3. AGENCY AND PARTNERSHIP LAW

AGENCY LAW

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Apparent authority

The elements

3.1 The elements that must be present before apparent or ostensible authority is made out are not controversial. As the concept is premised on estoppel, the principal's representation, that created the appearance of authority of an agent, made to the other contracting party, lies at the core of the doctrine. Where the representation does not emanate from the principal himself, as would necessarily be the case where corporations are concerned, it is of central importance to show that the representation was made by a person with the actual authority to make such representations. Such persons would include one who has the actual authority to manage the business of the principal either generally or in respect of the matters to which the impugned contract relates: see *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480. It is clear therefore that a representation as to his own actual authority made by the unauthorised agent himself will not suffice.

3.2 These points were reiterated by the High Court in *Equatorial Marine Fuel Management Services Pte Ltd v The Bunga Melati 5* [2010] SGHC 193. The plaintiff claimed against the defendant for sums allegedly owing under certain contracts for the supply of bunkers to the defendant's vessels. The plaintiff's case was that these contracts were made on the defendant's behalf by its alleged agent, MAL. The defendant's case, however, was that it had procured the sale and supply of bunkers to its vessels from MAL directly as the contractual seller. The plaintiff lacked the evidence to support a case of actual agency and sought to rely instead on, *inter alia*, the evidence of *third parties*, that the employees of the defendant had made representations to *them* that MAL was its agent, to establish a case of apparent authority.

3.3 The court held that the plaintiff's evidence fell far short of that required for establishing an agency by estoppel. Not only was there no evidence that those employees were authorised to manage the business

of the defendant, the representations, if made at all, were not made to the plaintiff. The plaintiff's case was therefore bound to fail.

The scope of apparent authority

3.4 Even where it is established that the principal has created, by a representation, an appearance of authority that was relied upon by the contracting party, the latter can only hold the principal to the contract if that contract falls within the scope of the apparent authority. The point is illustrated by the decision in *United States Trading Co Pte Ltd v Philips Electronics Singapore Pte Ltd* [2010] SGHC 194 ("*United States Trading*").

3.5 The plaintiff, United States Trading Co Pte Ltd ("UST"), claimed against the defendant, Philips Electronics ("Philips"), for a sum of money advanced to the latter purportedly under a contract of loan entered into on Philips' behalf by its agent. UST was a commission agent representing Lucky Alloys ("LA"), an aluminium smelter in Dubai. LA was one of Philips' two main suppliers of aluminium. Jason Ting ("Ting") was an employee of Philips who was responsible for the purchase of aluminium. He would receive quotations from UST for supply of aluminium from LA, orally confirm orders with UST, and raise the necessary purchase orders to LA, which were signed by the general manager and chief financial officer of Philips. Ting has been performing this function for at least four years. In 2006, when the prices of aluminium were rising rapidly, Ting requested help from UST to partially finance the purchase of an additional quantity of the metal. Ting convinced UST that the additional order was urgently required and that the financial assistance from UST was required as Philips had exhausted its budget for that year as a result of the price increases, and Philips' internal bureaucratic processes would delay the approval necessary for a budgetary increase. UST was persuaded to issue a cheque on the faith of a written acknowledgment of the loan and an indemnity purportedly issued by Philips, as well as a promise that more orders will be placed through UST.

3.6 As it turned out, Philips did not receive the moneys, which were in fact misappropriated by Ting as part of a fraudulent scheme. UST claimed that Ting, by reason of his appointment as purchasing manager as well as UST's course of dealings with him over the years, had been clothed with the necessary authority to enter into a loan contract with UST. Lee Seiu Kin J observed (*United States Trading* at [18]) as follows:

> While the course of dealings particularised could have led [UST] to the conclusion that Ting's authority to enter into purchase contracts was deep and wide, I cannot see how this can reasonably lead to the conclusion that he could borrow money on [Philips'] behalf, even

> though the loan was purportedly for the purpose of financing the purchase of raw materials.

3.7 UST's claim in contract therefore failed.

Liability to account

Burden of proof

3.8 In *Zim Integrated Shipping Services Ltd v Dafni Igal* [2010] SGCA 45 ("*Zim Integrated Shipping*"), the Court of Appeal held that, where moneys have been received by an agent in the course of its agency with the principal, the burden of explaining and justifying the receipt and retention of moneys by the agent laid with the agent.

3.9 Zim Integrated Shipping Services Ltd ("Zim") operated a container shipping business globally through a network of shipping agents, and its operations in Malaysia were facilitated by various agency arrangements with, *inter alia*, Starship Agencies Sdn Bhd ("Starship"), a shipping agency incorporated in Malaysia. The present dispute arose in connection with the payment of moneys to Starship by the operator of Port Klang, which were allegedly incentive rebates made on tariffs that had been paid by Zim *vis-à-vis* the export of containers from Port Klang. The moneys, therefore, ought to have been accounted for to Zim.

3.10 Whilst Zim bore the legal burden of establishing their legal entitlement to the moneys received by the agent, the court found that Zim had discharged its evidential burden of proving that the moneys were received in connection with Starship's role as Zim's agent. The evidential burden then shifted to the agent, Starship, to demonstrate that the moneys had not been so received. Andrew Phang JA observed (*Zim Integrated Shipping* at [12]) as follows:

> [I]t having been proven that payment had been made by a third party … to the agent (here, [Starship]), the agent has the burden of explaining as well as justifying its receipt and retention of the payment concerned. More importantly, perhaps, it could be argued that the burden thus placed on the fiduciary … is not merely an evidential one but a *legal* one. [Starship] had the burden of proving that full disclosure was made to [Zim], and that their consent was subsequently given. [emphasis in original]

3.11 As Starship had failed to discharge the burden of proof placed on it, it was liable to account to Zim for the moneys received.

PARTNERSHIP LAW

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Relationship of partners to third parties

3.12 There was only one significant partnership law case in 2010. In *Lim Hsi-Wei Marc v Orix Capital* [2010] 3 SLR 1189 ("*Lim Hsi-Wei*"), the Court of Appeal allowed an appeal from the High Court in *Orix Capital Ltd v Personal Representative(s) of the Estate of Lim Chor Pee, deceased* [2009] 4 SLR(R) 1062 (noted in (2009) 10 SAL Ann Rev 48). The appeal judgment is an important decision on the scope of the ostensible authority of a partner under s 5 of the Partnership Act (Cap 391, 1994 Rev Ed) (the "Act") and also the application of s 36 of the Act to "salaried" partners. The basic facts were as follows. Chor Pee & Partners ("CP&P") was a law firm comprising Lim Chor Pee ("LCP") and two salaried partners, Marc Lim ("Marc") (LCP's son) and Rebecca Yeo ("Rebecca"). The firm took a lease of Canon photocopiers from Orix Capital ("Orix") in July 2004 ("the Lease"). The Lease was in substitution for an existing copier lease from another company, Newcourt; as a result, a large early-termination payment would be triggered under the Newcourt lease. Under a four-way deal, Canon paid off the early-termination payment to Newcourt, that payment being reimbursed by Orix to Canon and, in effect, added to the sums payable by the firm under the Lease. The latter was signed by LCP and Marc; it also named, but was not signed by, Rebecca. In July 2005, the firm defaulted on rental payments, and Orix gave notice of termination of the Lease. In August 2005, following a request by LCP, Orix wrote to the firm offering to "reinstate" the Lease on condition of payment of the arrears and certain other amounts. The firm's payment of those sums in August thus re-established the contractual relationship. However, it was later held by the High Court (and not challenged on appeal) that the agreement in August 2005 (the "August Agreement") was in law a new contract rather than a revival of the Lease. Following LCP's death in December 2006, a further rental default occurred. Orix then terminated the agreement and brought proceedings for non-payment against LCP's estate, which admitted liability, and against Marc and Rebecca, who both denied it.

3.13 Marc argued, *inter alia*, that the August Agreement was not binding on him because entering it had exceeded LCP's authority as a

partner. The High Court disagreed and held him liable. Rebecca, who had stepped down to employee status in April 2005 and left the firm altogether by the end of July 2005, additionally argued that she had ceased to be a partner before the August Agreement was entered and so could not be bound by it. The High Court upheld this defence. The Court of Appeal allowed Marc's appeal but dismissed Orix's appeal in Rebecca's case. Accordingly, Orix ultimately failed against both of the salaried partners.

3.14 The main issue addressed by the Court of Appeal was whether LCP had had authority to enter the Lease and (more importantly) the August Agreement under s 5 of the Act. The second limb of that section states that a firm is bound by a partner's acts done for "carrying on in the usual way business of the kind carried on by the firm". Analysing that limb in terms of ostensible authority, the court stated that it required that a contract both fell within the usual *nature* of the firm's business and had been entered in a usual *manner* for such business. These questions are to be considered from the viewpoint of a reasonably careful and competent person of the same kind as the third party. The onus of proof in both issues is on the third party. What is usual is ultimately a question of fact, but the court identified certain kinds of transaction which have typically been held to be either usual (*eg*, purchasing goods) or unusual (*eg*, giving a guarantee). In this connection, the court reaffirmed the distinction drawn historically between "trading" and "non-trading" partnerships, the former normally being defined as those which buy and sell goods. Partners of trading firms have traditionally been held to have wider ostensible authority, including the authority to borrow money, in view of the dependence of such firms on credit. As law firms were not trading firms, partners did not have ostensible authority to borrow. Nor, the court held, did they have power to compromise a claim against the firm in a manner which may prejudice the other partners: *Lim Hsi-Wei* at [36]–[42].

3.15 In applying these principles, the Court of Appeal characterised the Lease as a composite "loan-cum-lease" transaction. The inclusion of an amount equivalent to the Newcourt early-termination payment, as shown by the total facility amount under the Lease being several times the value of the leased copiers, meant that the transaction in substance involved significant borrowings by CP&P. The court held that Orix must have known of the firm's cash-flow problems under the Newcourt lease and that the Lease, while reducing its short-term cash-flow requirements, could only increase its overall financial burden. While a "typical straightforward" equipment lease may have been usual, the fact that the Lease contained a very substantial borrowing element – of which Orix must have been aware – that took it outside the s 5 ostensible authority of a law firm partner. Moreover, even viewed as a "plain vanilla" lease transaction, the court held that the Lease seemed to

have been entered in an unusual way. There were other features of the transaction known to Orix which were "peculiar", *eg*, a single default would accelerate the whole amount due under the Lease. Orix had not discharged its burden of demonstrating that the Lease transaction was usual so as to come within s 5, and no other kind of authority had been shown: *Lim Hsi-Wei* at [53]–[57].

3.16 Similar considerations applied to the August Agreement which had replaced the Lease and which (unlike the Lease) had not been assented to by Marc. In addition, the court held that "as a matter of general principle, once a substantial claim had been made against a partnership, in the absence of specific provisions in the partnership agreement, the express consent of the partners would have to be sought to resolve the claim if this would prejudice them in any way": *Lim Hsi-Wei* at [62]. This is because the relationship had become adversarial: it was no longer business as usual. The August Agreement represented a settlement of the claim made by Orix when it terminated the Lease in July 2005. Orix, therefore, ought to have ensured that all three partners to whom the claim was addressed had consented to the new agreement. (However, the court did not go on to indicate how the August Agreement might have prejudiced Mark's position given that it was on virtually the same terms as the Lease on which he was undoubtedly liable as a signatory.)

3.17 The court's conclusion that LCP did not have authority to enter the August Agreement meant that even true partners in the firm, had there been any, would not have been liable on it. It was, therefore, unnecessary for the Court of Appeal to consider the further issues of (a) whether the two salaried partners had been held out as partners under s 14 of the Act (which is the foundation of a salaried partner's liability), and (b) if so, whether Rebecca's retirement before entry into the August Agreement absolved her of liability. However, the Court of Appeal did analyse the issue in (b) and reach the same conclusion as the High Court (see para 3.18 below). Further, the Court of Appeal made some *obiter* comments on the issue in (a) but without reaching a final conclusion (for discussion of the latter comments, see (2011) 23 SAcLJ 323).

3.18 Partners are *prima facie* liable only for obligations incurred by the firm while they were partners. By way of exception, s 36 of the Act has the effect that a liability incurred by a firm to a third party after the retirement of a partner will bind the retired partner if the third party (i) had known him to be a partner before his retirement and (ii) had not had notice of the retirement at the time when the liability was incurred: *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397. As both of these elements were satisfied in relation to Rebecca, Orix argued that she was liable on the August Agreement despite her earlier retirement. The

Court of Appeal stated that s 36 could indeed apply to salaried partners as well as true partners, so long as the salaried partner had been held out to and relied on by the third party (pursuant to s 14 of the Act). However, the court went on to opine that s 36 liability was limited to liabilities incurred under pre-retirement contracts, and so did not apply to the August Agreement in Rebecca's case. The court's reasoning was that, by retiring from the firm, an ex-partner terminates his co-partners' authority to continue concluding agreements that would bind him: *Lim Hsi-Wei* at [71]–[73]. However, with respect, this reasoning arguably places undue emphasis on actual authority; whereas s 36 is, as the court recognised, founded on the underlying premise of estoppel. Authority established under estoppel principles is based on an impression created in the third party's mind as to the agent's authority, and in principle continues until such impression has been dispelled, in particular by notice of revocation of the authority: see *SEB Trygg Liv AB v Manches* [2006] 1 WLR 2276 at [32]. Although Rebecca had retired, there was no indication in the facts that this had been brought to Orix's attention before the formation of the August Agreement.