

Practice questions for Chapter 8 – The law of agency

Essay question

Read the case of *Hely-Hutchinson v Brayhead Ltd* and answer the following:

- Explain the material facts of the case.
- Explain the difference between express and implied actual authority.
- How did Denning MR define apparent authority and how did he explain the relationship between actual and apparent authority?
- Did Richards have actual authority to enter into the contract on behalf of Brayhead Ltd?
- Did Richards have apparent authority to enter into the contract on behalf of Brayhead Ltd?

Introduction

- It is a fundamental principle of the law of agency that an agent can legally bind a principal to a third party providing that the agent is acting within his authority. Determining whether an act is within the agent's authority is therefore a crucial issue. In practice, determining this is not always easy. Where an agent's authority is expressly stated, the issue is straightforward. What makes this issue more problematic is the fact that an agent's authority can also be implied. The case of *Hely-Hutchinson v Brayhead Ltd*¹ explores the issue of implied actual authority and how it differs from express actual authority.
- When reading this case, consider the following:
 - (a) Richard's practical role within the company, and
 - (b) The extent to which actual and apparent authority can overlap?

Explain the material facts of this case

- Richards was a director and chairman of Brayhead Ltd. Although he was not formally appointed as managing director, he acted as the company's managing director with the knowledge and acquiescence of the other board members. It was common practice for him to enter into financial contracts on the company's behalf and inform the other directors subsequently.
- Viscount Suidale was chairman and managing director of Perdio Electronics Ltd, who had agreed with a bank to guarantee a loan of £50,000 payable to Perdio Ltd. Richards, on Brayhead Ltd's behalf, agreed with Viscount Suidale that Brayhead Ltd would indemnify Viscount Suidale against any loss in relation to the £50,000 loan and a separate loan of £45,000 made by Viscount Suidale to Perdio Ltd.
- Perdio Ltd went into liquidation and Viscount Suidale sought to enforce the agreement made with Richards which would make Brayhead Ltd liable for his £95,000 loss. Brayhead Ltd declined to pay Viscount Suidale, arguing that Richards lacked the authority to enter into the contract with Viscount Suidale. The significant issue to be determined was did Richards have the relevant authority to enter into the two contracts indemnifying Viscount Suidale.

¹ [1968] 1 QB 549 (CA).

Explain the difference between express and implied actual authority?

- Express actual authority is given in express words, such as an express provision in a contract or the passing of a board resolution that permits an agent to act in a certain way.
- Implied actual authority is inferred from the actions of the parties, such as where an individual is appointed to a certain post, or where an individual carries on an activity with the acquiescence of others.

How did Denning MR define apparent authority and how did he explain the relationship between actual and apparent authority?

- Denning MR defined apparent authority as ‘the authority of an agent as it appears to others.’ He noted that it is often the case that actual and apparent authority can overlap. He gave the example of a company director who is appointed to the office of managing director by his fellow directors. Such an appointment will grant the new managing director both implied actual authority and apparent authority.
- The implied actual authority will permit the managing director to do all things that fall within the scope of that office. The apparent authority will derive from the fact that others will see him acting as managing director and assume that he has the authority to do all things that a managing director can do.

Did Richards have actual authority to enter into the contracts on behalf of Brayhead Ltd?

- The judges unanimously agreed that Richards lacked express actual authority to enter into the contract. His position (that is, as chairman of the company) also did not grant him the relevant authority as the chairman could only enter into such contracts with the sanction of the board.
- However, all three judges in the Court of Appeal agreed that Richards had implied actual authority to enter into the contracts due to the fact that he had entered into several similar contracts and the board had acquiesced to his conduct. It was regular practice for him to enter into contracts and subsequently report this to the board.

Did Richards have apparent authority to enter into the contracts on behalf of Brayhead Ltd?

- At first instance, Roskill J concluded that Richards had apparent authority to enter into the contracts. On appeal, the judges stated that there was no need to establish apparent authority as Richards had implied actual authority. Therefore, they did not expand upon the issue. However, Lord Pearson did state that, as actual and apparent authority can overlap, their finding of actual authority in no way cast any doubts upon the findings of Roskill J.

Summary

- Very often companies will wish to disassociate themselves from contracts that have been entered into by individuals on its behalf. Similarly, outsiders may wish to escape from a contract entered into with the company. In both cases, a common method of rendering the contract non-binding is to argue that the individual(s) lacked the authority to contract in the company’s behalf. When the contract under discussion involves a company, the issue of implied actual authority becomes crucial as, by virtue of their office, certain individuals, such as directors, are deemed able to engage in certain activities on behalf of the company. Where the individual in question is a managing director or chairman, the issue of implied actual authority becomes even more acute.

- The case of *Hely-Hutchinson v Brayhead Ltd* is a good example of the differences that exist between express actual authority and implied actual authority. The case also demonstrates that the more senior the office of the agent, the wider the scope of their implied authority becomes. Even where the director is not validly appointed to a senior office, acquiescence to their acting in that capacity can bestow upon them the requisite authority.

Essay question

Read the case of *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* and answer the following:

- According to Diplock LJ, how do actual and apparent authority differ?
- Did Kapoor have actual authority to engage the claimant?
- Did Kapoor have apparent authority to engage the claimant?
- All three judges agreed that apparent authority was based upon the doctrine of estoppel. Explain how estoppel operates in relation to apparent authority.
- According to Diplock LJ, what conditions must be established to demonstrate that an agent had apparent authority to enter into a contract on behalf of the principal?

Introduction

- *Hely-Hutchinson v Brayhead Ltd* demonstrated the scope of an agent's actual authority. Actual authority can be defined as the authority the agent has been actually granted (either express or implied.) However, from the point of view of a third party, what matters is the authority that the agent appears to have. Therefore, to protect third parties who engage with an agent based upon the authority he appears to have, the courts have also created the concept of apparent authority (also known as ostensible authority). The case of *Freeman & Lockyer*² discussed apparent authority and its relationship with actual authority.
- When reading this case, consider the following:
 - (a) The relationship and distinctions between actual and apparent authority
 - (b) The extent to which the perception of the agent's authority is relevant, as opposed to the authority that he actually has.
- Before answering the questions, the facts will be briefly set out. Kapoor and Hoon formed the defendant company to purchase and resell a large estate. Kapoor and Hoon (along with their nominees) were directors of the company. The Articles contained a power to appoint a managing director, but none was appointed.
- However, to the knowledge and acquiescence of the board, Kapoor acted as *de facto* managing director and entered into contracts on the company's behalf. Kapoor employed a firm of architects to apply for planning permission to develop the estate and do other work.
- Kapoor had no specific authorization to do this (either in the Articles or via a board resolution). When the architects claimed their fees from the defendant company, the defendant company refused to pay, alleging that Kapoor did not have the authority to employ the architects. The architects sued. At first instance, the trial judge held that Kapoor had apparent authority. The company appealed.

² [1964] 2 QB 480 (CA).

According to Diplock LJ, how do actual and apparent authority differ?

- Actual authority relates to the relationship that exists between the principal and the agent. The third part is not a part of this relationship. Providing that an agent acts within the scope of his actual authority (which is usually stipulated in contract), the agent has the power to contractually bind the principal and the third party.
- Conversely, apparent authority relates to the relationship between the principal and the third party. Therefore, the agent is not part of the relationship. The relationship is created when the principal represents to the third party (through words, conduct etc) that the agent has authority to contract on behalf of the principal. Once the third party relies upon this representation, the principal cannot subsequently claim that the agent lacked the authority to contractually bind the principal to the third party.

Did Kapoor have actual authority to engage the claimant?

- The claimant contended that Kapoor had actual authority to engage its services. Both Wilmer and Diplock LJ rejected this contention. There was no evidence of express actual authority as there was no board resolution authorizing Kapoor to engage the claimant. Nor was there implied actual authority as there was no evidence of Kapoor being formally appointed to any office, which would give him the power to engage the claimant.

Did Kapoor have apparent authority to engage the claimant?

- As a matter of fact and law, the Court unanimously agreed that Kapoor had apparent authority to engage the claimant. As a matter of fact, the Court believed there was 'abundant evidence' that Kapoor had apparent authority, such as:
 - (a) The entire venture was Kapoor's affair and he only set up the company as he could not acquire sufficient capital
 - (b) For the majority of the time, the other company director was out of the country and unable to participate
 - (c) Evidence from those involved and the minutes of board meetings clearly indicated that Kapoor should carry out the necessary acts.
- As a matter of law, the court relied on the judgment of Lopes LJ in the case of *Biggerstaff v Rowatt's Wharf Ltd*,³ where he stated:

...a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing bona fide with such persons, have a right to assume that they have been duly appointed.

All three judges agreed that apparent authority was based upon the doctrine of estoppel. Explain how estoppel operates in relation to apparent authority

- Pearson LJ explained that the basis for recognizing an agent's apparent authority lay in the doctrine of estoppel by representation. To estop is simply to deny the assertion of a right. Where a principal represents (either expressly, impliedly or through acquiescence) that an agent has authority to

³ [1896] 2 Ch 93 (CA).

contract on his behalf, the principal will be estopped from later denying the truth of his representation and claiming that the agent lacked authority.

According to Diplock LJ, what conditions must be established to demonstrate that an agent had apparent authority to enter into a contract on behalf of the principal?

- Where an agent lacks actual authority, in order for a contract to exist between the principal and the third party, the following three conditions must be satisfied:
 1. A representation was made to the third party that the agent had authority to enter into the contract on the principal's behalf
 2. This representation was made by person/s who had actual authority, and
 3. The third party was induced into entering the contract by, and relied upon, the representation.
- Note that Diplock LJ specified a fourth condition, but this will only apply where the principal is a company. In this instance, the fourth condition is that the company (the principal) has the requisite authority under the Memorandum or Articles to enter into the contract, or to delegate authority to the agent to enter into the contract on its behalf. Given the companies incorporated under the Companies Act 2006 have unlimited objects by default, this fourth requirement will become less important as time passes.

Summary

- In *Hely-Hutchinson v Brayhead Ltd*, Denning MR defined apparent authority as 'the authority of an agent as it appears to others.' From a third party's perspective, the authority that the agent professes to have and appears to have may be more important than the agent's actual authority. After all, third parties may not be aware of the express terms of the agent's authority, or the office they the agent may hold. It is therefore vital that third parties are protected against agents who act in a manner inconsistent with the scope of their actual authority. Holding contracts valid based upon the agent's apparent authority provides this protection.
- However, this can be extremely harsh on principals who may find themselves bound to contract based upon an authority that they did not confer upon the agent. Therefore, as we have seen, the Court in *Freeman & Lockyer* established a number of requirements that can protect the principal, namely that in order for a contract to be binding based upon an agent's apparent authority, someone with actual authority (normally the principal) will need to have made a representation that the agent is acting within his authority.

Problem question

Discuss the following:

- Andrew instructs Peter to locate a specific rare stamp called a 'Penny Red.' For simply locating this stamp, Peter will be paid £1,000, although no contract is drawn up. To aid in the search and to convince prospective sellers that Andrew is a serious stamp-collector, Andrew allows Peter to take a 'Penny Blue' from his collection to display to prospective sellers. Peter locates a seller, a contract is concluded and Andrew acquires the 'Penny Red.' Andrew has yet to pay Peter, but is requesting that his 'Penny Blue' be returned. Advise Peter. Would your answer differ if Andrew promised to pay Peter if he returned the 'Penny Blue' but then went back on his word?
- John owns a 1951 Mercedes SL that he wishes to sell. He instructs Ross to sell the car, and in return, will be paid £5,000 commission. Ross manages to find a buyer, Paul, and introduces Paul to John.

However, John decides not to proceed with the sale. Advise Ross.

- Mike and his friend Anna are at a party. Anna has recently passed her driving test and wishes to purchase a car. Knowing little about cars, she asks Mike to find her a decent car as a favour. Mike finds a 2-year old Vauxhall Corsa and recommends it to Anna. She purchases the car. A week later, the car fails to start. A mechanic confirms that it suffers from a number of serious mechanical defects and was previously involved in an accident, but was repaired poorly. Advise Anna.

Andrew instructs Peter to locate a specific rare stamp called a 'Penny Red.' For simply locating this stamp, Peter will be paid £1,000, although no contract is drawn up. To aid in the search and to convince prospective sellers that Andrew is a serious stamp-collector, Andrew allows Peter to take a 'Penny Blue' from his collection to display to prospective sellers. Peter locates a seller, a contract is concluded and Andrew acquires the 'Penny Red.' Andrew has yet to pay Peter, but is requesting that his 'Penny Blue' be returned. Advise Peter. Would your answer differ if Andrew promised to pay Peter if he returned the 'Penny Blue' but then went back on his word?

- Obviously, one could argue that Peter has a right to be remunerated. However, there is no contract and no express term. The courts would be likely to imply such a term here, but there is another way for Peter to gain recompense, which is to exercise his right to a lien.
- A lien is simply a right to retain the possession of property until a debt is paid. Therefore, if the agent has possession of the principal's property and the principal is refusing to pay the agent for services rendered, the agent can keep possession of the property until the principal pays. Therefore, Peter could keep the 'Penny Blue' until Andrew paid him the £1,000.
- The lien is based upon the agent having possession of the goods. If he voluntarily parts with the property, the right to lien is lost. Therefore, one might assume that if Peter gives the stamp back to Andrew, the right is lost.
- However, it is settled that the lien is not lost if goods are recovered by the principal through trickery. Accordingly, if Peter promised to return the 'Penny Blue' upon a promise of payment from Andrew, should Andrew then refuse to pay, then it could be argued that Peter's lien is not lost.

John owns a 1951 Mercedes SL that he wishes to sell. He instructs Ross to sell the car, and in return, will be paid £5,000 commission. Ross manages to find a buyer, Paul, and introduces Paul to John. However, John decides not to proceed with the sale. Advise Ross.

- Ross will understandably be annoyed that he has done his job as instructed, but is denied the £5,000 due to John's refusal to sell. Can Ross initiate a claim against John?
- The issue to discuss here is can a principal prevent his agent from earning the agreed commission. If there is an express term that the principal will not hinder/hamper the agent, then the answer is probably yes. However, these situations are likely to be rare.
- Will the courts imply such a term? The courts would be highly reluctant to do this as it would restrict the principal's right to deal with his won property.
- The leading case is *Luxor (Eastbourne) Ltd v Cooper*.⁴ Here, estate agents were instructed to sell two cinemas with commission of £10,000 payable upon sale. They introduced a buyer to the owners of the cinemas, but the owners decided not to proceed with the sale. The estate agents claimed there should be an implied term that the owners should sell.
- The House of Lords refused to imply such a term. The House was influenced by the size of the commission, with Lord Russell stating '[a] sum of £10,000 (the equivalent of the remuneration of a year's work by the Lord Chancellor) for work done in a period of 8 or 9 days is no mean reward and is

⁴ [1941] AC 108 (HL).

one well worth the risk,' Therefore, the House stated that the agents had assumed the risk that the sale would not be completed.

- However, a term was implied in the case of *Alpha Trading Ltd v Dunshaw-Patten*.⁵ Here, the agent was engaged to arrange a contract for the sale of cement. A contract was concluded, but the principal deliberately broke it because the cost of cement had risen and selling later would net them more money.
- The Court of Appeal held that this was not a risk that the agent had agreed to bear. The Court implied a term requiring the seller to sell in order to prevent the principal 'playing a dirty trick on the agent.'
- Although, subsequent cases have gone back and forth, it does appear that the question is has the agent agreed to undertake the risk. Given this, one feels that our case involving Ross has more in common with *Luxor* than *Alpha* and so, Ross will probably be unable to claim.

Mike and his friend Anna are at a party. Anna has recently passed her driving test and wishes to purchase a car. Knowing little about cars, she asks Mike to find her a decent car as a favour. Mike finds a 2-year old Vauxhall Corsa and recommends it to Anna. She purchases the car. A week later, the car fails to start. A mechanic confirms that it suffers from a number of serious mechanical defects and was previously involved in an accident, but was repaired poorly. Advise Anna.

- There is no doubt that a contractually rewarded agent owes a duty to his principal to exercise reasonable care and skill in the performance of his duties. However, what if there is no contract (that is, the agent is a gratuitous agent)? Is payment necessary to be an agent?
- These issues were answered in the case of *Chaudhry v Prabhakar*.⁶ Here, the claimant (Chaudhry) just passed her driving test. She asked the defendant (Prabhakar), a close friend, to find a second-hand car which had not been involved in an accident. He did this for no payment.
- The claimant knew nothing about cars. The defendant, whilst not a mechanic, did know about them. The defendant found a car being offered for sale. He noticed that the bonnet had been repaired, but made no further enquiries as to whether the car had been in an accident or not. The claimant bought the car and later discovered that it had been involved in an accident and was unroadworthy. The claimant commenced proceedings against the defendant.
- The Court of Appeal stated that the standard required of any agent is such that is reasonable in all the circumstances. In deciding this, courts should take into account whether the agent was paid or unpaid, the degree of skill the agent possessed or claimed to have, and the degree of reliance placed upon the agent by the principal.
- Based on this, the Court held that the defendant had not exercised reasonable skill and so was liable to the claimant. Therefore, in our problem, it could validly be argued that Mike is Anna's agent, and his failure to obtain a car that met Anna's specifications (that is, a 'decent' car) breached his duty to take reasonable care.
- There are notable differences between our problem and *Chaudhry*. In *Chaudhry*, the claimant asked the defendant to find a car that had not been in an accident. There was evidence that the car had been in an accident, but the defendant did not bother to enquire about this. In our problem question, Anna's instructions were vaguer (to find a decent car). On this basis, you may feel that Mike had not breached his duty to exercise skill and care, especially given that you are not told whether or not Mike is an expert on cars.

⁵ [1981] QB 290 (CA).

⁶ [1989] 1 WLR 29 (CA).