# 3. AGENCY AND PARTNERSHIP LAW

## AGENCY LAW

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### Apparent authority

3.1 The important role that agents play in commerce is not doubted. However, when transactions are entered into through the intermediary of agency, the intended contractual parties are exposed to the risk of fraud and dishonesty on the part of the agent. *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 was a case involving the purported lease of an apartment owned by the plaintiff and managed by a managing agent. Both the plaintiff and the managing agent were companies controlled by C, who was the sole shareholder and director of each company. The wrongdoing agent, R, was an employee of the plaintiff's managing agent, who, through a number of forgeries including the signature on the lease agreement, succeeded in leasing the plaintiff's apartment to the defendant's employer for the defendant's occupation. At all times, the defendant dealt only with R who had all the keys and access cards to the apartment. R was, however, acting on his own accord and without authority. The plaintiff, who had no knowledge of the lease until some two years later, claimed against the defendant for damages for trespass to land. Clearly, it was crucial for the defence to establish that the defendant's occupation of the premises was pursuant to a lease that was valid and binding on the plaintiff. As it was common ground that R had no actual authority (at [21]), the defendant's case had to rest on the doctrine of ostensible authority.

3.2 The elements that must be established before apparent or ostensible authority is made out are clear. As the doctrine 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. It was therefore incumbent on the defendant to show that the plaintiff had represented to him that R was authorised to enter into the lease on the plaintiff's behalf. In this regard, the court noted that whilst evidence of the internal workings of the plaintiff's managing agent (such as whether R was trusted to do certain things, the extent of his responsibility, and the distribution of duties amongst the employees of the managing agent) would be relevant to establish the scope of R's actual authority (which was in any case untenable, given the

forgeries, on the present facts), evidence of this nature was irrelevant to the present inquiry as to ostensible authority. Instead, the defendant was required to show that in allowing R to act in a certain way, the plaintiff had created a state of affairs which amounted to a representation that R had the authority to do certain acts. This was a question which must be decided on the specific facts of each case. On the present facts, the court considered that the only reasonable representation by the plaintiff was the act of equipping R with the keys and access cards to the plaintiff's property. However, this act did not amount to a representation that R had the authority to enter into leases on the plaintiff's behalf as this was commonly done by landlords in Singapore for the purpose of conducting viewings for prospective tenants and such like ministerial acts.

3.3 In any case, the evidence showed that the defendant had specifically insisted that R obtain, for the lease agreement, the signature of *C*, the sole director of the plaintiff. As the court noted, the defendant could not now contend that there had been a representation as to R's authority to enter into the lease on the plaintiff's behalf. Even if there had been such a representation, the evidence was clear that the defendant had not relied on the same.

3.4 The defendant also sought to rely on the decision of the English Court of Appeal of *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 ("*First Energy*") to argue that R had the ostensible authority to communicate and represent to him the plaintiff's approval of the lease. In *First Energy*, the regional manager of the defendant bank had made an offer of credit facilities to the plaintiff which the latter had accepted. The bank, however, declined to provide the finance and the plaintiff sued for breach of contract. Although the regional manager did not have the authority to conclude the transaction, and this fact was known to the plaintiff, the court found that the regional manager had ostensible authority by virtue of his position to communicate that head office approval had been given for the facilities offered. Evans LJ noted (at 206) that there was "no requirement that the authority to communicate decisions should be commensurate with the authority to enter into a transaction of the kind in question". This case was considered by our Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [59] (see further (2011) 12 SAL Ann Rev 48), where it observed as follows:

> A representation as to the principal's approval of a transaction goes to the heart of the agency relationship. While an agent may possess authority (whether actual or ostensible) to make general representations pertaining to a certain transaction … this authority, in a situation where the agent *does not* also possess authority (whether actual or ostensible) to enter into the said transaction on the principal's behalf,

> *cannot* include authority to make the specific representation that the principal has approved that transaction. To argue that an agent has authority to represent that his principal has approved a transaction – which is, in effect, authority to bind the principal to the transaction – because he (the agent) has authority to make general representations about the transaction and, hence, also has authority to represent that his principal has approved the transaction is contrary to the established principle that there cannot be self-authorisation by an agent. [emphasis in original]

3.5 The court in the present case applied this narrow reading of the decision in *First Energy* to the facts. Specifically, the court concluded that R did not have the ostensible authority to make the specific representation that the plaintiff had communicated approval of the lease. Further, the fact that the defendant had asked for the signature of C meant that the defendant did not believe that R had the necessary authority to communicate and represent the plaintiff's approval of the lease.

3.6 It was also argued that the plaintiff had, by its failure to react to a letter sent by fax and by post by the defendant to the plaintiff's registered address, ratified the unauthorised acts of R. The letter in question would have, had it been received by the plaintiff, notified the plaintiff of the defendant's occupation of the apartment. Whilst the court accepted that silence or inactivity was, in an appropriate case, capable of amounting to ratification, it noted that the juridical nature of ratification dictated that, to have that effect, the silence or action must be clearly indicative of the principal's assent to be bound by the agent's act. In the words of the court (at [31]):

> In essence, ratification is akin to an assent by the principal to the transaction entered into by the unauthorised agent by adopting the agent's otherwise unauthorised acts. To this end, the principal's inaction must when interpreted in the context and circumstances, be of a nature which *unequivocally* signifies such an assent. [emphasis in original]

3.7 In the circumstances, there was accordingly no valid lease between the parties.

**Consent**

3.8 The basis of an agency relationship is the consent of both the principal and the agent. There were a couple of decisions that dealt briefly with the concept of consent. In *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308, the Court of Appeal affirmed the requirement for the *agent's* consent to act as agent. The case involved transactions for the sale and acquisition of shares. A clause in the sale and purchase

agreement provided that certain persons were "authorised to receive [the agreed consideration] for and on behalf of the [vendor]". The vendor subsequently claimed that the consideration ought to have been paid to him directly. It was asserted, *inter alia*, that the agreed recipients were agents for the vendor, and were hence under a duty to account to the vendor *qua* agent. The agency was said to have arisen from the use of the phrase "for and on behalf of" in the sale and purchase agreement, which phrase constituted the recipients agents for the vendor.

3.9 The Court of Appeal, disagreeing with the lower court judge, considered the mere use of the phrase insufficient to show that the recipients had consented to act as agent. It was too tenuous a ground on which to found an agency relationship. In any event, as the recipients were not themselves parties to the sale and purchase agreement, the court opined that any agency relationship between the vendor and the recipients would have to be found outside of the agreement. As there was simply no unequivocal evidence as to the necessary consent, no agency relationship could be said to exist between the parties.

3.10 In *Strategic Worldwide Assets Ltd v Sandz Solutions (Singapore) Pte Ltd* [2013] 4 SLR 662, the plaintiff, which held a 25% stake in the defendant company, sued for its share of dividends which had been declared by the defendant. An issue that was raised was whether one L had been made the agent of the plaintiff in connection with the acquisition by the plaintiff of shares in the defendant company. L was the founder of the defendant company who, at the relevant time, controlled 75% of the defendant. The plaintiff was an investment company which ultimately came to acquire the remaining 25% of the defendant through an arrangement by which this stake was first acquired by L, and then transferred by L to the plaintiff. If L was acting as agent for the plaintiff in connection with the acquisition of the 25% stake, the plaintiff's entitlement to the dividends would have arisen at the time the stake was transferred to L. On the evidence, the court found that whilst various synonyms were used in the parties' description of their relationship, the intention was clearly for L to purchase the 25% stake in the defendant as agent on the plaintiff's behalf. The court noted, citing *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552 at 587, that whilst agency must derive from consent, it was not necessary for the consent to relate to the very relationship of principal and agent, which may in fact be denied. The consent may relate to a state of facts upon which the law imposes the consequences which result from agency. In the present case, almost the entire purchase price had been remitted by a law corporation which represented the plaintiff, and L had subsequently transferred the subject shares to the plaintiff for no consideration. These circumstances sufficed to indicate the parties' consent to a state of affairs which supported an agency relationship between them.

**Agent holding property for principal**

3.11 When an agent receives property for and on behalf of his principal, it is possible for the parties to agree that the property will, the moment it comes into the hands of the agent, belong to the latter. This was the effect of the agreement between principal and agent under consideration in the English Court of Appeal decision of *Clarence House Ltd v National Westminster Bank plc* [2009] EWCA 1311: see further Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 19th Ed, 2010) at para 6-041. Much therefore depended on the contract between the parties. Where the passing of proprietary rights to the agent is the effect of the contract, the agent should be entitled to utilise the property (now belonging to him) in any manner that he deems fit, including to repay any indebtedness he might owe to his principal. This very issue was raised in the High Court decision of *Ma Ong Kee v Cham Poh Meng* [2013] SGHC 144 in the context of a claim in debt.

3.12 The plaintiff, Ma, sought to recover from Cham sums which the latter had allegedly borrowed to fund his own business. Cham's defence was that he had repaid the loan out of sums in an account ("margin account") with a bank, which had been opened in his own name. The parties had been associated in a business collaboration which involved investing in publicly-quoted companies. Some of these investments were made through the margin account. When the collaboration ended in 2007, the account was closed, and the proceeds therefrom were handed over to Ma.

3.13 The court examined the relationship between the parties, and concluded that Cham was a "general factotum" (at [27]) to Ma *vis-à-vis* the latter's investments. The court found that the margin account had been opened by Cham at the direction of Ma, who provided all the funds therefor, and as his agent: at [54]. As agent for Ma, Cham therefore owed a personal fiduciary duty to account to Ma for the money that he had received and invested through the margin account. Accordingly, the return of the proceeds from the closure of the account to Ma was pursuant to Cham's personal obligation as an agent to account to his principal. The payments could not therefore be simultaneously a discharge of the debt owed by Cham to Ma, which was outside of the agency.

# PARTNERSHIP LAW

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## Existence of partnership

3.14 An argument that a partnership has arisen is sometimes made even where the relationship between the parties more obviously fits into another category, *eg*, main contractor and subcontractor. In *Qwik Built-Tech International Pte Ltd v Acmes-Kings Corp Pte Ltd* [2013] SGHC 278, the plaintiff was in the business of designing and fabricating steel framing systems for use in construction. It entered into a contract to supply steel framing systems to the defendant which was the contractor for a construction project in the Maldives. After supplying the systems, the plaintiff claimed the alleged contract price of $1.2m. One of the defences put forward by the defendant was that the parties had formed a partnership to share equally the profits gained from their participation in the Maldives project, and therefore until those profits had been determined the plaintiff should only be paid at cost for items actually supplied. The only argument made in support of a partnership was that the contract, which was partly written and partly oral, provided for profit-sharing. In fact, Lionel Yee JC found (at [17]) that there was insufficient evidence that a profit-sharing arrangement had actually been agreed. However, he also pointed out that, if it had been, the defendant could have succeeded on the basis of such agreement – whether or not it gave rise to a partnership. While agreed profit-sharing is an important indicium of partnership, the two are not the same thing. It has always been clear that profit-sharing can exist without partnership: see s 2(3) of the Partnership Act (Cap 391, 1994 Rev Ed). (The converse proposition, that partnership can exist without profit-sharing, was recently approved in England: see *M Young Legal Associates v Zahid* [2006] 1 WLR 2562 and *Rowlands v Hodson* [2009] EWCA Civ 1025; and Yee JC also concurred with that view: at [16].) A finding of partnership is usually more relevant where the issue is one of liability to a third party, in view of the mutual agency between partners and their joint liability with each other. Where the dispute is only between the parties to the contract, as in the present case, the primary issue is the scope of their agreement. As his Honour said (at [16]), in that context "the existence or otherwise of a true partnership between the parties is largely irrelevant".

3.15 In *Guy Neale v Nine Squares Pty Ltd* [2013] SGHC 249 ("*Guy Neale*") (which is more fully discussed at para 3.16 below), a party to what appeared to be a partnership agreement argued that the relationship created by the agreement was a mere "business venture" and did not amount to a partnership in law. The alleged reason was that the relationship lacked mutuality because the agreement allocated the "management and control" of the business to only one of the parties, who was given power to transact on behalf of all. Judith Prakash J dismissed this argument (at [65]): the ability for partners' meetings to exercise their powers was sufficient indication of the mutual carrying on of the business. This is, with respect, correct: a partnership must, by definition, carry on business in common – but for this it is not essential either that all partners be allowed to take an active part in management or that all partners have actual authority to bind the firm. If it were, the possibility of "sleeping partners" would not exist.

**Partnership property**

3.16 A dispute over whether a trademark was owned by a partnership or by a company owned individually by one of the partners was considered by Prakash J in *Guy Neale*. Although the partnership in question was formed under a contract governed by the law of Victoria, Australia (at [61]), the similarity of the partnership law of the two jurisdictions makes the decision worth mentioning. In 1999, Chondros, an Australian, had investigated setting up a restaurant, bar and club in Bali and had enlisted the local assistance of Kadek, an Indonesian. The restaurant, *etc*, was to be called "Ku De Ta", and in January 2000 Kadek applied for an Indonesian trademark for that name. In February 2000, a partnership agreement ("HoA") was entered by Chondros, Kadek and others in relation to the restaurant. Trademarks for "Ku De Ta" were later registered in Australia (2002), Singapore (2004 and 2009) and elsewhere in the name of the defendant, a company co-owned by Chondros and used by him in managing the Bali restaurant and for other purposes. In 2009, the defendant entered into an agreement to license the Singapore trademarks to a third party for use in a new Singapore restaurant business. In response, the plaintiff partnership sought a declaration that the *Singapore* registered trademarks were held on trust for the partnership. Although nominally a plaintiff, Chondros opposed the proceedings.

3.17 The judge first considered an argument that the defendant (which was not a partner) held the Singapore marks on an *express* trust for the partnership. However, she rejected this contention on the facts, holding that there was no intention to hold those assets on trust (at [139]); it is beyond the scope of the present chapter to discuss this issue.

3.18 The judge then had to determine whether the partnership owned the "Ku De Ta" name/trademark generally. If so, the procurement by Chondros of the defendant's registration of the mark in Singapore may have been a breach of his partnerial fiduciary duty, resulting in the possible imposition of a *constructive* trust: at [46]. The starting point for determining the rights to the name as between the partners was the HoA, drafted by Chondros' lawyer, which did not expressly deal with that matter. The agreement contemplated a partnership relating to the Bali restaurant, and was expressed to be for a term of 20 years. At the expiry of that time, the HoA provided that all rights would vest absolutely in the members. Prakash J held that such rights must refer to the partnership property, including the name and goodwill of the restaurant, which would probably be the only significant assets at expiry. Even if Chondros considered himself to be the inventor and owner of the name, he could have preserved his rights in the agreement but had not done so: at [55]–[56]. Further, it was unlikely that the other partners contemplated that the name would belong to Chondros alone, as they were contributing the bulk of the capital. It was also a new name, not used for any prior business but brought into being for the purpose of the envisaged firm. Her Honour distinguished *Ratna Ammal v Tan Choo Sow* [1964] MLJ 399, where a trademark previously owned by one partner was held to have remained outside the partnership property. In that case, the partner had used the mark in carrying on the business alone before bringing in partners: at [57]–[58]. In conclusion, Prakash J held that the "Ku De Ta" trademark generally (as distinct from the Singapore registrations thereof) was partnership property. The rights to the Singapore registrations therefore turned on the issue of breach of duty (see below, para 3.19).

## Relationship of partners between themselves

### *Fiduciary duties*

3.19 That issues of fiduciary duty and partnership property are often inter-twined is illustrated by the same case, *Guy Neale* (see facts outlined at para 3.16 above). The court there went on to consider whether Chondros had breached his fiduciary duty to his partners by obtaining, for his own company, the Singapore registrations of the partnership's trademark – *ie*, a usurpation of a partnership opportunity. It was accepted that this issue was also governed by the law of Victoria (at [145]), on which the court received expert evidence. The experts agreed that, under Victoria law, obtaining the Singapore registrations would have been a breach of duty only if there had been "a real or substantial possibility" of the partnership setting up an operation in Singapore at the time of either registration (*ie*, 2004 or 2009). This entailed that expansion to Singapore "would have been a likely activity

that the … partnership would have entered into had it appreciated the opportunity, or would have moved to in the ordinary course of events". Her Honour concluded that this test had not been satisfied on the evidence. In particular, she held (at [176]–[181]) that the fact that Chondros (together with the defendant's co-owner) had since 2005 been exploring with third parties the possibility of bringing the Ku De Ta concept to Sentosa did not make it an action that the *partnership* would likely have undertaken. Accordingly, Chondros had not breached his fiduciary duty and the Singapore registrations were not held on constructive trust for the partnership.

3.20 Two points may be noted in passing. First, Prakash J applied the agreed test under Victoria law without commenting on whether it was precisely the same one which prevailed in Singapore law. Second, on the facts there was no need to consider whether the applicable test for diversion of opportunity may be less strict for partners as compared with company directors – as is suggested by the English case of *O'Donnell v Shanahan* [2009] EWCA Civ 751.

## Limited liability partnerships

### *Liability of partnership and partners to third parties*

3.21 *The Singapore Professional Golfers' Association v Chen Eng Waye* [2013] 2 SLR 495 ("*SPGA v Chen*") is the first case in which the higher courts have considered the law of limited liability partnerships ("LLPs"). These were introduced into Singapore in 2005 under the Limited Liability Partnerships Act (Cap 163A, 2006 Rev Ed) ("LLP Act"). As the name suggests, LLPs are a hybrid form of business organisation, combining features of partnerships and limited-liability companies. Singapore's version of the LLP draws on both the UK and Delaware models as well as the Singapore limited company, which pedigree has resulted in an "eclectic mixture": see Yeo Hwee Ying, "Nature and Liability Shield of Limited Liability Partnerships in Singapore" (2007) 19 SAcLJ 409.

3.22 *SPGA v Chen* was a passing-off action brought by the Singapore Professional Golfers' Association ("SPGA"), a registered society formed to promote the interests of professional golfers, against an LLP called "Singapore Senior PGA LLP" ("SSPGA LLP") and the latter's two partners, who were a father and son named Chen. The SPGA failed to establish passing off in the High Court ([2012] 3 SLR 699), which did not therefore discuss the issues relating to LLPs. On appeal by the SPGA, however, the Court of Appeal held that liability for passing off had been made out.

3.23 The interest of the case for the law of LLPs concerns *who* was liable for the tort. SSPGA LLP, despite comprising the legal minimum of two partners, was in effect a "one-man" partnership. Chen Senior was the moving force behind the business, and had carried out all the acts which amounted to the passing off. On the other hand, Chen Junior was not involved in the business at all and had only agreed to become a partner to fulfil the minimum requirement. The effect of s 8(3) of the LLP Act is that a partner remains liable for his own wrongful acts and omissions: the court, accordingly allowed the appeal, against Chen Senior: at [80]. Under s 8(4), an LLP (which is a separate legal entity) is liable to the same extent as a wrongdoing partner for acts done in the course of the LLP's business or with its authority: hence, SSPGA LLP was liable, in effect jointly, with Chen Senior: at [70]. However, under s 8(2) a partner is not liable solely by reason of being a partner of an LLP. Therefore, as an "innocent" partner, Chen Junior was not liable: neither vicariously under s 8(2) nor personally under s 8(3): at [79].

3.24 The Court of Appeal's application of the statute is thus entirely consistent with its plain wording. Despite its novelty, the case was not a hard one on the facts: one partner was wholly responsible for the tortious acts while the other was completely innocent. The facts did not raise what could have been more difficult issues, such as where an otherwise blameless partner had a supervisory role over a wrongdoing partner.

3.25 In the light of s 8(3), there is limited scope for arguing that a tortfeasor partner of an LLP is not personally liable where he acted purely in the course of his position as such – an argument which in some contexts has been accepted in relation to directors of companies: see *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830. *SPGA v Chen* is also a reminder that in spite of their name, LLPs are not on all fours with limited companies: the liability of members of an LLP can, in some circumstances, be *unlimited*.