An introduction to the law of agency

Part 1

Introduction

With our increasingly busy lives and the burden of regulation and bureaucracy, it is not really possible for us to do everything for ourselves. We have neither the knowledge or the time.

The answer normally is to appoint some other knowledgeable person to do things for us. This person is generally known as an agent.

So for example we may have an estate agent and then a solicitor to deal with the sale of property, a stockbroker to deal with investments, and a letting agent to manage residential property. Other common agency situations are actors and literary agents, shipping agents, auctioneers and accountants.

Commerce and much of our financial and business lives would grind to a halt if we were not able to appoint agents to act for us in these specialised areas.

The purpose of an agent is generally to negotiate some sort of contract or agreement with a third party. So for example:

- An estate agent will deal with finding a buyer for a property you wish to sell, with the solicitor acting to deal with any problems that might arise regarding the conveyance of the legal title.

- A letting agent will find a tenant for a landlord and will sometimes even sign the tenancy agreement on the landlords behalf.

- An actor’s agent will negotiate the terms of an actor’s contract with television and film companies.

Let’s have a quick look at the terminology used in this area of law:

- **Principal** – this is the person who employs the agent. So in a letting agency situation it will be the landlord.

- **Agent** – this is the person employed by the principal as his agent.

- **Third party** – this is the person the agent contracts with on behalf of his principal. So in a letting agency this will be the tenant.

There are a number of legal issues which I will explore in this article, but let us look first at two which are at the heart of this arrangement.

- One is the power of an agent to bind his principal in a contract which the agent makes on his behalf, sometimes without the principal being aware that this is happening.
The other is the unique position of trust that an agent is in (because of this powerful right), and the duty that the law imposes on him because of it. This is called the **fiduciary duty**.

I will look first at the fiduciary duty.

**The fiduciary duty**

As discussed in the article on equity and trust law last week, an agent / principal is one of those situations where one party is deemed to have a fiduciary duty towards the other. Typically it arises where the fiduciary takes care of money for another person (as often happens in an agency situation).

Here is a definition of a fiduciary from the case of *Bristol & West Building Society v Mothew* [1998]

*A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. Lord Millett Ch 1 at 18*

A fiduciary will have the highest duty of care and is expected to be loyal to his principal and not put his own interests first. He must not profit from his position as a fiduciary unless his principal consents, and must not put himself in a position where he has a conflict of interests.

So far as the agency relationship is concerned, the following are key fiduciary duties of an agent which are implied into all agency relationships:

- The duty not to delegate his office
- The duty not to put himself in a position where his duties as agent conflict with his own interests
- The duty not to accept bribes
- The duty not to take advantage of his position in order to gain benefits for himself
- The duty to pay any money held for the principal over to him, and to account to the principal for all money held on his behalf

Let us now take a look at the circumstances under which an agent can bind his principal to a contract.

**The power of the agent to bind his principal**

The general rule is that an agent has the power to make a contract on the principals behalf, sometimes even if the principal is unaware that this is being done, and also sometimes against his express wishes.

The power of an agent to bind his principal depends on what lawyers call his **authority**. There are a number of different kinds of authority.
Express actual authority

This is authority which is specifically conferred on an agent by agreement with his principal. It will be the thing he is employed to do.

There will generally be a contract, usually in commercial circumstances a written contract. However this is not legally necessary, just preferable. It is perfectly possible to have an oral agreement where the parties discuss what the agent is going to do and the agent goes off and does it.

The extent of an agents actual authority will depend on the terms of his contract. This may be difficult to work out though, if there is no written contract document. In that case, things such as the general practice in the business concerned, and any previous agency agreements made between the parties, will be taken into account. If the question ever arises, for example in court proceedings.

Implied actual authority

This is authority to do something which may not be specifically set out in a written agreement but which is normally needed for the type of work concerned. Implied authority can also include things which are usual or customary in the type of work concerned.

So in a letting agency situation, it will normally be implied that the agent will deal with the protection of the tenancy deposit and serve the relevant prescribed information on the tenant.

Apparent / ostensible authority

This is actually a form of the estoppel principal, which we looked at in the article on equity and trusts.

It is where a principal is bound by the action of an agent even if it is for something which he did not agree to.

The principal can also sometimes be bound by a contract even if the agent is not his authorised agent, if the principal, by his actions, lead the third party to believe that he was.

There are three elements which are necessary for ostensible authority:

- **Representation** – the principal must have done something to make the third party believe that the agent is a proper agent, or is still an agent (if the agency agreement has actually been terminated) or is authorised to act in the way concerned. That is why, if a letting agent’s authority is terminated, it is important that you tell the tenants this.

- **Reliance** – the third party must have relied on the representation. So if a landlord tells the agent ‘no pets’ and the tenant asks if he can keep a boxer dog, then if the agent says yes, and the tenant then signs the tenancy agreement on that basis, then the landlord will be bound by the permission granted to the tenant by the agent.

- **Alteration of the third parties position** – this must be as a result of the reliance. So in the dog example above, the tenants signed the tenancy agreement because the agent said they could have the dog. If they had already signed the tenancy agreement at the time the
permission was given, then the landlord would be able to cancel the permission – unless the
tenants had in the meantime gone out and bought the dog!

**Authority by operation of law**

Normally this will arise in situations where someone is an agent of necessity – for example if there is
an emergency and there is no time to speak to the principal and ask his permission.

One example is if someone saves a sinking ship, they may be entitled to remuneration for this. Most
of the cases in this area of law are to do with ships.

In the past there were also situations where a wife was deemed to have the authority to pledge her
husband’s credit, but I suspect this is less likely to be accepted now.

**Ratification**

If an agent creates an agreement which is outside his authority, then generally the principal will not
be a party to this.

However if he wants the contract to go ahead, he can **ratify** the agreement by specifically accepting
it, after which he will be in the position he would have been had the agent had proper authority in
the first place.

**Agents liability for breach of warranty of authority**

If the agent had no actual or ostensible authority and the principal refuses to ratify the agreement,
then the third party can bring a claim against the agent for any losses suffered by him due to the
agents actions.

**Part 2**

**The three part agency relationship**

In an agency situation there are three separate relationships:

1. The relationship between the principal and the agent
2. The relationship between the principal and the third party, and
3. The relationship between the third party and the agent

So lets have a look at them one by one.

**Principal and agent**

In a landlord situation this will be the relationship between the landlord and the letting agent.

**Duties**
As discussed above, the agent's fiduciary duty underlies everything. But what else is he obligated to do? Well, firstly he must

- comply with his contract and do the things he has contracted to do, and
- he must do this with due care and skill – the level of this will depend on whether he is being paid or not

Then he has his fiduciary duties. I won't repeat these, I discussed them at the start of this article.

**Rights**

- The most important right, which an agent has is the right to be paid. Assuming that this is included in his contract.
- He also has a right to be reimbursed for any expenses he incurs while carrying out his duties as agent, so long as these are within the scope of his authority.
- If he is not paid, then in most cases he will have a lien on his principal's property (although only property obtained by virtue of his work as his agent). This means that he can hang on to it until he gets paid.

**Principal and third party**

This really depends on whether the agent has disclosed that he is actually acting as an agent.

**Disclosed agency**

Here the actions of the agent will create a contract between the third party and the principal. Unless:

- the agent is acting outside both his actual and ostensible authority, or
- the third party knew that the agent did not have actual authority

So if a tenant asks if he can keep five cats and the letting agent says yes, then the landlord will be bound by the agent's agreement. Unless the landlord had previously said to the tenant “under no circumstances will I permit you to keep those five cats in my house”.

However if the tenant asks if he can demolish part of the property and re-build it, that is not something an agent will have authority to authorise, so the landlord will not normally be bound by the agents agreement.

Assuming there is no problem with the agent's authority, then the agent will not normally be liable under the contract. So if the third party wants to sue, for example for breach of the landlord's repairing obligations, it is the principal / landlord he must sue, not the agent. Even if it is the agent's fault that the repair work has not been carried out.
There are a few special exceptions to this rule – the most important for our purposes being that agents are personally liable if they fail to carry out their obligations regarding:

- tenancy deposit protection and
- obtaining an Energy Protection Certificate.

**Undisclosed agency**

Generally if the agent signs a contract in his own name and the third party is unaware that there is a principal involved, the agent will be able to sue and be sued on the contract.

There is a rather odd rule in agency law though which that says that in most circumstances, even though the third party may have been unaware of the fact that Mr X was the principal rather than the agent, the principal can still intervene and sue and be sued on the contract.

There are exceptions though, for example if the personality of the agent was an important factor when the third party agreed to the contract believing he was contracting with the agent as principal.

If the principal decides to intervene in a contract with an undisclosed principal, then the agent will then lose his right to sue. From the third parties point of view however, if he finds out that there is a principal involved, he will have the right to choose which one he is going to hold liable on the contract (this is called the third parties **right of election**).

Once he has chosen and sued one party though, he can’t then decide to sue the other! He is stuck with his choice.

**Agent and third party**

As discussed above, the general rule is that once an agent has made the contract on behalf of his principal, he drops out of the picture. He is not a party to the contract nor does he become liable under it (save in a few exceptional cases).

However where is acts for an undisclosed principal, he will incur personal liability. As the third party will be ignorant of the existence of the principal, so far as he is aware the agent IS the principal.

Even if the third party discovers the existence of the real principal, if he elects to sue the agent rather than the principal, the agent cannot escape liability. This is a powerful reason for letting agents to make sure that all tenancy agreements are made by them are in the name of the real landlord rather than in the agents name.

There are a few circumstances where the agent is able to sue the third party in his own name:

- One is where he acts for an undisclosed principal.
- Another is the special case of auctioneers who are allowed to sue the highest bidder for the price.
Part 3

Introduction

As with all contracts, an agency agreement will have a beginning, a middle and an end.

There are three ways that an agency agreement can end – by performance, one or both of the parties ending the agreement, or by ‘operation of law’. Let’s have a look at these separately.

Ending the agreement by performance

This is where the agent does what he is supposed to do. So in a landlord and tenant context, if an agent on a find only agreement finds a tenant for the property and the property is then let to him.

The agent will have nothing further to do and so the agreement will automatically end.

Ending an agency agreement by one of the parties

Often one or other of the parties (and by this I mean the agent or the principal) will wish to end the agency agreement. In a landlord and tenant context it is usually the landlord, perhaps because he has decided to manage his properties himself rather than via an agent.

You hear many stories of agents objecting to this and saying that the landlord is unable, under the terms of his contract, to end it.

However interestingly this is incorrect. If either party wishes to end an agreement they can, in most cases, do this simply by giving notice to the other party. It is not possible for an agent to compel the principal to continue with the agency agreement. The reason for this is that a court will not order specific performance of a personal contract such as this.

If the contract is for a specific period of time, the agency may be able to claim damages for breach of contract. The amount of damages, or compensation, which the court will award will depend upon the terms of the contract and the remuneration lost by the agent.

Note that this does not apply to commercial agents, where the Commercial Agents (Council Directive) Regulations 1993 specifies minimum notice periods.

A commercial agent (by the way) for the purpose of these regulations, is a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the “principal”), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal.

So this will not include a letting agent, who is generally employed to let a property and then (sometimes) to manage it.

The law does state however that there are a few types of contract which are ‘irrevocable’. So let us look in a bit more detail at the rules that cover irrevocable and then revocable agency agreements.
**Irrevocable agencies**

An agency will be irrevocable if the agreement has been entered into to secure or protect some interest of the agent.

An example of this is the case of Gaussen v. Morton [1830]. Here the principal owed a large sum of money to the agent, so he gave him power of attorney to sell various land so he could pay off the debt to him.

When the principal later tried to end the agents authority, the court held that he could not do this – it was irrevocable as it combined an agency with an interest. This situation will only arise where the whole point of the agency is to give some sort of benefit or interest to the agent.

The fact that the ending of the agency will prevent the agent from earning his commission does not come into this category!

There is another sort of irrevocable agency which arises when the agent has already started to do whatever it is he was employed to do, and has incurred liabilities because of this. The principal will still be liable to pay the agent for these liabilities, for example if they fall due for payment later, even if the agency agreement has been terminated by him. So in that respect the agency will be irrevocable.

There are also a few situations, chiefly in insolvency situations, where the principal is unable to end the agent / principal relationship.

**Revocable agencies**

As mentioned above, the general rule is that most agencies can be revoked so long as the agent has not actually fulfilled his obligations.

So you can end a letting agency agreement before the property is let (subject to paying any outstanding fees due to the agent) but if he has actually let the property it will be too late and you will be bound by the tenancy he has set up for you.

The effect of revoking / ending the agency agreement is that the legal relationship of agent and principal will end. However this will not affect the rights of either party to sue the other.

So in a landlord and tenant agency situation, the landlord will be entitled to sue the agent in negligence for not managing his property properly (assuming this was the case) and the agent will be entitled to sue for any unpaid fees or commission, for work done before the agency was ended.

However, does the agent have any rights to sue for commission he would have earned had the agency continued? This will depend on the terms of the agreement between them, and also on the reason for the termination. So:

- If the agreement was ended due to the negligence of the agent, then even if the contract provided for a period of notice to be given, any right he may have to future fees will probably be offset and in many cases completely cancelled by the landlords claim.
However if the landlord simply ends the agreement because he fancies managing the property himself, then he will normally need to give the agent proper notice – which in most cases will be set out in the agency agreement. If he fails to do this, the agent will be entitled to claim compensation in lieu.

So it is complicated.

**The Unfair Terms in Consumer Contracts and the Foxtons litigation**

Another complication is if the landlord / principal can be classed as a consumer, the terms of the agency agreement will be subject to the Unfair Terms in Consumer Contracts Regulations 1999. We know this is the case, as this is the basis of the Office of Fair Trading v. Foxtons litigation that took place in 2010.

This litigation was about the right of Foxtons to claim commission on the renewal of a tenancy with a tenant sourced by them, even after the agency agreement had ended. You will find a lot about the Foxtons litigation on my Landlord Law Blog (there is a link on the online version of this article).

**Termination by operation of law**

There are four main ways this can be done:

1. **Death.** Generally the death of either the agent or the principal will end the agency immediately. Unless the agency is an irrevocable one.

2. **Insanity.** Again, unless the agency is irrevocable.

3. **Bankruptcy.** If either party becomes bankrupt this will end the agency, as it will be a sort of legal incapacity.

4. **Frustration.** We looked at frustration when we looked at contract law. It is where a supervening event makes the performance of the contract illegal, impossible or something radically different from what the parties originally contemplated.

**The effect of termination**

So far as the principal and the agent are concerned, the termination of the agency brings the agents actual authority to an end.

However what about the third party? In some circumstances the agent may be able to bind the principal, in particular if the third party has not had notice of the end of the agency agreement. There are several authorities where principals have been bound by contracts entered into by the agent after the end of the agency agreement, where the third party believed that he was still acting as agent.
This is why it is very important, if a landlord ends an agency agreement with a letting agent who was previously managing the property, to tell the tenants as soon as possible, and also provide details as to where the rent should be paid in future.

Otherwise if the tenants pay the rent in good faith to the former agent and he spends it, for example to offset against commission which is being challenged by the principal, the tenant will be deemed to have paid the rent and the landlord will not be able to do anything about this.

Conclusion

Well this is the end of this introductory three part article on the law of agency. As you will see it is complex and not many people know about it!

If you are a landlord or a letting agent hopefully it will help you to understand better the rights and obligations you have.

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