

Law for Purchasing and Supply

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Damages must be inadequate as a remedy

In many contracts damages would suffice as a remedy but there are some contracts where mere money would prove inadequate. This situation is most likely to pertain where the subject matter of the contract is unique. A contract for the purchase of land is a prime example as all land is unique if only because of its location, thus the court would be likely to award specific performance to enforce a contract for the sale of land. Similarly, specific performance might be awarded to enforce a contract for the sale of goods if the goods are unique as, for example, if the contract were for the sale of the Mona Lisa. By contrast, if the contract were for the sale of an item that is widely available such as a washing machine, specific performance would be refused as damages would be sufficient to allow the innocent party to obtain the goods elsewhere. (Other remedies relating to contracts for the sale of goods are discussed in Chapter 7.)

Specific performance must be available to both parties

The court will not award specific performance to one contracting party if the remedy would not be open to the other party. Thus, for example, as specific performance cannot be awarded against a minor, a minor cannot claim it against an adult.

The court must be capable of supervising the order

The court will not award specific performance if it is incapable of supervising the enforcement of the order as this would bring the law into disrepute. Similarly, it is unlikely to award specific performance in respect of personal contracts such as employment contracts as it would be potentially inequitable to force an employee to work for an employer with whom he has disagreed in the past.

5.6.3 Injunctions

While specific performance enforces the positive terms of a contract, injunctions are used to enforce the negative ones, as, for example, to enforce a legitimate restraint of trade clause as in the **Nordenfelt** decision (see Chapter 3).

In respect of the use of injunctions in employment contracts, the decisions of **Lumley v Gye** (1852) and **Warner Bros Inc v Nelson** (1937) both support the notion that an injunction can be used against an employee to enforce a clause under which he has agreed not to work for someone else. However, the court will not allow an injunction to be used as a way of forcing an employee to continue working for his present employer. Lastly, injunctions may be used by an employer to protect confidential information by restraining an employee from disclosing it (see also Chapter 19).

5.6.4 Limitation of actions

Whether seeking damages or one of the equitable remedies, the plaintiff must commence his action within the appropriate time period as specified in the Limitation Act 1980. This is six years from the time of the breach for simple contracts (s 5) and 12 years in respect of contracts under seal (s 8).

Section 32 of the 1980 Act provides that where a fraud, concealment or mistake is alleged, the limitation periods will not begin to run until the plaintiff has discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it.

Of particular interest in the commercial context is that under s 29, when an action has accrued in respect of a debt or a liquidated damages claim, the limitation period begins afresh every time that the debt is acknowledged in writing by the debtor or his agent or a part payment is made in respect of it. This applies, however, only if the original claim was commenced within the appropriate limitation period.

Question

Danny, a house building contractor, entered three different contracts:

- (a) To buy some window frames from Eric Ltd. The frames were to be delivered in six instalments, each instalment to be paid for on arrival. After four instalments had been delivered, Eric Ltd announced that they were in financial difficulties and did not intend to deliver the rest.
- (b) Plumbers Ltd were employed to install all the plumbing in the houses at a total cost of £30,000. While they completed the job, some of the work was unsatisfactory and Danny had to get another plumber to remedy the defects at a cost of £350. Consequently, Danny has not paid the last £1,000 due on the original agreement.
- (c) A contract with Flooring Ltd to supply ceramic floor tiles for the kitchen. The contract contained a liquidated damages clause stating that a payment of £100 would be due for every day by which delivery was delayed. The tiles were three days late arriving.

Advise Danny about his rights and liabilities in respect of each of the three contracts.

Answer

- (a) Danny's contract with Eric Ltd for the purchase of the window frames is probably a divisible contract. While this issue is never clear-cut, the fact that each instalment carries with it a right to payment suggests that it is divisible. Despite their failure to complete the contract, therefore, Eric Ltd will be entitled to be paid for the four instalments that they have delivered. Danny should be advised to pay for them. However, he may be able to claim some compensation for the fact that Eric Ltd are not intending to complete the contract. Their statement means that there is an anticipatory breach and Danny can sue for damages immediately without waiting for the completion date of the contract.

- (b) Plumbers Ltd have completed the contract by performance. However, the fact that Danny had to employ another plumber to do some necessary remedial work means that the performance was substantial rather than complete. As such, Danny is entitled to deduct the cost of the remedial work from the contract price but he is liable to pay the remainder. Applying **Hoening v Isaacs (1952)** Danny must pay Plumbers Ltd the outstanding £1,000 less the £350 for the remedial work.
- (c) The contract with Flooring Ltd contained a liquidated damages clause effective if the floor tiles were late in being delivered. The issue is whether the clause is a genuine pre-estimate of the loss or a penalty. If it is a genuine pre-estimate, Danny will be entitled to claim £300 from Flooring Ltd for the three-day delay, irrespective of whether his actual loss was more or less than £300.

Further reading

- Adams, A (2000). *Law for Business Students*, 2nd edn (Longman)
- Bradgate, R (2000). *Commercial Law*, 3rd edn (Butterworth)
- Dobson, P (1997). *Charlesworth's Business Law*, 16th edn (Sweet & Maxwell)
- Downes, T A (1997). *Textbook on Contract*, 5th edn (Blackstone Press)
- Keenan, D (2000). *Smith and Keenan's Advanced Business Law*, 11th edn (Longman)
- Keenan, D and Riches, S (2001). *Business Law*, 6th edn (Longman)
- Richards, P (2001). *Law of Contract*, 5th edn (Longman)
- Stone, R (2000). *Principles of Contract Law*, 4th edn (Cavendish)

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The law of agency

6.1 Introduction

While the doctrine of privity stipulates that, with the exception of situations governed by the Contracts (Rights of Third Parties) Act 1999 (see Chapter 1), only the contracting parties have the right to enforce a contract, there is no requirement that they be the only people involved in the precontractual negotiations in which the terms of the contract are agreed. It is commonplace, particularly in business, for a contracting party to use another person, an agent, to negotiate on his behalf. Thus, an employee is the agent of his employer, an estate agent is the agent of the vendor and a stockbroker is an agent for the purposes of buying and selling stocks and shares. The use of agents by businesses and financial institutions to advise and act on financial matters, by market research agencies to advise on marketing trends and practice, and by advertising agencies to advise on popular presentation bears testimony to the continued importance of agents in the commercial sector.

The degree of formality needed to establish an agency will be dictated by the character of the relationship. While all agency situations are governed by the common law, agency situations involving a commercial agent must also comply with the Commercial Agents (Council Directive) Regulations 1993 (see later). The crucial factor central to the establishment of any agency arrangement is that the agent is acting on behalf of the principal with the latter's authority.

6.2 The role of an agent

The function of an agent is to bring about a valid, binding contract between his principal and a third party. Essentially, his role is that of negotiator, there being no intention that he should be bound contractually himself by the deal. The limit of the agent's contractual involvement is that a contract of agency exists between himself and his principal. It is from this contract that the agent derives his authority.

While in the vast majority of situations the agent drops out of the picture after arranging the contract, there are some exceptions, discussed later, in which the agent may become contractually bound to the third party.

The contractual relationships between the principal, the agent and the third party are as illustrated in Figure 6.1.

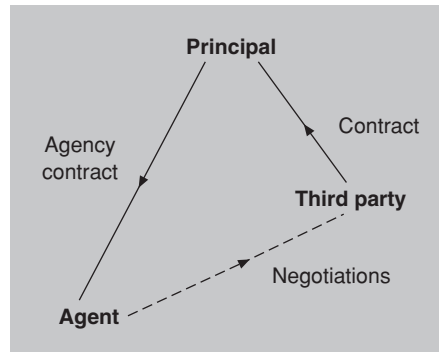


Figure 6.1 Agency/contractual relationship

6.3 The creation of an agency

There are no formal requirements at common law for the formation of an agency unless the principal wishes to give his agent the authority to enter deeds on his behalf, in which instance a power of attorney will need to be created under the provisions of the Powers of Attorney Act 1971.

The only restriction on an ability to appoint someone as an agent is that the principal must both exist and have the contractual capacity to enter the contract. Thus, a company cannot create an agency to enter a contract prior to its incorporation, s 36(4) of the Companies Act 1985 providing that where a company purports to enter a pre-incorporation contract, the person acting on behalf of the company, i.e. the supposed agent, will be personally liable on the contract unless it provides otherwise. Similarly, a minor cannot create an agency for a contract other than a contract for necessities and any adult purporting to act as an agent in this situation would, in fact, enter the contract as a principal in his own right.

6.4 Authority

The scope of an agent's power is delineated by the level of authority that the principal has bestowed upon him. Authority may be actual or apparent, express or implied.

6.4.1 Actual authority

As the name suggests, this is the level of authority that actually exists between the principal and the agent and the authority for which the agent is entitled to receive his remuneration. If the agent acts in excess of this authority he may be liable to the principal for breach of agency, particularly as, depending on the circumstances, the

principal may be bound by a contract negotiated by his agent when he was acting outside his actual authority.

Actual authority may be either express or implied.

Express authority

If the agency has been created by a written contract of agency, the scope of the express authority can be determined from the construction and wording of the document. In an oral agency agreement, it will depend on what the parties agreed the agent should have the authority to do.

Implied actual authority

The scope of implied actual authority is more difficult to determine as it must be deduced from all the surrounding circumstances. Typically, it will arise from the extension of a pre-existing express authority although this is not necessarily the case as, for example, in the implied authority existing between a husband and wife. **Hely Hutchinson v Brayhead Ltd** (1968), a Court of Appeal decision, examined the scope of implied authority. The chairman of the defendant company acted as its *de facto* managing director with the acquiescence of the other directors although he had not been formally appointed to that position. He issued two letters of guarantee to the plaintiffs, which they subsequently sought to enforce, the defendant denying liability on the grounds of lack of authority. The court held that the ‘managing director’ had implied actual authority exercised with the defendant’s agreement.

An agent will also have implied authority for any acts that are necessarily incidental to the exercise of his express authority. Thus, for example, if an agent is instructed to buy an item for his principal, there would be an implied authority to pledge the principal’s credit such as to bind him to the debt.

Usual authority

The exact location of usual authority within the law of agency has given rise to much academic debate, but the widely held view that it is a subdivision of implied actual authority is supported here.

Usual authority is the authority which an agent acquires by virtue of his profession. It results from an assumption that a principal, when appointing an agent to a recognised job or profession, impliedly provides him with the authority to undertake all the duties that would normally fall within such a job or profession. It follows that it does not have a general application but is limited to those situations where the agent occupies an identifiable job or profession. Hence, in **Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd** (1971) it was held that a company secretary has the implied authority to enter contracts ‘dealing with the administrative side of the company’s affairs’. This included the authority to hire cars and thus the company was liable in respect of such contracts even though the company secretary had hired the cars for his own purposes. From the **Panorama** decision, a company secretary would clearly also have authority to buy office equipment, hire staff, rent accommodation, etc.

Given the breadth of the powers that an agent might acquire under usual authority, it is appropriate that a principal should have the ability to limit the extent of those powers if he sees fit. Any such restriction will be binding on a third party