

Agency

I. Definition

“...the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”

(Bowstead and Reynolds on Agency, 17ed.)

“...relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal’s legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.”

(Fridman, The Law of Agency, 7ed.)

II. Creation of the relationship of principal and agent

(1) Way to create the agency relationship:

- (i) by express or implied agreement between principal and agent (actual authority);
- (ii) under the doctrine of apparent authority;
- (iii) by operation of law; and
- (iv) by ratification of the agent’s acts by the principal.

(2) Whether an agent has authority is a question of fact

(3) In general, P will only be bound by the contracts and acts of his agent if P has capacity to contract or to do the act himself. (cf. Companies Ord.)

III. Actual authority

- Real authority where prior consent given by principal expressly or impliedly
- Consensual but need not be contractual

Contractual	Purely consensual
Consideration present	No consideration
Agent under obligation to carry out his functions	Agent no such obligation
Principal under obligation to remunerate	Principal no such obligation
Agent's right to indemnity for loss and expense incurred in the execution of duties – arises by operation of law	

➤ **General rule:**

1. Only if A acts within scope of actual authority is he entitled to an indemnity from P (same for remuneration due under a contract of agency) (presence and scope of agency matter of construction).
2. If A acts outside actual authority, he may be liable to P for breach of contract or to 3p for breach of his implied warranty of authority (subject to P's later adoption or ratification of A's unauthorised actions).

i. Express actual authority: agreement

- No formality required (*Heard v Pilley*): orally (even if P-3p contract to be in writing or evidenced in writing)/ in writing/ by deed
 - Exceptions: (1) Statutory; (2) A appointed to execute deed must be appointed by deed unless deed is executed in P's presence (*Berkeley v Hardy*; *Ball v Dunsterville*)
- Where authority given orally or by instruction in a document not under seal, construed liberally, without regard to the purpose of the agency and to the usages of trade of business
- Where authority contained in deed, usual strict rules of construction apply: (1) authority limited to purpose for which it was given and (2) general words of appointment will be restricted by other specific words which describe the particular acts A is authorised to perform
- If P's instructions vague, A not in default if he had done a reasonable job in interpreting the instructions, provided that (1) he was being reasonable in the circumstances and (2) with modern technology (and time), he had first clarified those instructions with P

ii. Implied actual authority

- (1) Where it may arise
 - (i) *Incidental authority*
 - i.e. implied actual authority to do everything necessary for, or

ordinarily incidental to, the effective execution of his express authority in the usual way

- ◆ scope of incidental authority a matter of construction of express authority

(ii) Usual authority

i.e. implied actual authority to do what is usual in his trade, profession, or business for the purpose of carrying out his authority or anything necessary or incidental thereto

(iii) Customary authority

i.e. implied actual authority to act in accordance with the usages and customs of the particular place, market or business in which he is employed, so long as those usages or customs are reasonable and lawful

- ◆ Usage/custom unreasonable if inconsistent with P's instructions or with nature of agency relationship
- ◆ P bound by unreasonable usage/custom if had actual notice of it at the time he conferred authority on A
- ◆ Whether illegal usage/custom bind P, who is aware of illegality, depends on nature of illegality

(iv) Inferred from conduct of parties and circumstances of the case

- ◆ corresponds to creation by implied agreement
- ◆ P: appoint a person to a position in which he would usually act as agent for the person who appoints him; simply acquiesce in the acts of another (but P's consent not presumed from silence unless other factors indicate acquiescence)
- ◆ A: purported to act on P's behalf; A acting out P's request (but merely doing so not invariably result in agency relationship—act must be unequivocal)

- (2) A cannot have actual authority when he exceeds an express limit on his authority or when he does something which P has expressly prohibited, i.e. no implied actual authority where P expressly restricts A's authority.

P continues to be bound by prohibited acts of A if (1) those acts fall within the authority which A of that type would usually possess (usual authority),

and (2) 3p dealing with A is not aware of restrictions which P has placed on A's authority. > apparent authority

IV. Apparent Authority

- Not real authority; a form of estoppel; 3 ingredients:
 - (1) representation; (2) reliance on the representation and (3) alteration of position resulting from such reliance. (*Rama Corpn*);
 - “(1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
“(2) that such representation was 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;
“(3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it...”
(*per Lord Diplock, Freeman*) (note p.120 bottom – 121)
 - Effect of apparent authority
 - (1) create authority where there was none before
 - (2) enlarge A's actual authority
 - (3) clothe A with authority where he would usually have actual authority but for the existence of a restriction unknown to 3p
 - (4) extend A's authority beyond termination of the agency relationship
 - Make P liable under any contract made by A but not give P an independent cause of action unless P ratifies A's unauthorised act
- i. **Representation**
- Must be made by P or another intermediate agent with (actual) authority to make such representation
 - Representation by apparent authority?
 - ◆ Probably A with authority to make representations can make a representation that he/someone else has authority to do an act (*dicta per Browne-Wilkinson LJ, Egyptian*)

- ◆ But unless A would usually have authority to do the act in question, very difficult for 3p to rely on a specific representation of A/someone else's authority to act, as 3p would normally have been put on enquiry as to the actual limitation on A's authority (see *Armagas*)
- ◆ *Note to self: there may be situations where the intermediate agent do have apparent authority but the circumstances are so weird that 3p should nonetheless be put on enquiry regarding A's authority, such as when A is not an employee of the company*
- Can be express (oral/in writing) or implied (conduct/course of dealing/entrusting A with the indicia of ownership of property)
- Made to the particular 3p who deals with the agent, or to the public at large when it would be expected that members of the general public would be likely to deal with the agent (*Farquharson*)
- Must be of fact and not of law (*Chapleo*)
- **A must be authorised to act as agent and not as P (!!??-p.126)**
- Must be made intentionally or, possibly, negligently

ii. Reliance

- Causal connection between the representation and 3p's dealing with A and (where representation by negligence) P's breach of duty proximately caused 3p's damage
- 3p not able to rely on representation if he knew or ought to have known of the restriction on A's authority (**also that of intermediate A as well**)
 - Whether 3p under duty to inquire depends on who A is and the precise circumstances of the case
 - Where A acts within the usual authority of a person holding the position which he holds, there will normally be no duty to inquire, unless the transaction is abnormal or there are particular circumstances giving rise to suspicion
 - There may well be a duty to inquire where A acts outside the scope of his usual authority

iii. Alteration of position

- "[t]he only detriment that has to be shown...is the entering into the contract' (*The Tatra*)

iv. Subsequent conduct of P

- Not apparent authority
- P may be bound by a contract, even though the requirements of apparent authority are not satisfied, if he is precluded by his subsequent conduct from denying that the contract was made on his behalf:

“If A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B’s disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the non-existence of the supposed obligation.” (*per* Buckley LJ, *Spiro*)
- Detrimental reliance necessary

Add little comparison between actual and apparent authority after apparent authority (p.118 bottom)

V. Usual Authority

- No technical definition; mean different things in different contexts

Watteau v Fenwick

Facts: 3p sues UP for price of cigars supplied to UP’s hotel. The hotel was kept, not by UP, but by a person named Humble, whose name was over the door. 3p gave credit to Humble, and to him alone, and had never heard of UP. Humble was forbidden to buy cigars on credit. The cigars were such as would usually be supplied to and dealt in at such an establishment.

- Once it is established that P was the real principal, the ordinary doctrine as to P and A applies—that P is liable for all acts of A which are within the authority usually confided to an agent of the character, notwithstanding limitations, as between P and A, put upon the authority
- Not matter there is no holding out of authority (no apparent authority) (e.g. where person supplying goods knew nothing of the existence of P)
- Restrictions:
 1. Existing agency relationship, and A should be of such a character that it is possible to identify the ‘usual’ powers that such an agent

will have

2. *Watteau v Fenwick* not apply where A acts for himself and not for his principal, or where 3p knows, or ought reasonably to know, of the restriction on A's authority

- UP under personal liability but no right to sue 3p
- As A exceeds his actual authority, P cannot sue 3p under the doctrine of undisclosed principal; neither can he rely on ratification of A's acts, as an UP cannot ratify (see below)
- *Strongly criticised principle*

VI. Disclosed Agency

Disclosed principal – existence of whom 3p is aware at the time of contracting with A

'Named' – name of P known to 3p

'Unnamed' – name of P not known to 3p

i. General rule (*Montgomerie*)

- (1) Prima facie, at common law the only person who may sue is P, and the only person who may be sued is P.
 - ◆ where A acts within the scope of his authority on behalf of a disclosed principal, direct contractual relations are established between P and 3p
 - ◆ if A acts within the scope of his actual authority (express/implied), or P subsequently ratifies A's unauthorised acts, P may sue and be sued on the contract
 - ◆ if A has only apparent authority P will be liable on the contract made by A but he will not be able to sue upon it himself, unless he ratifies A's unauthorised act
 - ◆ where A acts without authority and there is no ratification, P will incur no liability to 3p; A cannot be sued as P but may be sued, if there was any fraud, in an action for deceit, or on an implied contract that he had authority, whether there was fraud or not

- (2) P may be excluded in several other cases.
 - ◆ when contract made by deed inter partes between A and 3p, P will not be able to sue and be sued on the contract unless he is described in the deed as a party to it and the deed is executed in his name (exception: if A who contract by deed contract as trustee for P then P can sue on the deed)
 - ◆ when A makes himself a party in writing to a bill or note
 - ◆ P cannot be made liable on any negotiable instrument unless his signature appears on it; however, P will be liable on the instrument if his signature is written on the document by someone acting by or with his authority. A signature by procuration will put 3p on notice that A's authority to sign is limited and P will only be bound by signature if A was acting within the scope of his actual authority.
- (3) P's ability may be limited, though not excluded.
 - ◆ where 3p elects to sue A, cannot sue P afterwards
 - ◆ if P is sued, he is entitled to an allowance for payments which he may have made to A if 3p gave credit originally to A
- (4) In all cases the parties can by their express contract provide that A shall be the person liable either concurrently with or to the exclusion of P, or that A shall be the party to sue either concurrently with or to the exclusion of P.
- (5) Although the general is that A 'drops out' of any contract made on behalf of his disclosed principal, the mere fact that a person acts as agent does not prevent him being liable to 3p.
 - ◆ "...a person is liable for his engagements (as for his torts) even though he acts for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negated his personal liability." (*Yeung Kai Yung*)
- (6) A may be liable and entitled on the main contract made with 3p or on a collateral contract. Even if not liable on the main contract, A may be liable for breach of warranty of authority.
- (7) A may be personally liable in tort.
- (8) A may be personally liable for deceit notwithstanding P's liability.

ii. **Ways in which the rights and liabilities of P and 3p may be affected by A**

- Settlement with A
- Set-Off and other defences available against A
- Merger and election

iii. **Exception to the general rule that A drops out when act within authority**

(1) “Where A contracts with B on behalf of a disclosed principal C, the question whether both A and C are liable on the contract or only C, the question whether both A and C are liable on the contract or only C depends on the intention of the parties, That intention is to be gathered from (1) the nature of the contract, (2) its terms and (3) the surrounding circumstances.” (*The Swan*)

- ◆ objective intention of A and 3p
- ◆ each contract construed in its own context; contracts made by deed, bills of exchange, promissory notes and cheques are governed by their own rules
- ◆ the terms of the written contract indicating that A contracted personally cannot be contradicted by parol or other extrinsic evidence (but A may have an equitable defence if he can establish an extrinsic agreement between himself and 3p that he should not be made personally liable)
- ◆ with oral contract it is a question of fact in each particular case whether it was intended that A should or should not be sued, and/or held personally liable, on the contract. A’s failure to name P is merely one factor, albeit a significant one, for the court to take into account when assessing whether A intended to contract personally
- ◆ if A contracts by deed, he will be personally liable so long as he is a party to the deed and has executed it in his own name. In the circumstances, A will be liable even if he is described in the deed as acting for and on behalf of a named principal
- ◆ at common law, A who purports to act for a non-existent or fictitious P may be held personally liable on the contract. Whether A is liable turns on the objective construction of the terms of the contract by the court. Even if the parties did not intend A to be liable on the contract, he may still be held liable for breach of warranty of authority, in deceit, or possibly for

negligent misstatement.

- ◆ by statute, where a contract purports to be made by or on behalf of a company at a time when the company has not yet been formed, then subject to any agreement to the contrary, the contract has effect as a contract made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly. If A is to avoid liability under the statute, there must be ‘a clear exclusion of personal liability’: signing the contract ‘for and on behalf of X Ltd’ would not be enough.
- ◆ When it turns out that A is in fact his own P, there is authority that the apparent agent can be held personally liable on the contract.

- (2) “The intention for which the Court looks is an objective intention of both parties, based on what two reasonable businessmen making a contract of that nature, in those terms and in those surrounding circumstances, must be taken to have intended.” (*The Swan*)
- (3) “Where a contract is wholly in writing, the intention depends on the true construction, having regard to the nature of the contract and the surrounding circumstances, of the document or documents in which the contract is contained. Where...the contract is partly oral and partly in writing, the intention depends on the true effect, having regard again to the nature of the contract and the surrounding circumstances, of the oral and written terms taken together.” (*The Swan*)
 - ◆ “...no difference in the approach to the problem, whether the contract concerned is wholly in writing or partly in writing and partly oral. In either case the terms of the contract must be looked at and their true effect ascertained.” (*The Swan*)
 - ◆ Parol evidence of custom or usage may be introduced to show that A is personally liable on a contract, where he does not appear otherwise to be so and the parol evidence does not contradict the terms
- (4) If A signs a contract solely in his own name, he is personally liable as principal unless there are other terms in the contract that blatantly shows that he is an agent.

(5) If A signs a contract and shows words such as “Agent”/”Director”/”Broker”, this may amount to no more than a description of his position/post and not a qualification of his liability, unless a contrary intention can be established from the whole of the contract or from the surrounding circumstances. However, courts generally view this as not enough to exclude liability.

- ◆ “Where such words are not used but the person is merely stated to be an agent, or the word ‘agent’ is just added after is signature, the result is uncertain, because it is not clear whether the word is used as a qualification or merely as a description...In general it would seem that in such a case the person does not avoid personal liability, although there may be exception to this general rule depending on the other terms of the contract or the surrounding circumstances.” (*The Swan*)
- ◆ “Where a person contract as agent for a company and does nothing more than add the word ‘director’ or ‘secretary’ after his signature, it seems that he does not avoid personal liability...” (*The Swan*)

(6) If A signs in a way that shows that he is signing with exclusion of his liability, he is generally not liable, e.g. “as agent”. (A may nonetheless undertake some form of personal liability)

- ◆ “Where it is stated in the contract that a person makes it ‘as agent for’, or ‘on account of’, or ‘on behalf of’, or simply ‘for’, a principal, or where words of that kind are added after such person’s signature, he is not personally liable.” (*The Swan*)

Sometimes when a practice have been adopted by the commercial community, it is better to give effect to it as certainty is important in commercial practice.

Remember: consider whether A/P solely/jointly liable
As if joint: A/P sued > may go to the other and seek indemnity

Universal Steam

Facts: D "as agents"

Held: "...The words 'as agents' are, in my opinion, clearly words of qualification and not of description." (*per* Lord Parmoor)

The Swan

Facts: Ps claiming cost of repairs to a vessel, which was owned by Rodger but at all material times hired to a company. Rodger was a director and shareholder of the company and acted as A of the company when it ordered repairs to be carried out to the vessel. Contract partly oral and partly in writing on the company's headed notepaper, signed "JD Rodger, Director". P knew Rodger was the company's agent but they also knew he was the vessel's owner. P claimed that Rodger was personally liable on the contracts, the company having become insolvent.

Held: Though Rodger signed as agent, he did not sign solely as agent, i.e. Both Rodger and company liable. > a borderline case > not matter that company did all the payment

Reasoning: "The main surrounding circumstance, in my view, is that the defendant was at all material times the owner of the Swan and that both plaintiffs dealt with him either in the knowledge or on the correct assumption that he had a personal interest in the repairs in addition to his interest as director of the company"

"But the question is whether he made it clear to them at the same time that, although he was the owner of the boat and would therefore derive personal benefit from the repairs, he was nevertheless disowning any personal liability to pay for the work. Unless he did so it seems to me that they were entitled to assume that, while he was placing the order for the company to whom the account was to be sent, he remained also personally liable on the contract."

Burden of proof on Rodger to show that he had made it clear to the plaintiffs that, although he was the owner of the boat and would therefore derive personal benefit from the repairs, he was nonetheless disowning any personal liability to pay for the work.

The Santa Carina

Facts: P and D are both brokers (agents) for their own principals. P aware of D being an agent, those principal unnamed. Contract made orally.

Held: D cannot be sued as, inferring from the contract and the whole of the circumstances, they were acting as agents only.

Note: The cases on written orders and written contracts do not apply to oral orders or oral contracts—at any rate not so rigidly.

iv. **When A is entitled to sue on the main contract**

- (1) Where it is the parties' intention that A should have rights as well as liabilities on the main contract.
- (2) Where A's right of action arises out of a collateral contract with 3p.
- (3) Where A has some special property in the subject matter of the contract, or possesses a lien over it, or has a beneficial interest in completion of the contract, he may sue 3p.
- (4) Where A purports to contract on behalf of a company yet to be formed, A may be entitled as well as liable on the contract under the Companies Ordinance.
- (5) If A turns out to be the real P, he, having signed a contract as agent for a named principal, may not sue as the real principal, at all events unless he had given notice to 3p of his true status in advance of bringing the action.
 - ◆ From Alderton B's dictum in *Rayner*, A who purports to act for a *named* principal may nevertheless sue on the contract as the real principal provided that A has informed 3p that he acted on his own behalf, or 3p has otherwise become aware of the true position, *and* the identity of P was immaterial to the making of the contract by 3p.
 - ◆ Alderton B also suggested that, whenever the contract remained entirely executory, A should not be allowed to sue in his own name.

- ◆ What if *unnamed* P? A number of cases where A, who purports to act for an unnamed P, has been allowed to reveal himself as the real P and sue on the contract, on the ground that the personal characteristics of the supposed P cannot have influenced 3p.

v. **Breach of warranty of authority**

- Warranty of authority
 - made when one represents oneself, by words or conduct, as having authority to act on behalf of another and induces 3p by such representation to act in a manner in which he would not have acted if such representation had not been made
 - may also be made for another person
 - Note academic debate as to whether apparent authority/ratification by A gives rise to such warranty

- Breach of warranty
 - liable for any loss caused to 3p whether (1) A was fraudulent or (2) has without fraud untruly represented that he had authority when he had not or (3) innocently misrepresents that he has authority where the fact is either (a) that he never had authority or (b) that his original authority has ceased by reasons of facts of which he has not knowledge or means of knowledge (*Yonge v Toynbee*)
 - may be liable to a person unknown but who nevertheless relied upon his representation
 - 3p need not be induced to transact with P as a result of A's warranty

- Liability may not apply if:
 - (1) A will not be liable where 3p knew, or ought to have known, that A was not warranting his authority
 - (2) A's representation of authority must be one of fact and not of law
 - (3) A's warranty is limited: authority to make the contract or enter into the transaction; not that the contract or transaction will be performed by P. Thus if P insolvent, 3p cannot recover more from A than he would have recovered from P, had A had authority.

- Contractual measure of damages
 - Difference in the position 3p would have been in had the

representation been true and the position he is actually in in consequence of its being untrue

- Assessed at the date of the breach; not absolute rule and may be assessed at another date if it is more just to do so

Yonge v Toynbee

Facts: Solicitors instructed of Toynbee to defend an action. Unknown to the solicitors, Toynbee became of unsound mind before the action. The solicitors entered an appearance in certain proceedings but then discovered their client was insane and informed Yonge of the fact. Yonge then applied for the solicitors to pay personally for his costs of action, that they have acted without authority.

Held: Solicitors liable

“...a person professing a contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist.”

VII. Undisclosed Agency

3p deals with A under the impression that he is not dealing with an agent but a principal > unaware of agency

Privity between 3p and A > P intervenes

Authority must be **actual authority** (express/implied)

- (4) If apparent authority, 3p would have been aware of existence of P (cf. **usual authority**)

i. General rule (*Sin Yin Kwan*)

- (1) An undisclosed principal may sue or be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority.
- (2) In entering into the contract, the agent must **intend (objective?/subjective?)** to act on the principal's behalf.

- (3) The agent of an undisclosed principal may also sue and be sued on the contract. (have limitations)
- (4) Any defence which the third party may have against the agent is available against his principal.
- (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.
- (6) It matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone whose behalf the agent may have been authorised to contract. (*Teheran-Europe*)
 - i. "If B contracts with C prima facie that is a contract between these two only, but if at the time B entered into the contract he was really acting as agent for A, then evidence is generally admissible to show that A was the principal, and A can take advantage of the contract as if it had been actually made between himself and C...the principle is limited by [a] consideration..." (*Fred Drughorn*)
- (7) In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so willing." (*Teheran-Europe*)
- (8) If P is UP and is sued, must accept the facts as he finds them at the date of his disclosure, so far as those facts are consistent with reasonable and proper conduct on the part of 3p. (*Montgomerie*)

Sin Yin Kwan

Facts: Shipping agents insured in their own name the employers of the crew of a ship against liability.

The insurers had dealt with the shipping agents before and knew that they did not own the ship, but it was just about conceivable that they might have employed the crew. The actual employers were the ship owners, whom were not mentioned in the policy. The ship sank in an accident and the relatives of the dead employees sued the insurers. The success of the action depended on whether the owners could themselves have enforced the policy.

PC Held: Owners (undisclosed P) can enforce policy.

Reasoning: Although the policy is personal in the sense that it is not assignable, this did not prevent the intervention of the owners as UP in this case because the trial judge had found as a fact that the identity of the actual employer was a matter of indifference to the insurer and not material to the risk (only risk factor that matters has already been assessed) (Obiter: impersonal contract as opposed to a contract to paint a portrait; an ordinary commercial transaction; not clear that insurance company only wanted to contract with the agents as not exclusion of P)

Dragages

Facts: contract entered into by G "for and on behalf of" his principal

Held: sufficient to exclude G's personal liability > those terms commonly accepted by common practice as having such effect > should continue to have such effect

ii. Exclusion of the undisclosed principal

- (1) Where it can be shown 3p intended to contract with A and no one else
 - ii. e.g. By the terms of the contract
 1. Evidence of P's authority not admissible if to give such evidence would be to contradict some term in the contract itself (*Fred Drughorn*); e.g. where A described as "owner"/"proprietor"
 2. Where A described as "charterer", not preclude admission of evidence: unlike the case of an owner/proprietor, a charterparty is not a lease but prima facie a contract for the hiring and use of the vessel and thus the charterer should be able to contract as agents
 3. Test: whether A has expressly/implicitly contracted that there is no principal behind him
- (2) On grounds of personal characteristics
 - (i) Incidents where personal attributes of contracting party matters
 4. e.g. skills, solvency (credit/financial standing; cannot

assign to someone bankrupt) or other personal characteristics of A

5. where performance expected from contracting party
6. expect P not allowed to intervene

Set-off

- (5) suppose A owes B \$500 and B owes A \$1,000 > set them off and thus B owes A a net amount of \$500
- (6) some 3p enters into contract with A as A owed him \$ > 3p wants to take advantage of his right to set off
- (7) therefore, if UP intervenes, unfair to 3p as 3p no set off against P
- (8) therefore, generally speaking, UP not allowed to intervene when 3p contract on the basis of his right to set off (there are exceptions; principle flawed as when UP intervenes, 3p can use defence against A on P (above, p.7)

Greer v Down

Down (3p) purchased timber from A, it being agreed that 3p should have the right to set off against the price the debt A owed to him. A was actually acting for UP who sought to intervene.

CA held: UP no right of action, as 3p contracting with A because A was his debtor.

Said v Butt

Said wished to attend the first night of a new play to be staged at the Palace Theatre. He knew the theatre owners would not sell a ticket to him because of an existing dispute with them. Said therefore asked his friend to buy a ticket for him. When Said arrived at the theatre for the performance, Butt (managing director) refused him admittance. Said sued Butt for wrongfully inducing the theatre owners to commit a breach of contract.

KB held: Said cannot sue on contract. No contract between UP and 3p; contract between A and 3p. Everyone knows 3p will not contract with UP; personal element strikingly present.

Dyster v Randall

Dyster (UP) knowing that Randall would not sell certain land to him (due to distrust), procured his friend to purchase the land for him. When Randall discovered, they sought to resist specific performance of the contract of sale of the land.

Chancery Division held: UP may enforce contract.

Reasoning: Personal qualifications of Dyster's friend not a material ingredient of the contract; contract assignable; no actual misrepresentation as 3p not asked A whether acting for someone else; no mistake (sale of land).

- (ii) Where there cannot be vicarious performance of the contract
 1. e.g. A contracted to paint; cannot ask someone else to do it; somewhat personal
 - (iii) Where contract normally not assignable, strong evidence that 3p only intends to contract with A (exclude intervention of UP)
 2. not absolute as in *Siu Yiu Kwan* (above)
 - (iv) Arguable whether UP can intervene when 3p clearly will not contract with UP
 3. *Said cf. Dyster*
 4. But clear from *Dyster*: mere fact that 3p would not have dealt with UP was not enough to prevent P's intervention
 - (v) If the contract between A and 3p was induced by A's misrepresentation, P cannot enforce it against 3p. (*Archer v Stone*)
- (3) Deeds, bills of exchange and promissory notes
- ii. UP cannot sue or be sued on a deed *inter partes*, nor can he be made liable on any negotiable instruments.

iii. Rights of 3p

- (1) 3p may sue and be sued by A (with limitation).
 - iii. Privity of contract

- (2) 3p may sue and be sued by P (with limitation).
 - iv. As A had actual authority from P

- (3) If 3p is sued by P/contract intervened by P, 3p entitled to raise any defences he has against A (which would be available to him against A as long as those defences accrued before 3p had notice of P's existence) (including personal set-off of debts) and P.
 - v. Right of set-off (*Cooke*)
 1. Not enough to show A contracted in his own name
 2. Must also show A contracted on his own account, in other words, the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that A was selling on his own account and not for an UP
 - i. 3p must not have notice of the existence of P at the time he contracted with A, or at the time that the debt available for setting off accrued if that was later
 - ii. Notice = no 'reasonable belief' that A was selling on his own account and not for an UP / put on notice of P's existence if the circumstances are such as to put 3p on inquiry as to the status of A and he fails to make an inquiry
 - iii. E.g. *Cooke*: equivocal as to whether A contracting on his own account or for UP; A failed to inquire
 3. Must also be shown that A was enabled to appear as the real contracting party by the conduct, or the authority, express or implied, of P
 4. In short, UP not bound by 3p's rights of set-off against A unless P had misled 3p by allowing A to appear as P

- (4) If 3p is sued by A, 3p can set up against him any defence which would have been available against UP, including the fraud of UP.
 - vi. Set-off may not be always available

- (5) Once P intervenes, A can no longer sue.
 - vii. As when P intervenes, P taking ownership of contract;

inconsistent for both to have right to sue

viii. It is otherwise if A has a lien or other interest over the goods which form the subject matter of the contract

(6) As 3p enters into contract without knowledge of P, A and P liable on the contract in the alternative, i.e. 3p can sue either.

- ix. Even if P intervenes, 3p can still sue either
- x. A remains liable until 3p elects to sue one

(7) Limitation on 3p's right to sue: 3p has to elect whom to sue; pick one only

xi. What is election? Question of facts depending on the circumstances (act can be short of obtaining judgment)

1. But 3p must have (1) full knowledge of all the relevant facts and (2) unequivocally chosen to pursue one in the exclusion of the other

2. When 3p sues A/P and not go till judgment

甲、Prima facie evidence of election, but not conclusive

i. Retain right to sue if issue simultaneous writ; simultaneously expressly inform the other that the alternative claim was not abandoned; simultaneously 3p was maintaining vis-à-vis the other the attitude that he might be looked to for liability on the contract

ii. See *Clarkson v Andjel*: letter threatening proceedings to A and P; letter then written to P announcing intention 'to obtain judgment' against them; no similar letter written to A; no steps taken beyond the issue and service of the writ. CA held no election as threat of proceedings not withdrawn.

3. When 3p presses all the way and obtain judgment

i. Clear evidence of election, even if retains all along right to sue the other

ii. When get judgment, merger (contractual right merged with judgment; the other may not be sued on the contract; right on the judgment, not contract) (*Priestly v Fernie*)

4. Debiting one party
 - i. May be evidence of election

(8) Where UP, after the contract was made, and in consequence of it, bona fide and without moral blame, paid A at a time when 3p still gave credit to A, and knew of no one else, it is too late for 3p to come upon UP. (*Armstrong*)

- xii. where A indebted to UP (thus giving rise to a set-off or mutual credit between them), situation may be different

(9) Where 3p pays or settles with A acting for UP, 3p discharged from liability to UP if he was unaware of UP's existence at the time of payment or settlement. (*Coates*)

- xiii. in the case of a set-off, 3p can only rely on this defence if UP's conduct induced him to believe that A was the principal in the transaction

VIII. Ratification

If A acts without authority, or exceeds his authority, his actions cannot bind P on whose behalf he purports to act. Subsequently, however, P may ratify A's acts.

i.e. for apparent authority; not necessary for actual authority

(1) Ratification validates A's actions with effect from the time those actions took place

(2) Express/implied from P's unequivocal conduct

- ◆ If implied from conduct, P must be shown to have had full knowledge of A's unauthorised acts and a real choice as to whether or not he wished to adopt them
 - Silence or inactivity alone not amount to ratification
 - may amount to ratification if coupled with other factors
 - ◆ e.g. where P is aware of all the material facts and appreciates that he is regarded as having accepted the position of P, and takes no steps to disown that character within a reasonable time,

or adopts no means of asserting his rights at the earliest possible time

- ◆ P with incomplete knowledge may be held to have ratified the unauthorised acts of his agents if it can be shown that he took a risk as to how the circumstances might turn out

(3) Must adopt transaction in its entirety, but adoption of part of a transaction may be held to be ratification of the whole

(4) Requirements for ratification

(i) P can only ratify where A purported to do on P's behalf 'openly and avowedly'. If A purports to act on his own behalf, P cannot ratify.

- thus principal affected by usual authority and undisclosed principal cannot ratify
 - remember: UP may sue and be sued on a contract made by A acting within the scope of his actual authority
- A's 'undisclosed intentions' irrelevant

(ii) P must be in existence at the time of A's act

- newly incorporated company cannot ratify a prior contract made by its promoters > promoters liable (*Kelner v Baxter*)
- s.32A of CO: companies allowed to ratify such contract after incorporation

(iii) Person for whom A professes to act must be a person capable of being ascertained at the time.

- Not necessary to be names
- Must be such description of him as shall amount to a reasonable designation of the person intended to be bound by the contract
- Note exception: marine insurance

(iv) P must have been competent at the time when the act was done by A

- (v) P must also have capacity at the date of the purported ratification
- (vi) An act which is void *ab initio* cannot be ratified.
 - voidable acts can be ratified
- (vii) P cannot ratify an unauthorised contract which is prohibited by statute.

(5) Effect of ratification

- ◆ Ratification is thrown back to the date of the act done, and A is put in the same position as if he had had authority to do the act at the time the act was done by him (*Bolton Partners v Lambert*)
 - Not matter that 3p purported to withdraw before the ratification
- ◆ Effect limited:
 - (i) Must take place within a reasonable time after acceptance of the offer by the unauthorised person
 - ◆ What a reasonable time is will depend on the facts of the case
 - ◆ Passing limitation period not conclusive
 - ◆ May ratify even after loss incurred (see insurance cases)
 - ◆ Not permit if unfairly prejudice 3p (see below)
 - ◆ 3p may abridge the time within which the ratification must take place by informing P of his wish to withdraw from the contract
 - (ii) Rule in *Bolton Partners* will not apply if 3p's offer was expressly made subject to ratification, or 3p's acceptance was expressly made subject to ratification, or 3p has intimation (knowledge) of the limitation of A's authority
 - ◆ 3p may withdraw his offer at any time before P ratifies A's unauthorised acceptance
 - (iii) A and 3p may cancel the unauthorised transaction by mutual consent
 - (iv) Ratification is not effective where to permit it would

unfairly prejudice 3p, and in particular where it is essential to the validity of an act that it should be done within a certain time, the act cannot be ratified after the expiration of that time, to the prejudice of any 3p

- ◆ in each case, important to assess whether there has been unfair prejudice to 3p; even a relatively small amount of prejudice coupled with a long delay before ratification may be unfair
- ◆ what is required to show unfair prejudice unclear

Remember all the above principles must be looked at in light of the cases and common sense.