Agency and Attribution of Knowledge and Conduct in Modern Commerce

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Four topics in agency and attribution

The modern approach to apparent authority and communication by agents who themselves lack authority

The statutory supplement in section 39 of the Financial Services and Markets Act 2000 for “appointed representative” (AR) firms

Principles of attribution

Modern extensions of vicarious liability

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First topic

Modern extensions of apparent authority

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American Restatement

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act."

Para 1.01.

So too *Bowstead & Reynolds on Agency*

Insufficient in commercial practice.

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A triangular relationship

The Principal ("P")

The Agent (A")

The Third Party or "Contractor" ("TP")

P-A: internal relationship: actual authority

External relationship: apparent or ostensible authority

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Examples of agents

Factors and brokers

Intermediaries in financial services: stockbrokers; insurance brokers (Lloyd's); independent financial advisers; credit brokers

Auctioneers

Company directors

Partners

Solicitors and counsel

"Commercial agency" under EU law

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Law of Agency

Actual authority

- Express
- Implied

Apparent or ostensible authority

Agency by operation of law

- Agency of necessity
- Statutory e.g.s CCA 1974 ss 56 and 75; FSMA 2000 s 39
- NB Companies Act 2006, s 40

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Actual and apparent authority

Three seminal cases:

Ireland v Livingstone (1872) LR 5 HL 395 (Lord Chelmsford)

Freeman & Lockyer v *Buckhurst Park Properties* [1964] 2 QB 480 (Diplock LJ)

Hely-Hutchinson v *Brayhead Ltd* [1968] 1 QB 549 (Roskill J; Lords Denning, Wilberforce and Pearson)

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Implied actual authority

(1) Incidental authority

(2) Usual authority

(3) Customary authority

(4) Conduct of the parties and circumstances of the case: *Hely-Hutchinson* v *Brayhead Ltd*

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Ingredients of apparent authority

(1) Representation by the principal (“holding out”)

Representation by the agent?

(2) Reliance by the third party (*Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846, [31] (Lord Scott))

(3) Alteration of position

Detriment?: *The Tatra* [1990] 2 Lloyd’s Rep 51,59 (Gatehouse J)

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Bootstraps?

- *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd, The Raffaella* [1985] 2 Lloyd's Rep 36
- *Armagas* v *Mundogas, The Ocean Frost* [1986] AC 717 (CA: Robert Goff LJ; and HL: Lord Keith)
- *First Energy (UK) Ltd* v *Hungarian International Bank* [1993] 2 Lloyd's Rep 194, CA
- *Kelly v Fraser* [2012] UKPC 25, [2013] 1 AC 450, PC

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The Raffaella

“It is obviously correct that an agent who has no actual or apparent authority either (a) to enter into a transaction or (b) to make representations as to the transaction cannot hold himself out as having authority to enter into the transaction so as to effect the principal's position. But, suppose a company confers actual or apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction; why should not such a representation be relied upon as part of the holding out of Y by the company? By parity of reasoning, if a company confers actual or apparent authority on A to make representations on the company's behalf but no actual authority on A to enter into the specific transaction, why should a representation made by A as to his authority not be capable of being relied on as one of the acts of holding out?”

Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd [1985] 2 Lloyd's Rep 36, 43 (Browne-Wilkinson LJ)

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The Ocean Frost

Robert Goff LJ in the Court of Appeal was scathing of an analysis involving:

"an extraordinary distinction between (1) a case where an agent, having no ostensible authority to enter into the relevant contract, wrongly asserts that he is invested with actual authority to do so, in which event the principal is not bound; and (2) a case where an agent, having no ostensible authority, wrongly asserts after negotiations that he has gone back to his principal and obtained actual authority, in which event the principal is bound. As a matter of common sense, this is most unlikely to be the law."

Armagas v Mundogas (The Ocean Frost) [1986] AC 717, 731.

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The Ocean Frost (2)

The House of Lords affirmed the decision of the Court of Appeal and endorsed Robert Goff LJ's analysis. Lord Keith (at 779) was not willing to accept:

"the general proposition that ostensible authority of an agent to communicate agreement by his principal to a particular transaction is conceptually different from ostensible authority to enter into that particular transaction."

Lord Keith thought, (at 777), that while it was conceptually possible to have a case of "ostensible specific authority to enter into a particular transaction", such cases were bound to be rare.

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First Energy

Disputed loan facility evidenced by a letter signed by the bank's Manchester branch manager alone

Customer was aware, through prior dealings, of the bank's usual practice, and of banking practice in general, that two signatures were required to approve a loan facility

Nevertheless the Court of Appeal robustly held that on the facts the manager had ostensible authority to communicate the approval of his superiors for the facility, and indeed general ostensible authority to communicate such matters.

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Kelly v Fraser

- Mr Fraser became President and Chief Executive of the Island Life Insurance Company in Jamaica, having previously been employed by another life office on the island.

- He sought to transfer his accrued pension benefits from his previous employer to his new employer's scheme. The vice-president of the company responsible for employee benefits wrote confirming the transfer, and subsequent statements showed it had taken place.

- However, although the funds were received, the trustees of the scheme were not aware of the transfer and had never been in a position to approve the transfer. The vice-president of the company responsible for employee benefits had been delegated power to conduct day-to-day administration of the scheme, but was not authorised to approve the transfer of funds into it.

- PC in a judgment delivered by Lord Sumption, formulated the question as being whether the vice-president and the employee benefits division personnel had the ostensible authority to tell Mr Fraser that whatever steps were needed to make the transfer had been duly performed, even if they had no authority to carry out those steps themselves.

Kelly v Fraser (2)

Lord Sumption distinguished *The Ocean Frost* as a case on "complex and extraordinary facts" where the agent was holding himself out as having authority to do a specific act where the third party knew that he had no general authority to do so. His Lordship referred with approval to both the statement of principle by Browne-Wilkinson LJ in *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd* and the *First Energy* case, and observed:

"Such cases are necessarily fact sensitive. *The Ocean Frost* is not authority for the broader proposition that a person without authority of any kind to enter into a transaction cannot as a matter of law occupy a position in which he has ostensible authority to tell a third party that the proper person has authorised it…."

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Kelly v Fraser (3)

"To take an obvious example, the company secretary does not have the actual authority which the board of directors has, but he is likely to have its ostensible authority by virtue of his functions to communicate what the board has decided or to authenticate documents which record what has been decided. The ordinary authority to communicate a company's authorisation of a transaction will generally be more widely distributed than that, especially in a bureaucratically complex organization and in the case of routine transactions. It is not at all uncommon for the authority to approve transactions to be limited to a handful of very senior officers, but for their approval to be communicated in the ordinary course of the company's administration by others whose function it is to do that."

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Second topic

Statutory agency – s.39 of FSMA

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Legislative Source

- S.19 FSMA and the general prohibition
- Authorised vs exempt persons
- Exempt persons and appointed representatives ("ARs") - piggybacking
- S.39(1) FSMA and the statutory contract – spawning networks
- S.39(3) FSMA – "*The principal…is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative* ***in carrying on the business for which he has accepted responsibility***"
- Statutory agency – directly authorised firm (principal) + indirectly regulated AR (agent)

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Consequences

(1) Principal stands in shoes of FCA – SUP

(2) Employees of AR are for regulatory purposes effectively employees of principal

(3) Clients of AR are for regulatory purposes effectively the clients of principal

(4) Redress – only principal subject to FOS compulsory jurisdiction – both principal and AR in firing line in any civil action

Networks sell 3 things – Piggybacking, capital/insurance and compliance/support/training

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The Proviso

"*in carrying on the business for which he has accepted responsibility*"

Customer has no access to AR contract

Principals have SUP duties to ensure that ARs do not carry out unpermitted activities

Statutory mischief – s.44(6) of FSA1986

Professor Gower's report – avoiding need for individual registrations of tied salespersons – but typically self-employed – regulatory 'trade-off'

Recommendation – "*it should be specifically enacted that the company to which they are tied is fully responsible for their acts to the same extent as if they were its employees with full authority to act on its behalf*"

Where did the proviso come from?

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Rothschild Insurance plc v Collyear – s.44(6)

"*The pensions in question were sold through JRA's sales force of 'appointed representatives' who have self-employed status but who enter into contracts for services to act as agents for JRA. JRA are responsible under s44(6) of the Act for everything that their appointed representatives do in carrying on JRA's investment business. However, each appointed representative is also potentially liable for his own mis-selling*" (per Rix J)

Prepared to gloss over proviso BUT proviso did not come up for direct consideration

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Emmanuel v DBS Management plc – s.44(6)

Defendant principal appointed AR for purpose of introducing clients

AR advises claimants to (1) invest £40,000 over 8-year period (NB transaction entered into 3 days prior to coming into force of s.44) (2) invest in shares in AR firm and to lend money to AR firm

Moneys dishonestly appropriated and AR goes into liquidation

"*An authorised person is liable for all the acts of his appointed representative which that representative does in the course of acting as such appointed representative, because those are the acts for which the authorised person will have accepted responsibility for the purposes of section 44…He is not responsible generally for all the acts which the appointed representative may have done in some capacity other than the carrying on of business for that particular principal*" (per Mr Jonathan Sumption QC)

High water mark of restrictive approach BUT unusual facts and no reference to public policy considerations

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Martin v Brittania Life Ltd – s.44(6)

Mis-selling of endowment product linked to re-mortgaging transaction provided by separate entity – NB mortgages not regulated at this time

Advice given by AR – principal denies liable for advice given in connection with other persons products

Associated or ancillary transactions

Jonathan Parker J emphasised that although source of AR's actual authority must derive from AR contract, "*such limitations take effect subject to the statutory agency imposed by section 44(6)…*"

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Page v Champion Financial Management Ltd – s.39(3)

"*…[the principal] has full responsibility in law for all the acts and omissions which the [AR] committed or omitted in carrying out its business as the [principal's] authorised representative…Responsibility under Section 39(3), which covers both civil and criminal liability, means that a claimant has the ability to pursue both the authorised representative and the principal…Section 39(3) prevents an authorised representative from* ***'falling through the net',*** *so that there is no regulation of his activities by the FCA, achieving this by making the principal responsible for the authorised representative's actions and enabling the principal to be sanctioned if its authorised representative fails to meet the requirements only indirectly imposed on the authorised representative*" (per Mr Simon Picken QC)

Public policy considerations – ARs not directly regulated + no principled reason why customer should be afforded less protection by engaging AR

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Ovcharenko v InvestUK Ltd – s.39(3)

HHJ Waksman QC dealing with argument that AR exceeded scope of permission in AR contract

"*I regard that proposition as wholly unarguable…First of all, as would be expected, the whole point of section 39(3) is to ensure a safeguard for clients who deal with authorised representatives but who would not otherwise be permitted to carry out regulated activities, so that they have a long stop liability target…section 39(3) is a clear and separate statutory route to liability*"

"*All that does is regulate the position inter se between D1 and D2. It says nothing about the scope of the liability of D2 to the claimants under section 39(3)…D2 will be, as it were, on the hook to the claimants as in respect of the defaults of D1 and if those defaults have arisen because D1 has exceeded what it was entitled to do or has broken the law in any way, then that gives a right of recourse which sounds in damages on the part of D2 against D1…*"

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Palmer v FCA – s.39(3)

Upper Tribunal Tax and Chancery Chamber

"*As the Authority observed in this case, regardless of the supplementary commercial arrangements that may exist between the principal firm and the appointed representative, the principal has full regulatory responsibility (including for any liabilities that might arise) for ensuring that the appointed representative complies with the Authority's rules: a breach by the appointed representative is regarded as a breach by the principal firm*"

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R v FOS (Tenetconnect Services Ltd) – s.39(3)

Ponzi-style fraud where AR advised surrender of regulated investments so that money could be invested in unregulated offshore property in Goa

FOS jurisdiction extends to unregulated advice in mixed case

Ouseley J expressed mild scepticism of "*seemingly rigidly drawn*" distinction in *Emmanuel*

"*The fact that Dhanda had no actual authority, express or implied, to act as he did on Tenet's behalf, nor was he held out by Tenet as having such authority, does not answer the s39(3) issue. The fact that Dhanda's acts were fraudulent does not take them outside the scope of statute. Fraud in the course of giving "regulated" advice comes within s39(3), for the reasons given in Ovcharenko, but with added force precisely because it concerns fraud*"

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Third topic

Attribution of conduct and knowledge of directors, employees and other agents

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Meridian

The leading case and seminal explanation is by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, PC.

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Meridian (2)

Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called “the rules of attribution.”

(Lord Hoffmann at 705-6)

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Meridian (3)

Primary rules of attribution:

The company's primary rules of attribution will generally be found in its constitution, typically the articles of association…. These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders.

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Meridian (4)

General rules of attribution:

The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

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Meridian (5)

Special rules of attribution – *context* and ***purpose***:

"there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

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Meridian (6)

The result:

Once it is appreciated that the question is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be as straightforward as it did to Heron J. The policy of section 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing.

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Bilta

Meridian's insistence on:

- Context
- Purpose
- Policy of the rule

Followed and applied by the UK Supreme Court in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1, esp at paras [187-90].

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Hampshire Land?

Status of “breach of duty exception” associated with *Re Hampshire Land Co* [1896] 2 Ch 743.

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Da Vinci

Meridian was recently applied in a financial services context in *Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401 (Ch), [2016] Bus LR 274, [2016] 3 All ER 547, paras [109-118].

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Topic Four

Vicarious liability ”on the move”

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Recent Developments

Various Claimants v Catholic Child Welfare Society

Cox v Ministry of Justice – law of VL "*has not yet come to a stop*" (per Lord Reed)

Essential factors of relationship, even in absence of contract of employment: (1) activity undertaken by tortfeasor on behalf of D (2) activity was integral to D's business activities

(3) D created the risk of tort being committed by tortfeasor

SC confirmed that expansive approach not confined to special category of hard cases

NB not to be extended to cases where tortfeasor's activities entirely attributable to independent business

NB Did not consider agency

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Frederick v Positive Solutions

Does modern expansive approach apply to reliance-based torts?

Claim struck out – importantly, Cs could not even satisfy the requirements of expansive approach, because fraud perpetrated by AR without any real involvement of principal – not integral to principal's business

"*In the circumstances, it is not necessary to go further and determine whether…reliance based torts such as deceit or misrepresentation committed by an agent are in a distinct category from other cases such the Christian Brothers case, Cox or Mohamud, so that the principal cannot be vicariously liable unless the agent had actual or ostensible authority…*" (per Flaux LJ)

Still open to argue that principal should be VL for reliance-based torts of agent as tortfeasor

SC has granted permission to appeal – watch this space

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