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Adjudicating Intermediary-Related Losses

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Abstract

Three-party situations are problematic due to the agency, information and administrative costs involved. This includes the substitution of parties in relationships characterized as choses in action, which is why we see them as property transfers even if that is not fully accurate. We also create separate personality to help compress the number of parties involved in a transaction but that still contains separate layers within an artificial entity. It is not possible to fully avoid the use of intermediary analysis once there are dealings with the outside world in situations of coownership of property or co-sharing of power and so the goal is to keep costs low.

The problem is not with agency costs as principals are well protected today. But that then shifts informational costs to third parties, particularly if objective standards are imposed on them. This lowers the administrative costs of adjudication but if so we need to get those standards right in order to minimize total costs. At the moment much of the work is done through the doctrine of notice and burden of proof, which could turn on how a case is pleaded. This may be too onerous for third parties and could in fact increase transactional costs if principals are not incentivized to control agency costs. There needs to more notice-creating mechanisms and perhaps more principled ways to apportion losses.

Keywords: Agency law; Commercial law; Company Law; Equity; Notice; Law and Economics

Introduction

The commercial landscape would be quite different without intermediaries. For a start, the number of transactions and economic activity would be much lower. But the use of intermediaries comes at a cost, which includes agency costs of monitoring them, information costs for third parties dealing with principals through these intermediaries and the costs of adjudicating disputes arising between principals and third parties due to the actions of intermediaries. Where possible, we try to avoid the unnecessary use of intermediaries and/or intermediary analysis. Three-party situations complicate things. However, reducing this to two parties can sometimes be artificial and that leads to its own difficulties.

An example of this is the law of assignment, which in some contract law textbooks[1], comes right before the chapter on agency. Both are meant to be exceptions to privity and focus on the need to bring a third party into the contractual relationship. With assignments, the accepted view is that there is a property transfer of the chose from assignor to assignee and, in equity, involving the obligor is not strictly necessary. In a recent book, however, Tham challenges the neatness of this narrative, which attempts to replicate a principal seller to principal buyer transaction involving tangible property.[2] Instead he sees all parties remaining in the picture, with the assignor becoming a bare trustee and the assignee a limited agent with respect to the entitlements that the assignor has against the obligor. With agency law, the archetypal situation with disclosed agents is that they drop out of the picture once the contract is made. But the three-party picture cannot be avoided with undisclosed agents. It also comes back in disclosed agency once there are any disputes or difficulties arising in the original tripartite relationship. A disclosed agent can also still be liable to a third party even when a contract is properly made with the principal.[3] And apparent authority is always there to haunt us as "(e)very few years, the vexed question of whether an agent of a company is able to represent his own authority arises before a Commonwealth court"[4]. The answer there, which invariably in practice is in the negative, is a good example of incentivizing third parties, especially in their initial transaction with the principal, to seek out the principal or to obtain independent verification as opposed to relying totally on an agent. One should not rely on intermediaries before some contact with, or representation has been made by, the principal.

Intermediaries are unavoidable even with aggregated entities

There is an unavoidable need to use intermediaries in one form or other, and many seemingly two-party situations in fact involve more participants than that. Incorporation creates a separate legal entity that captures the web of relationships needed to run a business. This is done to reduce hold out costs by otherwise outside contracting parties but it then creates other agency costs.[5] Even if the corporate fund is partitioned separately so that shareholders have no control over it, how it is committed to a person dealing with a company, an "artificial construct"[6], means that intermediary analysis, usually involving the directors,

[1] See, eg, Edwin Peel, *Treitel: The Law of Contract* (Thomson Reuters, 15th ed, 2020).
[2] Chee Ho Tham, *Understanding the Law of Assignment* (CUP, 2019).
[3] A disclosed agent that drops out of the picture can still be liable to the third party by, eg, assuming personal liability on the contract, David Fox, RJC Munday, B Soyer, AM Tettenborn, PG Turner, *Commercial Law, Text, Cases and Materials* (OUP, 6th ed, 2020) at 175.
[4] Tracey Evans-Chan and H Tjio, "Unusual Apparent Authority and Vicarious Liability" (2012) 128 *Law Quarterly Review* 27.
[5] Edward M Iacobucci and George G Triantis, "Economic and Legal Boundaries of Firms" (2007) 93 Virginia Law Rev 515 at 517. It "creates different and more complex problems" George M Cohen, "The Law and Economics of Agency and Partnership" in Francesco Parisi ed, *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law* (OUP, 2017) at 402.
[6] *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [77] (Chan CJ).

cannot be avoided. There are many occasions when we have to look within a company even when we try not to.

Attempts have been made to see the shareholders in general meeting or the board of directors not as agents but as organs of the company. It has never been clear whether these organs are the company itself for the purposes of a particular decision but organs were seen to be more than just a discrete part of the company. But it has also been cogently argued that the board as a whole should still be seen as an agent of the company.[7] Similarly, senior management in a company can also be seen as the company in some situations but also as a separate body in others. The UK Corporate Manslaughter and Corporate Homicide Act 2007[8] was introduced to remove the directing mind requirement even for manslaughter to one where more generalised management failure could make the company liable. But an older edition of *Gower and Davies* recounted how “the wheel thus came full circle”[9] when, during passing of the Act, there was debate on imposing liability not just on the company but on senior individuals within it, although this was eventually resisted by the legislature. It does show how difficult and circular the question of punishing a corporation can be because of the other constituencies directing it.[10] A contextual approach[11] to the attribution of the rogue director’s knowledge to the company has also prevented “absurd extremes”[12] where controlling agents say that the attribution always means that the company approved or ratified their actions.[13]

Outsiders dealing with a company can, however, rely on the “indoor management” rule,[14] which was an attempt at allowing third parties to use a presumption of regularity to cure any irregularities that may have existed within the corporate structure in terms of the co-ownership of property or co-sharing of power.[15] It is a powerful rule as described by *Boyle & Birds’ Company Law*[16] who state that “where it applies, the *Turquand* rule is conclusive and does not simply raise a rebuttable presumption.” Similarly, *Ford’s*

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[7] Peter Watts, “Directors as Agents - Some Aspects of Disputed Territory” in D Busch, L Macgregor, and P Watts eds, *Agency Law in Commercial Practice* (OUP, 2016) stating that even boards can be considered agents of the company having to serve in the company’s interest and not creditors even in insolvency. Compare, Paul L Davies and Sarah Worthingon, *Gower’s Principles of Modern Company Law*, (Sweet & Maxwell, 10th ed, 2016) at 7-4.

[8] c. 19.

[9] Paul L Davies, *Gower and Davies, Principles of Modern Company Law* (Sweet & Maxwell, 8th Ed, 2008) at 7-32. See also Reuben Guttman, “Effective Compliance Means Imposing Individual Liability” (2018) 5 Emory Corporate Governance and Accountability Review 77.

[10] The UK Law Commission initiated a review of the law on corporate criminal liability on 3 November 2020.

[11] Ultimately, whether such attribution is made depends on its context and purpose, *ie* whether the company’s responsibility is being apportioned with an agent or with a third party: *Singularis Holdings Ltd (In Official Liquidation) (A Company Incorporated in the Cayman Islands) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [34] (noted Rachel Leow, “Attribution and illegality again” (2020) 136 LQR 181) citing *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; [2016] AC 1 (hereinafter “*Bilta*”), [92] (Lord Sumption). The court disapproved its earlier decision in *Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A Firm)* [2009] UKHL 39; [2009] 1 AC 1391 which held that the wrongdoing of a company’s directing mind and will is automatically attributed to the company so that a top management fraud defence was fully available to the defendant auditors on the basis of *ex turpi causa non oritor actio* on the part of the company.

[12] *Gower and Davies, Principles of Modern Company Law supra* n 9 at 7-30. See also H Tjio and EB Lee, “Understanding the Company in Context” in *The Law in his Hands: A Tribute to Chief Justice Chan Sek Keong* (Academy Publishing, 2012), [16]-[17].

[13] Or if the directors raise the illegality defence against the company, which was rejected in *Bilta*, *supra* n 11.

[14] *Royal British Bank v Turquand* (1856) 6 E & B 327, 119 ER 886; *Mahony v East Holyford Mining Co. Ltd.* (1875) LR 7 HL 869.

[15] John Armour & Michael J Whincop, “The Proprietary Foundations of Corporate Law” (2007) 27 Oxford Journal of Legal Studies 429 Part C (this could be sequential or joint).

[16] (Jordans, Bristol, 3rd ed, 1995), 116

Principles of Corporations Law,[17] point out that the evidential presumption of regularity is rebuttable whereas the indoor management rule is not, preferring instead to explain the rule on the basis that third parties have no access to the company's records. On one view, this is a two-party situation between an outsider and a monolithic entity.

The operation of the rule appears to be founded on the fact that despite its due diligence, third parties might have not been able to determine whether things had in fact been regularized. This is linked to the doctrine of constructive notice, which is often used to decide whether a principal or third party would have to bear the losses in situations occasioned by the wrongdoing of an intermediary. The Privy Council in the recent decision of *East Asia Company Ltd v PT Satria Tirtatama Energindo*[18] ("*East Asia*"), held that the indoor management rule did not allow a third party to circumvent the normal rules of agency.[19] It referred to Dawson J's judgment in *Northside Developments Pty Ltd v Registrar General*[20] to confirm that the rule only applied where it was already independently established that the person in question had actual or ostensible authority.[21] Relying on Sargant LJ's judgment in *Houghton & Co v Nothard, Lowe & Wills Ltd*[22], the Privy Council also thought that the indoor management rule was limited in scope, and simply because a company's articles of association contained the *power* of delegation did not necessarily mean that the power was *exercised* in favour of the relevant officer of the company.[23] Something more is required to trigger the application of the rule, which is not a magical elixir protecting outside parties dealing with a company in all circumstances.

On this view, the issue of third party notice is incorporated into the question of whether the indoor management rule applies in the first place, as is the case with ostensible authority, rather than as a triggering device that causes a transaction to be avoided. The ruling in *East Asia* means that we cannot avoid the involvement of an intermediary as the need to be informed means that the third party would have had to approach one, rather than just relying on, eg, the corporate constitution, without any human interface. Once that happens, issues of agency law and authorization come into the picture.

East Asia confirms that the burden of proof is on the third party to show that it had acted reasonably (and not just rationally) in relying on any representations made in corporate documents or by individuals in the company. As no agreement has been established yet, it is not about setting aside an existing agreement but asserting that one existed in the first place. As Peter Watts put it:[24]

> At least where an alleged contract is still executory, and arguably even when it is not, the onus lies on the party alleging a contract to prove its existence. While the point is not always appreciated, where such proof requires that an agent has acted on the promisor's behalf, the onus again rests with the promisee to show that it dealt with a person with actual or apparent authority to bind the promisor.

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[17] Robert P Austin and Ian M Ramsay, *Ford's Principles of Corporations Law* (Sydney: Butterworths, 15th ed, 2013), [13.160]; preferring this to the evidential presumption of regularity supported by cases like *Morris v Kanssen* [1946] AC 460, 475 (Lord Simonds); *Northside Developments Pty Ltd v Registrar General* [1990] 170 CLR 146, 177 (Brennan J).
[18] [2019] UKPC 30.
[19] *Ibid*, [63].
[20] [1990] 170 CLR 146.
[21] *East Asia*, [64].
[22] [1927] 1 KB 246, 266.
[23] *East Asia*, [63].
[24] Peter Watts, "Authority and Mismotivation" (2005) 121 LQR 4, 5.

The Privy Council also discussed a contrary view of Lord Neuberger NPJ in the Hong Kong Court of Final Appeal in *Thanakharn Kasikorn Thai Chamkat v Akai Holdings Ltd*[25] ("*Akai*"), that only required the representee to not be irrational or dishonest in order to invoke the operation of apparent authority.[26] The Privy Council rejected Lord Neuberger's view in *Akai* that the third party must take reasonable steps to ascertain relevant facts only when relying on the indoor management rule but not on ostensible authority. Lord Neuberger had expressed concerns that have existed since *Manchester Trust v Furness* about constructive notice disrupting commercial transactions.[27] While the Privy Council appreciated this,[28] in those situations *A* bought goods from *B* honestly believing that *B* was principal and not knowing that *B* was agent for *C*, and so *C* cannot claim for the price and yet assert that *A*'s belief was negligent.[29] But in the *East Asia* type scenarios, it is *A*, not *C*, who claims that there was a binding agreement and it bore the burden of showing that, which included dispelling any notice on its part.

On such narrow classifications do such cases turn as it can lead to different gateways which may have different states of mind triggering liability. The case which perhaps shows this most clearly was the House of Lords in *Criterion Properties plc. v Stratford UK Properties LLC.*[30] There, the House doubted the correctness of the decision of the Court of Appeal in *Bank of Credit and Commerce International (Overseas) Ltd. v. Akindele*,[31] which suggested that cases of knowing receipt and want of authority were both founded on the unconscionability of the recipient third party. The House reclassified the issue in *Criterion* as based solely on whether an agreement could bind a company despite the want of authority on the part of directors in creating a "poison pill" to frustrate potential takeover offers, and not the knowing receipt of company property resulting from directors acting for improper purposes, as had been the case at first instance and the Court of Appeal.[32] Lord Scott pointed out that the latter presupposes the receipt of assets by one person from another, and this did not include the creation of contractual rights by an executory agreement whose enforceability was in question.[33] The issue of whether the acts were in fact within the directors' powers was sent back to trial. However, indications that restitutionary liability is strict, particularly in Lord Nicholls'[34] speech, does not remove the need for the court to first answer the question whether the agreement should be, in his Lordships' words, "*not* set aside".[35] As we have seen, as the law stands, the third party has to prove that it reasonably relied on the appearance of authority.

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[25] [2011] 1 HKC 357; [2010] HKEC 1692, [62] (noted Ji Lian Yap (2011) 127 LQR 350, where the transaction was unusual as Akai did not benefit from it.

[26] *East Asia*, [83].

[27] *Ibid*, [84].

[28] *Ibid*, [85]. See *eg Bowstead & Reynolds on Agency*, 21st ed (Sweet & Maxwell, 2018), [8-049]–[8-050]; Peter Watts, "Some Wear and Tear on *Armagas v. Mundogas* - The Tension between Having and Wanting in the Law of Agency" (2015) 1 LMCLQ 36, 52-3 stating that "it is at least doubtful whether Lord Neuberger was right to treat the case before him as involving two steps, namely whether there was a holding out and, if so, whether the promise was put on inquiry, rather than a single step, where all the information known to the third party is taken together in considering whether there has been a reliable representation of authority".

[29] *East Asia*, [86]. See also Ivan Sin, "Corporate contracting, ostensible authority and constructive notice: returning to orthodoxy" (2020) 136 LQR 364 at 367.

[30] [2004] 1 W.L.R. 1846, noted Peter Watts (2005) 121 LQR 4, Robert Stevens [2004] LMCLQ 421.

[31] [2000] 4 All E.R. 221; Hans Tjio, "No Stranger to Unconscionability" [2001] J.B.L. 299; Graham Virgo "Conscience in Equity: a new utopia" (2017) 15 Otago LR 1.

[32] [2003] 1 WLR 2108.

[33] *Ibid*, [27].

[34] *Ibid*, [5].

[35] *Ibid*, [4]. This appears to suggest that the agreement was only voidable, not void. While this is the case for transactions involving self-dealing by directors, cases of directors acting without actual authority are different: Richard C Nolan, "The Proper Purpose Doctrine and Company Directors" in BAK Rider ed., *The Realm of Company Law*

Two versus three party situations – a distinction without a difference?

Another example of the importance of characterisation is the more recent decision in *Singularis Holdings Limited (in liquidation) v Daiwa Capital Markets Europe Limited*[36]. The Supreme Court and Court of Appeal focused on corporate attribution, where it was said above that a contextual approach was taken so that the wrong of a sole shareholder who was also a dominant director would not be attributed to a company.[37] This was to prevent the corporate customer claiming against its bank for the bank's failure to prevent the defrauding shareholder director transferring money out of the corporate customer's bank account to his other business operations, which had succeeded in the High Court[38]. This is possibly the first time that this *Quincecare* duty had been successfully invoked. In that case 25 years ago[39], Steyn J thought that there was an implied term in the banker/customer relationship that the bank would observe reasonable care and skill in executing its customer's order which would be breached if it knew that it was "dishonestly given, shutting its eyes to the obvious fact of the dishonesty or acting recklessly in failing to make such inquiries as an honest and reasonable man would make"[40]. Although the reasoning was in the two-party context, there are signs here of the notice we have seen used in the three-party situation. The bank did not challenge the finding of Rose J at first instance in *Singularis* that it had been negligent, or that *Quincecare* was wrong given the burdens it would impose on a bank which also has to observe its customer's mandate, which Steyn J had stressed in that earlier case[41]. Rose J also dismissed a claim based on dishonest assistance as the bank had not been willfully blind in relation to the breaches of fiduciary duty by the director. Again, this shows the fortune in being able to find different pathways, in that even if the test in dishonest assistance is one of objective dishonesty[42], that is still possibly at least one level higher (using the *Baden Delvaux* classifications), from the kinds of constructive notice/negligence involved in *Quincecare*. In *Singularis*,[43] Rose J also observed that none of the defences raised in relation to the *Quincecare* claim (which was the focus on appeal) applied to the dishonest assistance claim. Put differently, this was a form of negligent assistance at common law[44].

So a higher standard was imposed on the bank because it was held that the purpose of the *Quincecare* duty was to protect Singularis against the misappropriation of funds by an agent of the company.[45] This though

(Kluwer Law International, 1998) pp. 5, 27. In the latter situation, the contracts do not bind the company unless the directors had ostensible authority to do so, in which case they do. It is likely that this is what Lord Nicholls meant in *Criterion* in the context of directors acting for improper purposes. See also *Heinl* v. *Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank. 511 (CA). D. Fox, "Overreaching" in P Birks and A Pretto eds., *Breach of Trust* (Hart, 2002) at pp. 98-99 argues that self-dealing is not an equitable wrong, but involves a trustee acting beyond its proper powers, relying on *Tito v Waddell (No. 2)* [1977] 1 Ch. 106 (Megarry V-C).

[36] [2019] UKSC 50.

[37] *Supra,* n 11.

[38] *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257.

[39] *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363.

[40] *Ibid*, 376.

[41] *Ibid*, 376d-f.

[42] Recently Rosemary Teele Langford, "Dystopian Accessorial Liability of the End of 'Stepping Stones' As We Know It?" (2020) 37 C & SLJ has highlighted that derivative stepping stone liability was seen in *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52 as just an application of a direct statutory duty as well.

[43] *Supra* n 38, [115].

[44] *Quincecare supra* n 39*,* 375d.

[45] The *Quincecare* duty does not cover individual customers of the bank that have been defrauded by outside third parties as the instruction given by that customer would validly transfer title to the third party: *Philipp v Barclays Bank UK plc* [2021] EWHC 10 (Comm) at [161]-[167]. In contrast, with corporate customers, a constructive trust arises where its agent misappropriates the customer's monies. But the court acknowledged that such a *Quincecare*

is a failure to meet the standards of conduct expected. But that negligence standard was pegged to the fact that the bank was put on inquiry which is more about a state of mind. There is an elision of the two here which was fortuitous in a way as negligence liability then allowed a finding that *Singularis* had been contributorily negligent to the extent of 25% in not monitoring and controlling what its director was doing. It is harder to balance relative fault in three-party analysis where the focus is on secondary liability and states of mind as opposed to conduct.

Even more recently, however, the duty of care of a director towards the company was framed in terms of third party liability in *Ciban Management Corporation v Citco (BVI) Ltd*,[46] so that it was entitled to rely on the ostensible authority of a company's agent who was not himself a director. The Privy Council acknowledged that "there has been considerable difficulty in deciding in this case whether the doctrine of ostensible (or apparent) authority has a pivotal role"[47]. The director was said to have acted reasonably due to the close links between the agent and the company's sole shareholder who informally consented to the representation by conduct that the agent had authority. The contrast with section 40 of the UK Companies Act 2006 and indoor management is stark as it is said that insiders like directors usually find it hard to rely on those rules which protect outside third parties to the corporate entity.[48] With *Ciban*, the director was not liable because it was characterized as a third party that was not put on inquiry and so was entitled to rely on the appearance of authority and did not breach its duty of care owed to the company.

The point about achieving the right balance in terms of protecting both principals and third parties, however characterised, will be the focus on the rest of this article. That balance must take into account the fact that it has to prevent arbitrage between different causes of action in that they have to be calibrated consistently. We will see that third party notice may be the tiebreaker most of the time even in what are ostensibly two party cases, particularly where relationships are captured within an artificial separate entity. The strategy to be adopted should be disclosure of information rather than mandatory rules and that seems to be captured in the use of the doctrine of notice. In a world of increasing individual preference, mandatory or property type rules seldom work given the number of customised intermediary relationships. As Taisu Zhang shows[49], while information costs are negatively correlated with social and political cohesion, the latter is negatively correlated with the diversity of individual preferences. In turn, there is less correlation between information costs and legal standardization because the latter frustrates preferences. Individual preferences make it very hard to create a mandatory rule giving blanket protection to one party or the other. Intermediaries like agents thus have a great deal of flexibility in terms of what they can or cannot do in their internal arrangements with their principals.

Balancing agency and information costs

Sitkoff points out that the goal then "is to design a body of law applicable to agency relationships that minimizes agency costs while preserving the benefits of agency".[50] Armour and Whincop believe that that "(i)t seems likely that the overall costs of the system would perhaps be reduced by a corresponding shift to

duty should still be subordinated to the bank's mandate to comply with the corporate customer's instructions. See also *Roberts v The Royal Bank of Scotland plc* [2020] EWHC 3141 (Comm).

[46] [2020] UKPC 31.

[47] *Ibid* at 6.

[48] Paul L Davies and Sarah Worthingon, *Gower's Principles of Modern Company Law*, (Sweet & Maxwell, 10th ed, 2016) at 7-12. Compare *Hely Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (implied actual authority).

[49] Zhang, Taisu, "Beyond Information Costs: Preference Formation and the Architecture of Property Law" (2020) 12 Journal of Legal Analysis 1.

[50] Robert H Sitkoff, "An Economic Theory of Fiduciary Law" in AS Gold and P Miller eds, *Philosophical Foundations of Fiduciary Law* (OUP, 2014), 200.

allocate greater responsibility to third parties.[51] However, they also say (and this is consistent with the individual preference point above):

> Reducing the monitoring costs of other shared owners does, however, come at the price of imposing costs on TPs. For every 'unauthorized' transaction where P succeeds in asserting their entitlements to an asset against a TP, the latter may suffer a reliance loss of an equivalent or greater amount. If the entitlements of P are completely enforced in every case, then the sum of the costs imposed on TPs may exceed the savings in P's monitoring costs.
>
> The legal system must therefore make a trade-off between maximizing the effectiveness of shared control arrangements for organizational participants, and imposing externalities on third parties.[63] There are also the procedural costs of administering the system.[64] All other things being equal, it would be desirable for the legal system to seek to minimize the *total* costs of shared ownership amongst organizational participants. Property and organizational law employ a mix of 'balancing' strategies, which are not mutually exclusive, to effect this fundamental trade-off. Each has comparative (dis)advantages in relation to some elements of the total cost function, and therefore the selection of the optimal mix of strategies will depend upon the context. [52]

One of the balancing strategies is to use a 'least-cost avoider' approach to determine whether a principal should be bound to a third party despite the agent's wilfulness – the principal should, if it was far easier for him to have policed the agent's actions. But enforcement is selective for a blanket rule such as with overreaching imposing liability on the principal could create incentive problems and should be used only when it involves certain stylised property substitutions. At the other extreme would be a blanket rule protecting the principal, such as with the old *ultra vires* doctrine which rendered any transaction with a company beyond its objects void. Here Armour and Whincop thought that it might "impose disproportionate costs on third parties".[53]

The balancing strategy today with cases of true *ultra vires* was to make it such that it would not affect third parties transacting with the company in good faith by virtue of the Companies Act 1985, section 35 (now section 40 of the UK Companies Act 2006). Together with section 35B (now section 39) this also absolves third parties transacting with the company from having to inquire about the capacity of the company or the authority of its directors.[54] Just prior to this, *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*[55] narrowed the scope of the *ultra vires* doctrine and shifted the focus onto the authority of the directors of the company to enter into a particular transaction.[56] Put differently, many cases were not in fact about the lack of corporate capacity but directors' want of authority (where the burden is on the third party to prove an agreement) or breach of duty (where the burden is on the company to set aside a voidable agreement). Although the burden of proof can be crucial, what matters then is whether the third party knew

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[51] Armour & Whincop, *supra* n 15, 459.
[52] *Ibid*, 445.
[53] *Ibid*, fn 135.
[54] Introduced by Companies Act 1989, section 108. But see *Gower's Principles of Modern Company Law*, *supra* n 48 at 7-10 that "only little need to be added to knowledge of lack of authority to produce bad faith", although good faith is a stricter test than notice, and the burden of showing it is on the company: Armour and Whincop, *supra* n 51 at 458. In the UK, sections 39 and 40 of the Companies Act 2006 relate to corporate capacity and directors' powers whereas in some parts of the Commonwealth, constructive notice has been removed in relation to the entire corporate constitution: New Zealand (section 19, Companies Act 1993) and Singapore (section 25A, Companies Act (Cap 50, 2006 Rev Ed)).
[55] [1984] BCLC 466.
[56] *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation* [1986] Ch. 246. See also Companies Act 1985, section 35A, introduced by Companies Act 1989, section 108.

or had been put on inquiry or, more contentiously, where the cost of determining the extent of the agent's authority was in fact cheaper for the third party to bear (but in many cases, some fault may lie on both sides[57]).

Lord Sales[58] has pointed out, however, the thin distinctions that lie between void and voidable contracts outside of ultra vires transactions, and that:

> in that exercise of a discretion for an improper purpose is itself an action taken in excess of power….. we should treat the basic problem to be confronted—to resolve this tension between competing interests in a principled, coherent and fair way—as the same whether one conceives the relevant legal framework to be the common law or equity or a mixture of both.

While he suggests the consistent use of a *Turquand* type rule dependent on notice, it is submitted here that there should also be more principled use of notice in terms of where the burden of proof lies (and what parties are expected to do) in that regard if it is always to be used as a tiebreaker. We should try to provide greater certainty to what has to be done especially if the burden is on the third party to prove the absence of notice. As we shall see, the problem is also that courts may favour minimizing their own administrative costs of adjudication.[59]

Notice in the modern context

Notice today is a wider concept than that known to conveyancing lawyers.[60] Lord Sales appeared to link notice with priorities between competing interests in a way that some did with *Barclays v O'Brien.*[61] But we saw how that evolved from a duty to make inquiries to one to take reasonable steps to ensure that the surety receives independent advice[62] and then to obtain advice from a solicitor[63] which may have its basis in an equitable duty of care.[64] There is an interplay between the state of mind and judgable conduct as we saw in *Singularis* as once a bank takes reasonable steps to advise the surety to seek independent advice or to consult a solicitor, it avoids constructive notice of any possible wrongdoing by the debtor because, there is now, on the surface, less likelihood of such.[65] The problem is that that distinction is not always appreciated, but that may also be because we do not also always maintain a difference between a state of mind and an assessment of the wrongdoers' actions given what they know against an external benchmark that is often objective in order to lower administrative costs of judicial decision making.[66] What in effect happened with *Etridge* is the creation of a banking code in the particular repeated situation where a weakened surety is asked to provide security or quasi-security for a bank loan to a related borrower. It is actually akin to a due diligence defence for banks, and not dissimilar to the need to be informed before one

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[57] See below at text accompanying note 78.
[58] Philip Sales, "Use of powers for proper purposes in private law" (2020) 136 LQR 384 at 400.
[59] Ward Farnsworth, *The Legal Analyst* (University of Chicago, 2007) at Ch 6.
[60] *Macmillan Inc* v. *Bishopsgate Investment Trust Plc. (No 3)* [1995] 1 WLR 978, 1000 (Millett J).
[61] JRF Lehane (1994) 110 LQR 167, relying on *Latec Investments Ltd.* v. *Hotel Terrigel Pty Ltd* (1965) 113 CLR 265, a true three-party priority case. Compare Sales, *supra* n 58. See also Andrew Phang and H Tjio, "From Mythical Equities to Substantive Doctrines – Yerkey in the Shadow of Notice and Unconscionability" (1999) JCL 72.
[62] John Mee, "Undue Influence, Misrepresentation and the Doctrine of Notice" [1995] CLJ 536.
[63] *Royal Bank of Scotland plc v Etridge* (No 2) [2001] UKHL 44.
[64] Charles Rickett and David McLauchlan, "Undue Influence, Financiers and Third Parties: A Doctrine in Transition or the Emergence of a New Doctrine?" [1995] NZ Law Review 328.
[65] The crucial point is that one only has constructive notice of matters that necessarily affect property and not matters which may or may not: *English and Scottish Mercantile Investment Company, Ltd* v *Brunton* [1892] 2 QB 700.
[66] Farnsworth, *supra* n 59 at 60-61.

can rely on the indoor management rule which we saw in *East Asia*. But because the situation has become so stylized, the solution is mandatory in nature for greater certainty and easy adjudication, even if the burden of proof in *O'Brien* situations is in fact on the surety[67]. But the latter point lessens the criticism of *Etridge* which is that "(o)ne of the difficulties posed by determinate legal rules is that unscrupulous parties can take advantage of the loopholes that occur when conduct is regulated in blunt terms".[68]

What needs to be done, where possible, is to create perhaps more stringent *Etridge*-like steps for a third party or counterparty to take in other more commonly encountered situations, particularly where the burden is on it to show the absence of notice. Aside from apparent authority and indoor management in *East Asia*, the Privy Council in *Credit Agricole v Papadimitriou*[69] also held that in the case of a fraudulent disposal of property, the equity's darling rule applies and burden is on bank to show that it was without notice, following *Re Nisbett and Potts Contract*[70]. In partnerships, the burden of proof is also on the third party to show that a partner's act was carried out in the ordinary course of business in order to be an act of the partnership.[71] It is particularly hard to prove a negative if notice is left an open-ended question. It may be, however, that there has to be some uncertainty attached to it.

Following on from the discussion in the last part about mandatory rules, *Etridge* type codes of conduct can only work in common stylised situations. Many other transactions have peculiar characteristics or there are not enough of them to standardize. There, it is ultimately about *balancing* the needs of flexible internal governance structures of an institution, and of protecting external parties dealing with that institution that is required to facilitate any such dealing in the first place.[72] But it may be that co-owners are given too much flexibility today such that not only has it reached a stage where a mandatory rule is impossible, but using notice as a "selective strategy" may still impose too much of an informational cost on the third party. Very often, as in *Rolled Steel*, *Akai* and *Singularis*, the question is whether the court sees the transaction on its face as conferring any benefit on the principal. This may leave the third party with too much to do as it will have to satisfy itself that there was a proper commercial purpose for the transaction, and then later convince the court that that was the case if, for example, it was decided on the basis of want of authority instead of a breach of fiduciary duty on the part of the agent director. On the other hand, the director treated as a third party in *Ciban Management* was seen as a service provider, which it was, subject to "execution only" [73] responsibilities which had acted reasonably in relying on a powerful agent without having to conduct any due diligence itself on the relationship between the agent and principal. Its sphere of responsibility was reduced because it was able to craft the right characterisation for the issues at hand. But

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[67] *Barclays Bank v Boulter* [1994] 4 All ER 513, where Lord Hoffmann overruled the Court of Appeal and held that the bona purchaser for value without notice situation was different as the land was burdened by a prior equitable interest.

[68] Emily Sherwin, "Equity and the Modern Mind" in JCP Goldberg, HE Smith and PG Turner eds, *Equity and Law Fusion and Fission* (CUP, 2019) at 366.

[69] [2015] UKPC 13

[70] [1905] 1 Ch 391. Some conflicting authorities are set out in JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity Doctrine and Remedies* (Lexis Nexis, 5th ed, 2015) at 8-300 although they conclude that the burden should lie with equity's darling. Compare *Polly Peck v Nadir* [1992] 2 Lloyd's Rep 238 where a claimant had to prove third party notice even with a proprietary claim at the end of a tracing exercise.

[71] *Lim Hsi-Wei Marc v Orix Capital* [2010] 3 SLR 1189. It is what is usual for firms in that business rather than the firm itself: *Kotak v Kotak* [2017] EWHC 1821 (Ch) at [127]. Section 5 of the UK Partnership Act 1890 (c 39) states that any act of a partnership carried out in the usual way business of that kind is carried on by the partnership is binding unless "the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner". With limited liability partnerships, see UK LLP Act 2000, s 6 (c 12). See also Andreas Televatos, *Capitalism Before Corporations* (OUP, 2020), 4.2.

[72] Trust Law Committee, *Report: Rights of Creditors against Trustees and Trust Funds* (June 1999), [3.7].

[73] [2020] UKPC 21 at [25].

the test was still ultimately whether it had been "put on notice because of the 'red flags'"[74]. While that is defendant-sided, and consistent with the burden of proof, it is likely, however, that the examination of the director's state of mind was made in the shadow of the relationship between the agent Mr Costa and the company's controller Mr Byington. In that context, the Privy Council agreed with the trial judge that Mr Byington "accepted the risk that Mr Costa might one day betray him"[75].

In many cases, the principal would have contributed in some way to that appearance of authority, and it would have been impossible, or extremely costly, for the third party to have discovered otherwise. There is a balancing of relative fault, even if modern courts do not like this because it increases the costs of adjudication. Televantos has argued that earlier on courts did in fact determine "who was *more* at fault" as they were suspicious of business in general.[76] Today, the greater focus on commerce and certainty means that it is presently captured by the doctrine of notice where an objective standard is imposed on the third party. Although this area of law can be improved upon, it still cannot be a bright line rule, in order to provide the correct *ex ante* incentives for contracting parties. There would be too much moral hazard were the costs always to be imposed on third parties, although in many cases it is. The danger, however, with readily shifting informational costs to third parties is that it could incentivise principals to create agency costs, or at least not minimize them. The case that may have recognized this most clearly is *Ciban* where the Privy Council thought that the principal and agent simply went too far[77]. A contrast is with the Singapore Court of Appeal decision in *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd* [78] where third party banks were unable to claim on loans made to the company whose financial manager gambled away the monies even though the company was seen to be "derelict in its corporate governance duties"[79] by allowing the finance manager to run the entire finance division without much supervision.

In summary, we have seen that if we cannot avoid the use of intermediaries/intermediary analysis we have to control costs. That is not usually a problem with agency costs as we are quite protective of principals today. But that then shifts informational costs to third parties. There seems to be more of that today especially as we are seeing objective standards imposed on them when principal-agency relationships are even more fluid. This lowers the administrative costs of adjudication, which "often explain the large structure of rules"[80] but if so we need to get those standards right. The problem is that things like notice and recklessness are both about states of mind and standards of behavior and at some point they elide with negligence and dishonesty respectively[81]. But the burden of proof may not have been fully worked out in a consistent way and where it is borne by the third party could be too onerous. In exceptional cases, it can become a set of procedures to be followed as in *Etridge*. But if notice remains as a tiebreaker, we need to know when it allows for the inference of knowledge, or is a synonym for negligence, whether it is purely a defence to a proprietary or restitutionary claim, or whether it should ever allow an argument that any

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[74] *Ibid* at [23].
[75] *Ibid* at [22].
[76] Televatos, *supra* n 70, 70 who also points out (at 117) that in *Akai*, *supra* n 25, there was discussion about the difference between the common law concept of being put on inquiry and the equitable doctrine of notice, which historically had never been made.
[77] It has been said that the "primary economic purpose of agency law is to enhance the benefits of agency by deterring such collusion": George M Cohen, *supra* n 5, 401.
[78] [2011] SGCA 22; [2011] 3 S.L.R. 540.
[79] *Ibid* at [5].
[80] Farnsworth, *supra* n 59, 61.
[81] See the criticism of counsel doing so in *Macmillan Inc* v *Bishopsgate Investment Trust Plc*, *supra* n 60, 1014.

inquiries would have been futile in the circumstances[82]. Constructive notice creates difficulties even for equity lawyers[83] and "leads to loose thinking"[84].

Further balancing strategies

But notice, even if properly worked out, cannot do all the work alone. What is needed are perhaps greater responsibilities on the part of a principal to disclose its arrangements and more information creating mechanisms as Armour and Whincop suggest can happen with electronic notice-filing or registration[85]. Ironically, doing so may then lessen the need to work out what notice is precisely. But outside of formal registration systems, technology clearly can make the monitoring of agents more effective[86] and also reduce for third parties the costs of ascertaining the truth behind the appearance of authority.[87] An increasingly connected world is primed for this at a time in which a leading hedge fund manager has suggested is an opportune juncture for fraud.[88] The abuse of preferences in highly differentiated principal-agent relationships was recognized in *Ciban Management* where the Privy Council concluded by saying that:

> A central message of the decision in this case is that the ultimate beneficial owner who chooses such arrangements takes the risk of being betrayed by an agent who is being used to convey instructions to the director. Although there may be claims by the ultimate beneficial owner against the agent, the ultimate beneficial owner, on facts comparable to this case, cannot throw the risk taken onto the director by instigating an action by the company against the director for breach of the director's duty of care. The courts will treat the ultimate beneficial owner - Mr Byington in this case - as having been hoist by his own petard.[89]

There is some kind of legal realism going on here in terms of disclosure duties[90] and arguably the decreased costs of permanent record keeping[91]. While blockchain and decentralized ledgers can be used for this purpose, again, this works best in standardized transactions that are repeatable without too much customization. But technology does not have to be cutting edge to help third parties to reach principals or

[82] See eg *Janvey vs. GMAG, LLC*, 66 Bankr Ct Dec (CRR) 167 (5th Cir, 2019) (rejected argument that inquiries would have been futile due to the complexity of the transferor's scheme). In *Credit Agricole v Papadimitriou supra* n 69 at [33] Lord Sumption said that: "[t]he rule is that the defendant in this position cannot say that there might well have been an honest explanation, if he has not made the inquiries suggested by the facts at his disposal with a view to ascertaining whether there really is." See also *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 Lloyd's Rep 289 at 324, cited with approval in *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774; [1996] SGCA 45 at [60].

[83] See, *eg, Macmillan Inc* v *Bishopsgate Investment Trust Plc*, *supra* n 60 at 1014-1015, criticized by the Privy Council in *Credit Agricole v Papadimitriou supra* n 69 at [17] (Lord Clarke).

[84] *Scott on Trusts* (4th ed., 1989) para 297, p 110. *Meagher Gummow & Lehane*, *supra* n 70, point out that the burden of proof with respect to equity's darling is even more uncertain in the US.

[85] *Supra* n 51, fn 148 (with respect to security interests).

[86] One goal of decentralized autonomous organisations is to do away with human management or employees altogether, but decision making may be less efficient and slower than with corporations: Ruo-Ting Sun, Aravinda Garimella, Wencui Han, Hsin-Lu Chang and Michael J Shaw, "Transformation of the Transaction Cost and the Agency Cost in an Organization and the Applicability of Blockchain – A Case Study of Peer-to-Peer Insurance" Frontiers in Blockchain, 21 May 2020 at 13. Human intervention is also required where there are complications, such as when a "hard fork" is required: Christopher Bruner, "Distributed Ledges, Artificial Intelligence and the Purpose of the Corporation" (2020) 79 CLJ 431 at 441.

[87] While blockchain can improve trust and transparency, it may actually increase bargaining costs if it leads back to the use of markets over aggregated entities: Ruo-Ting Su *et al*, *ibid*, 10.

[88] Harriet Agnew, "Jim Chanos: "We are in the Golden Age of Fraud" Financial Times, London, 24 July 2020.

[89] *Supra* n 73, [54].

[90] Televatos, *supra* n 70. 72, points out that for earlier courts, "the real issue was the actual behavior of A and B".

[91] Bruner, *supra* n 86, 435.

other agents or organs within an organization as part its due diligence exercise. It is not about imputing constructive notice of such parties via the use of formal registers, but giving them a better chance at determining what is the actual state of play by improving the quality of notice. Even real time balance sheet accounting will help. This is to help them overcome the burden of proving the absence of notice or knowledge if such is to be imposed on them.

We are not in a position to determine what additional registers or information/data bulletins will come about; that should be driven by market forces. But having more information available may paradoxically reduce the application of doctrines like apparent authority since that makes it less likely that there can be the appearance of authority which a third party can safely rely upon. It could drive apparent authority back to its roots in requiring a clear representation from the principal as to the agent's authority, as opposed to hard modern cases that turn on silence, self-representations, course of dealing or in effect some form of estoppel by negligence. Modern law has never really been able to use estoppel by negligence in situations where two innocent parties have been deceived by a rogue middleman, whether with respect to ownership or authority. The statement of Ashurst J in *Lickbarrow v Mason*[92] that "whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it" exemplifies its indeterminacy. It creates too much administrative cost for the courts. Instead the use of estoppel ends up in the search for a representation by the principal that was relied upon by a third party, and morphs into apparent authority.[93] But not only is that sometimes contrived[94] but it then leads to the question of notice which focuses on the third party and at present does not formally take relative fault into account.

We have seen how it was perhaps fortuitous that a negligence claim succeeded in *Singularis* where the dishonest assistance claim failed against the bank, which was in a sense more an outsider to the corporate structure than the director in *Ciban*. However, this allowed a finding of contributory negligence on the part of the company and avoided an all or nothing solution that may create moral hazards. Outside of duty of care cases, however, it is not clear how relative fault will be apportioned in situations where most of the time both parties would have been guilty of some wrongdoing and oversight. Again, while this protects the court in having to perhaps make value judgments on relative fault or concern itself with ideas of proportionality, the time may have come for that to be embraced not just in public law, but in private law as well and not just for discrete parts of contract law like the defence of illegality.[95]

Contributory negligence was itself an all or nothing outcome in the past in the UK[96] and still is the case in some US states (as opposed to comparative fault or negligence)[97]. It is also not a defence with intentional

[92] (1787) 2 Term Re 63 at 70, which "statement is notorious as having been frequently cited (not least in examination questions!) and rarely, if ever, applied": David Fox *et al*, *Commercial Law supra* n 3 at 368.
[93] *Farquharson Brothers & Co v King & Co* [1901] 2 KB 697, noted (1902) 2 Columbia Law Review 44 (with traces of ostensible ownership). See also Tan Cheng Han, "Estoppel in the Law of Agency" (2020) 136 LQR 315 preferring to see apparent authority as a form of estoppel rather than "real authority" as in the US.
[94] See *Ciban supra* n 47, where it was combined with the *Re Duomatic* unanimous assent principle to find that the company had made the necessary representations of the agent's authority that were made by the sole shareholder.
[95] Ernest Lim and Francisco Urbina, "Understanding Proportionality in the Illegality Defence" (2020) 136 Law Quarterly Review 575, Tan Zhong Xing, "The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?" (2020) 33 Canadian Journal of Law & Jurisprudence 215 and "Illegality and the promise of universality" [2020] JBL 428.
[96] Dongen, Emanuel and Verdam, Henriëtte, "The Development of the Concept of Contributory Negligence in English Common Law" (2016) 12 Utrecht Law Review 6, arguing that it allowed for apportionment by the late 19th Century before it was formalized by the Law Reform (Contributory Negligence) Act of 1945.
[97] Gail D. Hollister, "Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault" (1993) 46 Vand. L. Rev. 121.

torts[98] nor perhaps with most forms of third party liability[99]. But the need for counterfactuals has been recognized[100] and at a broader level consideration should be given to how losses are allocated where accepted notions of fault and causation like the 'but-for' test in negligence may not serve as well as alternative conceptions of shared risks and responsibility. Such ideas and even the "formerly discredited approach" [101] in *McGhee v National Coal Board*[102] where one "materially increased the risk of injury"[103] have appeared in causation issues in tort law although by and large only in hard cases, such as in the mesothelioma cases[104]. Greater use can be made of this with less protected values such as economic loss as opposed to the integrity of person or property. In the English Court of Appeal in *Rubenstein v. HSBC Bank Plc*,[105] for example, Rix LJ thought that an investment adviser who had been negligent in recommending a specific investment to an investor (as opposed to providing information) "may well be responsible if some flaw in the investment turns out materially to contribute to some investment loss".[106] But there should be less concern in correspondingly finding contributory negligence here on the part of an investor. There is consequently enough in the cases that will allow further development of proportionate liability as opposed to an all-or-nothing approach.

In *Singularis*,[107] the Supreme Court acknowledged Lord Hoffmann's concerns expressed in an earlier House of Lords decision of *Reeves v Comr of Police of the Metropolis*[108] with respect to the incongruity of fully allowing a claim against another for harm the claimant inflicts on itself. But the *Quincecare* duty is seen as a "rare case"[109] in which this is permitted. But it does not have to be a binary solution as there may be a whole spectrum of cases from such a rare case at one end to the other extreme where claimants "must look after themselves and take responsibility for their actions"[110]. And yet even in this rare (if not only) instance in which the *Quincecare* duty was breached by the bank, its customer Singularis was found to have been 25% contributorily negligent. This suggests that the *Quincecare* type situation is only triggered in very narrow circumstances, possibly when the bank is between 50[111] to 75% at fault. This suggests that there are some situations where there is always relative fault involved, and this is invariably intertwined with issues of causation and contributory negligence (where available). It was said in *Philipp v Barclays*

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98 James Goudkamp and Donal Nolan, *Contributory Negligence Principles and Practice* (OUP, 2018) at 2.02.
99 *Ibid* at 2.03 observing that it is not clear that it applies even to the primary breach of fiduciary duty.
100 Venkatesan, Niranjan, "Causation in Misrepresentation: Historical or Counterfactual? And 'But For' What?" (July 15, 2020). Law Quarterly Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3743619.
101 Kumaralingam Amirthalingam, "The Changing Face of the Gist of Negligence" in Jason W. Neyers, Erika Chamberlain & Stephen G.A. Pitel, eds., *Emerging Issues in Tort Law* (Portland, Oregon: Hart Publishing, 2007) 467 at 470.
102 [1973] 1 W.L.R. 1 (HL).
103 *McGhee*, *ibid* at 5 (Lord Reid); see also Lord Salmon at 12-13.
104 *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. This was confirmed in another decision on asbestos poisoning, *Barker v Corus* [2006] 2 AC 572, although the specific effect of this was later reversed by the *Compensation Act 2006* (UK). The risk of harm can be seen as a form of damage: Gemma Turton, *Evidential Uncertainty in Causation in Negligence* (Hart Publishing, 2018) at 182 et seq ("risk as gist").
105 [2012] EWCA Civ 1184 [*Rubenstein*].
106 *Rubenstein*, *ibid.* at [103]. Low Kee Yang, "Causation, Remoteness, Scope of Duty and the *Rubenstein* Decision" *Singapore Law Gazette* (February 2013) argues, however, that such an approach towards causation may not be applicable outside the line of medical cases discussed here, and that the focus of *Rubenstein* was on remoteness and the scope of duty, not causation.
107 *Supra* n 36 at [22].
108 [2000] 1 AC 360, at 368.
109 *Ibid*.
110 *Ibid*.
111 No award below 50 or 51% can be made in some US states adopting "comparative contributory negligence".

Bank[112]*,* a recent case restricting the bank's *Quincecare* duty of care to corporate customers being defrauded by their officers (and not individual customers), that[113]:

> A finding that the only duty owed by the Bank (in relation to the two payments and by reference to facts sufficiently incontrovertible to support a summary determination) was the duty to process the payments – unqualified, on those facts, by any meaningful Quincecare duty – will therefore dispense with any further point about causation; just as the finding in *Singularis* of a breach of the duty led to the issue of causation being resolved in favour of the claimant in that case.

There are shades of Lord Hoffmann's "assumption of responsibility"[114] here although apportioning losses can be very messy for courts to adjudicate upon. It is true that balancing has been criticized in the context of illegality but that is because that usually leads to an all or nothing outcome. But if the balancing also leads to a proportionate outcome, it could be more acceptable. This does not have to be a common law solution. It could also take into account the different values involved across jurisdictions and this can be seen in how contributory negligence or comparative fault operates in different US states. The increased costs of adjudication may be counterbalanced by lower informational costs borne by third parties and also incentives for principals to lower agency costs themselves *ex ante*. And in the longer term, even the former will decline with use.

Conclusion

It is clear that intermediaries and intermediary analysis cannot be avoided much of the time where the intermediary has caused a loss to be borne by either a principal or third party. The exceptions are where property-like rules help in avoiding a three-party picture. That seldom exists and so the test is whether a third party has been put on notice and made the necessary inquiries. But imposing the burden of proof on the third party means that this is often a due diligence defence in disguise, and can impose a heavy duty of care. It may in fact be better to frame it in such terms as it is difficult even for equity lawyers to understand what notice is, let alone their clients. But in a world of individualized preferences, principals and agents desire flexible arrangements that may impose too much informational cost on third parties dealing with them. Steps may need to be taken as was done with *Etridge* which is like a mandatory rule in a particular context[115]. If that is not possible, as is usually the case, we should also require greater disclosure from principals and use technology for more notice-creating mechanisms so that an objective standard used to reduce administrative costs of adjudication does not create impossible burdens on third parties. We should, where possible, also apportion responsibility and liability as a starting point rather than as an afterthought. There should be some calibration (even if not perfect) between different causes of action (and contributory fault) which are in nature similar.

Just as important as *ex post* compensation is *ex ante* prevention, and as we have seen the need to minimize total transactional cost. Certain equitable doctrines create too much uncertainty. But the suggestion here is only that there is some modification with intermediary rules around a settled middle, where third party

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[112] [2021] EWHC 10 (Comm).

[113] *Ibid* at [123].

[114] *Eg South Australia Asset Management Corporation v York Montague Ltd* [1996] UKHL 10 and *The Achilleas* [2008] UKHL 48 (both applied in *Rubenstein supra* n 105 at [5] with the former seen to go to the scope of duty and the latter remoteness of damages).

[115] It has been cogently argued recently that there is a difference between what is central to the idea of the trust and other mandatory rules that may for policy or other reasons apply to some forms of trusts but not others: Jason Fee, "Trust-owned Companies and the Irreducible Core of the Trust" (2021) 26(9) Trusts & Trustees 826, discussing *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* [2019] HKCFA 45 which upheld the effectiveness of anti-Bartlett clauses.

notice is applied in a less binary fashion, and not that the rules be thrown out completely. Ideas like the least-cost avoider and proportionality can be used to check on existing rules, much as Lord Hoffman may have intended concepts he introduced towards the end of his career in relation to the scope of duty, causation and remoteness. Here it may be used not just to found liability, but to apportion it in an area where notice has tried very hard to be the tiebreaker but has been found slightly wanting.