

MGM3352

LAW OF AGENCY



Why Agency Law?

- Relevant to many business transactions
- Common activity : outsourcing certain organization's functions & works to agents
- The principal-agent model
 - the "simple" situation where a principal delegates a task to a single agent through a contract

s.135 of the Contracts Act 1950

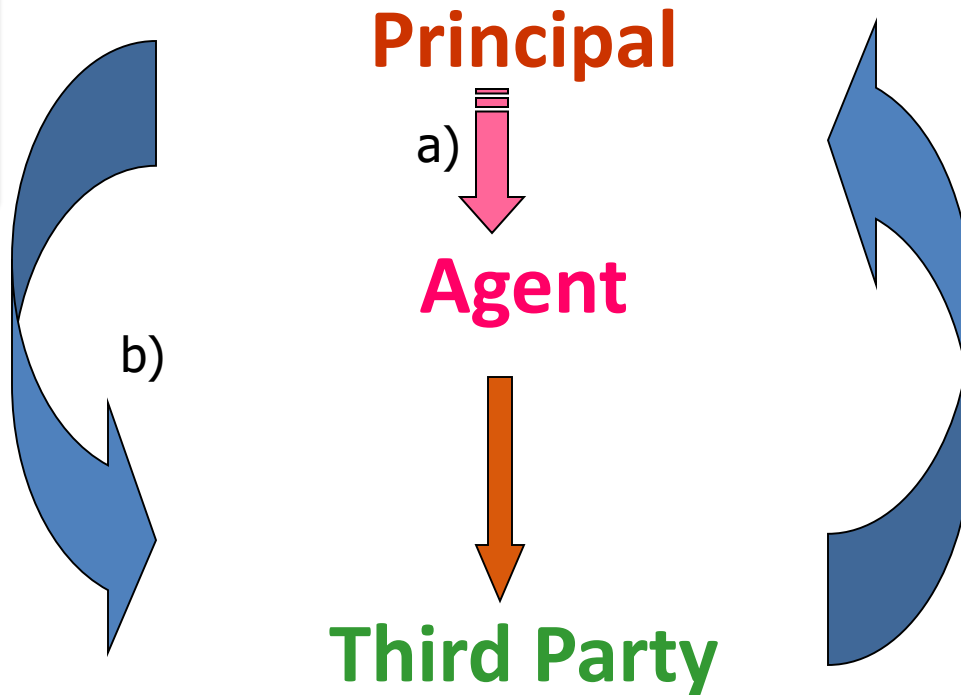
: Agent

: Principal

Definition

- **Agent:** A person employed to do any act for another or to represent another in dealings with third person.
~ only an intermediary between two other parties
(*Halsbury's Laws of England* 4th Edn, Vol.1(2))
- **Principal:** The person for whom such act is done ,or who is so represented.

How
does it
works?



* appoint/represented by,  deals with,  dealing effects (liability)

2 kinds of contractual relationship: Between

- a) Principal and agent
- b) Principal and 3rd party

CAPACITY

- **Section 136 of CA, 1950**
 - ***Principal must be of the age of majority according to the law to which he is subject & sound mind***
- **Section 137 OF CA, 1950**
 - ***Agent who is NOT of age of majority & of sound mind can become an agent, but will not be responsible to his principal***
 - **Chan Yin Tee v William Jacks & Co (Malaya) Ltd [1964]**

Creation of Agency

- No specific formality in order to form/create a contract of agency
- **S. 138 OF CA :**
“No consideration is necessary to create an agency”

Creation of Agency

- Express appointment
- Implied appointment
- Ratification
- By Necessity

Section 139 CA:

“The authority of an agent may be **expressed** or **implied**”

i- Express Appointment (s.140)

- **Verbal / written agreement / authorization**
- Must be in writing if required by law:
eg:
Powers of Attorney Act 1949
:A document by which a donor gives another person the power to act on his behalf & in his name

- *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996]

Held:

The appointment of an agent need not be in writing & that the existence of a relationship of principal & agent can be inferred from the circumstances of the case

ii- Implied Appointment (s.140)

The authority can be drawn from the circumstances of the case, *i.e inference from words (things spoken) / conduct (act done in the course of dealing)*. That person holds out another person as having authority to act for him.

Chan Yin Tee v William Jacks & Co. (Malaya) Ltd ***[1964]:***

Chan & Yong (minor) were registered as partner. Chan held himself out to be Yong's partner at a business meeting with R, leading to goods supplied to Yong but the price was not paid. R claimed against Chan & Yong. Held: ..

Summers v Solomon (1857):

Held that there was evidence that the nephew was held out as Solomon's agent to buy the goods.

- In situations where authority given under an express appointment but principal not specifying the extent of agent's authority

- **s. 141(1) &(2):** authorized agent has authority to do every lawful necessary thing in order to do the act or usually done in the course of conducting such business

Ryan v Pilkington [1959]: *Principal merely instruct agent to find purchaser.*

Held:

ii- Implied Appointment (Common law)

Relationship of the parties:

i) Husband & wife~ wife is implied agent (has authority to pledge the husband's credit) for husband to buy necessities

- However, the husband **can rebut** by proving that:
 - 1) Expressly forbid his wife from pledging his credit;
 - 2) Expressly warned the tradesman not to supply his wife with goods or credit;
 - 3) His wife was sufficiently provided with the goods ;
 - 4) His wife was given a sufficient allowance for buying goods without having to pledge her husband's credit; ***Miss Gray v Cathcart [1922]***
 - 5) The contract was unreasonable, taking into consideration her husband's income.

ii- Implied Appointment (Common law)

Relationship of the parties:

ii) Partners ~ partners are each other agents

- Each partner : **implied agent to** the firm
- The firm/ other partners are the **implied Principal** to any one of the partners.
- The firm/ other partners are liable to whatever contracts which has been entered into by any of the partners.

iii- Ratification (s. 149)

- Principal accepting the unauthorized act of
 - a) an agent who exceeds his authority, OR
 - b) a person acting on his behalf (not previously appointed as agent)

Conditions for ratification must be fulfilled:

1. Unauthorised act / contract must not be a void / criminal act

Bedford Insurance Co. Ltd v I.d.R.d. Brasil [1985]

1. Agent cannot contract in his own name

Keighley Maxted & Co. v Durant ; Brook v Hook

3. At the time the contract was made, the agent must have actual principal in existence: *Kelner v Baxter*

Now: Companies Act 2016: allows ratification of pre-incorporation contract

Cosmic Ins Corp v Khoo Chiang Poh [1981]: s. 35 of Companies Act 1965

4. At the time contract was made & time of ratification, principal has contractual capacity (s.136)

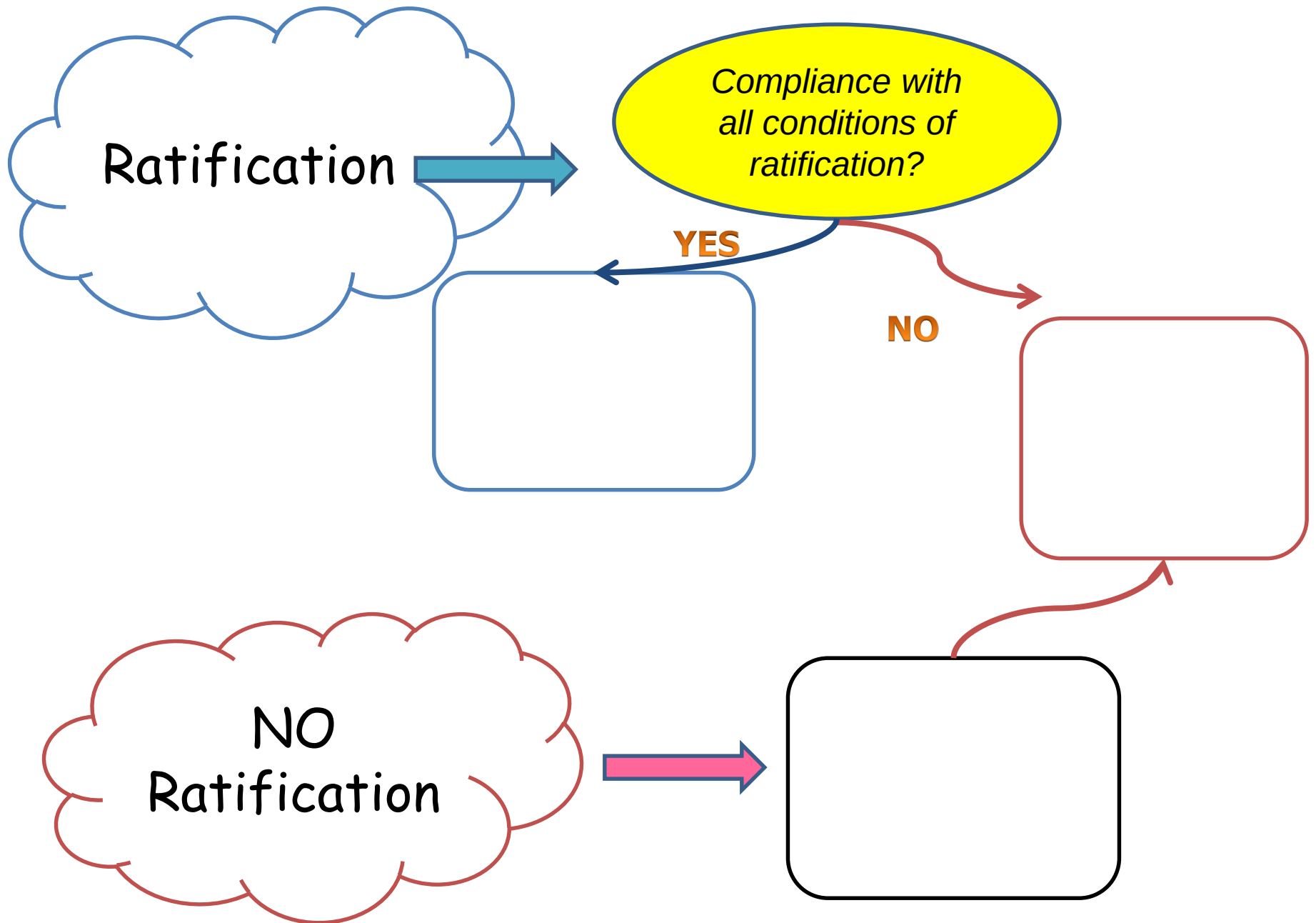
5. At the time of ratification, principal must have full knowledge of the material facts unless proven he didn't care of the facts that he intends to ratify (*s.151: no valid ratification can be made by a person whose knowledge of the fact of the case is materially defective*)
6. Principal must ratify the whole contract (*s.152*)
7. Ratification must not affect, injure or terminate a third party's rights / interest (*s.153*)
8. Ratification must be made within reasonable time

Grover & Grover v Mathews [1910]: a fire insurance policy ratified after the event insured against had happened. Held: Ineffective ratification.

- Effects of ratification : Operates retrospectively

~ *Bolton Partners v Lambert*

-takes effect from the date made by the agent , not from the date of ratification



iv- By Necessity (s. 142)

- Arises when there is an emergency situation and it becomes necessary for agent to act to protect principal from loss.
- No prior instruction from principal for what action to take when such emergency occur.
- The agency was created for a particular purpose.
~ GNR Co. v Swaffield

Conditions for agency by necessity must be fulfilled:

a- Impossible to get principal's instruction

~ *Springer v GWR Co. [1921]*

b- Action is necessary to prevent loss / a real case of emergency

~ *Prager v Blatspiel Stamp & Heacock Ltd*

~ *Phelp James & Co. v Hill* : “ emergency must be referred to the reasonable situations by looking into the.....”

c- Acted in good faith for the interest of principal

Jebarra v Ottoman Bank [1972]2 KB 254

- Held:

“ agency by necessity only exists if the agent is ***entrusted with the goods of the principal or being instructed to deliver the goods to certain destination and where at the time emergency occurred*** while the goods are under the responsibility of the agent”.

Effects of Agency By Necessity:

- The agent will be **protected from any claims** by the Principal
- The agent will be **entitled to the additional payment** for his effort to protect & to preserve the safety and interest of the Principal
- A **contract exists** between the Principal and & 3rd party.

Kinds of Agency

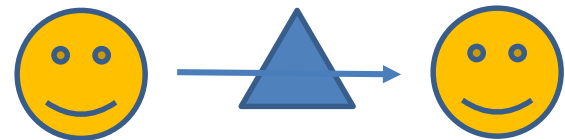
Classification according to extent of authority

- *A universal agent*: a general agent with extensive powers. Usually created by a deed in the form of general Power of Attorney
- *A general agent*: an agent employed to act on behalf of his principal, generally in trade / business
- *A special agent*: an agent appointed to do specific act / purpose

Classification according to function

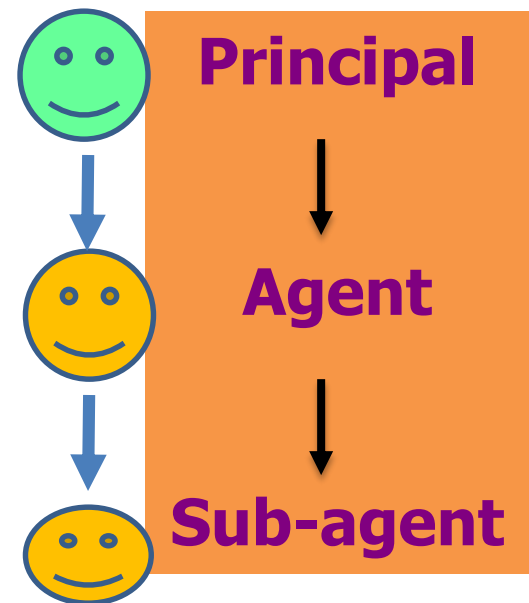
- *Del Credere agent*: will get paid if 3rd party perform his contractual obligation.
- *Factors*: a commercial agent, in his ordinary course of business, entrusted with principal's goods for sale
- *Brokers*: a commercial agent under brokerage commission; no possession of principal's goods for sale
- *Auctioneers*
- *Bankers*

Rights of agent to delegate or nominate others



SUBSIDIARY AGENT (s.144)

- ❖ Appointed by & under the control of the agent: Proper appointment (s. 143)
- ❖ Appointing agent is the principal for sub-agent (s.145)
 - no privity of contract between principal & sub-agent
 - Principal cannot sue sub-agent for \$ received on principal's account ; sub-agent cannot claim remuneration from principal
- ❖ Exception: Principal can sue agent / sub-agent/ both for fraud / wilful wrong (s.145(3))

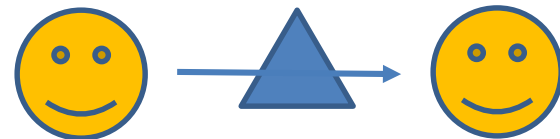
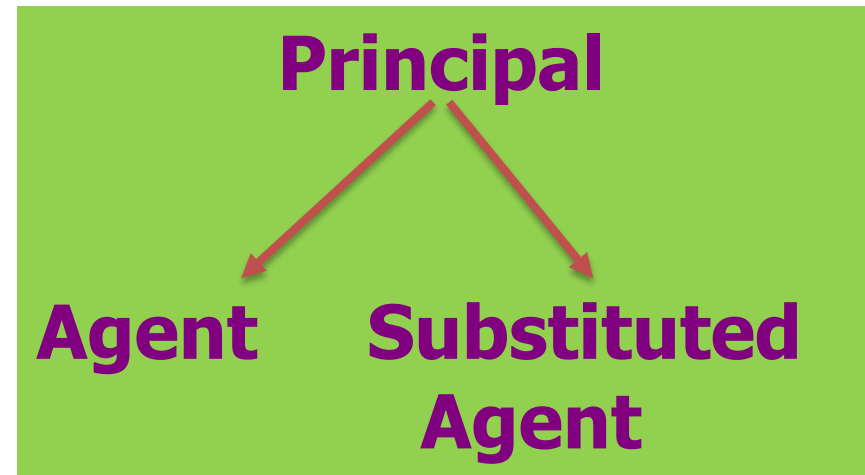


In respect of 3rd parties:

- For authorized delegation, the principal is bound by the acts of sub-agent
 - As if sub-agent was the original agent of principal
 - Agent can be held liable together if he is a party to a fraud or wilful wrong (*Robertson v Slicher*)
- For unauthorized delegation, agent is personally liable to principal & third parties for acts & misconducts of sub-agent.
 - Principal will only be liable here if he ratifies sub-agent's act.

Substituted Agent (s.147)

- ❖ Agent with express or implied authority to name another person
- ❖ Agent of the Principal;
not a sub-agent
 - Principal has privity of contract with substituted agent
- ❖ Must exercise due care & diligence in naming to avoid liability



Agent's Authorities

To know if the act done by the agent binds the principal

1) Actual authority :

- a) Expressed: Expressly given by the principal, orally/ in writing
- b) Implied: all such powers that are necessary to execute the express authority either:-
 - Implied from circumstances & trade usage / custom
 - Implied from conduct of the parties

Hely Hutchinson v Brayhead Ltd. (1968)

“ Actual authority may be expressed or implied. **It is expressed** when it is **given by words** such as when a board of director passed a resolution which authorizes 2 of their members to sign cheque.

It is implied when it is **inferred from the conduct of the parties and the circumstances of the case** such as when the board of directors appoint one of their members to be managing director. They thereby impliedly authorized him to do all such things as fall within the **usual scope** of that office.” (*per Lord Denning*)

- *Panorama Development (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971]*

: company secretary's act of hiring motor vehicle in Defendant's name

- *Watteau v Fenwick [1893]*

:Defendant appointed a manager to run a public house.

2) Apparent/ Ostensible authority:

Agency that appears from circumstances; principal causes a person to appear to have authority as agent.

~ s. 190

~ A replica of doctrine of estoppel.

Conditions to fulfil:

- Representation by Principal
- Reliance by 3rd party &
- Alteration of position (3rd party enters into the contract).

Freeman and Lockyer v Buckhust Park Properties (Mangal) Limited

- “An ‘apparent or ‘Ostensible’ authority is a legal relationship between the principal and the contractor **created by a representation, made by the principal to the contractor,** intended to be and in fact **acted upon** by the contractor that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority so as to **render the principal liable to perform any obligation imposed upon him by such contract.** The representation when acted upon by entering into a contract with the agent **operates as an estoppel,** preventing the principal from asserting that he is not bound by the contract. **It is irrelevant whether the agent has actual authority to enter into the contract.”** (per Lord Diplock LJ)

Apparent authority:

~ Categorized under 4 different headings:

a- Principal allowed another to appear as if he were his agent, whereas in fact he is not

Barrett v Deere (1828)

b- Allowed his agent to give the impression that he has more authority than he actually has

Todd v Robinson (1825):

c- Allowed his agent to continue to appear as his agent whereas the agency relationship between them is terminated

Drew v Nunn

d- When the principal limits the agent actuals / implied authority but fails to inform third parties to deal with him of the agent limited authority.

Hely Hutchinson v Brayhead

Panorama Development (Guildford) Ltd v FFF:

- *Mayban Factoring Bhd v Koperasi Pekerja-pekerja PM Malaysia Bhd [2001]*

: Respondent's (R) secretary was also a member of Board of Directors & was authorized to receive all documents meant for R.

Held: Appellant can rely on ostensible authority of secretary to act on behalf of R.

- ***Freeman and Lockyer v Buckhust Park Properties (Mangal) Limited***

: A director acted as an MD although there had been no appointment to that office.

Held: the company was liable for the architect's fees. There was ostensible authority because the BoD knew the director had acted as an MD, so they held him out as having the authority of a MD.

Breach of Warranty Implied Authority

- Agent exceeds his authority / person pretends as an agent.
- Action brought by 3rd party only for actual loss.
- Agent not liable: 3rd party knows; principal's vague orders was reasonably interpreted.
- Principal bound by actions within agent's authority unless the unauthorized acts is inseparable (s.180-181)
- Innocent misrepresentation by agent: *Yonge v Toynbee*

Yonge v Toynbee

- Held: solicitor was liable for the costs of the other party following the termination of his authority to act, although he had no knowledge that his authority had been terminated.

Agent's Duty

1. Obey principal's instructions; if none, according to prevailing custom in business
2. Exercise care & diligence & skill
3. Render proper account.
4. Pay all sums received on principal's behalf
5. Communicate with principal
6. Avoid conflicting interests
7. Avoid secret profit
8. Not disclosing confidential information/ document entrusted to 3rd party
9. Not to delegate his authority unless allowed in law.



1) Obey principal's instructions

s. 164:

- Agent is bound to conduct the business of his principal according to the directions given by the principal
- If agents act otherwise, if any loss sustained, he must make it good to the principal & if any profits accrues, he must account for it

- Agent who fails to carry out principal duty is in breach of his agency contract & is liable for any loss
- Agents has no obligation to obey illegal order

Turpin v Bilton (1843): agent fails to insure ship when instructed to.

The Hermione [1922]: agent cannot contradict principal's express instruction.

2) Exercise care & diligence & skill

s. 165:

- Agent is bound to conduct the business of agency with as much skill as it generally possessed by persons engaged in similar business, unless principal has notice of his wants of skill
- Agent is bound to act with reasonable diligence & to use such skill
- To make compensation for direct consequence of his neglect, want of skill or misconduct

Keppel v Wheeler: agent fails to inform principal of a better offer.

Illustrations (a)-(d) of s. 165

7) Avoid secret profit

s. 168:

If principal knows of the extra profit & consents to it, agent is entitled to keep the profit, as it is no longer secret

s. 169:

Principal may recover the amount of bribe /secret commission from agent

Secret profit incl. secret commission or any financial advantage received by agent, above commission /remuneration agreed by principal & agent.

Civil remedies: When proven, principal can:

i- repudiate the contract

ii- recover the secret commissions: *Andrews v Ramsay*

iii- refuse to pay agent's commission: *Andrew v Ramsay*

iv- dismiss agent for breach of duty: *Boston Deep Sea Fishing & Ice Co v Ansell*

v- Sue agent & 3rd party for any loss he sustained through entering into the contract: *Maheesan v Malaysian Govt. Officers Co-op Housing Soc Ltd.*

Criminal offence: agent & 3rd party may be guilty under the Prevention of Corruption Act 1961

Principal's Duties (ss.175-178)

1. Pay commission / remuneration as agreed, unless the agency relationship is gratuitous
2. Not to wilfully prevent / hinder agent from earning his commission
3. Indemnify & reimburse agent for acts done in the exercise of his duties

*Not to wilfully prevent / hinder agent from earning his commission

- Principal has appointed an agent. Principal later cannot appoint second agent in the midst of negotiations to deprive the original agent of his commission particularly if the original agent is responsible to bring together the principal & 3rd party.
- The above exclude estate agent for sale of real property. Principal can also nego & sale the property himself

*Indemnify & reimburse agent for acts done in the exercise of his duties

-Right to be indemnified by principal against all losses & liabilities incurred by him in the performance of his duties (s.175)

- Right to be reimbursed in respect of legitimate expenses incurred in compliance with principal's instructions.

- To be indemnified where:
 - i- agent has incurred losses & liabilities in the performance of his duties
 - ii- agent causes injury to 3rd party in the performance of his authority (principal will be jointly & severally liable, other than in criminal act)
 - iii- agent suffers injury during the course of his duty due to principal's neglect or want of skill

Kyall & Evatt v Lim Kim Keat

Davison v Fernandes

Solloway & Anor v McLaughlin: agent engaged in fraudulent scheme to defraud their principals cannot have rights to an indemnity in respect of the transactions which formed part of the fraud

Effects of Contracts Made by Agents

1. A *'named' principal*

- **Known principal; agent is acting as an agent**
- **Agent incurs no rights/liability, except if he exceed his authority.**
- **Subject to s.183.**

2. Principal's existence is disclosed but not the name.

- Agent incurs no rights/liability, except if he exceed his authority**

~ Universal Steam Navigation Co. v James McKelvie & Co

~ MAA Holdings S.B & Ors v Ng Siew Wah & Ors.

3. Undisclosed Principal

- Identity and existence of principal not disclosed.
- Agent acts as if he's the principal.
- No ratification could occur.
- 3rd party can sue either agent / principal / both once he knew the principal's existence (s.186)
- Undisclosed principal can interfere / sue 3rd party but he opens himself to the 3rd party's claim.
- No claim by undisclosed principal / 3rd party if:
 - ~ the rights & option are against the express/implied terms in the contract between 3rd party & agent
 - ~ agent exceeded his authority/ without authority.

Termination of Agency

1. By the Acts of the Parties

- Mutual consent / unilateral revocation (principal) or renunciation (agent)
- Must give reasonable notice
- Principal cannot revoke agency if:
 1. Agent has interest in property that formed the subject matter of the agency : *Smart v Sanders*
 2. After the authority has been partly exercised that the agent has incurred personal liability for such act:
illustrations to s. 157
Read v Anderson

- Time termination takes effect (s.161) 'becomes known'
 - ~ knowledge of termination either from principal / any other source
- Agency for fixed period termination earlier without lawful justification: compensation
- Agency for indefinite duration, revocation/renouncing with reasonable notice. In default, pay damages.

2. Operation of Law

- Completion of agency (s.154)
- Expiration of period fixed / implied
- Death of agent/principal (s.161)
- Insanity of agent/principal (s.162)
- Principal's bankruptcy / insolvency
- Frustration

Issues

- Does an agent also has a duty to society?
~ if an agent knows her employer is engaging in an unethical /illegal marketing, eg marketing an unsafe product?
- Does an agent breach of loyalty terminate the agency relationship?
~employees who breach confidential info, or sell trade secret to competitor

