unlimited,[213] but directors could be personally liable for loss caused by an irresponsible delegation. Outside parties are otherwise well protected by s.40. This is further reinforced by s.161 of the 2006 Act, under which "The acts of a director or manager are valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification".[214] Where a company has only one

[205] Companies Act 2006 s.40(2).

[206] *EIC Services Ltd v Phipps* [2004] EWCA Civ 1069; [2005] 1 W.L.R. 1377. This is open to doubt: see Payne and Prentice [2005] L.M.C.L.Q. 447.

[207] Companies Act 2006 s.40(2)(b)(ii). But on the authority of *International Sales and Agencies Ltd v Marcus* [1982] 3 All E.R. 551, on the 1972 wording, the burden is on the third party to establish that he dealt with the company within the wording.

[208] Companies Act 2006 s.40(2)(b)(iii). A person acts in good faith if he acts genuinely and honestly in the circumstances, i.e. the test is subjective; *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] B.C.L.C. 1 at 18 (on the predecessor provision to the current s.40).

[209] This distinction is required by art.9(2) of the First Directive.

[210] Companies Act 2006 s.40(4).

[211] Companies Act 2006 s.41. This section supersedes Companies Act 1985 s.322A. It seems on the strength of the *Smith v Henniker-Major & Co* [2002] EWCA Civ 762; [2003] Ch. 182, that in some circumstances a dealing with a director might be void, and not merely voidable; s.322A was not discussed in the case.

[212] See Companies (Model Articles) Regulations 2008 (SI 2008/3229) Sch.3 art.3 (public companies); Sch.1 art.3 (private companies).

[213] See Companies (Model Articles) Regulations 2008 (SI 2008/3229) Sch.3 art.5.

[214] This provision is not excluded by s.160 (void resolution to appoint), replacing s.292 of the 1985 Act. However, it only applies where there is a defect in an appointment made by persons who had the ability to make the appointment had they complied with proper procedures, and does not apply to appointments made by persons without the ability to make the appointment: *Morris v Kanssen* [1946] A.C. 459; *Re Northwestern Autoservices Ltd* [1980] 2 N.Z.L.R. 302; *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 A.C. 1 at [91]; *New Falmouth Resorts Ltd v International Hotels Jamaica Ltd* [2013] UKPC 11 at [25].

director, that director will have authority orally to override earlier general instructions to a bank that it is to act on written instructions only.[215]

8-039 **Dealings with other agents of the company** In respect of other agents, including individual directors, the agreement will be enforceable by the application of the normal rules of agency. The third party cannot be affected by anything in the company's constitution. The third party is also entitled, if acting in good faith, to assume by virtue of s.40 that the board of directors has power to authorise others to bind the company. But that party can only assume that it has actually exercised this power by virtue of the common law rules. In particular there must, as before, be a holding out by the company, which might then be reinforced by the indoor management rule.[216] This may be by appointing a person to an office carrying a usual authority,[217] e.g. managing director, or representing that it has done so.[218] In such a case all acts within that authority will bind the company,[219] but not acts outside it. The holding out may also, as in apparent authority generally, be by more specific conduct, as by granting powers of attorney without restriction,[220] or regularly accepting the acts of the agent in question.[221] But pursuant to the general doctrine, there is no protection, even in such a case, for a third party who has notice of the lack of authority[222] or is put on inquiry by the facts of the transaction.[223]

In the leading case on apparent authority, which also relates to the agents of companies, Diplock LJ said that in such cases:

> "the representation must be made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates."[224]

This must now be read subject to s.40 of the Companies Act 2006, above. But on the general principle, the High Court of Australia has followed this wording and

[215] *Hill Street Services Co Ltd v National Westminster Bank Plc* [2007] EWHC 2379 (Ch) at [17].

[216] See *Kreditbank Cassel GmbH v Schenkers* [1927] 1 K.B. 826 at 842–843; *Wrexham Associated Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237; [2008] 1 B.C.L.C. 508 at [47].

[217] See Articles 22 and 29.

[218] *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480, Illustration 28.

[219] *Mahony v East Holyford Mining Co* (1875) L.R. 7 H.L. 869; *Biggerstaff v Rowatt's Wharf* [1896] 2 Ch. 93, Illustration 25; *British Thomson-Houston Co Ltd v Federated European Bank Ltd* [1932] 2 K.B. 176, as explained in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480; *Clay Hill Brick & Tile Co Ltd v Rawlings* [1938] 4 All E.R. 100; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480, (Illustration 31); *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 Q.B. 711, Illustration 30. cf. *Kreditbank Cassel GmbH v Schenkers* [1927] 1 K.B. 826; *Rama Corp Ltd v Proved Tin and General Investments Ltd* [1952] 2 Q.B. 147.

[220] *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] 1 All E.R. 52.

[221] See *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 194, Illustration 12.

[222] *Morris v Kanssen* [1946] A.C. 459; *Howard v Patent Ivory Co* (1888) 38 Ch.D. 156. cf. *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549; affirmed on other grounds at 573.

[223] *A.L. Underwood Ltd v Bank of Liverpool* [1924] 1 K.B. 775; *Liggett v Barclays Bank* [1928] 1 K.B. 48; *Houghton & Co v Nothard, Lowe & Wills* [1927] 1 K.B. 246, Illustration 26; and see Article 75.

[224] *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 at 506.

because whatever misrepresentations had been made, they had not reached C nor caused him to act to his detriment.[257]

(5) A person is employed by a company to service their aircraft and teach some of its employees to fly. The company permits him to run an air taxi business under a name which gives the impression that the business is part of theirs. Neither the company nor the person concerned is licensed to do such work. An aircraft crashes while on such work. The company has held out the person concerned as its agent and is the carrier.[258]

(6) The holder of a stolen cheque card and cheque book may, by virtue of the statements on the card, have apparent authority to communicate to a third party the offer of the card issuer to honour a cheque supported by it.[259]

Extension of existing authority

8-044 (7) A occasionally employed B to purchase goods from C and duly recognised such purchases. Subsequently, B purchased goods from C for his own use, C believing him to be buying them on behalf of A, and giving credit to A. Held, that it was a question of fact whether A had, by his conduct, held out B as his agent to purchase the goods.[260]

(8) The assignee of a life policy which was voidable if the assured went beyond Europe, in paying the premiums to the local agent of the assurance company, told him that the assured was in Canada. The agent said that that would not avoid the policy, and continued to receive the premiums until the death of the assured. Held, that the company was estopped by the representation of its agent from saying that the policy was avoided by the absence of the assured.[261] So, where a shipmaster signed a bill of lading containing a statement that the freight had been paid, it was held that the owners were estopped from claiming the freight from an indorsee for value of the bill of lading.[262]

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[257] *Mac Fisheries Ltd v Harrison* (1924) 93 L.J.K.B. 811; cf. *Smith v M'Guire* (1858) 3 H. & N. 554; *Dunn v Shanks* [1932] N.I. 66. See also *Charrington Fuel Oils Ltd v Parvant Co, The Times*, December 28, 1988, CA (property changes hands; new owners request previous suppliers, who have no notice of change, to continue; no apparent authority to bind former owners).

[258] *Gurtner v Beaton* [1993] 2 Lloyd's Rep. 369. See also *Lease Management Services Ltd v Purnell Secretarial Services Ltd* [1994] C.C.L.R. 127 (finance company estopped from saying employee of supplying company not its agent). Such an explanation could be applied to the famous but puzzling case of *Watteau v Fenwick* [1893] 1 Q.B. 346, considered below, para.8-077. See Tettenborn [1998] C.L.J. 274.

[259] *First Sport Ltd v Barclays Bank Plc* [1993] 1 W.L.R. 1229.

[260] *Todd v Robinson* (1825) 1 Ry. & M. 217; *Gilman v Robinson* (1825) 1 Ry. & M. 226; *Haughton v Ewbank* (1814) 4 Camp. 188; *Watkins v Vince* (1818) 2 Starke 368. See also *International Paper Co v Spicer* (1906) 4 C.L.R. 739; *International Sponge Importers Ltd v Watt & Sons* [1911] A.C. 279; *Swiss Air Transport Co Ltd v Palmer* [1976] 2 Lloyd's Rep. 604; *Pharmed Medicare Private Ltd v Univar Ltd* [2002] EWCA Civ 1569; [2003] 1 All E.R. (Comm) 321; *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch); [2009] 2 B.C.L.C. 19; *CRJ Services Ltd v Lanstar Ltd (t/a CSG Lanstar)* [2011] EWHC 972 (TCC) (agent regularly hiring equipment short term for principal has apparent authority to hire larger capital items for longer periods); cf. *Spooner v Browning* [1898] 1 Q.B. 528. Article 75, Illustration 1; *Bailey & Whites Ltd v House* (1915) 31 T.L.R. 583 (carelessness over paying for unordered goods did not constitute a course of dealing); *Slingsby v District Bank Ltd* [1932] 1 K.B. 544 at 566; *PEC Ltd v Asia Golden Rice Co Ltd* [2014] EWHC 1583 (Comm) at [67] (relevant contract on a grander scale than any previous dealings).

[261] *Wing v Harvey* (1854) 5 De G.M. & G. 265. See Clarke, *Law of Insurance Contracts* (6th edn), paras 8-2A1 and 20-7C. cf. Article 75, Illustration 8.

[262] *Howard v Tucker* (1831) 1 B. & Ad. 712. See also *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 K.B. 237; *Silver v Ocean Steamship Co Ltd* [1930] 1 K.B. 416 (statements as to apparent order and condition of goods shipped); *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606 (shipment under deck); Article 75, Illustration 2.

(9) A was in debt to a company for goods supplied by its branch at X, and also for goods supplied by its branch at Y. He entered into a deed of assignment for the benefit of his creditors. The company's agent at X branch assented to the deed, but its agent at Y branch refused to assent. The company sued A for the debt incurred at Y branch. Held, that the company was bound by the first assent given by its agent at X branch as to all debts due from A, and was precluded from maintaining the action.[263]

(10) E, in one case as a salaried partner of a firm of solicitors, and in the other as an employed solicitor of a different firm, makes representations that funds becoming available to his firm will be transferred to a bank or to a customer of the bank: on the security of these undertakings the bank makes loans. The firms are bound.[264]

(11) The documentary credits manager of a trading bank signs a guarantee without, as he should have done, obtaining a director's assent and a countersignature. Evidence indicates that practice regarding the authority of such officials is varied, but there are other indications from which it appears that the bank has entrusted the handling of this particular matter to the manager. The bank is bound.[265]

(12) The senior manager in charge of the Manchester office of a foreign bank operating in London who would have usual authority to enter into debt contracts of the type requested, but in fact did not have actual authority, informs the borrower of the fact that any facilities would need to be approved by head office. Pending approval of a loan facility, a valid ad hoc hire purchase agreement was entered into between the parties. The manager writes a letter accepting the borrower's request for further hire purchase finance. He has apparent authority to notify the prospective borrower that his superiors in London have approved the finance and is interpreted as having done so: the bank is bound.[266]

Reservations in authority not known to third party

8-045 (13) An agent was entrusted by his principal with a document containing a written consent signed by the principal to do a particular act, but the agent was told not to give the consent, except on certain conditions which were not specified in the document. The agent consented unconditionally. Held, that the principal was bound, though he had signed the document without having read it.[267] So, where A gave B a power of attorney to charge and transfer in any form whatever any estate, etc. "following A's letters of instructions and private advices which, if necessary", should "considered part of these

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[263] *Dunlop Rubber Co Ltd v Haigh & Sons* [1937] 1 K.B. 347.

[264] *United Bank of Kuwait Ltd v Hammoud* [1988] 1 W.L.R. 1051; see [1989] J.B.L. 63 and above, para.8-020. But cf. *Hirst v Etheringtons* [1999] Lloyd's Rep. P.N. 938; and see *Hammoud*'s case criticised in *Lindley and Banks on Partnership* (20th edn), para.12-06.

[265] *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd (The Raffaella)* [1985] 2 Lloyd's Rep. 36. cf. Article 21, Illustration 2.

[266] *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 194.

[267] *Duke of Beaufort v Neeld* (1845) 12 C. & F. 248.

presents", it was held that A was bound by a mortgage on his property executed by B, although as between A and B the mortgage was not authorised.[268] So, where a principal wrote: "I have authorised A to see you, and, if possible, to come to some amicable arrangement" and gave A private instructions not to settle for less than a certain amount, it was held that he was bound by A's settlement for less than that amount, the instructions not having been communicated to the other party.[269]

(14) A gives B a signed form of promissory note or acceptance in blank, with authority on certain conditions to fill it up and convert it into a bill of exchange or promissory note for a certain amount. B fills it up in breach of the conditions and for a larger amount than was authorised, and negotiates it to C, who takes it in good faith and for value, without notice of the circumstances. A is liable to C on the bill or note as filled up, for he is estopped from denying its validity as between himself and C.[270] It would be otherwise if C had had notice of the circumstances in which the document was issued[271] or if B had not been authorised to issue the document as a negotiable instrument except on the receipt of instructions from A on that behalf.[272]

(15) An agent was given authority, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business. A third person, in good faith and without notice that the agent was exceeding his authority, lent money to him on such exceptional terms. Held, that the principal was bound, although in the particular case the emergency had not arisen.[273]

(16) A solicitor is entrusted with the conduct of litigation for clients who are defendants. A compromise is contemplated involving the purchase of property by the defendants at a valuation. The clients tell him not to agree to the appointment of a valuer, but these instructions do not reach the person handling the matter, who agrees the terms of the compromise and the appointment of a valuer. The client is bound.[274]

(17) An auctioneer is instructed to sell goods by auction, a reserve price being fixed. By mistake he sells without reserve. The principal is bound by the sale,[275] unless the conditions of sale expressly provide that the lot is offered subject to a reserve price.[276]

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[268] *Davy v Waller* (1899) 81 L.T. 107. cf. *Industrial and Commercial Bank of China Ltd, Mumbai Branch v Ambani* [2019] EWHC 3436 (Comm) at [87].

[269] *Trickett v Tomlinson* (1863) 13 C.B.(N.S.) 663.

[270] *Lloyd's Bank Ltd v Cooke* [1907] 1 K.B. 794. But quaere whether this and related cases should be regarded as agency cases: they are more properly to be attributed to general estoppel principles. See also Bills of Exchange Act 1882 s.20. See further *Chalmers and Guest on Bills of Exchange* (18th edn), para.2-139; below, para.8-134; *General & Finance Facilities Ltd v Hughes* (1966) 110 S.J. 847.

[271] *Hatch v Searles* (1854) 24 L.J.Ch. 22.

[272] *Smith v Prosser* [1907] 2 K.B. 735; see also *Baxendale v Bennett* (1878) 3 Q.B.D. 525; *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* [2009] NSWCA 84.

[273] *Montaignac v Shitta* (1890) 15 App.Cas. 357.

[274] *Waugh v H.B. Clifford & Sons Ltd* [1982] Ch. 374. But this may not always be so: see above, para.3-005. See also *Thompson v Howley* [1977] 1 N.Z.L.R. 16; Kenny (1982) 126 S.J. 663; Foskett (1982) 79 L.S.Gaz. 57.

[275] *Rainbow v Howkins* [1904] 2 K.B. 322.

[276] *McManus v Fortescue* [1907] 2 K.B. 1. See also *Fay v Miller, Wilkins & Co* [1941] Ch. 360 (bidders need not have read the conditions). cf. *Szembrener v Pepper (New Zealand) Custodians Ltd* [2014] NZHC 324 (vendor ratified auctioneer's action by signing memorandum of sale).

(18) A solicitor is authorised to sue for a debt. A tender of the debt to his managing clerk operates as a tender to the client, although the clerk was instructed not to receive payment of the particular debt, unless at the time of the tender the clerk disclaims any authority to receive the money.[277]

(19) At a meeting of the provisional directors of a proposed company it was resolved that the company should be advertised, and the secretary was directed to take the necessary steps for that purpose. The secretary employed an advertising agent and upon being asked on what authority he was acting, showed the agent the prospectus and resolution. Held, that the jury were justified in finding the directors who were parties to the resolution liable for the expenses of the advertising agent, though they had allowed their names to appear as provisional directors on the faith of a promise by the secretary to find all the preliminary expenses.[278]

(20) A charterparty provides that the master, who is appointed by the owners, shall sign bills of lading as the agent of the charterers only. The owners are liable on a bill of lading signed on their behalf by the master, to a person who ships goods with notice of the charterparty but without notice of its terms.[279]

(21) A man who has regularly paid bills in respect of contracts made by his wife[280] or otherwise shown his acquiescence in such contracts, as by directing alterations to goods supplied,[281] revokes his wife's authority to pledge his credit. His wife nevertheless orders further goods from a supplier who does not know of the prohibition. The man is liable. The same would be true if the debt was incurred in similar circumstances by a person who lived with him but was not his wife.[282] But apparent authority does not necessarily arise merely because he has met one bill,[283] or accompanied the person concerned shopping,[284] nor did it arise where the goods were supplied to a different address from that originally used.[285]

(22) A signs an underwriting agreement purporting to give B authority to apply for shares in a company in A's name and on his behalf, and hands it to an agent of the promoters, with a letter stating that the agreement was signed, and is only to hold good, on certain conditions. The agreement is delivered to B, who applies for the shares, and they are duly allotted to A, neither B nor the company having any notice of the letter or conditions. A is bound as a shareholder, though the conditions were not complied with.[286]

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[277] *Moffat v Parsons* (1814) 1 Marsh. 55; *Kirton v Braithwaite* (1836) 1 M. & W. 310; *Finch v Boning* (1879) 4 C.P.D. 143. cf. *Bingham v Allport* (1833) 1 N. & M. 398. And see *Re Buckley and Bienefelt* (1976) 13 A.L.R. 291; Cordery, *Solicitors* (8th edn), p.82.

[278] *Maddick v Marshall* (1864) 17 C.B.(N.S.) 829; *Riley v Packington* (1867) L.R. 2 C.P. 536; cf. *Burbidge v Morris* (1865) 3 H. & C. 664. As to company promoters, see further *Gower's Principles of Modern Company Law* (10th edn), Ch.5.

[279] *Manchester Trust v Furness* [1895] 2 Q.B. 539; cf. *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] A.C. 8, where the master was appointed by the demise charterer.

[280] *Debenham v Mellon* (1880) 16 App.Cas. 24 at 36; *Drew v Nunn* (1879) 4 Q.B.D. 661; *Hawthorne Bros v Reilly* [1949] V.L.R. 137.

[281] *Jetley v Hill* (1884) C. & E. 239.

[282] *Ryan v Sams* (1848) 12 Q.B. 460.

[283] *Durrant v Holdsworth* (1886) 2 T.L.R. 763.

[284] *Seymour v Kingscote* (1922) 38 T.L.R. 586.

[285] *Swan & Edgar Ltd v Mathieson* (1910) 103 L.T. 832; cf. *Filmer v Lynn* (1835) 4 N. & M. 559. See also Illustration 7; Article 75, Illustration 1.

[286] *Ex p. Harrison, re Bentley & Co & Yorkshire Breweries Ltd* (1893) 69 L.T. 204.

the third party,[1534] declaring a constructive trust of assets in the third party's possession,[1535] imposing liability for knowing receipt[1536] and imposing compensatory liability for dishonest assistance in the agent's breach of duty.[1537] In all cases, a third party is unlikely to be affected by an agent's breach of equitable duty unless that third party has a sufficient degree of knowledge of the breach to warrant equity's attention.[1538] It is clear now that only dishonesty, in an objective sense (itself a difficult concept), is sufficient for liability for dishonest assistance.[1539] The dishonesty can be in an employee or partner, whereupon the usual principles of vicarious liability apply.[1540] There remains uncertainty as to the applicable tests for liability to rescission, for the invocation of the defence of bona fide purchaser for value in relation to proprietary actions and for liability for knowing receipt.[1541] Knowledge of one agent's breach of fiduciary duty may be fatal even if even greater corruption existed within the principal's organisation of which the third party was unaware.[1542]

8-222 **Bribery and secret commissions** Bribery is a particularly obvious form of corruption, and one that has attracted much attention since the nineteenth century from both common law and equity. A small group of core cases before and after the beginning of the twentieth century lay down and repeat stern rules in respect of bribery, which dominate the area and appear to have had some element of deterrent purpose. Definitions of bribery and of the wider concept of a secret commission, together with an account of the internal effect of the applicable rules as between principal and agent have been addressed in Article 49. This Article concerns the external effect, but should be read in conjunction with the commentary to Article 49. The breadth of the concept of a secret commission means that a third party who offers or confers money or some other personal benefit on an agent (knowing the facts giving rise to that person's fiduciary capacity[1543]) cannot escape legal repercussions merely because the third party avers that he or she thought that the agent would tell or had told the principal of the payment[1544]; or was unaware of the agent's exact intention but aware that the agent did not intend to

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1534 *Clark v Cutland* [2003] EWCA Civ 810; [2004] 1 W.L.R. 783.

1535 See the cases referred to in commentary to Article 88.

1536 See, e.g. *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at [194]. See also the cases in fn.1532, above, and the discussion in Article 116. In cases of receipt of corporate opportunities, as opposed to receipt of existing assets of the principal, it seems that a higher test of knowledge is required for liability: see *Satnam Investments Ltd v Dunlop Heywood* [1999] 3 All E.R. 652; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 C.L.R. 89 at [118]; and as to Scotland, *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75 at [95].

1537 *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at [185] and [197] (recipient of corporate opportunity (and others) also liable for dishonestly assisting director to divert opportunity); *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614; [2020] Ch. 129. See too below, para.8-225. For general discussion of the dishonest assistance action, see Article 116.

1538 See *Chancery Client Partners Ltd v MRC 957 Ltd* [2016] EWHC 2142 (Ch) at [22].

1539 See *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378; *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614; [2020] Ch. 129.

1540 See *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366; and *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614; [2020] Ch. 129. See further para.8-178.

1541 For discussion, see commentary to Article 116. See too *UBS AG (London Branch) v Kommunale Wasserwerke Peipkiz GmbH* [2017] EWCA Civ 1567 at [110].

1542 See *UBS AG (London Branch) v Kommunale Wasserwerke Peipkiz GmbH* [2017] EWCA Civ 1567 at [113] and [154].

1543 *Pengelly v Business Mortgage Finance 4 Plc* [2020] EWHC 2002 (Ch) at [54].

1544 *Shipway v Broadwood* [1899] 1 Q.B. 369 at 373 (Illustration 3); *Grant v Gold Exploration and*

disclose the dealing to the principal.[1545] The third party is also liable where having arranged for the payment not knowing of the agency, that party continued and entered into the contract with the principal after he or she had learned of it.[1546] It is not necessary for the principal to show that the third party had an intention to influence the agent.[1547] Although it is true that the objectionable feature of bribery is the general one that it gives rise to a conflict of interest,[1548] factors such as those above distinguish bribes from the more general idea of undisclosed profit, which need not involve the complicity of a third party.[1549]

Forms of relief and remedy The material that follows addresses both Rule (1) and (2) above. The principal who learns of a bribe or secret commission is presented with a wide range of legal options against the inculpated third party. Certainly where the payment was corrupt, and therefore a bribe in the technical sense, the principal has the right to rescind, or cancel, any contract with the third party. Such rights arise at common law and equity. Where the agent's authority extended to binding the principal to the relevant contract, and the agent was as corrupt as the briber, the contract is likely to be void for lack of authority, under the principle discussed in Article 23. Equity then takes a wider view of what constitutes a conflicting interest sufficient to warrant curial intervention. Relevant case law is found above, and in the commentary to Article 49. Where bribery is involved, it will also not generally be necessary that the briber be placed back in its pre-contract position.[1550] In cases where the agent is not dishonest, albeit receiving a secret commission, the contract will be voidable only. Avoidance is less likely where the agent has disclosed the inducement but not given as complete an account as should have been given.[1551] Rescission might be denied in such cases where it is no longer possible fully to return the payer to its pre-contract position.[1552] 8-223

Otherwise, the principal may, at common law, claim from the third party the amount of the bribe or damages for loss flowing from the agent's involvement with the bribing party. These are alternative remedies: "(1) to recover from [the third party] the amount of the bribe as money had and received, or (2) to recover, as damages for tort, the actual loss which he has sustained as a result of entering into the

Development Syndicate Ltd [1900] 1 Q.B. 233 at 248–250; *Taylor v Walker* [1958] 1 Lloyd's Rep. 490, Illustration 4, at 509–513; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch. 119 at [53]; *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm) at [68]; *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2018] EWCA Civ 1732 at [84] (intention to influence need not be shown); reversed on the facts [2020] UKSC 34; *Pengelly v Business Mortgage Finance 4 Plc* [2020] EWHC 2002 (Ch) at [55] and [78].

1545 *Logicrose Ltd v Southend United FC* [1988] 1 W.L.R. 1256 at 1260–1262.

1546 *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 Q.B. 233 at 248.

1547 *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All E.R. 573.

1548 *Anangel Atlas Cla. Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd* [1990] 1 Lloyd's Rep. 167 at 171.

1549 As to secret profits, see Articles 45–47.

1550 See *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 at [225]. See also P. Watts, "Rescission of Guarantees for Misrepresentation and Actionable Non-disclosure" [2002] C.L.J. 301.

1551 See *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299; [2007] 1 W.L.R. 2351; [2007] 4 All E.R. 1118 at [47]. See too above, para.6-085. cf. *Pengelly v Business Mortgage Finance 4 Plc* [2020] EWHC 2002 (Ch) at [80] (undertaking to disclose payments from third party not kept, so rescission the appropriate remedy).

1552 cf. *Barry v The Stony Point Canning Co* (1917) 55 S.C.R. 51 at 77.

forms of corruption may also be unenforceable under the rules for illegal contracts.[1572]

8-224 **Bribery by agent of third party** The discussion so far has been concerned with bribes paid or promised by third parties themselves, or readily imputable to such third parties. Where a bribe is paid or promised by an *agent*[1573] of the third party without that party's knowledge, the position is likely to be affected by the remedy being sought by the third party. If only rescission is being sought, it may be that the third party cannot maintain the contract because that would be both to adopt and disown the agent's conduct.[1574] If damages are being sought, then probably the standard tort rules should be applied, meaning that usually the principal would be liable only if the agent were an employee, or cognate and the conduct took place in "the course of employment".[1575] There may also be cases where the third party uses an intermediary but does not know exactly what the intermediary will do. In such cases the act of such party may still be attributed to the third party[1576]; or that party may at least be subject to the rescissionary remedy on the grounds that it would be inequitable to insist on the transaction in the circumstances.[1577] It will not usually matter that the agent also performs some role for the other party; the party whose agent received the bribe is nonetheless entitled to rescind the transaction.[1578] This liability would not preclude the third party suing its agent for having embroiled it in corrupt activity.[1579] Conversely, where the third party knows that its own agent is attempting to bribe the agents of the principal, it is likely to find itself unable to plead any default against the agent by reason of the principle ex turpi causa non oritur action.[1580]

8-225 **Action for dishonest assistance** Now that the basis of accessory liability in respect of breach of fiduciary duty has been clarified,[1581] it is possible that claimants, apprised of their agents' corruption, may prefer to rely on the action for dishonest assistance in a breach of fiduciary duty than rely on the law of tort and the action for money had and received, though the remedies would be slightly different; it has been said that "the difference lies not in the factual background but in the remedy sought".[1582] An unsettled issue is whether accessory liability can apply where there is no misappropriation of existing trust assets.[1583] However, there is some authority that it can,[1584] and it seems that the action can extend to stripping the briber of profits.[1585] The use of this action would also enable use of the more generalised principles as to the knowledge required, recently developed in connection with accessory liability, instead of some of the awkward quasi-presumptions which dicta in the common law cases have sometimes seemed to apply. More commentary on the action can be found in Article 116.

[1572] For the general law, see *Chitty on Contracts* (33rd edn), Ch.16. For particular difficulties in this context, see Berg [2001] L.M.C.L.Q. 27 at 41 onwards. See too *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299; [2007] 1 W.L.R. 2351; [2007] 4 All E.R. 1118; *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83; [2019] 1 W.L.R. 4481 at [49] cf. *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC); [2014] 2 Lloyd's Rep. 133 at [185].

[1573] See the discussion above, para.6-087. See too *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [449] (procuring payment by company controlled by briber), affirmed on different points [2020] EWCA Civ 245; [2020] 3 W.L.R. 109.

[1574] See above, paras 8-097 and 8-222.

[1575] See *Armagas Ltd v Mundogas SA* [1986] A.C. 717 at 744–745 (in CA, bribing party a joint venturer, perhaps partner), following *Barry v Stoney Point Canning Co* (1917) 55 S.C.R. 51. See also *Hamlyn v John Houston & Co* [1903] 1 K.B. 81; *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm) at [589] (affirmed [2017] EWCA Civ 1567). The payment of bribes is normally outside the authority of the agent: *E. Hannibal & Co Ltd v Frost* (1988) 4 B.C.C. 3, Illustration 4 to Article 29; see further above, para.2-026. But that would not preclude the operation of vicarious liability in appropriate cases.

[1576] See Berg [2001] L.M.C.L.Q. 27 at 46–47. See too *UBS AG (London Branch) v Kommunale Wasserwerke Peipkiz GmbH* [2017] EWCA Civ 1567 at [113].

[1577] *Armagas Ltd v Mundogas SA* [1986] A.C. 717 at 745, per Robert Goff LJ.

[1578] *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm) at [616] (affirmed [2017] EWCA Civ 1567).

[1579] *Ho Kang Peng v Scintronix Corp Ltd* [2014] SGCA 22.

[1580] *Nayyar v Sapte* [2009] EWHC 3218 (QB).

[1581] See *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378; *Secretary of State for Justice v Topland Group Plc* [2011] EWHC 983 (QB) at [94]; and Article 116.

Illustrations

8-226

(1) A company awards to another company a sub-contract for the laying of cable. The performance of the sub-contract is subject to certification by an engineer appointed by the first company. The sub-contractor employs the same engineer as sub-sub-contractor to lay the cable. The financing of the project goes wrong. The first company discovers the involvement of its engineer in the sub-contract and claims that it should be set aside. The company is successful.[1586]

(2) A person who dealt with an agent gave him a gratuity in order to influence him generally in favour of the giver. The agent was in fact so influenced in making a contract with the giver on the principal's behalf. Held, that the contract was voidable by the principal, although the gratuity was not given in direct relation to the particular contract.[1587]

(3) A agreed to buy a pair of horses from B, provided a veterinary surgeon who had been employed by A to find such horses certified that they were sound. B secretly offered the vet a certain sum if the horses were sold, and the vet accepted the offer. The vet certified that the horses were sound. Held, that A

[1582] *Logicrose Ltd v Southend United FC* [1988] 1 W.L.R. 1256 at 1261, per Millett J. As to the monetary remedies available in equity, see Comment to Article 115.

[1583] See Comment to Article 116; *Lewin on Trusts* (20th edn), Ch. 43.

[1584] See ibid.; *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep. 643, per Toulson J; *Secretary of State for Justice v Topland Group Plc* [2011] EWHC 983 QB. cf. *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep. 486 to the contrary; Mitchell (2001) 118 L.Q.R. 207.

[1585] See *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [99]; affirmed [2014] EWCA Civ 908 at [84]; *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* [2016] NSWCA 34; (2017) 340 A.L.R. 580; cf. *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43 (noted A. Douglas, "Dishonest Assistance, Causation and Account of Profits" (2019) 135 L.Q.R. 214). In *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch); [2007] 2 All E.R. (Comm) 993 at [133]–[134]; affirmed [2011] EWCA Civ 347; [2012] Ch. 453 it was doubted whether the liability of the briber would extend to liability for incidental profits gained beyond the amount of the bribe itself, and the view was strongly expressed that, if it did, the profits would not be held on trust for the claimant. The third party is unlikely to be liable to the principal for remuneration forfeited by an agent as a result of an improper conflict of interest: *Electrosteel Castings (UK) Ltd v Metalpol Ltd* [2014] EWHC 2017 (Ch) at [65].

[1586] *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) L.R. 10 Ch.App. 515.

[1587] *Smith v Sorby* (1875) 3 Q.B.D. 552n; *Hough v Bolton* (1885) 1 T.L.R. 606. See also *Galloway v Pedersen* (1915) 34 N.Z.L.R. 513 (specific performance refused).

past,[33] though there are signs that they may be more readily recognised in the future.[34] It is suggested below that they may be particularly relevant in considering unidentified principal situations. The remainder of this list enumerates them.

(2) Joint or joint and several obligation The agent may be held to contract jointly or jointly and severally together with the principal.[35] Joint liability applies to partners,[36] but not normally to husband and wife.[37] Joint liability is subject to certain technical rules which may make it inappropriate to an agency relationship[38]; so, though to a lesser degree, is joint and several liability.[39]

(3) Suretyship The agent may be a surety for the principal, that is to say the agent may guarantee the principal's obligation; or contract to indemnify the third party in respect of its non-performance. This is to be distinguished from *del credere* agency, where the agent's liability is to the principal, not to the third party. Here again suretyship in general, and guarantee in particular, are subject to special rules which may not be appropriate to the particular situation.[40] The possibility is however occasionally referred to.[41]

(4) Collateral contract The agent may undertake a separate liability on a separate or collateral contract which is not one of suretyship. A contract of indemnity is of course a specialised form of such a contract. Consideration can often be found by the entry into the main contract with the principal. Examples of such

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Othon Ghalanos Ltd [2008] UKHL 11; [2008] 1 Lloyd's Rep. 462 at [45].

33 Stoljar, p.234–238. And see Blackburn, *Contract of Sale* (3rd edn), p.352.

34 See *The Swan* [1968] 1 Lloyd's Rep. 5, Illustration 6; *Gardiner v Heading* [1928] 2 K.B. 284; *Teheran-Europe Co Ltd v S.T. Belton (Tractors) Ltd* [1968] 2 Q.B. 53 at 59–60; [1968] 2 Q.B. 545 at 558; *Wolfe Stevedores (1968) Ltd v Joseph Salter's Sons Ltd* (1971) 16 D.L.R. (3d) 334; *Burt v Claude Cousins & Co Ltd* [1971] 2 Q.B. 426 at 455; *Format International Security Printers Ltd v Mosden* [1975] 1 Lloyd's Rep. 37; *Et Biret Cie SA v Yukiteru Kaiun KK (The Sun Happiness)* [1984] 1 Lloyd's Rep. 381; *Stag Line Ltd v Tyne Shiprepair Group Ltd (The Zinnia)* [1984] 2 Lloyd's Rep. 211; *The Starsin* [2001] 1 Lloyd's Rep. 437 at 452. But cf. *Wilson v Avec Audio-Visual Equipment Ltd* [1974] 1 Lloyd's Rep. 81 at 83, where such liability is said to require "clear and precise evidence of a very special relationship"; *N. & J. Vlassopulos Ltd v Ney Shipping Ltd (The Santa Carina)* [1977] 1 Lloyd's Rep. 478, Illustration 3 to Article 101; *Foalquest Ltd v Roberts* [1990] 1 E.G.L.R. 50; *Belleli SpA v AIG (Europe) Ltd*, QBD (Rix J), May 22, 1996. See also below, para.9-016.

35 See, e.g. *Middle East Tankers and Freighters Bunker Services SA v Abu Dhabi Container Lines* [2002] EWHC 957 (Comm); [2002] 2 Lloyd's Rep. 643; *Savills (UK) Ltd v Blacker* [2017] EWCA Civ 68 at [46], Illustration 15. See too *Air Tahiti Nui Pty Ltd v McKenzie* [2009] NSWCA 429 (subsidiary company agent of parent; both liable); *Rabiu v Marlbray Ltd* [2016] EWCA Civ 476; [2016] 1 W.L.R. 514 (husband severally liable on contract of purchase when lacked authority also to bind wife).

36 Partnership Act 1890 s.9.

37 *Morel Bros & Co Ltd v Earl of Westmorland* [1904] A.C. 11; cf. *Hoare v Niblett* [1891] 1 Q.B. 781; *Swanton Seed Service Ltd v Kulba* (1968) 68 D.L.R. (2d) 38; *Rabiu v Marlbray Ltd* [2016] EWCA Civ 476; [2016] 1 W.L.R. 514.

38 See Glanville Williams, *Joint Obligations* (1949); but see Civil Liability (Contribution) Act 1978 s.3; and *David Moore Builders Ltd v Preddy* Unreported October 24, 1995 CA; *Goei Tsusho Co Ltd v Leader Engineering & Construction Ltd* [2010] 2 H.K.L.R.D. 1084.

39 e.g. release of one debtor releases all: see Glanville Williams, *Joint Obligations* (1949), p.135.

40 e.g. giving time to the principal debtor releases the surety: *Chitty on Contracts* (33rd edn), para.45-104 onwards. See also Rowlatt, *Principal and Surety* (7th edn); Glanville Williams, *Joint Obligations* (1949), p.121 onwards. Guarantees may require written evidence under the Statute of Frauds.

41 *Imperial Bank v London and St Katharine Docks Co* (1877) 5 Ch.D. 195 at 200; *Fleet v Murton* (1871) L.R. 7 Q.B. 126 at 132; see also *Young v Schuler* (1883) 11 Q.B.D. 651; *Rutherford v Ounan* [1913] 2 I.R. 265 at 268.

contract are found in cases of warranty of authority[42] and auctioneers.[43] It has been held that stockbrokers may warrant the genuineness of a share transfer which they present for registration.[44]

(5) Alternative liability The agent may undertake a liability alternative to that of the principal, the choice to lie with the third party. Though this interpretation seems to be assumed by some of the cases on election, it is submitted that there is little to commend it.[45] Such cases as do recognise the liability of the agent do not usually consider further the nature of that liability, because the question is not relevant. Many old cases raise questions of the Statute of Frauds or of parol evidence, and concern the question whether the fact that a written contract mentions only principal or agent necessarily excludes the other.[46] Others are simply concerned with the question whether the agent can be sued, regardless of whether the principal can, or whether the agent who has paid on a contract is entitled to indemnity as having discharged a legal liability resting on the principal: they go no further than is necessary for the particular decision. The area is therefore not yet fully mapped.

Election When principal and agent are both liable, the doctrines of merger and election may apply, and the third party may be debarred from suing one by obtaining judgment against, or even perhaps simply electing to look to, the other. But this only operates where the two remedies available to the third party are inconsistent, and this may not be so in all cases. The nature of the liability assumed by the agent may therefore be crucial, but it has received insufficient attention in the cases. The value of the doctrine is also doubtful.[47] **9-007**

Agent's right to sue The question of an agent's right to sue certainly arises less frequently than that of the agent's liability,[48] and it seems that the incorporation of the agent into the contract has more normally the purpose of securing personal liability. In any case, the right to sue can often be specifically assigned to the agent when this is thought desirable. On the analysis given above of the possible interpretations of the agent's liability, headings (1), (2) and (4) could also involve the right to sue. Plainly, the agent who makes the contract as sole contracting party can sue on it as well as be held liable.[49] An agent who is a party to a joint or joint and several obligation can sue on it, subject to the technical rules applicable.[50] **9-008**

And a collateral contract made by agent with the third party may give the agent

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42 Article 105.

43 Below, paras 9-009 and 9-023; Illustrations 11–14 and 18–20. It may be that the position of the nineteenth-century factor would today be explicable in such terms, but it is no longer relevant to seek to explain it.

44 *Yeung Kai Yung v Hong Kong & Shanghai Banking Corp* [1981] A.C. 787, Illustration 5.

45 See Comment to Article 82.

46 See Article 102; *Higgins v Senior* (1841) 8 M. & W. 834; *Calder v Dobell* (1871) L.R. 6 C.P. 486; *Basma v Weekes* [1950] A.C. 441; *Davies v Sweet* [1962] 2 Q.B. 300.

47 See Articles 82 and 104.

48 See above, para.9-006. It has arisen where the principal is fictitious or non-existent, or where the agent is his own principal: see Articles 107 and 108.

49 e.g. *Short v Spackman* (1851) 2 B. & Ad. 962. For a more modern example where this was probably the case, see *Anglo-African Shipping Co of New York Inc v J. Mortner Ltd* [1962] 1 Lloyd's Rep. 610; *Carminco Gold & Resources Ltd v Findlay & Co Stockbrokers (Underwriters) Pty Ltd* (2007) 243 A.L.R. 472, Illustration 24.

50 e.g. a partner: cf. Co Litt. 182A. See also *Jung v Phosphate of Lime Co Ltd* (1868) L.R. 3 C.P. 139;

the right to sue on it: a conspicuous example is that of the auctioneer, who can sue for the price of the goods or land sold.[51] On the other hand, a contract of suretyship does not, and a contract of indemnity would not normally, confer a right to sue; and the cases suggesting alternative liability do so in connection with the *third party's* right to choose between principal and agent. In so far as any question arises between these two as to who should sue, it would probably be solved by reference to the subordinate position of the agent vis-à-vis the principal.[52] Where a party has assigned absolutely contractual rights, that party cannot usually avoid the rule requiring the assignee to be joined by asserting that the suit is brought as agent of the assignee.[53]

9-009 **Lien and special property** A number of cases, mostly on nineteenth-century factors and auctioneers, suggested that certain types of agent could sue because they have a special property in or lien upon the subject-matter of the contract or a beneficial interest in the completion thereof.[54] It is however clear that the mere fact that an agent has an interest in the completion of the contract, e.g. because the agent hopes to earn commission on it, does not entitle the agent to sue upon it.[55] The cases are in the modern context best explained as particular collateral contracts, upon which there is long-standing authority conferring specific rights and imposing specific duties upon these types of agent. The case law on the factor may be obsolete, but the auctioneer's contract is still of importance.[56] The possibility of detecting such contracts in new circumstances is not of course closed.

9-010 **Agent suing on behalf of principal** A further group of old cases can be read as suggesting that the agent can in general sue on behalf of a disclosed principal and recover the principal's loss.[57] They should be viewed with extreme caution. Many date from a time when there was no method of assigning legal choses in action, communications did not make it easy for foreign contracting parties to sue in England, contract rights under bills of lading were not transferable,[58] and the central contractual doctrines now accepted had not been fully worked out. The distinction between a right of suit and a right to recover substantial damages was not taken in some of these early cases. However the matter would have been viewed at the time,

Perpetual Trustee Co Ltd v Nebo Road Pty Ltd [2011] QSC 283 (contract recognises lead lender as having power to sue for all lenders); *HSBC Bank Plc v Rondônia Transportes Ceviran* [2019] EWHC 30 (Comm) at [52].

51 See below, para.9-023; Illustrations 11–14 and 18–20.

52 See below, para.9-012.

53 *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376 at [58] (no evidence of authority).

54 The wording of Article 119 of the 1st edition of this book.

55 e.g. *Bramwell v Spiller* (1870) 21 L.T. 672 (*del credere* agent); *Fairlie v Fenton* (1870) L.R. 5 Ex. 169; *Turnbull & Jones Ltd v Amner & Sons* [1923] N.Z.L.R. 673.

56 See below, para.9-023; also above, para.1-046; Reynolds, in *Contemporary Issues in Commercial Law* (Lomnicka and Morse eds, 1997), p.161 onwards.

57 *Davis v James* (1770) 5 Burr. 2680; *Moore v Wilson* (1787) 1 T.R. 659; *Joseph v Knox* (1813) 3 Camp. 320; *Atkinson v Cotesworth* (1825) 3 B. & C. 647; *Dunlop v Lambert* (1839) 6 Cl. & F. 600; *Mead v SE Ry* (1870) 18 W.R. 735. The nearest to a strong case is *Joseph v Knox*. Also cases indicating that admissions by principal or agent are admissible against the other: *Bauerman v Radenius* (1792) 7 T.R. 663; *Smith v Lyon* (1813) 3 Camp. 465; *Welstead v Levy* (1831) 1 M. & Rob. 138; and on discovery: *Willis & Co v Baddeley* [1892] 2 Q.B. 324 (but cf. *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1906] 2 K.B. 217); *Abu Dhabi National Tanker Co v Product Star Shipping Ltd* [1992] 2 All E.R. 20.

58 A problem dealt with by the Bills of Lading Act 1855 (now replaced by the Carriage of Goods by Sea Act 1992).

it is submitted that most of them would not now be followed or would be otherwise explained. An action brought for another by an agent authorised to do so should nowadays be brought in the name of the principal.[59]

9-011 **Insurance cases** There are also cases in the context of insurance law in which an assured is held entitled to recover loss though another party has actually suffered it; and agency reasoning has sometimes been invoked to justify this.[60] However, it is not clear that this is the correct analysis for such cases. Where the assured is a bailee of goods, the assured's right can be explained by reference to its interest in them. The leading case on such facts is *A. Tomlinson (Hauliers) Ltd v Hepburn*[61] where it was stressed that goods may be insured by a person with an interest in them so as to cover the interests of others. In such a case the assured would have an insurable interest in the full value of the goods, and would recover on *its own* contract; it would then be under an obligation to account to any person actually suffering loss.[62] Where actions are brought by agents and brokers, reliance is often placed on wide dicta regarding actions by agents on insurance policies in *Provincial Insurance Co of Canada v Leduc*[63]; but the case itself still concerned insurance by a part-owner for the other part-owner. Other situations and dicta can be explained on the basis that the agent is in some circumstances a *trustee* for others[64]; but this is by no means true of every agency situation.[65] The person suffering loss may also be able to sue under the Contracts (Rights of Third Parties) Act 1999. But though it has been held at first instance that the principle permitting actions by agents and brokers is a general one[66] it is not in fact clear that there is such a principle, or that it is needed.[67] If it existed it might also make such agents liable, as well as entitled on the contract, which may be contrary to expectation. Where normal agency requirements are satisfied, the principal can of course sue.[68] If however the principal is undisclosed and does not wish to sue, or was excluded by the terms of the contract,[69] the agent as the ostensible contracting party would be able to sue (and also liable).[70] In this special case it may be that the agent could recover the principal's loss as an exception to the normal rules for *damages*: the problem is discussed below.[71] Some special situations are now discussed.

59 *Jones v Gurney* [1913] W.N. 72; *PM Law Ltd & Motorplus Ltd* [2016] EWHC 193 (QB); [2016] 1 Costs L.R. 143 at [45]. See too *Moores v Hopper* (1807) 2 B. & P.N.R. 411.

60 See, e.g. *Waters v Monarch Fire and Life Insurance Co* (1856) 5 E. & B. 870.

61 *A. Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451. The principle can be extended beyond bailment: see *Petrofina (UK) Ltd v Magnaload Ltd* [1984] Q.B. 127 (multi-participant construction project).

62 See *Re E. Dibbens & Sons Ltd* [1990] B.C.L.C. 577.

63 *Provincial Insurance Co of Canada v Leduc* (1874) L.R. 6 P.C. 224 at 244.

64 See *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277 at 294 HL; referring to *Lloyd's v Harper* (1880) 16 Ch.D. 290.

65 See *Allen v F. O'Hearn & Co* [1937] A.C. 213 at 218.

66 *Transcontinental Underwriting Agency SRL v Grand Union Insurance Co Ltd* [1987] 2 Lloyd's Rep. 409 at 415.

67 See Lord Millett in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 582; Reynolds, in *Consensus ad Idem* (Rose ed., 1996), pp.84–88. Insurance textbooks do not clearly commit themselves: see *MacGillivray on Insurance Law* (14th edn), Ch. 38; Clarke, *Law of Insurance Contracts* (6th edn), para.5-5 onwards.

68 See *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582 (unidentified principal).

69 See above, para.8-081.

70 See below, para.9-012.

71 See below, para.9-013.