AGENCY

Law and Principles

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1

THE NATURE OF 'AGENCY'

Usage of the Term 'Agent'

1.01 The American Law Institute's *Restatement of the Law—Agency* defines agency as 'the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'[1] Although issue could be taken with the detail, this does bring out the following distinctive legal traits of agency: that agency is a fiduciary relationship; that in most instances the relationship between principal and agent will be consensual, very often contractual; and that the agent's role is to act on behalf of the principal.

The term 'agency' is frequently employed imprecisely in commerce

1.02 The concept of agency is notoriously slippery, and difficult to define. In part, this is because agency can take on a multitude of different forms, and in part because the word 'agent' is often used indiscriminately to describe individuals and entities whose activities, in strict legal terms, are not actually governed by the law of agency. Just as a Bombay duck would not be expected to quack, so too a 'motor factor' is unlikely to be a 'factor' in a conventional agency sense of a selling agent, a 'sole agent' is more probably a distributor than an 'agent', and even an 'estate agent' will not normally fulfil the classical criteria of agency when selling properties for clients as he will rarely

[1] See §1. 01 'Agency Defined'.

be empowered, without more, to bring his principal into direct contractual relations with a third party purchaser.[2]

1.03 The problem of distinguishing between true cases of agency and other legal relationships is far from new. Lord Herschell perceived it clearly in *Kennedy v De Trafford*:

> No word is more commonly and constantly abused than the word 'agent'. A person may be spoken of as an 'agent', and no doubt in the popular sense of the word may properly be said to be an 'agent', although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading.[3]

In *WT Lamb and Sons v Goring Brick Co Ltd*,[4] too, where a manufacturer of bricks appointed a merchant who purchased his bricks and re-sold them to builders and contractors as 'sole selling agents', Greer, LJ felt impelled to remark:

> It is somewhat remarkable that, notwithstanding the numerous cases in which the difference between a buyer and an agent has been pointed out, there are still innumerable persons engaged in business who do not understand the simple and logical distinction between a buyer and agent for sale, but are content to treat the two words as synonymous.[5]

More recently, in *Potter v Customs & Excise Commissioners*,[6] Sir John Donaldson, MR noted:

> The use of the word 'agent' in any mercantile transaction is, of itself, wholly uninformative of the legal relationship between the parties, and the use of the words 'independent agent' takes the matter no further. Either is consistent with a self-employed person acting either as a true agent who puts his principal into a contractual relationship with a third party or with such a person acting as a principal.[7]

1.04 At other times, the term 'agent' is not necessarily employed even where there exists a principal-and-agent relationship. Although, broadly, company law falls outside the present book's remit, a significant proportion of the cases to which reference will be

[2] To mention a few further commercial examples, an 'escrow agent'—*aliter*, an 'escrow officer'—simply signifies a legal arrangement whereby money, intellectual or other property is handed over to a neutral third party who holds that money or property in trust pending the fulfilment of a contract: eg *Dyer v Piclux SA* [2004] EWHC 1266 (Comm). Nor is a 'company formation agent' an agent in the true sense: *Aerostar Maintenance Int'l Ltd v Wilson* [2010] EWHC 2032 (Ch) at [73] *per* Morgan, J, any more than is a 'calculation agent': *WestLB AG v Nomura Bank International plc* [2012] EWCA Civ 495. Nomenclature, then, can deceive.

[3] [1897] AC 180, 188.

[4] [1932] 1 KB 710.

[5] [1932] 1 KB 710, 720.

[6] [1985] STC 45.

[7] [1985] STC 45, 51.

made concern the actions of company directors. As Cairns, LJ remarked in *Ferguson v Wilson*:

> What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company. This being a contract alleged to be made by the company, I own that I have not been able to see how it can be maintained that an agent can be brought into this court, or into any other court, upon a proceeding which simply alleges that his principal has violated a contract that he has entered into. In that state of things, not the agent, but the principal, would be the person liable.[8]

1.05 Usage of the term 'agent', then, may be legally uninformative. However, it would be an error to assume that, even when used in a correct legal sense, the rules affecting agents are uniform. As we shall discover throughout this book, specific rules and customs may apply to different species of agent. Additionally, from time to time both domestic and European legislation have created new forms of agency. In order to foster uniformity of practice within the Union, European legislation also requires courts to adopt a mode of interpreting texts distinct from that employed in the domestic context.

Varieties of Agency

1.06 A law of agency first emerged as a largely unitary body of common law. However, particular customs, many of which later hardened into rules, came to be recognized to apply to particular classes of intermediary. By the eighteenth century, for instance, it was fully accepted that those agents known as 'factors' had the right to sell their principals' goods in their own names; brokers, in contrast, did not.[9] But whereas the fundamental notion of an agent, as a fiduciary, acting on behalf of a principal and

[8] (1866) LR 2 Ch App 77, 89–90.

[9] *George v Claggett* (1797) 7 TR 359; (1797) 2 Esp 557. In relation to specialized classes of agent, too, nomenclature must be viewed with suspicion. As Sir Andrew Park noted in *Re Global Trader Europe Ltd* [2010] BCC 729 at [17], 'Global Trader was commonly described as a broker. It carried on business with persons whom it described as clients and who wished to enter into either or both of two kinds of financial transaction, referred to as contracts for differences and spread bet trades. The terms "broker" and "client" were regularly used, but in the context of Global Trader's business they did not carry their more usual meanings of one person, the broker, acting on behalf of another, the client, and arranging for the client to enter into a transaction with a third party. Usually a person described as a broker is an agent of some sort for the client. In the present case, however, Global Trader was not an agent for its "clients". If a client wanted to enter into, say, a contract for differences he concluded the contract with Global Trader: Global Trader was not the client's agent; it was itself the counterparty to the contract.'

altering the latter's legal relations with third parties has endured, the terminology of the subject has not always remained constant over time. Confusingly, whilst some traditional 'factors' still exist selling goods in their own names, today one direct descendant of the factor—the factoring company—is actually a species of financier, specializing in the acquisition of accounts receivable, and no longer an agent at all.[10]

The degree of liability undertaken by the agent

1.07 The extent of the liability an agent undertakes on behalf of his principal, too, can vary considerably. In the classical form of agency the agent will act very much as a facilitator: the agent will bring principal and third party into direct relations with one another but will incur neither rights nor liabilities under the resulting contract. As Lord Denning, MR said in *Phonogram Ltd v Lane*:

> The general principle is, of course, that a person who makes a contract ostensibly as an agent cannot afterwards sue or be sued upon it.[11]

In contrast, however, an agent may act in such a manner as to engage his personal liability on his principal's contract. The agent who acts for an undisclosed principal, in the first instance, will be party to the contract with the third party and normally will remain so until such time as the principal chooses to disclose himself.[12] Also, as we shall see, an agent may contract with the third party so as to engage his personal liability, either by an express term of the contract, perhaps by trade custom,[13] or by the character in which he signs the contract on behalf of his principal.[14] Some agencies even incorporate an element of credit insurance. Notably, a *del credere* agency occurs when an agent, for a specially agreed commission (often a double commission) undertakes to act as surety in respect of the due performance of contracts he has entered into on behalf of his principal. Because this variety of agency involves the agent's undertaking unusually extensive liability to the principal—normally, with the agent guaranteeing the creditworthiness of third parties,[15] although such an arrangement may be inferred from the parties' previous business dealings—*del credere* agency will almost always be specifically negotiated between principal and agent. *Del credere* agency has a long history,[16] but is nowadays said to be something of a rarity. In view of the range of alternative credit mechanisms available to principals—documentary credits, export credit guarantees, etc—'*del credere* agency would often in modern conditions involve liabilities which an

[10] See, eg, R Munday, *A Legal History of the Factor* (1977) 6 Anglo-American LR 221.
[11] [1982] 3 CMLR 615 at [23].
[12] See **chapter 10**.
[13] *Hutchinson v Tatham* (1873) LR 8 CP 482.
[14] See paras **12.05–12.15**.
[15] 'A *del credere* agent is one who guarantees the price of goods purchased by a third party': *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd* [2002] 1 All ER (Comm) 788 at [40] *per* Rix, LJ.
[16] Eg, *Associated British Ports v Ferryways NV* [2008] 2 Lloyd's Rep 353 at [63] *per* Field, J.

ordinary commercial agent acting for commission would be reluctant to undertake.'[17] Buxton, LJ, in *Blything v BVV/HFA Dekker*, added the further reflection 'that that must necessarily be the case when the parties concerned are all within the European Union.'[18] Nevertheless, the practice endures.[19]

1.08 The law of agency has gained in complexity largely thanks to legislation, which has intervened both to create new species of agent outright and to provide specifically for duties and privileges to attach to particular categories of agent, either by the enactment of settled trade customs or by the introduction of fresh rules.

'Mercantile agents' under the Factors Act 1889

1.09 A significant statutory invention has been the creation of a class of 'mercantile agents' under the Factors Act 1889. The current statute followed a succession of earlier Acts passed during the course of the nineteenth century to regulate the powers of factors. Over the centuries, 'factor' has meant several different things. Cotton, LJ, in *Stevens v Biller*, famously defined the factor at common law as a mercantile agent who has goods in his possession for the purpose of sale.[20] The 1889 Act—which repealed and replaced the Factors Acts 1823–1877—those earlier 'treasuries of perplexing pomposity'[21]—curiously only uses the word 'factor' in its long and short titles, substituting instead in the body of the statute the term 'mercantile agent'.[22] Section 1(1) defines a 'mercantile agent', somewhat tautologously, as:

> …a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

The statutory definition reaches far beyond the traditional factor, the selling agent, to a very wide range of persons indeed. The mercantile agent need no longer belong to any recognized class of agent, such as factors and brokers.[23] The definition may encompass those acting as agents in a single transaction, provided that they were acting in the course of business.[24] It has even been held to apply in certain circumstances to the owner of goods.[25] The effect of the 1889 Act has been to create an entirely new class of agent, of which the traditional factor of the common law was just one part.

[17] *Bowstead & Reynolds on Agency* (2010: London, Sweet & Maxwell) 19th ed, by Watts, para 1.038.
[18] (1999) 27 April, unreported, transcript no QBENF 1997/1630/1.
[19] Eg, *Gabem Management Ltd v Commissioners for Revenue and Customs*, 2007 WL 919446; *Bank Negara Indonesia 1946 v Taylor* [1995] CLC 255; *Mercury Publicity Ltd v Wolfgang Loerke GmbH* [1993] ILPr 142.
[20] (1883) 25 ChD 31, 37.
[21] AR Butterworth, *Bankers' Advances and Mercantile Securities* (1902, London) p 43.
[22] See *Triffit Nurseries v Salads Etcetera Ltd* [2000] 2 Lloyd's Rep 74, 79 *per* Robert Walker, LJ. See also H Gutteridge, *Contract and Commercial Law* (1935) 51 LQR at p 140.
[23] See *Lowther v Harris* [1927] 1 KB 393.
[24] Eg, *Budberg v Jerwood and Ward* (1934) 51 TLR 99.
[25] Eg, *Lloyd's Bank Ltd v Bank of America National Trust & Savings Association* [1937] 2 KB 147. Cp *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd* [1969] 1 WLR 1877.

1.10 The Factors Act 1889 endows a 'mercantile agent' with wide powers to pass title to goods belonging to his principal which are in the agent's possession. As Lord Goff of Chieveley explained in *National Employers' Mutual General Insurance Association Ltd v Jones*,[26] successive Factors Acts have sought to provide protection for those dealing in good faith with factors or mercantile agents to whom goods or documents of title had been entrusted by the true owner to the extent that their rights overrode those of the true owner.[27] The Acts were not intended, however, to enable a *bona fide* purchaser for value to override the true owner's title where the mercantile agent had been entrusted with the documents or goods by a thief or a purchaser from a thief.

1.11 Perhaps suffice it to say for the time being, whilst the Law of Agency can still be claimed with some justice to exhibit a common core of principles, it is also a subject that in its detail grows ever more fragmentary.

Agency and European Union Law

1.12 In recent years European law has exerted considerable impact on the English law of agency. It both affects the way in which certain bodies of rules require to be interpreted, and also via the Commercial Agents (Council Directive) Regulations 1993 has created an entirely new and commercially significant form of agency, whose enacted principles are at variance with traditional common-law agency rules.

1.13 When determining the purpose of a European Directive, courts may have to consult a range of sources, relatively unfamiliar to English lawyers. They may refer to the instrument's preamble[28] or to the explanatory notes that accompany the Directive.[29] Equally, in order to tease out the legislative intention it is not unheard of for a court to invoke draft legislative proposals that may have preceded the final version of the Directive.[30] Since the European Union is a multi-lingual legal endeavour, in the interests of uniform

[26] [1990] 1 AC 24.

[27] The declared aim was 'to protect bankers who made advances to mercantile agents . . . by means of an inroad on the common law rule that no one could give better title to goods than he himself had': *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, 60 *per* Lord Wright. However, as Scrutton, LJ pointed out, this was a concept that the courts were slow to embrace: 'The history of the Factors Acts is restriction of their language by the Courts in favour of the true owner, followed by reversal of the Courts' decisions by the Legislature': *Folkes v King* [1923] 1 KB 282, 306.

[28] *P Conradsen A/S v Ministeriet for Skatter og Afgifter* [1979] ECR 2221 at [1] (Case 161/78).

[29] *East (t/a Margetts and Addenbrooke) v Cuddy* [1988] ECR 625 at [11] (Case 143/86). The use of explanatory notes as an aid to the interpretation of English statutes is contested: R Munday, *Explanatory Notes and Statutory Interpretation* (2006) 170 JPJo 124.

[30] Eg, *Bellone v Yokohama SpA* [1998] ECR I-2191 at [16] (Case C-215/97): 'That interpretation of the Directive is borne out by the fact that, as already mentioned, the question of registration of agents had already been addressed during the preparatory work, but was not taken up, since it was not considered necessary for agents to be registered in order to enjoy rights under the Directive.'

application reference to other language versions of the enactment may be necessary in order to arrive at the authoritative interpretation.[31] Expressions found in the enactment must, so far as possible, be construed consistently with the EU Treaties as well as with 'general principles of Community law'.[32] Courts are duty-bound to promote the effectiveness (the so-called *effet utile*) of EU norms.[33] And, in the absence of any express reference to the laws of individual Member States, terms employed in EU legislation should receive 'an independent and uniform interpretation throughout the European Union'.[34] More generally, English courts must conform to the principle of consistent interpretation,[35] which may result in their giving legislation a meaning different to that which it would have received had English canons of statutory construction applied.

European Union law: the Customs Code

1.14 The notion of' agency' and the expression 'agent' may therefore require to be differently interpreted in different contexts. In the realm of taxation, for instance, when interpreting the Customs Code, which involves construing matters according to principles of European Community law, courts are enjoined to avoid applying the

[31] *Ferrière Nord SpA v Commission of the European Communities* [1997] ECR I-4411 at [15] (Case C219/95): 'In fact,…it is settled case-law that Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages (*Van der Vecht and CILFIT v Ministry of Health* [1967] ECR 335 at [18]). This is unaffected by the fact that, as it happens, the Italian version of Article 85, considered on its own, is clear and unambiguous, since all the other language versions expressly render the condition set out in Article 85(1) of the Treaty in the form of an alternative.'

[32] *Ordre des barreaux francophones et germanophones v Conseil des ministres* [2007] ECR I-5305 (C-305/05) at [28]: '[T]he Court has consistently held that, if the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty rather than to the interpretation which leads to its being incompatible with the Treaty (see *Commission v Council* [1983] ECR 4063 (Case 218/82) at [15], and *Spain v Commission* [1995] ECR I-1651 (Case C-135/93) at [37]). Member States must not only interpret their national law in a manner consistent with Community law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law (Case C-101/01 *Lindqvist* [2003] ECR I-12971 at [87]).'

[33] Eg, *Grad v Finanzamt Traunstein* [1970] ECR 825 (Case 9/70) esp at [5].

[34] *Brüstle v Greenpeave eV* [2011] ECR (Case C-34/10) at [25]: 'It must be borne in mind that, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (see, in particular, *Ekro* [1984] ECR 107 (Case 327/82) at [11]; *Linster* [2000] ECR I-6917 (Case C-287/98) at [43]; *Infopaq International* [2009] ECR I-6569 (Case C-5/08) at [27]; and *Padawan* [2010] ECR I-0000 (Case C-467/08) at [32]).'

[35] *Bernhard Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, Cases C-397/01-C-403/01 at [118]: '[T]he principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive…is fully effective,…(see, to that effect, [Case C-106/89 *Marleasing* [1990] ECR I-4135], at [7] and [13]).'

technical agency concepts of domestic law. The reason is that, when answering a question by reference to Community law, the court should interpret the situation according to a broad 'notion of acting in the name and for the account of another and not by reference to civil law provisions concerning agency and mandate which vary from one legal system to another'.[36] *Ex hypothesi* technical common-law concepts, too, are to be eschewed.

1.15 To take an example, in *Umbro International Ltd v Revenue and Customs Commissioners*,[37] U, which used P to import football team shirts manufactured in China, sought to argue that P was its buying agent and that the Commissioners had wrongly assessed U for customs duty not only for the price of the goods but also for its agent's commission which for a number of years had been incorporated into the overall price stated on P's invoices to U. P did not manufacture goods itself, but placed orders for U goods only with companies on an approved list produced by U. U furnished P with detailed specifications, indicating the quality and quantity of products it required as well as setting target prices that it was prepared to pay for them. P was responsible, at its own expense, for visiting manufacturers, negotiating prices with them, obtaining samples, scheduling delivery dates, performing quality control functions, ensuring that the products fell within EC customs duty quotas and ensuring that the goods could be supplied within the requisite time-scale. P was also responsible for insurance and payment for transport, storage and delivery of the goods. In agreeing a contract price with U, P took into account the manufacturing costs, its costs of providing the above services, and its own profit. U did not enquire about P's margin of profit which might vary from order to order, and sometimes even within a single order. A written purchase order, containing terms and conditions describing P as 'supplier', was submitted by U to P once a contract price had been agreed. P was free to place orders with any approved manufacturer of its choice without reference to U. On delivery of the goods, the Chinese manufacturer invoiced P for them and P then invoiced U in a higher sum, the difference being P's gross profit. U would then pay P. P's invoices to U did not specify P's commission; it was not possible to calculate the amount of its profit from the information stated in the invoices. The invoices, raised 'for account U', did not describe P as U's agent. In the invoices from the manufacturer to P, P was described as 'purchaser' and there was no mention of U. There was no written agreement between P and U purporting to define the commercial relationship between them.

1.16 The VAT and Duties Tribunal (Manchester) had concluded[38] that all in all there was insufficient evidence of a buying agency and declined to order repayment of duty. It laid

[36] Advocate-General Kokott in *De Danske Bilimpotorer v Skatteministeriet* (Case C-98/05, judgment 16 March 2006), with whose argument the European Court of Justice agreed.

[37] [2009] EWHC 438 (Ch); [2009] STC 1345.

[38] See *Umbro International Ltd v Revenue and Customs Commissioners* [2009] EWHC 438 (Ch).

particular emphasis on the parties' documentation—the standard terms and conditions printed on the back of each purchase order. This not only described P as 'the supplier', with no mention of agency, but also imposed obligations pointing towards a liability as principal (eg, the incidence of risk, warranty as to quality and provision as to refunds for unsatisfactory goods) and rendered P liable, at its own cost, to provide product liability insurance for the goods. This was said to tie in with the fact that all invoices from the manufacturer were addressed to P, which in turn invoiced Umbro, and the fact that all payments were made by P and all debit notes were issued by U to P. Admittedly, these circumstances were not necessarily inconsistent with U acting as undisclosed principal.[39] Nevertheless, the Tribunal considered that there was no, or insufficient, evidence that P was merely facilitating a contract between the Chinese manufacturer and U or otherwise to support a finding of agency.

1.17 On appeal, Proudman, J derived assistance from the Explanatory Notes and the Commentary accompanying Article 8 of the WTO's GATT Agreement,[40] which stress such matters as the need for an agent always to act for the account of a principal, to take a commission that is normally expressed as a percentage of the cost of goods bought or sold, to be paid by the importer, etc. Also, those Explanatory Notes stress that whether or not a particular individual is actually an 'agent' will turn 'in the final analysis, on the role played by the intermediary and not on the term ("agent" or "broker") by which he is known.' Drawing a further analogy with the way in which one identifies which 'commercial agents' fall within that designation under the European Directive on Commercial Agents,[41] and adopting Rix, LJ's view of that Directive expressed in *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd*[42] that the test is one of substance rather than form, Proudman, J concluded that although the Tribunal did not indicate how they thought that the Customs Code ought to be construed, nevertheless one could infer that they correctly believed that the expressions used in the definition of 'buying commission' in the Code had to be assigned their natural meaning as understood by an English court, bearing in mind the Explanatory Note and Commentary. Proudman, J, therefore, upheld the Tribunal's decision that U had not discharged the burden of proving that P was its buying agent, agreeing incidentally that the variable commission was a neutral circumstance.[43]

[39] On undisclosed agency, see paras **10.27ff**.
[40] See also Case C-486/06 *BVBA Van Landeghem*, judgment 6 December 2007, para 25.
[41] See, eg, discussion of *AMB Imballaggi Plastici SRL v Pacflex Ltd* [1999] 2 All ER (Comm) 249, at para **1.39**.
[42] [2002] 1 All ER (Comm) 788.
[43] *Ex p Bright re Smith* (1879) 10 Ch D 566, 570 *per* Sir George Jessel, MR.

European Union law: the Commercial Agents (Council Directive) Regulations

1.18 In a similar way, we shall discover presently that, in the context of 'commercial agents' operating under the Commercial Agents (Council Directive) Regulations 1993, it remains a moot question whether certain well-understood concepts of the English law of agency, which appear to figure in the definition of 'commercial agent' in reg 2(1) of the Directive—notably, the words 'conclude the sale or purchase of goods on behalf of and in the name of that principal'—are actually intended to wear the same meaning under the Directive.[44] Nor has this difficult question necessarily been clarified by Lord Hoffmann's speech in *Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd (Winemakers' Federation of Australia Inc intervening)*,[45] where his Lordship justified different national interpretations of the Directive's rules on compensation of commercial agents applying in different jurisdictions because the agents in question, whilst trading within a single market, in another sense could be said to be operating in different markets. Since it is unlikely that the Directive's draughtsmen had in mind English law's particular perspective on what actually constitutes agency—and what generic forms are legally permissible—when they framed the Directive, and bearing in mind the harmonizing objectives of the Directive,[46] it is not self-evident that 'commercial agent' was intended to have diverse meanings within the member States.[47]

Seeking the Essence of Agency

1.19 In orthodox parlance, in English law agency is a legal relationship that involves three parties: a 'principal', on whose behalf the agent acts; an 'agent', who acts on behalf of the principal; and 'third parties' whom the agent brings into legal relations with the principal. That said, the question is frequently posed, what distinctive element or elements lie at the heart of agency?

The agent creates or alters legal relations between a principal and a third party

1.20 One thing, which is beyond dispute, is that the agent enjoys the power to alter the legal relations of his principal *vis-à-vis* a third party. Having first rehearsed Lord Hershell's concerns over how loosely the term 'agent' is used,[48] Justice Gummow, in

[44] See paras **13.39–13.40.**

[45] [2007] 1 WLR 2055, esp at [18].

[46] See *Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd* [2000] CLC 1397, esp at [10] *per* Morison, J.

[47] Nor are matters helped when a report mistakenly refers to a commercial agent under the Directive as a 'mercantile agent', a term that properly refers to agents under the Factors Act 1889 and the Sale of Goods Act 1979: *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd* [2003] ECC 28, at H5.

[48] See para **1.03.**

the Australian High Court in *Scott v Davis*, supplied a helpful working definition of the archetypal form of agency:

> There is considerable terminological confusion in this area. The term 'agency' is best used, in the words of the joint judgment of this Court in *International Harvester Co. of Australia Pty Ltd. v. Carrigan's Hazeldene Pastoral Co*,[49] 'to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.'[50]

As Justice Gummow went on to explain:

> Usually the legal relations so created will be contractual in nature. In all these cases, the principal's liability will not be vicarious. The resultant contract is formed directly between the principal and the third party and there is no contract between the agent and the third party which is attributed to the principal.[51]

We shall see that this outline does not cover every variant of agency, but it does serve to emphasize that agency is primarily concerned to create or alter legal relations between principals and third parties, and that those resulting relations are almost invariably contractual.

The agent as fiduciary

Another indisputable fact is that agency is a fiduciary relationship. Because a principal places the agent in a position of trust, empowering the latter to act for him and to alter his legal relations with third parties, the agent owes his principal 'single-minded loyalty'.[52] In short, the agent is a fiduciary and, alongside any obligations the agent may owe the principal in contract or otherwise, the agent is also subject to the conventional, strict equitable duties owed by fiduciaries: a duty not to allow his interests to conflict with those of the principal, a duty to make disclosure, a duty not to take advantage of his position, a duty not to take bribes or a secret commission, a duty not to delegate his office, and a duty to account. **1.21**

Agency and consent

Many would claim that consent lies at the heart of agency. As we have seen, the *US Restatement* defines agency as a relationship to which both principal and agent manifest assent. Similarly, Article 1 of *Bowstead & Reynolds on Agency*, the classical English work on the subject, states that agency founds in the notion that the principal: **1.22**

> expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.[53]

[49] (1958) 100 CLR 644, 652 at [12].
[50] (2000) 204 CLR 333 at [227].
[51] (2000) 204 CLR 333 at [228].
[52] *Bristol & West BS v Mothew* [1998] Ch 1, 18 *per* Millett, LJ.
[53] (2010: London, Sweet & Maxwell) 19th ed, by Watts, para 1.001.

Certain case law, too, has adopted a similar approach. In *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd*[54] Lord Pearson famously declared:

> The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they had agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in *ex parte Delhasse*.[55] But the consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important. As to the content of the relationship, the question to be asked is: 'What is it that the supposed agent is alleged to have done on behalf of the supposed principal?'[56]

1.23 Of course, it is comparatively easy to state that consent lies at the root of agency. In practice, matters may be very different when it comes to fixing the exact nature of the various parties' relationships. For example, Rix, J, who was willing to adopt Lord Pearson's approach, admitted that the facts with which the case presented him in *Nueva Fortuna Corporation v Tata Ltd. The 'Nea Tyhi'* occasioned 'considerable difficulties of exegesis and analysis'. These were caused by the court's inability to penetrate the relations between the putative agent and third party, the absence of a material witness whose written declarations in any case were unreliable, confused documentation, claimants who were unable to decide how to qualify the defaulting party's conduct, incomplete accounts of the parties' elaborate dealings, witness evidence of dubious credibility, as well as the fact that 'the legal tests contain their own difficulties of objective perception in circumstances where the terms "agent" or "partner" maybe used or misused more or less freely.'[57]

1.24 In any case, it does not do to rely too heavily on assent/consent to explain agency. Consent does not lie at the heart of every agency. When the apparent authority of the agent is engaged, and the principal is effectively estopped from denying the authority of his agent, the resulting relationship is not exactly consensual.[58] When the law either imposes an agency relationship on the parties or extends an existing agency, as a matter of necessity, in order to enable the 'agent' to confront some emergency and protect the principal's interests, the relationship is scarcely consensual. Further, as the passage from Lord Pearson's speech in *Garnac Grain* reminds us, detecting agency is not merely a matter of looking mechanically for assent on the part of the putative

[54] [1968] AC 1130.
[55] See *In re Megevand, ex p Delhasse* (1878) LR 7 ChD 511.
[56] [1968] AC 1130, 1137.
[57] [1999] 2 Lloyd's Rep 497, 500 *per* Rix, J.
[58] See **chapter 4**.

principal and agent. Agency is a legal, rather than simply a factual, question. In Lord Pearson's words, the parties 'will be held to have consented if they had agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it.'[59]

Agency and authority

1.25 Another way of viewing the agency relationship has been in terms of the agent's possessing the authority to bind his principal. Although agency cases and texts repeatedly speak in terms of the agent's authority, again this affords an incomplete account of agency. In a number of situations an agent, who clearly lacks authority—either because the principal never granted authority to the agent to act for him in the first place or because the agent exceeded what limited authority the principal did confer upon him—can affect the legal relations of the principal. *Lloyd v Grace Smith & Co*[60] provides a celebrated example. A widow owned two cottages and a sum of money secured on a mortgage. She consulted a firm of solicitors about maximizing the yield on these assets. She saw the managing clerk, who conducted the firm's conveyancing business unsupervised. She was induced to give him instructions to sell the cottages and to call in the mortgage money. To that end, she handed over her title deeds and signed two documents, which she neither read nor had explained to her. She believed that she had to sign them in order to effect the sale of the cottages. In fact, they served to convey the cottages to the clerk and also transferred the mortgage to him. The clerk dishonestly disposed of the property for his own benefit. The House of Lords held that the clerk's principal, the firm of solicitors, was liable for the fraud committed by its agent in the course of his employment or authority. The House thereby dispatched any notion that earlier authorities[61] supported the proposition that a principal is not liable for the fraud of his agent unless committed for the benefit of the principal. Quite simply, a principal will be liable for the fraud of his agent, if acting within the scope of his authority, irrespective of whether or not the fraud was committed for the benefit of the principal.[62] As Lord Woolf, MR subsequently explained in *Credit Lyonnais Bank Nederland NV v ECGD*,[63] the guiding principle is:

> The wrong of the servant or agent for which the master or principal is liable is one committed in the case of a servant in the course of his employment, and in the case of

[59] [1968] AC 1130, 1137. See also *National Trust for Places of Historic Interest v Birden* [2009] EWHC 2023 (Ch) at [150]–[151] *per* HHJ Toulmin, QC.

[60] [1912] AC 716.

[61] Notably, *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259. Cp *Hamlyn v Houston & Co* [1903] 1 KB 81, 85 *per* Collins, MR.

[62] See also *Armagas Ltd v Mundogas Ltd* [1986] AC 717, 782 *per* Lord Keith of Kinkel: 'In the end of the day the question is whether the circumstances under which a servant has made the fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss.' The *Armagas* case is discussed at paras **4.21–4.22**.

[63] [2000] 1 AC 486.

> an agent in the course of his authority. It is fundamental to the whole approach to vicarious liability that an employer or principal should not be liable for acts of the servant or agent which are not performed within this limitation. In many cases, particularly cases of fraud, the question arises as to whether the particular conduct complained of is an unauthorised mode of performing what the servant or agent is engaged to do.[64]

By no stretch of the imagination could the agent in *Lloyd v Grace Smith* realistically have been said to have had true authority to act, even though the principal was held legally responsible for its errant managing clerk's acts.

A power-liability relation

1.26 The key relationship, between principal and agent, is often stated in a more abstract form, being described simply as a power-liability relationship. This 'nucleus of the relation of principal and agent'[65] consists in the agent possessing the power to affect the principal's legal position and the principal being under a correlative liability to see his legal position altered by his agent. In Dowrick's words:

> The distinctive feature of the agency power-liability relation is that the power of the one party to alter the legal relations of the other party is a reproduction of the power possessed by the latter to alter his own legal position. In other words, the power conferred by law on the agent is *a facsimile of the principal's* own power.[66]

Dowrick's phrase evokes one of Pollock's remarks, that 'by agency the individual's legal personality is multiplied in space'.[67] That the relationship is one of power-liability, Dowrick maintains, is to be inferred from the following leading principles of the law of agency:

> [W]hen the agent acts on behalf of his principal in a legal transaction and uses the principal's name, the result in law is that the principal's legal position is altered but the agent drops out of the transaction; persons who are not themselves *sui juris* may nevertheless have the power to act as agents for persons who are; the power of the agent to bind his principal is limited to the power of the principal to bind himself; if the powers of the principal to alter his own legal relations are ended by death, insanity or bankruptcy, the agent's powers are terminated automatically.[68]

A natural corollary of the agent's power replicating that of the principal is that 'the contract is the contract of the principal, not that of the agent, and, *prima facie*, at common law the only person who may sue is the principal, and the only person who

[64] [2000] 1 AC 486, 494.

[65] Dowrick, *The Relationship of Principal and Agent* (1954) 17 MLR 24, 37. The 'power-liability' relationship derives from Hohfeld's analysis of jural relations in *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1946: New Haven, Yale University Press).

[66] Dowrick (1954) (emphasis added).

[67] Winfield, *Principles of Contract* (1950: London, Stevens & Sons) 13th ed, p 45.

[68] (1954) 17 MLR 24, 37.

can be sued is the principal.'[69] However, this principle is subject to a number of exceptions:

> *First*, the agent may be added as the party to the contract if he has so contracted, . . . *Secondly*, the principal may be excluded in several other cases. He may be excluded if the contract is made by a deed *inter partes*, to which the principal is no party . . . Another exception is . . . if a person who is an agent makes himself a party in writing to a bill or note, by the law merchant a principal cannot be added. Another exception is that by usage, . . . where there is a foreign principal, generally speaking the agent in England is the party to the contract, and not the foreign principal . . . Again, where the principal is an undisclosed principal, he must, if he sues, 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 the other party . . . Also, . . . in all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal.[70]

1.27 This relatively abstract account of the role of the agent serves to emphasize that the agent's power to alter his principal's relations reflects a legal concept and not simply a factual reality. As Montrose explained:

> The power of an agent is not strictly conferred by the principal *but by the law*: the principal and agent do the acts which bring the law into operation, as a result of which the agent acquires a power.[71]

Whether a particular transaction is one of agency or, say, one of sale and resale remains a matter of proof

(i) Establishing agency on the facts

1.28 Even if one has satisfactorily teased out the essential legal attributes of the relationship between principal and agent, actually determining whether a particular transaction is one of agency *stricto sensu*, where the agent is representing the principal and bringing a third party into relations with that principal, or a situation in which, say, a party is independently purchasing and reselling goods without bringing 'principal' and third party into direct legal relations, remains a matter of proof; and sometimes a question of some difficulty. Take Buxton, LJ's judgment in *Blything v BVV/HFA Dekker, Wright-Manley (a firm)*:[72]

> [T]he question was whether W-N was an agent at all. If, as here, the objective facts indicate that he is not, it is a matter of evidence and common sense, not of legal rule, that that analysis must prevail, unless one or other of the parties makes it clear that the facts are different.

[69] *Montgomerie v United Kingdom Mutual SS Association Ltd* [1891] 1 QB 370, 371 *per* Wright, J.
[70] *Montgomerie* [1891] 1 QB 370 at 371–2, *per* Wright, J.
[71] *The Basis of the Power of an Agent in Cases of Actual and Apparent Authority*, 16 Can Bar Rev 756, 761 (1938) (emphasis added).
[72] (1999) 27 April, unreported, transcript no QBENF 1997/1630/1.

The evidence may not all point one way. The parties will not necessarily have given the precise nature of their legal relationship detailed thought. In *Blything* itself, W-N, which was a firm of auctioneers and agricultural agents, had assisted a Cheshire farming couple in the purchase of a herd of pedigree Holstein heifers from a breeder in Holland. The Court of Appeal accepted that W-N was acting outside its normal sphere in the transaction, that W-N appeared prepared to act *ad hoc* as principal, had failed to make clear what its terms of business were, and had given the farmers no reason to think that it was acting as an agent; that no meaningful contractual discussions ever took place between the farmers and the Dutch supplier; and that the Dutch supplier regarded W-N as its customer and the farmers regarded W-N as their vendor. The documentation, too, indicated that W-N accepted financial responsibility to the Dutch supplier as it was W-N which had invoiced the farmers and received payment from them. The relationship, then, was one of sale and resale, not of agency—although Buxton, LJ also admitted, confusingly, that 'it might have been open to [the first-instance judge] to come to a different conclusion.'

1.29 The inquiry may prove far from easy. In *A1 Lofts Ltd v HM Revenue & Customs*,[73] for instance, in order to determine whether a loft conversion company had supplied a homeowner with a finished loft conversion, thereby becoming liable to account for VAT, or whether it acted only as an agent and project manager in respect of supplies of building services offered by independent contractors, Lewison, J was obliged to pass in review a series of complex cases in which courts had previously analysed parties' relationships to determine whether or not they were in a principal-agent relationship for purposes of liability for the Value Added Tax Act 1994, ss 4(1) and 2(1).[74] In *Benourad v Compass Group plc*,[75] too, the first-instance judge had a particularly difficult task in determining whether or not there was an agency relationship between the parties.[76] The evidence in the case was predominantly oral. Much of it was so conflicting that Beatson, J was prompted to quote HHJ Jack, QC's words in *Loosemoore v Financial Concepts*:

> Memory, which is unsupported by documents, must inevitably be suspect. Things which occurred can be forgotten. Things can apparently be remembered which did not in fact occur. What did occur can be remembered with a false slant to it. All of that can happen without dishonesty. So, unless the documents are clear, the court's task is difficult.[77]

But this is scarcely unique to matters of agency.

[73] [2010] STC 214.

[74] At [47] Lewison, J includes a helpful summary, in which he distils nine propositions from the case law.

[75] [2010] EWHC 1882 (QB).

[76] See [2010] EWHC 1882 (QB) esp at [8]–[73].

[77] [2001] Lloyd's Rep PN 235, 237.

The manner in which the agent is remunerated for his services may contribute to the confusion. Whilst agents more usually are paid a commission, fixed as a percentage of the value of the business they conduct on behalf of the principal, nothing prevents the adoption of other arrangements that may make an agency resemble in some sort a sale and resale. As Lord Jessel, MR observed in *exp Bright re Smith*: **1.30**

> There is nothing to prevent the principal from remunerating the agent by a commission varying according to the amount of profit obtained by the sale. At present there is nothing to prevent his paying a commission depending on the surplus which the agent can obtain over and above the price which will satisfy the principal. The amount of commission does not turn the agent into a purchaser.[78]

Illustrating again that the manner in which an agent is paid will not always be determinative of whether the relationship is one of true agency or not, Christopher Clarke, J more recently observed of cargo recovery agents, such agents 'are often paid by way of commission on the recoveries which they take by way of deduction from the monies recovered. They then pass on the balance to the principal on whose behalf they have acted.'[79] The fact that the commission is deducted from sums recovered by no means necessarily excludes the agency relationship.

'Commercial Agents' under the Commercial Agents (Council Directive) Regulations 1993

Since the passing of the Commercial Agents (Council Directive) Regulations 1993,[80] a further distinct species of agent, the 'commercial agent', exists alongside English law's traditional forms of agent.[81] The Regulations were enacted in December 1993 pursuant to s 2(2) of the European Communities Act 1972. They give effect to a Council Directive of 18 December 1986 on the co-ordination of the law of the member States relating to self-employed commercial agents.[82] The Directive, in turn, grew out of an explanatory memorandum of December 1976 and a proposal first submitted to the Commission in January 1977. **1.31**

[78] (1879) 10 ChD 566, 570.

[79] *Dolphin Maritime & Aviation Services Ltd v Sveriges Angartygs Assurans Forening* [2009] 2 Lloyd's Rep 123 at [6].

[80] SI 1993/3053.

[81] For detailed treatment of this form of commercial agency, see S Saintier and J Scholes, *Commercial Agents and the Law* (2004: London, LLP); S Singleton, *Commercial Agency Agreements: Law and Practice* (2010: London, Bloomsbury Professional); F Randolph and J Davey, *The European Law of Commercial Agency* (2010: Oxford, Hart Publishing) 3rd ed; M Hesselink, JW Rutgers, O Bueno Diaz, M Scotton, and M Veldman, *Principles of European Law: Commercial Agency, Franchise, and Distribution Contracts* (2006: Oxford, Oxford University Press).

[82] Directive 86/6 5 3/EEC.

1.32 The 1993 Regulations were lightly amended in 1998.[83] Apart from correcting a misprint in reg 17(2), the 1998 draft of the Regulations responded to EC Commission representations that the 1993 version omitted to deal with cases where principal and commercial agent had expressly agreed that UK law was to apply to their contract and that, although the activities of the agent were to be carried out elsewhere in the Community, a court in the UK was to have jurisdiction. The 1998 Regulations put that matter beyond doubt. In such cases a UK court or tribunal is required to apply the Regulations, provided that the law of the other relevant member State so permits. The 1993 Regulations had already made provision for the converse case, thereby permitting commercial agents in the UK to agree to the application of the law of another member State.

Construction of the Regulations

1.33 When construing and applying the Regulations, the duty of English courts is to give effect to the manifest purpose of the Directive under which the Regulations are made. As Lord Templeman made clear in *Lister v Forth Dry Dock and Engineering Co Ltd*:

> [T]he courts of the United Kingdom are under a duty to follow the practice of the European Court by giving a purposive construction to directives and to regulations issued for the purpose of complying with directives.[84]

The underlying objective of the Regulations therefore has always to be borne in mind. Morison, J reflected upon the European and domestic legislative history of the Directive and the Regulations in *Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd*:

> The Directive has as an essential function, the co-ordination of laws relating to self-employed commercial agents. The rights of nationals from one member state to set up agencies, branches or subsidiaries in another member state (the right of establishment) lies at the heart of the Community. The Directive was made partly so as to give effect to the right of establishment and to the correlative obligation upon the Council and the Commission to effect, progressively, the abolition of restrictions on freedom of establishment (Arts. 43 and 44). It was also made pursuant to Art. 47 'to make it easier for persons to take up and pursue activities as self-employed persons' and to harmonise laws so as to enhance fundamental social rights including the promotion of employment and working conditions (Art. 136).[85]

1.34 The Regulations therefore must be construed in accordance with their purpose: namely, the promotion of freedom of establishment. With this in mind,

[83] See Commercial Agents (Council Directive) (Amendment) Regulations 1998, SI 1998/2868.
[84] [1990] 1 AC 546, 558.
[85] [2000] CLC 1397. See L. Vogel (ed), *Les agents commerciaux en Europe, échec de l'harmonisation?* (2012: Paris, Editions Panthéon-Assas) for a study that sets out to analyse how successful the harmonization of commercial agents' activities has been under the Directive.

Morison, J went on to contemplate the outlook courts should adopt in construing the Regulations:

> [T]he court is invited to look at the nature of the commercial bargain between the principal and the agent. Was it in the principal's commercial interests that this agent should be appointed to develop the market in the particular goods by the agent's expenditure of time, money and his own resources? It seems to me that by adopting this approach Parliament has properly reflected the purpose of the Directive. What the Directive is aimed at is the protection of agents by giving them a share of the goodwill which they have generated for the principal and from which the principal derives benefit after the agency agreement has been terminated . . . Essentially . . . the Regulations are asking whether this agent has been engaged in such circumstances as he can be said to have been engaged to develop goodwill in the principal's business.[86]

Viewed in this way, the principal concern becomes one of determining whether the agent's primary role is to develop goodwill in his principal's business—virtually developing a form of partnership with the principal in the market within which they operate.[87]

The definition of 'commercial agent'

Regulation 2(1) defines 'commercial agent' as follows: **1.35**

> '[C]ommercial agent' means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person ('the principal'), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal . . .

The Regulations will only govern the relationship of the parties if the activities of an agent comply with this definition, subject to what will be said presently regarding agents who 'act as commercial agents but by way of secondary activity only'. As Rix, LJ remarked in *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd*: 'It is common ground that the word "agent" can be carelessly and indiscriminately used, and that the test is ultimately one of substance rather than form.'[88] HHJ Mackie expanded upon this point in a subsequent case, noting that:

> Many claims under the Regulations are brought by and against relatively modest businesses . . . and the court should try to ensure that they are resolved as quickly and as cheaply as possible. Business people habitually use expressions like 'agent' and 'distributor' in a variety of loose ways. Moreover relationships which are in law agencies or [distributorships] as such take a wide variety of forms. Evidence from the parties or

[86] [2000] CLC 1397 at [28].

[87] This is confirmed by para 16 of the Law Commission report on the draft European Directive which noted that the term 'commercial agent', as employed in the Directive, is clearly based on the German *Handelsvertreter* or *Handelsagent.* The latter performs certain functions on a permanent basis for a standing client (Law Com No 84).

[88] [2002] EWCA Civ 288 at [6].

from their witnesses of what they understand the words to mean and how they characterise a particular commercial relationship will rarely assist.[89]

The agent must be a 'self-employed intermediary'

1.36 Regulation 2(1) requires that the agent be the equivalent of an independent contractor, as opposed to an employee of the principal. In the majority of cases the agent's self-employed status will be self-evident from the facts.[90]

The agent must be engaged in 'the sale or purchase of goods'

1.37 Although the Regulations provide no definition of 'goods',[91] it is clear that they do not apply to agents whose principal occupation is, say, the provision of services.

Nor do they govern the activities of estate agents because they negotiate the sale and purchase of land, not goods. If part of the agent's activities consists in the provision of services, provided that the sale or purchase of goods is not 'by way of secondary activity only',[92] he may still qualify as a commercial agent under the Regulations.

The agent must act 'on behalf of and in the name of that principal'

1.38 The meaning of this expression, in the context of English law, is far from clear. One can be confident that the activities of an agent who acts for an undisclosed principal will fall outside the Regulations because clearly he cannot be said to be negotiating the sale or purchase of goods 'in the name of that principal'. However, in other situations it is argued that what is intended by the expression is that the agent should act 'on behalf of and in the name of that principal' in the sense that a civilian lawyer would understand: namely, the agent will drop out of the transaction and will acquire neither rights nor personal liability in respect of the sales and purchases he negotiates on behalf of his principal.[93] Under English law, either by express provision or by construction of the agency agreement, an agent acting for a named principal,[94] and more frequently an agent acting for an unnamed principal,[95] can engage his personal

[89] *Raoul Sagal (t/a Bunz UK) v Atelier Bunz Gmbh* [2008] 2 Lloyd's Rep 158 at [11].

[90] Eg, *Marjandi Ltd v Bon Accord Glass Ltd* (2007) 15 October, 2007 WL 4947410 at [15].

[91] It may be recalled that in *St Albans City and District Council v International Computers Ltd* [1997] FSR 251, 264–5 Sir Iain Glidewell mused, 'Is software goods?', and hazarded *obiter* that under s 18 of the Sale of Goods Act 1979 and s 61 of the Supply of Goods and Services Act 1982 computer disks, as tangible media, qualified as 'goods', but computer programs, as intangible software, did not so qualify. Similar questions could readily arise under the Regulations.

[92] See paras **1.50–1.59**.

[93] See, eg, *Bowstead & Reynolds on Agency* (2010: London, Sweet & Maxwell) 19th ed, by Watts, para 11-019. See now *Sagal (t/a Bunz UK) v Atelier Bunz GmbH* [2009] 2 Lloyd's Rep 303, discussed at para **1.40**.

[94] See paras **12.05–12.15**.

[95] See paras **12.16–12.17**.

liability. In civilian terms, such an agent would not be described as acting 'on behalf of and in the name of that principal'.[96]

A person who buys and sells as principal is not a 'commercial agent'

1.39 Regulation 2(1) requires that a commercial agent must act 'on behalf of another person'. Thus, as Waller, LJ explained in *AMB Imballaggi Plastici SRL v Pacflex Ltd*:

> If a person buys or sells himself as principal he is outside the ambit of the regulations. This is so because in negotiating that sale or purchase he is acting on his own behalf and not on behalf of another. All the regulations point in the direction of the words 'on behalf of' meaning what an English Court would naturally construe them as meaning. The other person on whose behalf the intermediary has authority to negotiate the sale or purchase of goods is called the 'principal'; the duties are consistent with true agency and not with buying and reselling; 'remuneration' is quite inconsistent with 'mark-up', particularly 'mark-up' within the total discretion of the re-seller.[97]

In *Pacflex*, P dealt with the products in England of AMB, an Italian manufacturer. There was little documentation other than a letter in which AMB offered P the choice either to operate on commission on the basis that contracts would be arranged directly between end-users and AMB or to operate on a mark-up on the basis of a purchase from AMB and a resale to end-users. P selected the second option, but a formal agreement was never executed and the parties' reciprocal rights and obligations were never fully clarified. The Court of Appeal found that the evidence showed that all business was in fact done on the basis of sale and resale—P endeavouring to conceal the extent of its mark-up from AMB, albeit that P carried no stock and that AMB delivered directly to the end-users.[98]

1.40 Peter Gibson, LJ, in the same case, added:

> The plain implication of the language of the Directive and of the Regulations is that if the sale or purchase of goods is negotiated by the intermediary in its own interest rather than on behalf of the principal, the intermediary is not a commercial agent. The paradigm example of an intermediary so negotiating is as a distributor purchasing goods from the manufacturer but reselling the goods for a profit on the mark-up.[99]

This distinction came to the fore in *Raoul Sagal (t/a Bunz UK) v Atelier Bunz Gmbh*.[100] Under an oral contract, for some three-and-a-half years, S sold in the UK jewellery manufactured by a German company, B. S had a retail shop in St Albans and

[96] See further *Sagal (Trading as Bunz UK) v Atelier Bunz GmbH* [2008] 2 Lloyd's Rep 158 esp at [35] and [41].

[97] [1999] 2 All ER (Comm) 249, 252.

[98] See also *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd* [2002] EWCA Civ 288. 'Mark-up is not…conclusive against commercial agency': *Sagal (t/a Bunz UK) v Atelier Bunz GmbH* [2009] 2 Lloyd's Rep 303 at [15] *per* Longmore, LJ.

[99] [1999] 2 All ER (Comm) 249, 255.

[100] [2008] 2 Lloyd's Rep 158 (aff'd by Court of Appeal at [2009] 2 Lloyd's Rep 303).

formerly had a jewellery business in Tel Aviv. He held no stock, but placed orders with B whenever he had customers. In his accounts S set out purchases from B and sales to customers separately for VAT purposes. S bought most of the jewellery from B at a 20 per cent discount on the wholesale price and when he failed to pay on time B's accounts department would send 'dunning notices' seeking payment. When S, in turn, had to chase up his customers for payment, he did so in his own trading name. The relationship between S and B broke down, and S claimed compensation under the Regulations. Since the evidence clearly showed that this commercial relationship involved purchase of goods by S from B for the purpose of re-selling to his customers, and that S had no authority from B to negotiate or contract on its behalf, S was merely a distributor who bought and sold on his own account as principal and not a 'commercial agent' within the meaning of the Regulations.

1.41 The *Raoul Sagal* case invites comparison with the nineteenth-century Court of Appeal decision, *Re Nevill.*[101] T & Co habitually sent goods for sale to N, a partner in the firm of N & Co. N received them on his private account. The goods were accompanied by a price list, and N sold the goods on whatever terms he pleased, each month sending T & Co an account of the goods he had sold, debiting himself with the prices named for them in the price list, and at the expiration of another month paying the amount due in cash without any regard to the prices at which he had sold the goods, or the length of credit he had extended to his customers. N, however, paid the monies he received from these sales into the general account of his firm, and made his payments to T & Co through his firm, with whom he did keep a separate account covering transactions unconnected with N & Co, including those involving T & Co. N & Co having executed a deed of arrangement with its creditors, T & Co sought to prove against the joint estate for the amount standing to N's credit with his firm, arguing that it derived from monies belonging to T & Co. The Court of Appeal held that the course of dealing indicated that, whilst both parties might very well have looked upon their arrangements as in the nature of an agency, N did not in fact sell the goods as agent for T & Co. He sold them on his own account, upon the terms of his paying T & Co for them at a fixed rate if he sold them. The monies he received for them were therefore his own monies, which T & Co had no right to follow:

> [I]f the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time . . . whatever the parties may think, their relation is not that of principal and agent.[102]

[101] (1870–71) LR 6 Ch App 397.
[102] (1870–71) LR 6 Ch App 397 at 403 *per* Mellish, LJ.

Can agents who conclude contracts in their own names be 'commercial agents' within the terms of the Directive?

1.42 On appeal in *Sagal (t/a Bunz UK) v Atelier Bunz GmbH*,[103] S contended that, contrary to the first-instance judge's finding, the prices he charged for jewellery were mandatory, not advisory. S, it was said, had no discretion as to what he charged UK retailers, the prices being related mathematically to those B charged its German customers. In response to B's suggestion that because S made contracts with purchasers in his own name, albeit under the trade name 'Bunz UK', S fell outside the definition of a commercial agent, S argued that the mere fact that the mechanism chosen for implementing S' authority to negotiate the sale of jewellery was to make contracts under which he became personally liable to customers as 'Bunz UK' rather than making a contract in the name of the German company 'Bunz GmbH' was irrelevant. Longmore, LJ, looking to the terms of the Commercial Agents Council Directive[104] in preference to the English Regulations, considered that this raised 'an important question of construction',[105] with which 'the English authorities have not had to grapple directly':[106] namely, whether the Directive applies only to agents who bring their principals into direct contractual relationship with their customers or whether it can also apply to agents who make their own contracts with customers. He concluded that the terms of the definition precluded an agent who makes contracts in his own name and on his own behalf from being treated as a 'commercial agent' under the Directive. More specifically, if such agents were 'commercial agents', the second limb of the definition would thereby be rendered redundant:

> If someone is an agent for another he will invariably have authority to negotiate (namely, to find out the terms on which a third party wishes to contract) on behalf of his principal; the question may then arise whether he has authority to contract on behalf of his principal. The first limb of the definition envisages that the agent does not have authority to contract on his principal's behalf but only has authority to negotiate terms on behalf of his principal and then refer back to him to see whether he wants to make a contract on certain terms with a third party customer. To my mind, the definition further envisages that, if the principal does want to make a contract with the customer, he will then do so and there will then be a contract made directly between the customer and the principal which will be made in the name of the principal. It does not envisage that, after the agent refers back to the principal and obtains the go-ahead for making a contract, the agent will enter into a contract in his own name with the customer; the reason for that is that, although he will then have authority to conclude a contract which is not in the principal's name, he will not come

[103] [2009] 2 Lloyd's Rep 303.

[104] Article 1(2) of the Directive reads: 'For the purposes of this Directive "commercial agent" shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the "principal", or to negotiate and conclude such transactions on behalf of and in the name of the principal.'

[105] [2009] 2 Lloyd's Rep 303 at [10].

[106] [2009] 2 Lloyd's Rep 303 at [14].

> within the second limb of the definition which is the limb dealing with authority to contract.[107]

Longmore, LJ, therefore, concluded that agents with authority to contract (as opposed to authority to negotiate) only constitute 'commercial agents', for the purposes of the Directive, if they have authority to contract (and do contract) in the name of the principal as well as on his behalf.

'Commercial agents' and the question of proof

1.43 In *Sagal (t/a Bunz UK) v Atelier Bunz GmbH* Longmore, LJ advanced a further practical reason for construing the Directive in such a way as to exclude agents contracting in their own names: such a construction dispensed with the need for courts to receive possibly complex and conflicting evidence in order to determine whether a particular party was contracting in his own name on behalf of a principal and thus qualified as a 'commercial agent':

> [I]f the Directive only applies where the principal's name appears on the face of the contracts made with the third parties, the inquiry can be a quick and straightforward inquiry, only requiring disclosure of the parties' contractual documentation.[108]

1.44 The latter consideration led Longmore, LJ to reflect more generally on the degree to which a court should have to consider evidence in contested cases. He counselled that even if documentation is equivocal, 'judges should be cautious about allowing the question whether commercial agency exists to develop into an extended trial with extensive oral evidence.'[109]

The agent must have 'continuing authority to negotiate the sale or purchase of goods'

1.45 In determining what is meant by a 'continuing authority to negotiate the sale or purchase of goods' in reg 2(1), Guidance Notes issued by the Department of Trade and Industry in September 1994 commented:

> Some agents only effect introductions between their principals and third parties. The question arises as to whether such agents are commercial agents for the purposes of the Regulations. Such agents are sometimes known as 'canvassing' or 'introducing' agents. As such, they generally lack the power to bind their principals and are not really agents in the true sense of the word. However, to the extent that such an agent 'has continuing authority to negotiate the sale or purchase of goods' on behalf of his principal, even though, as a matter of fact, he merely effects introductions, it seems

[107] [2009] 2 Lloyd's Rep 303 at [12].
[108] [2009] 2 Lloyd's Rep 303 at [13].
[109] 'Bunz GmbH is, of course, German; most German businessmen would be surprised that it should take four days of trial to determine the question whether somebody is a "commercial agent" within the meaning of the Directive and appalled at the resulting cost…We were told that Bunz GmbH is now in liquidation or administration; one can only hope that that is not because of the expense of these English proceedings': [2009] 2 Lloyd's Rep 303 at [17].

that he would fall within the definition of 'commercial agent' in reg 2(1). It is clear that an 'introducing' agent who lacks such authority falls outside the scope of the definition of 'commercial agent'. It may be that the courts would give a wide interpretation to the word 'negotiate' and that, as a result, 'introducing' agents will, in general, have the benefit of the Regulations.

In *Parks v Esso Petroleum Co Ltd*,[110] Morritt, LJ gave the term 'to negotiate' a wide construction. *Parks* concerned a person who occupied a service station under a motor fuels agency agreement. Morritt, LJ adopted one of the *Oxford English Dictionary*'s definitions of negotiation: '(2) *Trans.* To deal with, manage, or conduct (a matter, affair etc., requiring some skill or consideration)'—observing that this definition did not require a process of bargaining in the sense of invitation to treat, offer, counter-offer and finally acceptance, more colloquially known as a haggling. Therefore, adopting this approach, in order to determine whether someone was a 'commercial agent' it was necessary to consider, *inter alia*:

(i) whether the suggested agent dealt with, managed or conducted the relevant transaction, and
(ii) whether a material process of negotiation was involved.

1.46 Subsequently, in *PJ Pipe & Valve Co Ltd v Audco India Ltd*[111] it was argued that the particular definition which Morritt, LJ had adopted in *Parks* was unduly wide and that other 'primary' definitions to be found in the *OED* were to be preferred. These were variously to 'try to reach an agreement or compromise by discussion with others' and 'to hold communication or conference (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some settlement or compromise'. Fullwood, J, however, rejected this argument. Whilst accepting that an agent's authority to negotiate the sale of relevant products was one of a number of factors that might demonstrate the existence of a commercial agency, he found that these definitions placed too narrow an interpretation on the word 'negotiate'. He was fortified in this view by *Tigana Ltd v Decoro Ltd*.[112] In *Tigana* it had been held, without argument, that an agent whose primary role was to effect introductions of potential customers interested in leather upholstery produced by the principal was a 'commercial agent' within the meaning of the Regulations. The agent typically introduced the importer, and its goods, to prospective substantial retailers in the UK with a view to securing the placing of orders. Thereafter he acted as a point of contact and liaison, trying to secure further orders, administering the relationship, overseeing delivery of goods and helping to deal with any service and specification problems that might arise.[113] As Davis, J explained, to a considerable

[110] (1999) 18 TrLR 232.
[111] [2005] EWHC 1904 (QB); [2006] Eur LR 368.
[112] [2003] EWHC 23 (QB); [2003] ECC 23.
[113] [2003] EWHC 23 (QB); [2003] ECC 23 at [4].

extent the agent's role was 'front loaded', although he also performed functions designed to cement the relationship between his principal and their clientele.[114] In *PJ Pipe & Valve Co Ltd v Audco India Ltd*[115] the agent performed broadly analogous functions. It partly managed discussions and transactions—notably, effecting introductions and engaging contractors' interest—when contractors were in the process of selecting a manufacturer. It also helped to put its client on the approved list of vendors and ensured that the client received the invitations to tender, in part by putting in an appropriate bid. It assisted with quotations and queries as well as providing feedback and advising on how a quotation might be improved. In Fulford, J's view, this showed that the agent was 'retained, *inter alia*, to develop goodwill on the part of [the principal]'. Because the purpose of the Directive was to provide protection to agents by giving them a stake in the goodwill which they had generated for the principal:

> the courts should avoid a limited or restricted interpretation of the word 'negotiate' that would exclude agents who have been engaged to develop the principal's business in this way, and who successfully generated goodwill for the manufacturer, to the latter's benefit after the agency terminated.[116]

In consequence, Fulford, J concluded that the agent in this case was a 'commercial agent', as defined by the Regulations, notwithstanding the fact that it lacked authority to progress agreement on commercial terms or prices.

1.47 As Patten, J has pointed out in *Nigel Fryer Joiner Services Ltd v Ian Firth Hardware Ltd*, 'the word "negotiate" is not defined in the Regulations'.[117] In *PJ Pipe Valve Co Ltd v Audio India Ltd*, however, Fulford, J did treat 'negotiate' as meaning, 'to deal with, manage or conduct'.[118] In *Nigel Fryer* the agent, F, had no authority to conclude sales of doors and hardware on behalf of IFH, but F could suggest contract prices, which were sometimes approved by IFH's head office and sometimes adjusted. F's role was to interest customers in a product, to quote an indicative price and request a price from head office, and in some cases—following receipt of the quotation from head office—to relay customers' queries about the price and to encourage the customer to place an order with IFH. F's authority was limited to introducing goods to clients and suggesting what prices might be charged. Although it was argued that Fulford, J had adopted too broad an interpretation of 'to negotiate' in *PJ Pipe*, Patten, J concluded that the inclusion in reg 2(1) of two definitions of commercial agent ('negotiate the sale' or 'negotiate and conclude the sale') indicated that the first could

[114] [2003] EWHC 23 (QB); [2003] ECC 23 at [58].
[115] [2005] EWHC 1904 (QB); [2006] Eur LR 368.
[116] [2005] EWHC 1904 (QB); [2006] Eur LR 368 at [155].
[117] [2008] 2 Lloyd's Rep 108 at [17].
[118] [2005] EWHC 1904 (QB); [2006] Eur LR 368. See also *Parks v Esso Petroleum Co Ltd* (1999) 18 TrLR 232 *per* Morritt, LJ.

include the wider meaning which Fulford, J attributed to the term 'negotiate' in the first of the two definitions. Thus, the activities of an agent like F came 'well within the ordinary meaning of "negotiate" '.[119]

1.48 The European Court of Justice, too, has had to consider the meaning of 'continuing authority'—and, more specifically, whether 'continuing authority' refers only to an agent who performs multiple transactions or whether it also extends to a case where a self-employed intermediary has authority to conclude a single contract, but the principal has conferred authority on that intermediary to negotiate successive extensions to the contract over several years. This question arose in *Poseidon Chartering BV v Marianne Zeeschip VOF*,[120] where a company had acted as intermediary in concluding the charter of a ship and in subsequent years negotiated extensions of the charter, which were recorded in addenda to the charter party. The company received a commission for securing extensions of the charter party. Whilst acknowledging that '[t]he number of transactions concluded by the intermediary for and on behalf of the principal is normally an indicator of that continuing authority',[121] the ECJ held that this is not the sole determining factor. It concluded that, provided that the national court makes the requisite findings of fact, continuing authority for the purposes of the Directive could relate to a single mandated transaction:

> [W]here a self-employed intermediary had authority to conclude a single contract, subsequently extended over several years, the condition laid down by that provision that the authority be continuing requires that the principal should have conferred continuing authority on that intermediary to negotiate successive extensions to that contract.[122]

Specific exemptions

1.49 Regulation 2 explicitly excludes from the application of the Regulations certain classes of persons who might otherwise be considered to act as intermediaries in the sense of reg 2(1). This is:

> ['Commercial agent'] shall be understood as not including in particular:
>
> (i) a person who, in his capacity as an officer of a company or association, is empowered to enter into commitments binding on that company or association;
>
> (ii) a partner who is lawfully authorised to enter into commitments binding on his partners;

[119] [2008] 2 Lloyd's Rep 108 at [20].
[120] [2006] 2 Lloyd's Rep 105.
[121] [2006] 2 Lloyd's Rep 105 at [25].
[122] [2006] 2 Lloyd's Rep 105 at [27].

(iii) a person who acts as an insolvency practitioner (as that expression is defined in s 388 of the Insolvency Act 1986) or the equivalent in any other jurisdiction;[123]

Equally, the Regulations have no application to commercial agents who act gratuitously, to commercial agents when they operate on commodity exchanges or in the commodity market, or to Crown Agents.[124] Most curiously for an English lawyer, however, the Regulations have no application to those 'persons whose activities as commercial agents are to be considered secondary'.[125]

Persons whose activities as commercial agents are 'secondary'

1.50 The concept of 'persons whose activities as commercial agents are to be considered secondary' was bound to appear alien to an English lawyer. Owing to the fact that, prior to 1993, English law did not possess a concept of commercial agency *tout court*, the idea of agents whose activities as commercial agents were 'secondary' would make little sense. Nevertheless, the distinction between the agent's primary and secondary activities is important because art 4 of the Directive provides that in their domestic legislation implementing the Directive, Member States are at liberty not to apply certain portions of the Directive 'to persons who act as commercial agents but by way of secondary activity only.'[126] Just to add to the mystery, as originally drafted, art 4(1) went on to state that 'the question whether the activity is carried on in that way being determined in accordance with commercial usage in the State whose law governs the relations between principal and agent.' There were moves to delete this provision. It was retained, however, even though the Legal Affairs Committee admitted that it was 'impossible to lay down suitable criteria for every possible case.'[127] The final version, incorporated into art 2(2) of the Directive, read:

> Each of the Member States shall have the right to provide that the Directive shall not apply to those persons whose activities as commercial agents are considered secondary by the law of that Member State.

1.51 Article 2(2) leaves it open to member States to derogate from whatever provisions of the Directive it wishes in the case of those practising the activities of a commercial agent in a secondary capacity. It also now declares that it is the law of each member

[123] Commercial Agents (Council Directive) Regulations 1993, reg 2(1).
[124] Commercial Agents (Council Directive) Regulations 1993, reg 2(2).
[125] Commercial Agents (Council Directive) Regulations 1993, reg 2(3) and (4).
[126] As Waller, LJ observed in *AMB Imballaggi Plastici SRL v Pacflex Ltd* [1999] 2 All ER (Comm) 249, the United Kingdom 'took advantage of that provision, and by an almost impenetrable piece of drafting sought by Regulation 2(3) and (4), together with a Schedule, to exercise that right' (p 250).
[127] Report of Mr P de Keersmaeker of July 27, 1978, para 25.

State that will regulate which agents fall into this 'secondary' category. Since English common law—unlike the laws of virtually all other member States—possessed no such concepts prior to implementation of the Directive,[128] the Regulations contain a provision intended to enable English law to distinguish between agents who act as commercial agents in a primary and a secondary capacity.[129]

To this end, reg 2 fills this lacuna in English law by providing: **1.52**

(3) The provisions of the Schedule to these Regulations have effect for the purpose of determining the persons whose activities as commercial agents are to be considered secondary.
(4) These Regulations shall not apply to the persons referred to in paragraph (3) above.

In essence, the Schedule does not define secondary activities but employs a formula that defines activities with a specified primary purpose. The Regulations then assume that anyone performing any other activities falling outside these defined areas is likely to be considered to be performing them in a secondary capacity. The Schedule provides as follows:

1. The activities of a person as a commercial agent are to be considered secondary where it may reasonably be taken that the primary purpose of the arrangement with his principal is other than as set out in para 2 below.
2. An arrangement falls within this paragraph if—
   (a) the business of the principal is the sale, or as the case may be the purchase, of goods of a particular kind; and
   (b) the goods concerned are such that—
      (i) transactions are normally individually negotiated and concluded on a commercial basis, and
      (ii) procuring a transaction on one occasion is likely to lead to further transactions on those goods with that customer on future occasions, or to transactions in those goods with other customers in the same geographical area or among the same group of customers, and

   that accordingly it is in the commercial interests of the principal in developing the market in those goods to appoint a representative to such customers with a view to the representative devoting effort, skill and expenditure from his own resources to that end.

[128] The Law Commission laid stress on this inconvenient fact in its report on the proposed Directive in 1977 (Law Com 84).

[129] This would explain why the Directive's recital states, 'Whereas additional transitional periods should be allowed for certain Member States which have to make a particular effort to adapt their regulations, especially those concerning indemnity for termination of contract between the principal and the commercial agent, to the requirements of the Directive.' To this end, the United Kingdom and Eire were allowed four extra years to comply with the Directive (art 22(3)).

3. The following are indications that an arrangement falls within para 2 above, and the absence of any of them is an indication to the contrary—the principal is the manufacturer, importer or distributor of the goods;
   (a) the goods are specifically identified with the principal in the market in question rather than, or to a greater extent than, with any other person;
   (b) the agent devotes substantially the whole of his time to representative activities (whether for one principal or for a number of principals whose interests are not conflicting);
   (c) the goods are normally available in the market in question other than by means of the agent;
   (d) the arrangement is described as one of commercial agency.
4. The following are not normally indications that an arrangement does not fall within para 2 above—
   (a) promotional material is supplied direct to potential customers;
   (b) persons are granted agencies without reference to existing agents in a particular area or in relation to a particular group;
   (c) customers normally select the goods for themselves and merely place their orders through the agent.

1.53 Contemplating these provisions in *Edwards v International Connection (UK) Ltd*,[130] Moore-Bick, LJ suggested:

> [T]he purpose of Regulation 2(4) and of paras 2, 3 and 4 of the Schedule is to distinguish between those persons falling within the definition of a commercial agent in reg 2(1) who are engaged primarily to carry out the functions of a commercial agent, that is, generating customers, obtaining repeat orders, and creating and developing a market for their principal's goods, and those who are primarily engaged for some other purpose but who incidentally provide some or all of those services. In the latter case their activities can properly be described as 'secondary'. One essential criterion in para 2 of the circumstances under which a person is engaged for the primary purpose of acting as a commercial agent is that to be found in the final lines of that paragraph, namely:
>
> > . . . that accordingly it is in the commercial interests of the principal in developing the market in those goods to appoint a representative to such customers with a view to the representative devoting effort, skill and expenditure from his own resources to that end.

In most cases the arrangement will fall within para 2, and the agent's activities will not be considered secondary, if its primary purpose is to achieve those ends.[131]

The burden of proving whether the agent's activities are secondary

1.54 Because the Schedule defines 'secondary' in terms of what is not 'primary', in determining whether or not a commercial agent's activities are to be considered secondary,

[130] [2006] EWCA Civ 662.

[131] [2006] EWCA Civ 662 at [17]. See also *Tamarind International v Eastern Natural Gas (Retail) Ltd* [2000] Eu LR 708 at [28] *per* Morison, J.

the agent will normally bear the burden of showing that his arrangement with the principal falls within para 2 of the Schedule—which is to say that it is an arrangement whose primary purpose is as described in para 2. This analysis, however, may not fit every situation.[132] As Briggs, J observed in *Crane v Sky-In-Home Ltd and Secretary of State for Trade and Industry*:

> There may . . . be cases . . . where two purposes of the relevant arrangement can be identified, but with equal status, so that neither can be described as primary. In such a case, para 1 will not apply, there being no single primary purpose, and the activities the agent will not be secondary.[133]

The test laid down in para 2 looks almost exclusively to the purpose of the principal:

> The claimant has to show that it is in the commercial interests of the principal in developing the market for the particular kind of goods which are the subject of the arrangement to appoint a representative to the defined customers of his with a view to the representative devoting effort, skill and expenditure from his own resources to the development of the market.[134]

The court has to be convinced that the commercial interests of the principal are furthered in the ways set out in para 2 (a) and (b). Whilst it may well be that the principal's interests are served in other ways by the appointment of a representative, these will entail that the representative is a commercial agent for the purposes of the Regulations.[135]

Although in *AMB Imballaggi Plastici SRL v Pacflex Ltd*[136] the matter did not strictly arise for decision, Waller, LJ set out the difficulties the drafting of the English Regulations poses, contending that the right answer must be to clarify the matter as soon as possible.'[137] In essence the problem is that whilst the Directive permits Member States to disapply the Directive where the activities of the agent *qua* agent are secondary as compared with the rest of the agent's business, the English Schedule appears to contemplate an assessment not of the activities of the agent as 'a commercial agent' as compared with his other business, but an assessment of the agent's arrangement with the principal.[138] Paragraph 1 of the Schedule states that a person's **1.55**

[132] In *Edwards v International Connection (UK) Ltd* [2006] EWCA Civ 662 at [15]. Moore-Bick, LJ expressed some uncertainty on the incidence of this burden of proof.

[133] [2007] 2 All ER (Comm) 599 at [54].

[134] *Crane v Sky-In-Home Ltd and Secretary of State for Trade and Industry* [2007] 2 All ER (Comm) 599 at [55].

[135] [2007] 2 All ER (Comm) 599 at [56].

[136] [1999] 2 All ER (Comm) 249.

[137] Both the other members of the Court, Peter Gibson and Judge, LJJ associated themselves with Waller, LJ's remarks.

[138] Waller, LJ suggested that in likelihood this had not been the intention, as indicated by the Guidance Notes issued by the DTI.

activities as a commercial agent are to be considered secondary 'where it may reasonably be taken that the primary purpose of the arrangement with his principal is other than as set out in para 2.' Inconveniently, para 2 does not set out any purpose but focuses upon aspects of the arrangement with a particular principal. As Waller, LJ explained:

> Paragraphs 3 and 4 suggest pointers are being supplied as to whether an arrangement is within para. 2, but provide no assistance as to what is being compared with what for the purpose of deciding what might be secondary as compared with what might be primary, nor any assistance as to whether other factors are excluded.[139]

Waller, LJ saw 'much force' in the argument that, contrary to what seemed to be required under the Directive, if an agent has entered into an arrangement with:

> the principal which falls within para 2, using the indications under paras 3 and 4 purely for the purpose of making that assessment, 'then it must be taken that that business is not secondary.'[140]

1.56 The very validity of the notion of commercial agency as a secondary activity has been called into question. In *Crane v Sky-In-Home Ltd and Secretary of State for Trade and Industry*[141] counsel sought unsuccessfully to argue that reg 2(3) and (4) was *ultra vires*, being outwith the authority to make secondary legislation conferred by s 2(2) of the European Communities Act 1972. This argument exploited the fact that, unlike other European jurisdictions, prior to the enactment of the Directive, English law had no concept of commercial agency and thus no need to set apart those agents whose commercial agency activities were secondary. The relevant Article of the Directive, it was contended, was meant for those States which already provided for commercial agents in their national law and was not intended as an option to decide precisely to how wide a class the benefit of the Directive should apply. The Regulations were, in counsel's submission, an exercise in national legislation, which the Directive neither required nor authorized. Briggs, J held that:

> The rational and common-sense interpretation of art 2(2) in relation to Member States with no such existing national law is that to enable them to exercise the right to derogate expressly conferred, they were expected if necessary to create national rules defining secondary activities by whatever means they thought fit.[142]

[139] [1999] 2 All ER (Comm) 249 at [4].
[140] [1999] 2 All ER (Comm) 249 at [23].
[141] [2007] 2 All ER (Comm) 599.
[142] [1999] 2 All ER (Comm) 249 at [41]. The matter was not discussed in the Court of Appeal: [2008] EWCA Civ 978 at [8] *per* Arden, LJ, when the appellant applied unsuccessfully to raise issues not investigated at trial.

1.57 There is no requirement under para 2(a) of the Schedule that the sale or purchase of the relevant goods was the sole or main business of the principal. Since the purpose of the Regulations is to protect the interests of a particular class of self-employed intermediaries, it has been suggested:

> The same agent may be appointed for the development of the same market in the same particular goods by, on the one hand, a large unitary corporation with many different businesses, including the sale of those goods, and on the other hand by a group of companies in which each different business is carried on by a different group company.[143]

Such a view makes sense as it would be odd if the relevant group company was liable to pay compensation on termination, but the large unitary corporation was not because sale or purchase of those goods was not its sole or main business. Paragraph 2(a) of the Schedule focuses the analysis upon the commercial interests served by the development of a market for goods of the relevant kind, rather than, for instance, a market for related services.

1.58 In making a determination whether an agent is a commercial agent for these purposes the 'indications' for and against making such a finding enumerated in paras 3 and 4 are not to be 'used in some slavish numerical way'.[144] They do not constitute an exclusive list or relevant considerations; others might be relevant. Moreover, they may possess different weight in different proceedings:

> Viewed in the aggregate they do provide some assistance towards an understanding of the elusive concept of secondary activities which the Schedule seeks to define by its identification of the opposite. Taken as a whole they appear . . . to be directed at distinguishing between a relationship where the agent develops goodwill (in relation to the market for the particular goods) which passes to the principal, and one where that does not happen, either because the agent's activities are not typically generative of such goodwill, or because the principal generates goodwill mainly by other means.[145]

Thus in *Crane*, Briggs, J held that under para 2(a) it was irrelevant that the principal conducted other sales (and service business) alongside the selling of box packages, which was the subject of the agency agreement. As regards para 2(b), para 2(b)(i) was satisfied because the box packages were normally sold one-to-one to customers in retail transactions on a commercial basis. Paragraph 2(b)(ii), however, was not satisfied as it would have been 'unreal' to describe the sale of box packages as playing a significant part in generating goodwill in the sale of further box packages: whatever

[143] [1999] 2 All ER (Comm) 249 at [58].
[144] [1999] 2 All ER (Comm) 249 at [59]. See *McQuillan v McCormick* [2010] EWHC 1112 (QB), [2011] ECC 18 at [129(1)].
[145] [1999] 2 All ER (Comm) 249 at [59].

commercial interests may have led to the agent's appointment, 'they were not derived from a likelihood that sales of box packages would lead in any causative sense to further such sales.'[146] In consequence, the agent's arrangement with the principal had a primary purpose different from that described in para 2, and had therefore to be considered 'secondary' within the meaning of para 1.[147]

1.59 In *Crane*, Briggs, J also held that in the requirement in para 3(c) that 'the agent devotes substantially the whole of his time to representative activities', 'representative activities' were not confined to activities in relation to goods rather than services. Paragraph 3(c) is focused on the question, for what primary purpose was the agent appointed? If his agency is ancillary to other non-representative activities, then it is unlikely that he was appointed for the exploitation of his skills as an agent. The question is simply whether the person in question is a full-time agent (ie, sales or purchase representative). Since the question addresses the purpose of the appointment, it is best answered at the time of the appointment. Otherwise he might drift in and out of qualifying commercial agency during the currency of the arrangement.[148]

The question, who qualifies as a 'commercial agent' under the Directive, is of considerable practical importance

1.60 As the fecund case law shows, numerous agents either fall, or would seek to fall, within the terms of the 1993 Regulations. The Directive makes generous provision for agents upon termination of their agency;[149] and, unlike the common law, it gives the agent a general right to remuneration, the right to demand a written statement of the terms of the agency agreement, statutorily delineated rights and duties, and a regime stipulating periods of notice of termination. Owing to their growing commercial significance, the special features of the law affecting commercial agents under the Directive will be discussed separately from the relevant elements of the general law of agency in ensuing chapters.

Contracting in

1.61 Whilst identifying whether or not a particular individual is a 'commercial agent' under the 1993 Regulations may involve nice points of interpretation, parties are at liberty simply to incorporate the Regulations into their contract regardless of their

146 [1999] 2 All ER (Comm) 249 at [67].

147 In *Crane* it was not thought to be an insuperable obstacle that the principal's commercial objective was the development of a distinct market for Box Packages and that it actually sold them at a loss as an incentive to customers to subscribe to Sky Digital, a service provided by the principal's sister company. 'The commercial interests of a group may satisfy the commercial interests test in para 2 without having to show that the purely separate interests of the principal are served, viewed in isolation' (at [72]).

148 [2007] 2 All ER (Comm) 599 at [77].

149 See **chapter 13**.

standing under reg 2(1). Although in *McQuillan v McCormick*[150] HHJ Behrens would have held on the facts that the parties' relationship in any case fell within the definition in reg 2(1), he determined that there was no need to pursue this analysis as the parties had expressly incorporated the Regulations into their agency agreement, as witnessed initially in correspondence prior to formation of their contract as well as in the principal's subsequent acceptance that the agents' contract had been subject to the protection of those Regulations.[151]

[150] [2010] EWHC 1112 (QB), [2011] ECC 18.
[151] [2010] EWHC 1112 (QB), [2011] ECC 18 at [125] and [127].