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Agency and partnership law [2011]

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3. AGENCY AND PARTNERSHIP LAW

AGENCY LAW

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Creation of agency

3.1 In *Yong Sheng Goldsmith Pte Ltd v Liberty Insurance Pte Ltd* [2011] SGHC 156, an insurance agent who was registered with the defendant insurers was held to be the latter's agent for the purposes of the plaintiff's insurance policy with the defendant. Accordingly, the defendant, as principal, could properly be imputed with the knowledge of its agent.

3.2 The issue arose in the context of a claim by the plaintiff on a contract of insurance it had entered into with the defendant. The defendant had attempted to repudiate the policy on the basis of material non-disclosure by the plaintiff. The plaintiff had, in fact, communicated the material information to one Johnny, the insurance agent who had been handling, since 2003, all matters relating to the plaintiff's policy with the defendant, including its procurement and subsequent renewals. The defendant denied that Johnny was its agent, claiming instead that he was the agent for the plaintiff as he had placed policies for the plaintiff with other insurance companies. The court rejected this submission, holding that the evidence (which included a valid name card issued by the defendant) clearly showed Johnny to be the agent of the defendant with authority to procure and put into effect insurance policies. In the circumstances, the communication by the plaintiff of the material information to Johnny was akin to a communication to the defendant, so that Johnny's knowledge constituted the defendant's knowledge. That Johnny did not in fact communicate the information to the defendant was held to be irrelevant to the issue.

Holding out and apparent authority

3.3 It is an established principle of agency law that an agent cannot "self-authorise" or create his own appearance of authority (see *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717 ("*The Ocean Frost*"). This principle appears to have been circumvented by the English Court of Appeal in *First Energy (UK) Ltd v Hungarian International*

Bank Ltd [1993] 2 Lloyd's Rep 194 ("*First Energy*") which held that an agent who had no actual or apparent authority to conclude, on his principal's behalf, the transaction itself, may nevertheless have the apparent authority to represent that the principal had approved and concluded that transaction: *The Ocean Frost* at 779. The effect of *this* apparent authority is that the principal is similarly bound. Given the "razor-edge thinness" (G McMeel, "Philosophical Foundations of the Law of Agency" (2000) 116 LQR 387 at 405) of the distinction between this case and that of the House of Lords in *The Ocean Frost*, it is not surprising that the decision has not been universally embraced (see, *eg*, C H Tan, *The Law of Agency* (Singapore: Academy Publishing, 2010) at [05.043]; *cf* I Brown, "The Agent's Apparent Authority: Paradigm or Paradox?" (1995) *Journal of Business Law* at 360). In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 ("*Skandinaviska*"), the Court of Appeal had occasion to consider the principle laid down in *First Energy*.

3.4 The issue before the court in *Skandinaviska* was whether the defendant company, APBS, was bound by certain acts of its employee. Chia, who held the title of "finance manager", had managed to obtain credit and loan facilities from the plaintiff banks, purportedly for the company's purposes. This was, however, part of a scheme to defraud the banks of large sums of money which Chia effected by providing the banks with forged documents, including forged resolutions of the APBS board. The banks claimed against APBS for the repayment of these sums on the basis, *inter alia*, that Chia had actual or ostensible authority to enter into the relevant transactions on APBS's behalf. The claims failed in the High Court before Belinda Ang Saw Ean J ([2009] 4 SLR(R) 788). Her Honour held that any actual authority Chia may have been granted would have been vitiated by his fraud and that, on the evidence, as APBS had not held Chia out as having the authority to transact as he did, the claim on apparent authority also necessarily failed.

3.5 On appeal in *Skandinaviska*, counsel for the banks submitted that her Honour ought to have accorded more weight to *First Energy*, which, it was argued, demonstrated the inadequacies of the orthodox doctrine of apparent authority in situations where the principal was an "impersonal corporate structure": *First Energy* at [37]. The focus of the court's inquiry therefore, ought not to have been whether there was an unequivocal representation by the principal to the third party, but should instead have shifted to "the reasonable expectations of the third party as they would objectively appear in the context of commercial convenience and modern-day dealings": *First Energy* at [37]. It was, therefore, submitted that Chia, being the most senior finance officer in APBS, had the authority, whether actual or apparent, to make representations on APBS's behalf, including the representations that

APBS had accepted the facilities and that the forged documents were genuine and the transactions ought, therefore, to be binding on APBS.

3.6 The Court of Appeal, however, agreed with the High Court judge that the evidence did not show that APBS had held Chia out as possessing actual and/or apparent authority to make the representations as asserted. Of *First Energy*, Chan Sek Keong CJ (who delivered the judgment of the court) stated (*Skandinaviska* at [51]):

> [T]he court's decision [in *First Energy*] was based on a *specific finding of fact* that the principal concerned had held out its agent as having authority to make, in relation to the transaction in question, representations of the class or kind of representations that the agent actually made, even though the agent knew he had no actual authority to enter into the transaction itself. [emphasis added]

3.7 In *First Energy*, the defendant bank had granted wide ranging authority to the branch manager in Manchester to perform a variety of tasks. Therefore, although the manager had no authority to grant a loan (as was made clear to the bank's customer), he was nevertheless found to possess the authority to convey the bank's approval of the loan to the customer. The present case was different as, in the Court of Appeal's view, Chia was "merely the finance manager of APBS, a title which does not connote the possession of any specific authority": *Skandinaviska* at [51]. The court further observed that a representation by an agent that his principal had approved a transaction "[went] to the heart of the agency relationship" (*Skandinaviska* at [59]), as it effectively conferred on the agent transactional authority. Therefore, whilst an agent may have the authority to make *general* representations about the transaction, this cannot include the authority to make the specific representation that the principal had approved the transaction, as this would be contrary to the principle, established in *The Ocean Frost*, that there cannot be self-authorisation by the agent. The position was different if the agent had *in fact* been conferred the authority, whether actual or ostensible, to make that specific representation, as was the case in *First Energy*.

3.8 The banks had also provided evidence which showed that Chia had unlimited authority to operate a genuine account that APBS held with another bank, that he had authority to open fixed deposit accounts in APBS's name, that he frequently dealt with banks and acted as the point of communication between APBS and its bankers and that he had wide powers with respect to APBS's facilities and properties. The Court of Appeal was, however, in agreement with the High Court that the evidence was insufficient to show that Chia was vested with the authority to make the representations asserted. In the court's view, Chia, being only a "finance manager" of one company in a large corporate group, was vested with much less general authority than someone in the position of a general manager, a finance director or a managing director.

In the circumstances, therefore, the banks' appeal on the point of apparent authority, must necessarily fail.

3.9 After taking note of the various criticisms that have been made of the decision in *First Energy*, Chan CJ opined that the case may *not* in fact be consistent with established authority, and, may instead be a radical departure from the traditional conceptual basis of the doctrine of apparent authority. As such, his Honour cautioned as follows (*Skandinaviska* at [57]):

> [I]f it becomes necessary in a future case for a Singapore court to decide whether or not *First Energy* is good law in this country, the court will have to first identify in so far as is possible, what principle (if any) was established in *First Energy* that is not … inconsistent with [*The Ocean Frost*].

PARTNERSHIP LAW

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Relationship of partners between themselves

Breach of duty

3.10 In *Ang Tin Gee v Pang Teck Guan* [2011] SGHC 259 ("*Ang Tin Gee*"), the plaintiff ("Julie") and the defendant ("Andy") in 1996 formed a partnership known as Japco TC International Enterprise ("Japco"). The firm's business was initially the export of electrical appliances. Andy, who claimed to have some expertise and experience in the field, was the primary manager while Julie's main role was to provide funding. Overdraft finance was also obtained from United Overseas Bank ("UOB"), secured by a mortgage on Julie's residence and by joint and several guarantees. However, after a major default by a customer in the Seychelles, losses were sustained on the appliances export business, and eventually the firm moved into the domestic supply of office consumables instead. A business called Office Consumables Supplies ("OCS") was registered in 2000. Thereafter, Japco, in effect, operated as the purchasing arm and OCS as the sales arm of the operation. Andy was in charge of both aspects. The partnership continued to accumulate losses and was ultimately dissolved in 2006 at the instance of Julie, who

subsequently brought a claim against Andy alleging breaches of his duty as partner and seeking an equitable account.

3.11 The principal issues concerned (a) the financial terms on which the partnership was based; (b) whether OCS was a partnership business at all; and (c) if it was, whether it had been operated by Andy for the benefit of the firm. While most of the key issues of fact were disputed by the parties, Belinda Ang Saw Ean J preferred the evidence of Julie in almost all respects.

3.12 The court concluded that the partnership was based on equal sharing of capital, profits and losses. The partnership agreement, apparently made without legal input, referred (in cl 2) to "capital to be maintained at S$250,000 in 3 years' time for equal partnership purposes" and (in cl 3) to Andy receiving a monthly salary and annual bonus "with profit sharing of 10% after net P & L. Profit sharing ceiling at 25%, thereafter subject to further discussion". While Julie paid in capital of S$125,000 over time, Andy never in fact contributed any capital. Nevertheless, Ang J held (*Ang Tin Gee* at [62]–[68]), that the foregoing agreement contemplated that Andy's share would be capitalised from his share of net profits (if any), over three years on a catch-up (or "earn-in") basis. Therefore, his true entitlement was 50% of the profits, but with up to 40% of the profits being capitalised to satisfy his capital obligation. Moreover, a 50% profit share was consistent with the 50:50 allocation repeatedly stated in the partnership tax returns. Applying the presumption in s 24(1) of the Partnership Act (Cap 391, 1994 Rev Ed), losses would be shared equally, *ie*, on the same basis as profits. Andy would, therefore, be liable to indemnify Julie for half of the outstanding UOB overdraft: *Ang Tin Gee* at [120].

3.13 OCS had been registered as a sole proprietorship in Andy's name. Although he argued that this fact indicated that OCS was his separate business rather than part of the Japco partnership, the court held (with respect, correctly) that it was not conclusive. The evidence showed that Japco had funded OCS's start-up costs and all its operational expenses, *eg*, rent and utilities for the common premises, without reimbursement. Further, Japco in effect financed OCS's inventory by purchasing for cash and on-selling to OCS on credit. Moreover, there was no proper system of invoicing between Japco and OCS. All of these points went to indicate that they were not separate businesses, but were in fact managed by Andy as components of the same business: *Ang Tin Gee* at [80]. In addition, as the judge pointed out (*Ang Tin Gee* at [69]), even if Japco and OCS *were* separately owned businesses, Andy's use of Japco's resources in OCS's business without proper disclosure to Julie would have amounted to misappropriation of Japco's money.

3.14 Given the conclusion that OCS was part of the partnership's business, Andy's fiduciary obligation was to manage OCS for the firm's benefit and account for its transactions. His failure to account properly for the usage of Japco's resources, and his retention of OCS's profits, gave rise to breaches of his fiduciary duty: *Ang Tin Gee* at [96], [103] and [106]. In view of the unreliability of the OCS figures produced by Andy for the trial, various accounts were ordered to determine the amount payable to Julie.

3.15 However, the court dismissed Julie's claim against Andy in negligence founded on the default of the Seychelles customer (see para 3.10 above). Even where a business loss is attributable primarily to one partner, his co-partners do not have a claim against him unless he has committed fraud, culpable negligence (apparently meaning "gross" negligence: *Tann v Herrington* [2009] EWHC 445) or wilful default, none of which had been made out: *Ang Tin Gee* at [141].

Dissolution of partnership

Effect of retirement

3.16 *Ang Tin Yong v Ang Boon Chye* [2012] 1 SLR 447 ("*Ang Tin Yong*") involved a short point on the effect of the retirement of two of the partners in a firm operating a food centre. The history was that the partnership had previously under-declared its income to the Inland Revenue, resulting in all the partners receiving additional tax assessments. The respondents in this appeal had then brought proceedings against the appellant claiming that, as they had entrusted the entire management of the partnership to him, he was liable to them for the additional tax. In those proceedings (reported at [2008] SGHC 177), an account was ordered to be taken of the firm's business for 1999–2004, and the respondents in 2008 obtained an assistant registrar's order ("AR's Order") requiring the appellant to produce the account. After he had failed to do so, the respondents in 2010 sought leave to bring committal proceedings against him for contempt. The appellant, however, pleaded that in 2009 the respondents had executed a deed with the other partners ("Deed") under which they had retired from the firm, and, therefore, they lacked *locus standi* to seek leave for committal. Although the High Court granted the respondents leave to proceed, this was overturned on appeal.

3.17 Under the Deed, the respondents had, in consideration for a payment of S$150,000 each, assigned "all [their] share and interest … in the goodwill debts and credits and all property of … [the partners] in connection with the partnership" to the continuing partners. Construing the Deed in the light of its clear object and with commercial

common sense, the Court of Appeal had little difficulty in finding that the respondents had settled their claims and retired from the partnership, ceasing to have any interest in its assets and accounts. Accordingly, their interest in enforcing the AR's Order no longer existed. The court, moreover, held that it was an implied term of the Deed that the AR's Order would be extinguished upon the respondents being paid out. For them to seek, one year later, to enforce that order amounted to bad faith and an abuse of process. It is of course possible for outgoing partners to preserve claims against their partners after retirement; it depends upon the terms of the retirement. In this case the court held that it was plain that the Deed was intended to effect a clean break.