

AGENCY REASONING—A FORMULA OR A TOOL?¹

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Holmes expressed doubts about the viability of Agency as a subject. This paper suggests that the law of Agency has a valid central core providing for the external powers of agents and their internal relations with their principals, surrounded by a considerable number of areas where agency principles are applied, but incompletely. There is a progression from the more central cases to situations where the agency analogy is weak or even sometimes misleading. In these extended applications it can be said that agency reasoning is only a tool requiring to be used with caution or even not used at all: but when the tool is acceptably used, features of the core of agency reasoning are still recognisably present.

Most people get involved in situations that can be said to involve an agency relationship. In the private sphere we deal with shop assistants, restaurants or at ticket offices, or as agents ourselves book a restaurant for someone else: the examples are legion. In commerce most people deal by means of agents, or layers of agency, and do not always make clear what they intend to be doing: indeed they often do not know themselves. The two most common business vehicles, the corporation and the partnership, would not be effective or convenient without agency reasoning. Accordingly, the correct legal analysis of what has happened or is happening where things are done by one person for another may be important in practice. Most of the time people get away without any problems: but when a difficulty arises, the law must have analysis ready. For this reason there seems little doubt that the topic, while not a new one, certainly requires ongoing study.

The general problem can be introduced by a dictum of Lord Herschell in 1897:

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 proper 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.²

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² *Kennedy v De Trafford* [1897] AC 180 at 188 (HL).

This is a useful starting point. An obvious way of proceeding further is to ask: “What does the word ‘agent’ mean in common speech?” The Latin “agere”, from which the word derives, simply means to act. But the derived noun “agent” is normally used of a person who acts *for another*; the person acted for is usually referred to as the principal.³ So if one defines “agent” as a person who acts for another, the first exercise is to ask what duties and responsibilities the law attaches to one who does this.

Obviously the first answer is that this turns on the terms of an applicable contract if there is one. Leaving aside employees, many people who have agency functions act under a contract: for example a broker, a paradigm example, whose contract can actually be said to be a contract of agency. Others operate under contracts which *will or may involve* agency functions (*eg*, a shop assistant, or on a different level a solicitor). What will the contract in general prescribe? The normal duty of a person providing services, which is what this is, is to exercise due care. To this in the agency context there is one exception of strict liability: the duty to not knowingly exceed any authority granted.

But there may in fact be no contract between principal and agent under common law, because there is no consideration for the agent’s undertaking to act. If so any liability of the agent would require to be in tort. This would of course be in negligence, and again involve due care, though it is unlikely to lie in respect of mere failure to act. In civil law the relationship would normally be one of mandate, and civil law has no requirement of consideration. This makes some examples of gratuitous agency easier to explain, as in civil law one does not have to fall back on tort as one may have to do in common law.

The position at common law is complemented by equity, which in this context intervenes in an extensive way and in particular, seeks to restrain the agent from acting contrary to the interests of the principal. Equity here invokes rules often termed principles of loyalty or fiduciary responsibility, which relate to conflict of interest and the like. These cannot usually be regarded as implied terms of a contract. Implication of terms into a contract is not easy at common law, and in any case sometimes there is no contract between principal and agent. Rather, they stem from a broader external source. They produce a result which is different from the position in contracts such as contracts for sale and in many cases for services, which are what one might call commercially adverse, where each party is entitled to act in its own interests in regard to the other. Where the role of the person concerned, the service to be provided, is in whole or in part one of acting for another, equity imposes potentially heavy requirements on that person. Their application varies very much from one case to another. But the principles of fiduciary responsibility are not part of the law relating to *agents*: they are part of a general set of principles which apply in some form not only to agents, but in many other relationships also (in particular, of course, that of trustee and beneficiary).

So far all we have got is the idea of one person acting for another, who is *not* the subject of special rules unique to his position, may operate under some form of contract for services but may well not, is in the absence of a contract to be treated as operating under a rather vague regime involving a duty to act with care, but may also

³ By way of contrast, an actor (a word with the same derivation), is (often) a person who acts *as* another.

be subject to extensive duties to act in his or her principal's interests, which stem from equity and are not confined to agents. There is hardly any special agency law or special formula, here.

This part of the exposition, which covers what may be called the *internal* function or relationship, is in fact the point at which the standard definition of agency is normally deployed. Thus the US *Restatement (Third) of the Law of Agency*⁴ says at §1.01, its very beginning:

Agency is the fiduciary relationship that arises when one person (a 'principal') manifests 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.

Definitions directed to English law are similar.⁵

To a lawyer, this definition on its own looks as if it does not properly grasp a major feature of agency in what a lawyer would think of as its full sense – the idea that an agent may do things that are not only done for the principal's benefit, but also may actually bind and entitle the principal, or both, *ie* alter the principal's legal position.⁶ This may be called the *external* function of agency and is obviously a relevant feature in many situations where one person acts for another. To exercise it the agent needs *authority*, a special notion that is to lawyers a key feature of much agency reasoning. In civil law this external function might be regarded as a separate notion altogether, that of *representation*, distinct from the internal relationship, which would be that of *mandate*.

Although the *Restatement* goes on in §2.01 to consider when the agent acts with actual authority, there is nothing in the initial definition that makes the granting of authority a prerequisite of agency – unless perhaps the reference to the principal manifesting assent to the agent acting “on the principal's behalf”. A recent United Kingdom Supreme Court case⁷ suggests that these very words “on behalf of” import the notion of conferring of authority. But this appears rather circular: where does this notion come from? Subject to this, it can be said that the initial definition in the *Restatement* and elsewhere relates to the internal arrangement between principal and agent, and common law does not require that to be a contract.

The conferring of *authority* on the agent, or at any rate some agents, is then something outside the internal relationship. It is best regarded as a “unilateral juristic act”⁸. It requires an act of conferring. This does not require a contract for its effect, and if there is an accompanying contract between principal and agent, as there very often is, that contract is analytically separate, even if it actually includes within itself a conferring of authority. This is shown by the fact that the authority may

⁴ *Restatement (Third) of the Law of Agency*, §1.01 (2006) [*Restatement*].

⁵ See Peter Watts & FMB Reynolds, eds, *Bowstead and Reynolds on Agency*, 21st ed, (London: Sweet & Maxwell, 2018), at art 1(1) [*Bowstead and Reynolds*].

⁶ See Tan Cheng Han, *The Law of Agency*, 2d ed, (Singapore: Academy Publishing, 2017), at paras 1-006–1-008 [*Law of Agency*].

⁷ *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222 at 4235 (SC).

⁸ See JL Montrose, “The Basis of the Power of an Agent in Cases of Actual and Apparent Authority” (1938) 16 Can B Rev 757 at 769-770; Wolfram Müller-Freienfels, “Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty” (1964) 13 Am J Comp L 193 at 203.

be withdrawn at will, but that the withdrawal may, if there is a contract between principal and agent, be a breach of contract. It is also shown most clearly by the fact that a power of attorney is valid without any contract between agent and principal. There may be such a contract and no doubt often is; but powers of attorney in family situations, for example, may well be undertaken as a matter of goodwill and involve no contract whatever between attorney and principal. Powers of attorney are on general a good check on agency principles.⁹

How then does one confer authority on another person? Although a unilateral act by the principal, the conferral probably also requires some sort of acceptance by the agent. Of course that acceptance does not require to be formal and often can be inferred. It is this that can lead, in some legal systems, to a confusion between the contract and the conferral of authority.¹⁰ A student puzzle is whether authority is conferred where the agent acts for the principal without knowing that he or she has authority, but the principal has actually, unknown to the agent, consented. For example a communication, perhaps a power of attorney, has gone astray in the mail. There are other elementary puzzles.

This model carries with it a further assumption. This is that when the agent acts on behalf of the principal, he or she creates legal relations between principal and third party and drops out of the transaction. In fact the agent need not drop out, and often does not; for a start, though it is often but not always true as regards contract and property, in tort the agent committing the tort is usually liable even if the principal is liable also. But the agent's dropping out can be regarded as a feature of agency law. The paradigm example is, as has been said, the broker, who makes contracts between people who may never see each other, and owes duties to the person for whom he or she acts, but is not in general liable or entitled on the transaction negotiated. (As ever, there are exceptions.¹¹)

So if the full legal apparatus, what is called in the title of this paper the "formula" or "formulation" is invoked, the first thing to be said is that an agent is one who acts for another, has an *internal* relationship with his principal that is probably but not necessarily based on contract, normally involves liability for due care only, and is subject to fiduciary rules. To make it tidier, the agent ought to be remunerated on the basis of the transactions he or she negotiates, *ie* on commission. This is not necessary and may well not be so, though if the agent took an undisclosed profit on the "turn" would be contrary to the fiduciary duties. It is also said in *Restatement* that the agent is under the control of his or her principal, and indeed much is made of the point.¹² As to this, it is difficult to see that it involves much more than the

⁹ A power of attorney is described as a "one-sided instrument" in *Sinfra Aktiengesellschaft v Sinfra Ltd* [1939] 2 All ER 675 at 682 (KB).

¹⁰ See Michele Graziadei, Ugo Mattei & Lionel Smith, "A Short Note on Terminology" in Michele Graziadei, Ugo Mattei & Lionel Smith, eds, *Commercial Trusts in European Private Law* (New York: Cambridge University Press, 2005) 45.

¹¹ For instance, in commodity and stock exchanges where brokers deal with each other under strict rules. This was a feature of the London Stock Exchange around the end of the 19th century. For other examples, see *Basma v Weekes* [1950] AC 441 (PC); *Bridges & Salmon Ltd v Owner of The Swan (The Swan)* [1968] 1 Lloyd's Rep 5 (QBD); *Law of Agency*, *supra* note 6 at paras 9-008 *et seq*; *Bowstead and Reynolds*, *supra* note 5 at para 9-005.

¹² *Supra* note 4 at §1.01, comment f.

principal's power to withdraw authority, or a reference to a contract accompanying the agency relationship, though this point will be mentioned again later.

But secondly and more prominently, the agent has conferred on him or her external authority to change the principal's position in certain ways. The standard example is where the agent makes a contract, in respect of which, having created the transaction the agent may not be personally liable and entitled. That the agent has this power is a reason, though not the only reason, for the fiduciary duties already mentioned in the internal relationship.

At this point it is appropriate to mention briefly the notion of apparent authority, on which we all rely extensively in our daily lives. This allows a third party who has no reason to doubt that a person has the authority which he or she appears in the circumstances to have had conferred, or would normally have been conferred, to enforce an obligation against the principal. The view of Anglo-Australasian common law is that this is based on estoppel, *ie* it only allows the third party to *sue*,¹³ though other views are possible.¹⁴

Justice Oliver Wendell Holmes Jr of the US Supreme Court, was of the view that in this area of authorised acts, agency law only contains a small number of rules, so few as not to justify the topic's existence as "a proper title in the law" if it went no further than to declare a man liable for the consequences of acts knowingly brought about by him.¹⁵ If one starts with the conferral of authority, which he in fact does not mention as such, he then suggests that the only specifically agency doctrines are that of ratification, which is the retrospective conferral of authority, and the unusual doctrine of the undisclosed principal, whereby agency law is wheeled in to make a principal liable and entitled on contracts made by the agent where the third party had no idea that there was anyone else involved at all.

There is certainly more to it than this.¹⁶ First, the full apparatus above described, involving the internal and external relationship, has enough substance to be a "proper title". Secondly, it is appropriate to go on to show that agency reasoning is frequently used in common law in connection with situations to which the full apparatus does not apply, and that there is a steady progression from situations where the full apparatus applies to situations where *some* agency reasoning is used but *very few* of them apply. In some of these situations the reasoning is valuable, in some less so. But we suggest that all, or at least most of, these extensions are still recognisable as part of a known notion, agency, which requires study.

For examples of this we may start with the real estate agent. Such persons are undoubtedly referred to as agents: perhaps they are one of the principal examples in English-speaking countries of persons who actually describe themselves as agents in a public way. But this is agency in a limited sense only. A real estate agent normally has no authority to create a contract between buyer and seller: the function of such an intermediary is to introduce business, and the contract is made between others. The external authority to affect the principal's legal position is therefore very limited. On

¹³ See *eg*, *Bowstead and Reynolds*, *supra* note 5 at para 8-028.

¹⁴ *Supra* note 4 at §2-03, comment c.

¹⁵ Oliver Wendell Holmes, Jr, "Agency", (1891) 4 Harv L Rev 345 at 346.

¹⁶ This point about Holmes is also made in a different way by Professor Deborah DeMott in "The Poseur as Agent", in Danny Busch, Laura Macgregor & Peter Watts, eds, *Agency Law in Commercial Practice* (London: Oxford University Press, 2016) 35 [*Agency Law in Commercial Practice*].

this basis it has sometimes been argued, and it certainly has been argued by estate agents themselves, that whatever they may call themselves, such persons owe no fiduciary duties at all: they are not agents but simply persons whose business it is to match up sellers and buyers on terms agreeable to both. This surely goes too far.

There can be cases where such an intermediary does actually have authority from the vendor, for example (depending upon local usage) to receive a deposit as agent for the vendor; and if he or she makes representations about the property, these may sometimes be attributed to the vendor in tort. These *would* be external functions, but limited ones. But as regards the *internal* position, the real estate agent has often access to special information regarding the vendor, and on this basis may owe the fiduciary duties typical of an agent. The famous case of *Kelly v Cooper*,¹⁷ concerning estate agents in Bermuda, if correct, suggests that the duties may be limited. In that case an estate agent was held not liable for failure to disclose to a prospective seller for whom she was acting that she had just handled the sale of a nearby house to a well-known person (Mr H Ross Perot) who was definitely interested in acquiring other property in the area and might therefore pay more for this one. Lord Browne-Wilkinson made the memorable erroneous statement that “Agency is a contract” (which surely cannot be accepted¹⁸) and then proceeded on the basis that contracts such as this were actually to be regarded as impliedly excluding fiduciary duties, at any rate of the sort argued for. The fact that estate agents regularly act for many parties (as is often clear from their shop windows), and must be free to do so, was said to indicate that the normal duties were to be excluded.

But in New Zealand, in *Premium Real Estate Ltd v Stevens*,¹⁹ an estate agent was held liable for not disclosing (and to some extent positively misleading the seller on the topic) that a prospective buyer was a person who renovated houses and passed them on, which might have affected the vendor’s willingness to sell; it also appeared that the estate agent’s behaviour could partly be attributed to a hope to secure further business from the buyer. Despite *Kelly v Cooper* (which was simply said to involve different facts) it is in general fairly clear that an estate agent, since he or she acts for someone in a fairly confidential capacity, may owe fiduciary duties in appropriate circumstances. An example apart from those already mentioned would be the duty not to suppress offers received.²⁰

It would be odd not to accept that a real estate agent is an agent. But only some of the standard features apply. The relevant rules largely regulate the internal relationship, and the idea of external authority plays a very limited role: the contract is in substance one for commercial services with, in some situations, an overlay of fiduciary liability.

Grading down from this rather clear example, the functions of other types of intermediary may require extremely careful analysis. An example is a solicitor or office lawyer (whom civil lawyers would not expect to find in a discussion of agency at

¹⁷ [1993] AC 205 (PC).

¹⁸ Even though some books, eg, *Chitty on Contracts*, put the chapter on Agency into a volume entitled “Specific Contracts.”

¹⁹ [2009] 2 NZLR 384 (SC). The judges of the Supreme Court of New Zealand were not unanimous in their reasoning.

²⁰ Eg, *Keppel v Wheeler* [1927] 1 KB 577 (CA).

all).²¹ The solicitor is engaged to perform a contract for personal services for reward. The solicitor may be a straightforward agent in doing things on behalf of the principal, for example booking a room in connection with a funeral. The solicitor undoubtedly acts on behalf of a person, the client, about whom he or she may have personal information and with whom there may be a confidential relationship; and this often requires the imposition of fiduciary duties which can arise from the solicitor's position as such regardless of any agency authority. If these duties are broken the solicitor may have to pay equitable compensation, which is not the same as common law damages. Finally, the solicitor may hold money received, for example in connection with conveyancing transactions, as a genuine trustee, and must only pay it out at the directions of the beneficiary; if he or she pays it out wrongly he or she must replenish the trust fund. This may certainly lead to different decisions as regards monetary liability than either actions for damages *or* for equitable compensation. There have been some important cases on this in recent times, and some of these in England and Wales at least seem at present often concerned to limit liability to actual loss (in effect applying by one means or another the so-called "compensation principle", which has become fashionable). Two obvious examples are *Target Holdings Ltd v Redfems*²² in the House of Lords and *AIB Group (UK) plc v Mark Redler & Co Solicitors*²³ in the Supreme Court of the United Kingdom. There are of course quite a lot of significant Singaporean cases, and interesting dicta, in this area.²⁴ There is also a fairly recent English decision, which seems less well reasoned.²⁵

Beyond circumstances such as these, some or many of the things done by a solicitor are done in connection with the contract for services entered into with the client, and if things go wrong the proper assessment may simply be that the solicitor has not performed the services with due care. In the conflict of laws, each of these different functions we have listed would require a separate choice of law rule, and this shows that they are juridically separate. The solicitor owes fiduciary duties, may hold money as trustee, but has a limited authority to commit the client as an agent; and though he or she should comply with instructions, the failure to do so is often to be attributed to the contract for personal services rather than breach of fiduciary duties. A leading case (not approved by all) in which such issues were raised is *Bristol & West Building Society v Mothew*.²⁶

We may now go on to a different, ancient and still quite conspicuous example of partial use of agency reasoning. There is a group of cases where an agent can be established to have *irrevocable* authority. In some respects irrevocable authority is a contradiction in terms, even though documents purporting to create it are still drafted. Authority is of its nature revocable: the conferring of authority on another is so important and indeed dangerous that it is assumed that the principal ought to be able to call it back. If there is, as there is usually, an accompanying contract,

²¹ See J E Penner, "Distinguishing fiduciary, trust and accounting relationships" (2014) 8 J Eq 202.

²² [1996] AC 421 (HL).

²³ [2015] AC 1503 (SC).

²⁴ Eg, *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 (CA); and see in general Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAclJ 884.

²⁵ *Various Claimants v Giambone & Law (A Firm)* [2017] EWCA Civ 1193; [2018] PNLR 2 (CA).

²⁶ [1998] Ch 1 (CA).

revoking the authority might well be a breach of it, but the revocation would still be effective.

However that be, ancient case law makes clear that it is certainly possible to have a situation where the agent's authority cannot be revoked *at all*. The cases are certainly abnormal applications of agency reasoning, because though the authority is duly conferred on the agent in the normal way, it is authority to act, not in the interests of the *principal*, which is the normal assumption, but here in the interest of the *agent*, who is regarded as having a legitimate interest in the execution of his authority *for his or her own purposes*.

This irrevocable agency reasoning was used in the nineteenth century, when doctrines were evolving out of a state of general flux, to secure results that we would now obtain by different techniques. For example, one person can appoint another as his or her agent to sue on a debt. If the authority is allowed to be irrevocable, agency reasoning is used to create what we would now call an assignment. Roman law used the same technique. At a later stage in the nineteenth century equitable, and then statutory, assignments were recognised, and the technique of using irrevocable agency was superseded.²⁷

Again, if one person irrevocably authorises another to take his or her property and sell it if the person giving authority does not repay a debt to that other, that could in modern terms be a charge or other security; and if the authorisation was in respect of a class of assets that would in the ordinary course of business fluctuate, that is what later in the nineteenth century was recognised in the commercial context as a floating charge.

This irrevocable agency reasoning has survived through the late nineteenth and twentieth centuries into the 21st century under some vague name such as "power given as security" or "authority coupled with an interest". Its orthodox formulation is that authority is irrevocable where it accompanies a security or proprietary interest and is part of it or a means to achieving it. It is not clear exactly when it applies in modern conditions, which is not surprising because most if not all of the operations it facilitated can now be achieved by other means. There is one not well-reasoned House of Lords case of 1906 on the topic, *Frith v Frith*,²⁸ and a Supreme Court case of 2016, *Angove's Pty Ltd v Bailey*.²⁹ A decision as to when the doctrine applies was not in the end required in the dispute of 1906, but the point was raised directly in the *Angove* case of 2016, where Lord Sumption sought to restate the doctrine but also to modify it. In his view, authority that is intended to be irrevocable and to secure the financial interest of the agent could be enforced as such. While an agent's commercial interest in continuing to act in order to secure his or her commission was not of itself enough to make the authority irrevocable, the position can be different as regards his interest in recovering a debt in respect of commission already earned. There was no reason to distinguish a debt arising in this way from any other debt, provided that it was sufficiently clear (which it was not in this case) that the parties intended that the agent's authority should secure it.³⁰ But in the result it was held that the authority

²⁷ This subject has recently been considered in CH Tham, *The Mechanics of Assignments: Functions and Form* (PhD Thesis, University of Oxford, Faculty of Law, 2016) [unpublished].

²⁸ *Reginald Charles Frith v Josiah Alexander Frith* [1906] AC 254 (PC).

²⁹ *Angove's Pty Ltd v Bailey and another* [2016] 1 WLR 3179 (SC) [*Angove*].

³⁰ *Ibid* at para 9.

was not intended to be irrevocable, and the agent's function of collecting money from customers was not intended to protect the right to commission.³¹ The decision was in the end a fairly easy one and one wonders whether this type of agency reasoning is needed at all.

There is however a group of cases from the turn of the 19th and 20th centuries suggesting a new use for irrevocable authority reasoning in the context of underwriting of share issues. If I agree with you to underwrite shares you are issuing, *ie* take them up if the public does not, and the issue fails, and I refuse to take them up, it is of little use to you to sue me for damages. What you want and need is the shares taken up. To secure such an arrangement, a possible method is for you to take from me an irrevocable power of attorney to apply in my name for the shares which I promised to take up. An additional feature is that the situation is likely to be multilateral: the person wanting the underwriting has sought such promises from several people, and failure by one could prejudice the rest. In some not very clearly reasoned cases the underwriting agreement has been held to be irrevocable in this context.³² There are two possible lines of organising reasoning for this result. One is that a person who is in a position to do so can legitimately use a new form of the old notion of irrevocable agency reasoning to procure the performance of an obligation owed to himself *by actually doing it*, without recourse to action for damages at law or a suit for specific performance. The second is that the possibility of using the notion arises where and because there is a situation of multilateral grantors of authority. Reasoning along these latter lines has been applied not long ago in cases relating to problems in Lloyd's, where certain rescue operations would only work if all those concerned agreed in grants of authority.³³ Either way, one probably obsolete, because unnecessary, use of agency reasoning may now have been superseded by another. Not everyone will agree with either line of reasoning. But if valid, they still form examples of agency reasoning used to achieve a purpose outside the norm.

The next example is of a person who actually assumes the role of agent in relation to someone else without having had any authority conferred on him or her *at all*. The most dramatic example is *English v Dedham Vale Properties Ltd*,³⁴ where a buyer of property applied for planning permission in respect of it (through a member of his firm) in the name of the vendor, but unknown to the vendor. This raised the value of the property. Not surprisingly the vendor sued the purchaser in respect of the profit which the purchaser had made by, in effect, assuming the role of an agent without having been authorised. The purchaser was held to be a fiduciary and liable to give an account of profits, a standard remedy against a fiduciary. It was also held that the application could have been *ratified*. Here then we go a stage further: use of clear agency reasoning without conferral of authority.

What other types of reasoning could have been invoked? One possibility might have been to sue the buyer for acting as agent without authority to do so. The

³¹ *Ibid* at para 16. In this case the commission amounted to 5% on the sums collected. See Peter Watts, "The insolvency of agents" (2017) 133 Law Q Rev 11.

³² *Re Hannan's Empress Gold Mining & Development Co*, *Carmichael's case* [1896] 2 Ch 643 (CA); *Re Olympic Fire and General Reinsurance Co*, *Pole's case* [1920] 2 Ch 341 (CA). Such cases are specifically excluded in the judgment of Lord Sumption JSC in the *Angove* case, *supra* note 29 at para 10.

³³ See *Society of Lloyd's v Leighs* [1997] CLC 1398 (CA); *Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd* [2009] EWCA Civ 453.

³⁴ [1978] 1 WLR 93 (Ch).

availability of an action by the person purported to be represented against someone who purports to act as agent but has no right to do so would have been highly controversial: there being no contract, it has been suggested that it would have to lie in tort.³⁵ However the duty is formulated at *common law*, and even bearing in mind recent developments on the topic, it is unlikely that by common law reasoning the seller could have had the actual profits made by the buyer. It is also possible that other rules could have been invoked, for instance as to unjust enrichment. But it was agency reasoning that was used.

Another more recent example of an unappointed agent has recently been seen in the context of statutory liability under criminal law, which admittedly often ploughs its own furrow. A person who acted for another without having been asked to do so at all was held by the Hong Kong Court of Final Appeal³⁶ to have acted as agent under the *Prevention of Bribery Ordinance*.³⁷ Lord Hoffmann, defining an agent for the purpose of the statute, said: "It is not even necessary that there should have been a request to act. A person who is in a position to act on behalf of another and voluntarily does so may also thereby assume fiduciary duties."³⁸ The basis of the decision was that a person acting as was done in the case was a person of the type the statute was seeking to catch. The result was achieved by applying the word "agent" to a situation well outside its normal applicability. It was agency reasoning which the drafter of the statute had invoked: the court rose to the occasion by a partial application of it.

Another special case is the so-called doctrine of agency of necessity, now nearly but not quite obsolete. This comes in two parts. The first creates authority in an agent to make unauthorised contracts in emergencies. The cases mostly originate from masters of ships in the nineteenth century who had to make emergency arrangements far from home, and made contracts for the repair, mortgage or even sale of the ship in distant parts. These are straight cases of agency which had they arisen more recently could have been accommodated within the scope of implied and apparent authority. They now look old-fashioned because of the way in which they prescribe precise details for the existence of the authority, which may not be known to the third party.

But the reasoning can also be used *internally* to justify the agent in what he or she does on the principal's account in emergencies (which might otherwise, for example, be a trespass), and in recovering expenses incurred in doing so from the principal. It can be said that recompense is due under the principle of the agent's entitlement to an indemnity for acts done on behalf of the principal. The old cases on one who acts for another's benefit without request and then seeks recompense are very limited. It may have seemed in the nineteenth century an acceptable idea to deploy agency reasoning here also. One might nowadays think in terms of restitution, and indeed this is what Lord Diplock indicated in the most recent leading case.³⁹

We turn now to liquidators and receivers. It is well known that in the area of such persons the law of agency is partly, but only partly, deployed. The connection between

³⁵ See Peter Watts, "Principals' claim for agents' wrongful assertions of authority—Is there need for another tort?" (2009) 17 Torts L J 100.

³⁶ *HKSAR v Luk Kin Peter Joseph* (2016) 19 HKCFAR 619 (HKCFA).

³⁷ *Prevention of Bribery Ordinance* (Cap 201).

³⁸ *Supra* note 36 at para 30.

³⁹ *China Pacific SA v Food Corporation of India (The Winson)* [1982] AC 939 (HL).

liquidators and receivers and agency law is the subject of a recently published paper.⁴⁰ To summarise, a liquidator is an agent of the company, which means that in the absence of further indications he or she is not personally liable when exercising powers to make contracts, to continue existing contracts, or not to perform them. Yet the liquidator is not appointed by the company, but, to make a generalisation over various different sets of rules, by the creditors; his or her acts bind not them but the company, and neither the creditors nor the company have control over liquidators except by the exercise of powers of removal. If the power of control is a definitional feature of agency, as the *Restatement* suggests, it is certainly absent here. The use of agency reasoning is primarily deployed to make clear that when the liquidator acts, he or she in many or most cases does not do so in a personal capacity.

As to the receiver, he or she again has external powers to act for the company without being personally liable to third parties, but the internal aspect is quite different from that of an ordinary agent: the receiver cannot be given directions by the company and may sometimes be under a duty to act *contrary* to the company's interests if this is thought to be in the interests of the debenture holders. It is suggested in the well-known Australian book *Meagher Gummow & Lehane*⁴¹ that the receiver is the only genuine example of a non-fiduciary agent. In view of the irrevocable authority cases this probably goes too far; but this is certainly another example of agency reasoning being utilised in part but far from completely.

To quote from the material cited, "While definitions of agency that include the paradigmatic agency situation are helpful, these are definitions in a loose sense of the word. The irreducible core of 'real' agency probably only consists of the internal aspect of consent and the external power to affect the principal's legal position."⁴² But even this only relates to the parts of agency law that take in the conferring of authority. As we have seen from the example of the estate agent, there can be a use of agency reasoning without any recourse whatever to the notion of the power to affect the principal's legal position.

Sometimes the use of agency reasoning is dangerous in that it may carry implications with it that are better avoided. If a drafter is aware of the dangers it may be possible to avoid them, but if not they may surface unexpectedly. An unsatisfactory operation of agency law can arise in connection with certain formulations of the *Romalpa* clause. As is well known, the "*Romalpa* clause" is a name (derived from the first case where the problems came up for decision⁴³) referring to a clause in which a seller retains title in goods sold until payment, but in a complicated and prolonged form which may in common law countries require the assistance of equity to make it work. Such clauses may seek to provide for goods which are processed or converted into something else; and some forms of them may contain provisions that until payment has been made the buyer shall hold the goods as fiduciary agent, shall keep them separate, may resell in the ordinary course of business but must account to the seller for the proceeds of resale. *Romalpa* clauses are now recognised, when

⁴⁰ See Tan Cheng Han and Wee Meng Seng, "The Agency of Liquidators and Receivers", in *Agency Law in Commercial Practice*, *supra* note 16 at 119.

⁴¹ JD Heydon, MJ Leeming & PG Turner, eds, *Meagher, Gummow & Lehane's Equity: Doctrine & Remedies*, 5th ed (Australia: LexisNexis Butterworths, 2015) at para 29-170.

⁴² *Supra* note 40 at para 8.40.

⁴³ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 (CA).

the requirements fit, as a form of security and so liable to be subjected to the rules of a different area of law, that as to security.⁴⁴ It has long been clear that relying too much on agency notions may import unsatisfactory by-products, and this type of clause provides an example.

In *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd*,⁴⁵ two judges of the English Court of Appeal accepted such an invocation of agency law into the relationship of buyer and seller as valid. Some doubt may be expressed about this: the judge dissenting on this point, Longmore LJ, who favoured a security rather than agency approach, said:

It would indeed be remarkable if it were the case, that once the credit terms had expired any payment was due and unpaid, the contractual relationship of the parties were transformed from seller and buyer to one of principal and agent, with the seller having no control over the terms on which his agent was reselling.⁴⁶

Indeed, if one goes that far, the doctrine of the undisclosed principal might be invoked to make the original seller liable on whatever terms the buyer had resold the goods. But the other judges accepted the agency analysis. The case has been held wrong on a different point,⁴⁷ but it shows that an inappropriate use of agency reasoning can carry with it baggage which may be totally inappropriate to the context unless carefully controlled.

There are also situations where the invocation of agency reasoning appears to get one nowhere at all, or at least not to get one far. In the recent case of *The Global Santosh*,⁴⁸ there was an issue about a vessel going off-hire in a time charter: that is to say, the charterer did not have to pay for the vessel during periods when it was totally or (in some forms of the clause) partially unavailable. The charter provided that the charterer was to perform all cargo handling, and that the vessel would be off-hire during any period of detention or arrest *unless* the detention or arrest was occasioned by any personal act or default of the charterers *or their agents*. The vessel was arrested, and so detained, by reason of events arising in connection with arrangements for subchartering and unloading it, performed by parties downstream of the charterer. It was held by the English Court of Appeal that the parties downstream were agents of the time charterer to the extent that they were performing the time charterer's obligations, even though there was no contractual or other relationship between them. In the end it was decided (by a majority of the UK Supreme Court) that this reasoning was not applicable in the circumstances.⁴⁹ But it is difficult to see that the question of whether the parties downstream were "agents" of the charterer in performing the charterer's obligations of cargo handling was more than a makeweight

⁴⁴ See eg, Michael Bridge gen ed, *Benjamin's Sale of Goods*, 10th ed, (London: Sweet & Maxwell, 2017), at paras 5-143 *et seq*.

⁴⁵ [2014] 1 WLR 2365 (CA).

⁴⁶ *Ibid* at [30].

⁴⁷ In *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] AC 1034 (SC).

⁴⁸ *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2016] 1 WLR 1853 (SC) [*The Global Santosh*]. See also *Laemthong International Lines Co Ltd v Abdullah Mohammed Fahem & Co (The Laemthong Glory (No 2))* [2005] EWCA Civ 519; [2005] 1 Lloyd's Rep 688 (CA).

⁴⁹ *The Global Santosh*, *ibid* at [26].

piece of reasoning. It is nowhere near the central core of agency reasoning and of doubtful value.

Finally we may refer to two types of situation where the use of agency reasoning is notoriously unreliable. The first is where a duty is alleged to have been non-delegable. In the result a person who performs it by agents may be liable if the agents are negligent: but the various types of persons supposed to be agents for the purpose makes the value of agency reasoning doubtful (one leading English case concerns a swimming pool lifeguard employed by the local authority⁵⁰). It could be sufficient merely to establish that an existing duty continued to be the responsibility of a person regardless of whether that person engaged others to perform elements of it. There was once a more extreme doctrine called that of “casual delegation”: in a group of cases of the 1960s and 1970s it was sought to make the owner of a car liable for the acts of others whom he allowed to drive it⁵¹ (in one the owner was actually asleep in the back of the car). The pressure to affirm such a liability in connection with cars came from the existing insurance position, and this was later changed in the United Kingdom. This liability was always difficult to account for⁵² and the Australian case of *Scott v Davis*,⁵³ concerning the use of an aeroplane to give rides at a party, has made it even more doubtful.

After all this comes the huge maze of cases where it is alleged that a party has received notice, or acquired knowledge, through an agent. The first situation, notice, is fairly straightforward: a formal notice (such as a notice to quit) given to a person other than the person who should primarily receive it may be effective if that person has authority, actual or apparent, to receive the notice. The second however, knowledge acquired through another, is too varied for generalisation: everything depends on the context. Sometimes the court asks whether the knowledge was acquired by a person while that person was acting for another. Sometimes it does not. If that fact is relevant, it invokes an agency related principle but little more.⁵⁴

Our conclusion should by now be fairly obvious. There is a central body of doctrine concerning the conferring of authority on agents (accompanied by a very important phenomenon only just touched on above, the doctrine of apparent authority). This central core is directed to the power by virtue of authority to do things which affect the principal’s legal position. It can be called a formula. But in common law the internal position between principal and agent is also taken into the law of agency, especially the fiduciary nature of the relationship. The assimilation of the internal duty into the general principles of authority has some logical strength, for the fiduciary duty is partly based on the power to exercise authority. But the amalgamation of the internal aspect, the position between principal and a person acting for him or her, and the external, whereby the principal may be affected by the acts of authorised agents,

⁵⁰ *Woodland v Swimming Teachers Association and others* [2014] AC 537 (SC). See also *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 (CA).

⁵¹ *Morgans v Launchbury* [1973] AC 127 (HL).

⁵² *Ibid* at 134 where Lord Wilberforce said that the “normal principles of the law of agency” applied, but at 135 added that:

I accept entirely that ‘agency’ in contexts such as these is merely a concept, the meaning and purpose of which is to say “is vicariously liable” and that either expression reflects a judgment of value – respondeat superior is the law saying that the owner ought to pay.

⁵³ [2000] HCA 52, 204 CLR 333.

⁵⁴ See *Bowstead and Reynolds*, *supra* note 5 at arts 94 and 95.

also creates a doctrine which is much looser and more malleable than stricter and more limited analyses such as that of the civil law. It is not unlikely that a civil lawyer would say (in a different language of course) that agency, or representation, is a formula or set of formulations. In common law, the amalgamated corpus of agency reasoning is fairly loose, with the result that it can be extended, sometimes to achieve objectives that might not have been expected, and it can also be modified for its context. In this sense it is a tool, and one that is both valid and useful if deployed with care. The extensions may be useful for supporting legal results, provided it is borne in mind that they may well not be complete, may be of tenuous relevance only, and may sometimes actually mislead by carrying baggage with them the primary operation and purpose of which is elsewhere.⁵⁵

Thus the answer to the question posed by the title of this paper is, as regards common law at least, both.

⁵⁵ As in the *Romalpa* case, *supra* note 43. Agency reasoning was rightly rejected in *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep 621 (CA).