

### 3. AGENCY LAW

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#### I. Creation of agency

3.1 Agency is underpinned by the power that an agent has to affect the principal's legal position. This power exists because of a "unilateral manifestation by the principal of willingness to have his legal position changed by the agent".<sup>1</sup> Establishing this manifestation of will demands careful scrutiny of the factual context. It is of note that this paradigm of agency discloses the two distinct aspects, which was referred to in *Bowstead and Reynolds on Agency* as an external aspect and an internal aspect.<sup>2</sup> These aspects are described therein as follows:<sup>3</sup>

The *external* aspect is that under which the agent has powers to affect the principal's legal position in relation to third parties. The *internal* aspect is the relationship between the principal and agent, which imposes on the agent special duties *vis-à-vis* the principal ... [emphasis in original]

Where the external aspect is absent, the agency is said to be "incomplete".<sup>4</sup> Such an incomplete agency was found in *Lew, Solomon v Kaikhushru Shiavax Nargolwala*<sup>5</sup> ("*Lew, Solomon*"), a decision of the Singapore International Commercial Court.

3.2 The case concerned a dispute over whether a luxury resort villa at the Andara Resort in Phuket, Thailand, had been sold by the defendants to the plaintiff through the intermediation of an alleged agent. Whilst the Andara Resort itself provided facilities for the buying and selling of such villas and employed a sales manager for this purpose, the alleged

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1 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 1-006.

2 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 1-019.

3 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 1-019.

4 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 1-020.

5 [2020] 3 SLR 61.

agent of the defendants in this instance was not the sales manager, but the general manager of the resort, Meury, who did not operate as a real estate agent. This fact was known to both the plaintiff and the defendants, who nevertheless chose to utilise the general manager's "good offices" because, as the court noted, "he was friends with both parties".<sup>6</sup>

3.3 There was no dispute as to the applicable law on actual agency that applied. It was also common ground that Meury was not expressly authorised to act on behalf of the defendants. The plaintiff's case proceeded on the basis that an agency arose by virtue of the conduct of the relevant parties. As the court noted, this was a complex undertaking as any implication of authority depended wholly on assessing the conduct of the parties and the circumstances of the case.<sup>7</sup> On the basis of the court's finding of facts, arrived at after a careful consideration of the evidence, the court accepted that Meury was indeed acting as an agent of the defendants in that the latter entrusted Meury to act on their behalf in seeking to facilitate a deal with the plaintiff. The court however concluded that Meury's authority did not extend further than the authority conferred on "a properly appointed real estate agent", who would only have authority to take matters to the point of a non-binding agreement in principle.<sup>8</sup> Meury was therefore a canvassing agent of sorts, a category described in *Reynolds and Bowstead on Agency* as being "on the fringe of the central agency principles used by the common law" because the powers of such "agents" to alter the principal's legal position is extremely limited.<sup>9</sup> Like agents in this category, Meury was found to possess the implied actual authority to receive and convey messages on the defendants' behalf.<sup>10</sup>

3.4 The court made it clear, however, that the scope of this authority did not extend to any actual authority to "convey any acceptance of the alleged oral contract (or any binding contract) for and on behalf of the [defendants]".<sup>11</sup> The significance of an authority, actual or apparent, to convey the principal's acceptance of a transaction was highlighted in *First Energy (UK) Ltd v Hungarian International Bank Ltd*,<sup>12</sup> where the English Court of Appeal accepted that an agent possessed of such authority, but who had no actual or apparent authority to conclude a particular transaction on his principal's behalf, may yet bind the

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6 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [186].

7 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [176].

8 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [194].

9 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 1-021.

10 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [195].

11 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [195].

12 [1993] 2 Lloyd's Rep 194.

principal to the transaction. It is therefore necessary, in order to remain true to the fundamental underpinnings of apparent authority, for the facts to be carefully considered before any conclusion may be made as to the existence of such an authority. Thus, the mere fact that Meury had actual authority to convey messages on behalf of the defendants could not, by that fact alone, also mean that he had actual authority to convey any legally binding acceptance of an offer to the defendant. The court stated:<sup>13</sup>

In my judgment, in the circumstances of this case, any such submission must be based upon a contention that [Meury] had ostensible authority to bind the [defendants] by way of an oral contract.

3.5 The need to imply an agency also arose in *Materials Industry and Trade (Singapore) Pte Ltd v Vopak Terminals Singapore Pte Ltd*<sup>14</sup> (“*Materials Industry and Trade*”) in the context of a dispute as to who had a prior right to a cargo of palm methyl ester. The plaintiff had sold the cargo to a customer under a contract that contained a retention of title clause. The defendant, which had provided storage facilities for the cargo, claimed a contractual lien over the cargo and had disposed of the same in exercise of its rights thereunder. The plaintiff claimed that the disposal was in breach of its right to possession and brought the action against the defendant for damages.

3.6 The court found that the plaintiff did retain title to at least a part of the cargo. This notwithstanding, the defendant argued that its contractual lien over the cargo could still be validly exercised as the plaintiff had consented to and authorised the storage of the cargo at the defendant’s facilities. The question therefore was whether the customer, who had placed the cargo with the defendant, had been impliedly or apparently authorised by the plaintiff to do so.

3.7 The court found that the plaintiff, as a commercial party, must have appreciated and accepted that the customer was storing the cargo with the defendant in an arrangement that was necessarily governed by an agreement between the parties. In addition, it must also have been aware that the usual terms of such an agreement would include a right of lien, even if the precise terms of the agreement were not known to it. Accordingly, the court held that the plaintiff must have impliedly granted authority to the customer to grant possession of the cargo to the defendant on terms that would include a right of lien. The defendant was therefore entitled to exercise its contractual lien over the cargo.

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13 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [196].

14 [2019] SGHC 276.

## II. Actual authority

3.8 The question whether the shareholders of a company were authorised to enter into an agreement on behalf of the company was raised in *Law Chau Loon v Alphire Group Pte Ltd*.<sup>15</sup> The company had sued the applicant to recover certain sums the latter had collected on the company's behalf whilst acting as its director and judgment had been entered in the company's favour. The applicant claimed that the parties had then entered into a binding settlement agreement in relation to the judgment debt. The company refuted this claim on the basis that the persons who had entered into the settlement agreement on its behalf lacked the authority to do so. Those persons, whom the court referred to as "Investors", were directors of an investment holding company which had invested significant sums in the company.

3.9 There was no document or company resolution vesting authority on the Investors to act on behalf of the company. Indeed, the power to act on the company's behalf was, as is typically the case, vested by the company's constitution on the company's board of directors. However, as the court noted, actual authority may be inferred from the conduct of the parties and the circumstances surrounding the transaction.<sup>16</sup>

3.10 The evidence showed that the Investors were in fact significantly involved in the affairs of the company. Indeed, the court found that the *de jure* directors were:<sup>17</sup>

... subservient to the Investors, who were directly involved in the management and operation of [the company], and who were the ones whom the directors of [the company] answered and/or reported on issues relating to the management, operations and profitability of the company.

The court considered the evidence sufficient to ground the conclusion that the Investors were vested with the implied actual authority to act on the company's behalf *vis-à-vis* the settlement agreement.

## III. Apparent authority

3.11 The *locus classicus* on what amounts to apparent authority is Diplock LJ's statement in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*:<sup>18</sup>

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15 [2019] SGHC 275.

16 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [23].

17 *Law Chau Loon v Alphire Group Pte Ltd* [2019] SGHC 275 at [29].

18 [1964] 2 QB 480 at 503.

[A] legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself.

3.12 It is therefore the principal's *representation* to the contractor that provides the basis of his liability. Accordingly, where there was no direct communication between the purported principal and the contractor, can there be any operative representation? This particular question was raised in *Lew, Solomon*.<sup>19</sup>

3.13 In that case, there was no direct contact between the defendants and the plaintiff as all communications were made through the alleged agent. Nevertheless, the court considered that the necessary representation could be located in the conduct of the principal in permitting the agent to act in some way in the conduct of the principal's business with other persons.<sup>20</sup> The court stated:<sup>21</sup>

The nature and extent of any representation by conduct must ... depend upon the circumstances of the case in question. Plainly the subjective understanding of the person to whom the representation is made will be material but it cannot be decisive if, objectively, the representee was reading more into the facts surrounding the alleged representation than a reasonable third party would have done.

3.14 However, the mere fact that the purported agent had carried on negotiations and conveyed information between the plaintiff and defendants fell short of a representation that he was acting as the defendants' agent with authority to bind them by way of an oral agreement. As there was nothing on the facts to sustain a contrary conclusion, the court held that there was no representation of the requisite sort that could ground an assertion of apparent authority.

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19 See para 3.1 above.

20 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [200].

21 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [201].

#### IV. Agency by estoppel

3.15 It has been observed that the representation on which apparent authority rests is said to “operate as an estoppel”.<sup>22</sup> The closeness between the doctrines of apparent authority and agency by estoppel was noted by the Court of Appeal in *The Bunga Melati 5*.<sup>23</sup> In *Materials Industry and Trade*,<sup>24</sup> the defendant had argued, in the alternative, that the customer had the *apparent* authority to store the cargo with the defendant. As indicated above, the operation of the doctrine of apparent authority is dependent on there being an appropriate representation *vis-à-vis* the agency by the principal to the contractor. The plaintiff in the present case, like the plaintiff in *Lew, Solomon*,<sup>25</sup> had never communicated in any way with the defendant. However, unlike the parties in *Lew, Solomon*, the defendant here had further been blithely unaware of the plaintiff’s existence until the latter’s assertion of rights over the cargo. In such circumstances, it would be difficult to locate an appropriate operative representation.

3.16 Nevertheless, in *The Bunga Melati 5*, the Court of Appeal had recognised that even in cases where it is difficult to find any manifestation or representation of agency by the supposed principal, that supposed principal could yet be found liable for the acts of an alleged agent. It is, however, unclear precisely what circumstances would dictate such an eventuality. The court did, however, venture that where there was a legal or equitable duty to make a disclosure, communication or correction, silence or inaction could well constitute a valid operative representation for the purposes of establishing a basis for estoppel.<sup>26</sup> As noted above, the court in *Materials Industry and Trade* had concluded that the plaintiff was aware that there the cargo was being stored at the defendant’s facilities under terms that gave the defendant some form of lien over the cargo. The High Court opined that these specific factual circumstances suggested that the plaintiff might well be estopped from denying the defendant’s right of lien over the cargo. The court stated:<sup>27</sup>

[T]he plaintiff had effectively constituted [the customer] as its bailee for the specific purpose of storing, or continuing the storage of, the [cargo] at the [defendant’s facilities]. The plaintiff then arguably had a ‘duty to speak’ to correct what it ought to have known would be the defendant’s wrong impression. Its failure to do so led the defendant to believe it could exercise its lien over the cargo.

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22 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503.

23 [2016] 2 SLR 1114.

24 See para 3.5 above.

25 See para 3.1 above.

26 *The Bunga Melati 5* [2016] 2 SLR 1114 at [14].

27 *Materials Industry and Trade (Singapore) Pte Ltd v Vopak Terminals Singapore Pte Ltd* [2019] SGHC 276 at [116].