

3. AGENCY LAW

Pearlie KOH

LLB (Hons) (National University of Singapore), LLM (University of Melbourne);

Advocate & Solicitor (Singapore);

Associate Professor, Singapore Management University, School of Law.

Apparent authority

3.1 The concept of a self-authorising agent is generally anathema in agency law, and despite seeming inroads made by the UK Court of Appeal, that general position has been affirmed locally, most recently in *Ong Han Ling v American International Assurance Co Ltd*¹ (“*Ong Han Ling*”).

3.2 It is trite that an unauthorised agent may be able to bind his principal where he may be said to have “apparent authority”. Apparent authority arises where the principal, by his words or conduct, leads another (the contractor) to believe that the agent has the requisite authority to act on his (that is, the principal’s) behalf. Where the contractor transacts with the apparently authorised agent on the faith of this belief, the principal may be bound by the acts of the unauthorised agent as though the latter is indeed duly authorised. Given that apparent authority arises as a result of the *principal’s* representation to the contractor, it logically follows that the unauthorised agent’s own representation as to his alleged authority cannot bind the principal. In this regard, the UK Court of Appeal decision in *First Energy (UK) Ltd v Hungarian International Bank Ltd*² (“*First Energy*”) is said to stand rather close to the line,³ as it was accepted there that an agent who was known not to have the necessary authority to conclude a transaction could nevertheless erroneously represent in a binding manner that the principal had approved the transaction. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*⁴ (“*Skandinaviska*”), the Court of Appeal expressed reservations about the correctness of *First Energy* and cautioned against treating such

1 [2017] SGHC 327.

2 [1993] 2 Lloyd’s Rep 194.

3 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 8-021.

4 [2011] 3 SLR 540.

representations as similar to other general representations. The court noted as follows:⁵

While an agent may possess authority (whether actual or ostensible) to make general representations pertaining to a certain transaction (such as, for example, a representation about the condition of the goods involved in a sale transaction), this authority, in a situation where the agent *does not* also possess authority (whether actual or ostensible) to enter into the said transaction on the principal's behalf, cannot include authority to make the specific representation that the principal has approved that transaction. To argue that an agent has authority to represent that his principal has approved a transaction – which is in effect, authority to bind the principal to the transaction – because he (the agent) has the authority to make general representations about the transaction, and hence, also has authority to represent that his principal has approved the transaction is contrary to the established principle that there cannot be self-authorisation by an agent ... [emphasis in original]

3.3 The argument was, however, attempted by the plaintiffs in *Ong Han Ling*. The case involved a fraudulent insurance agent who was representing the defendant insurers. She had sold a fictitious insurance policy to the plaintiffs by fabricating documents. She had then misused the premium paid to purchase different policies for the plaintiffs by forging the plaintiffs' signatures on the applications for these policies. The defendant insurers were therefore also defrauded by the agent. When the plaintiffs discovered the existence of these policies, the agent induced them to surrender the same by falsely representing that these had been erroneously listed in the plaintiffs' names. The surrender proceeds were misappropriated by the agent. The plaintiffs sought expectation damages on the basis that the fictitious policy was a valid contract binding on the defendant insurers. The plaintiffs had contended, *inter alia*, that although the agent did not have the actual authority to conclude the policy, she was nevertheless able to bind the defendant insurers because she had the actual authority to represent to the plaintiffs that their policy application had been approved. The High Court held that these arguments "[missed] the point".⁶ As the policy was entirely fabricated, as was the alleged acceptance of the policy application by the defendant insurers, the agent could not be said to have purportedly contracted on the defendant insurers' behalf. It was

5 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [59].

6 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [139].

therefore unnecessary to have resorted to agency principles to decide the contract issue.⁷

3.4 The court, nevertheless, proceeded to consider the defendant insurers' contractual liability on agency principles. Noting that the Court of Appeal had, in *Skandinaviska*, read *First Energy* as limited in its application to only situations where the court expressly finds that the agent had actual or ostensible authority to make the specific representation that his principal had approved the impugned transaction, the court proceeded to examine whether the agent in the present case in fact possessed such authority. In this regard, the court opined that as “[a] representation as to the principal’s approval of a transaction goes to the heart of the agency relationship”⁸, such authority must be clearly vested in the agent by the principal.⁹ The court examined the facts and concluded that the agent had no actual authority to make the necessary representation.

3.5 Central to the court’s conclusion was the fact that the *agent’s contract* with the defendant insurers did not provide her with the authority to communicate policy approvals to customers. Whilst the contract authorised her to procure and transmit applications for insurance policies, it did not authorise her to “negotiate, enter into contracts and/or agreements on behalf of the [defendant insurers]”¹⁰. Although there was evidence that the agent regularly delivered counter-offers and policy contracts to the customer, the court considered such evidence to be insufficient to show that the agent had the actual authority to represent to the customers that their policy applications had been approved. The court stated:¹¹

An agent ... would only have such authority if she were able to represent to the third party without additional involvement by the principal that her principal had approved the transaction (*and thus she was empowered to enter into the transaction with the third party on behalf of the principal*) ... [emphasis added]

7 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [141].

8 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [112], citing *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [59].

9 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [146].

10 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [147].

11 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [148].

3.6 The court appears to have located the agent's actual authority to make the specific representation within the agent's actual authority to *transact* on the principal's behalf. In so doing, the court may be suggesting that the two types of authority are coterminous. However, in *First Energy*, Evans LJ had stated that there was "no requirement that the authority to communicate decisions should be commensurate with the authority to enter into a transaction of the kind in question on behalf of the principal".¹² This approach was expressly approved by the Privy Council in *Kelly v Fraser*,¹³ although the Privy Council did caution that "[every] case calls for a careful examination of its particular facts".¹⁴ The High Court's approach clearly restricts the application of the *First Energy* to a very narrow band and is indicative of the opprobrium with which the local courts view that decision.

3.7 In any event, the court considered any actual authority that the agent might have had to be, in any case, nullified by her fraud.¹⁵

3.8 The court also opined that, on the facts, no apparent authority could arise as there had been no representation by the defendant insurers that the agent was authorised to represent that they (that is, the defendant insurers) had approved a policy application. In this regard, the court considered insufficient for that purpose the evidence that it was usual for the agent to deliver letters and policies to clients.

Principal's liability for fraud of the agent

3.9 The plaintiffs also argued, *inter alia*, that the defendant insurers ought to be liable for its agent's fraudulent misrepresentations. As a general principle, liability of the principal for such torts of its agent depended on whether the tortious acts fell within the agent's apparent authority.

3.10 In the present case, it was clear that the agent would not have been actually authorised to make any representation as to the fictitious policy. The question then is whether the false statements were made within her *apparent* authority. The court held that this exercise involved determining whether the specific misrepresentations fell within a class of representations that the agent was held out as having the authority to

12 *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 at 206.

13 [2013] 1 AC 450 at [15].

14 *Kelly v Fraser* [2013] 1 AC 450 at [15].

15 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [149].

make.¹⁶ For this purpose, it would suffice that the principal had placed the agent in a position generally associated with the exercise of certain powers and functions.¹⁷ On the present facts, the court found that the defendant insurers, by appointing the agent as its insurance agent, did clothe her with the authority to make representations to potential clients about insurance policies offered by the defendant insurers. Accordingly, the latter was liable for the agent's misrepresentations.

3.11 The question of a principal's liability for the tortious acts of its agent was also raised in *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin*.¹⁸ The case involved a fraudulent sales agent, Kelvin, who represented the defendant, a real estate agency. The defendant was engaged by the plaintiff in respect of certain property transactions, including the sale of an apartment in Bayshore Park and a subsequent lease of another property. The plaintiff had also contracted to purchase an apartment at Bedok Court, but the defendant denied any knowledge of this transaction. The plaintiff opened a bank account for the purpose of receiving the proceeds from the sale of her apartment. The plaintiff, on Kelvin's advice, issued a number of cheques drawn on that account and executed in blank, allegedly to facilitate the payment for her purchase of the other property. These cheques were handed to Kelvin, who misappropriated the cheques to make payments to himself. In an action against the defendant, the plaintiff argued, *inter alia*, that the defendant was liable for the wrongful acts of its agent. The court held that although Kelvin was "clearly acting as [the defendant's] agent" in his dealings with the plaintiff,¹⁹ the defendant was not liable. The court stated:²⁰

An agent's authority may be express, implied or apparent. It was not the plaintiff's case that she thought that [the agent] had authority to receive cheques signed in blank. Instead, her case was based simply on the fact that Kelvin was authorised to receive cheques on behalf of [the defendant]. However, it could not be disputed that Kelvin was authorised only to receive cheques crossed and made payable to the [defendant]. Clearly, this was vastly different from receiving a cheque signed in blank ... there was no basis upon which the Kelvin's fraudulent acts could be said to have been within his authority as an agent.

16 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [216].

17 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [218].

18 [2017] SGHC 149.

19 *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin* [2017] SGHC 149 at [38].

20 *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin* [2017] SGHC 149 at [39].

3.12 With respect, it is not entirely clear why Kelvin's authority should be limited to receiving cheques that were crossed and made payable to *the defendant*. Perhaps this was in response to the plaintiff's case, which was premised on the ground that Kelvin was authorised to receive cheques on behalf of the *defendant*. This seems a curiously restrictive argument given that the cheques were meant, not only for the payment of the defendant's agency fees, but also for the payment of other parties.²¹ Real estate agents and their salespersons are regulated by the Estate Agents Act.²² As a representative of the defendant, Kelvin would fall within the definition of a "salesperson" under s 3 of that Act. Whilst it is an offence under reg 7(1)(a) of the Estate Agents (Estate Agency Work) Regulations 2010²³ for any estate agent or salesperson to hold or handle any money for or on behalf of any party in relation to the sale or purchase of any property situated in Singapore, this general prohibition does not prevent the estate agent or salesperson from "delivering on behalf of any party a *crossed account payee cheque* ... in favour of *another party to the transaction*" [emphasis added].²⁴ The Regulations clearly recognises that estate agents and their salespersons do receive cheques that are made out in favour of the counterparty to the property transaction. As the defendant in the present case was *itself* acting as the plaintiff's agent in respect of her property transactions, Kelvin should logically be authorised to receive cheques meant for a counterparty albeit only for the purposes of delivery to that counterparty.

3.13 Given the explicit exemption made for crossed cheques under the Regulations, it is likely that the holding of blank cheques would fall within the spirit of the prohibition. If that is correct, Kelvin's holding of the blank cheques would be illegal.

3.14 It is, however, not clear how that illegality affects Kelvin's *authority* to receive the blank cheques. Peter Watts has observed as follows:²⁵

To the extent that actual authority turns on a manifestation of will by the principal to the agent that the latter act in certain ways on the former's behalf, there seems no reason of principle why a principal should not give authority to an agent to engage in illegal activity. Indeed, it seems safe to assume that it is a relatively common occurrence for a principal to condone illegal action, particularly where

21 *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin* [2017] SGHC 149 at [32].

22 Cap 95A, 2011 Rev Ed.

23 S 644/2010.

24 Estate Agents (Estate Agency Work) Regulations 2010 (S 644/2010) reg 7(2)(a).

25 Peter Watts, "Illegality and Agency Law: Authorising Illegal Action" (2011) 3 *The Journal of Business Law* 213.

it is not altogether clear that the conduct is illegal and the principal is happy to test the waters. [references omitted]

Be that as it may, it is probable that the boundaries of Kelvin's *actual* authority were likely to be delineated by the relevant regulatory regime for estate agents. If so, he would have had no *actual* authority to receive those cheques. Would the holding of those blank cheques have fallen within his *apparent* authority as a salesperson for the defendant? This would depend on the facts. Even if the requisite representation was established, the plaintiff might be hard put to establish reliance as, on her evidence, she had given the blank cheques to Kelvin because "she trusted him".²⁶

26 *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin* [2017] SGHC 149 at [14], [15], [33] and [49].