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TWENTIETH EDITION

BY

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PREFACE

It is obvious enough that few areas of private law are insulated from the concept of “agency”. Issues involving the role of intermediaries are apt to arise in any litigation. But agency law is rarely the only or even the central focus of a case, so agency issues tend to lurk within judgments. Applying a range of techniques I have attempted to keep up with the case law of England and Wales and several other Commonwealth jurisdictions. A fairly consistent pattern has emerged of some 150 cases a year needing to be considered. About 80 of these a year have warranted some degree of mention in Supplements, with plainly more weight being given to decisions of the home jurisdiction, England and Wales. This new edition incorporates the cases up to the first half of 2014. Every chapter of the book has garnered new authority.

In terms of reconsideration of the text, there has again been some change to all chapters, but the chapters principally affected have been Chapters 6 and 8. In relation to Chapter 6, dealing with the relations between principals and agents, the most important development occurred after the first proofs had been produced, with the expeditious release by the Supreme Court of its decision in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45. This decision has determined that for England and Wales proprietary claims are generally available for capturing identifiable gains made by an agent in breach of fiduciary duty. Amongst other new material in that chapter, mention can be made of the law on agents acting for competing principals, issues of onus of proof of breach of duty, the commencement and termination of fiduciary duties, conflicts of interest, duties of confidentiality, the keeping of records and the duty to account.

In relation to Chapter 8, particular consideration has been given to aspects of the concept of apparent authority in agency law, prompted by parts of the judgment of Lord Neuberger NPJ in *Thanakharn Kasikorn Thai Chamchat v Akai Holdings Ltd* (2010) 13 HKCFAR 479. This judgment of the Hong Kong Court of Final Appeal has had considerable influence on first instance judgments in England, but it is argued that in respect of the question of apparent authority that influence is regrettable. The main parts of the reasoning are inconsistent with established principles of English law. In particular, it would be a retrograde step no longer to focus on the *reasonableness* of a third party’s reliance on an asserted representation by a principal as to an agent’s authority in the light of the third party’s state of knowledge of pertinent facts. Reasonableness plays an intrinsic part in direct contracting, and that must be true too of contracting with agents. It is a concept well capable of taking account of the necessities of business life.

Amongst other topics in Chapter 8 on which new material can be found are: indicia of apparent authority, including the relevance of a course of dealing; third parties who also act through agents; the subject of vicarious liability and non-delegable duties; torts involving agents’ statements; liability for procuring wrongs; imputed knowledge; and the liability at common law and equity of third parties for involvement in agents’ breaches of duty. Material on principals’ liability to restitutionary claims has been moved from Section 1, which is

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directed to liability in contract, to Section 2 (property and restitutionary claims).

Although they may in fact have no greater impact on the day-to-day practice of the law than first instance decisions, it may be useful to collect here the decisions of the Supreme Court and Privy Council since the last edition relevant to the book, additional to *FHR European*, and in reverse temporal order: *Dunhill v Burgin* [2014] UKSC 18, *Revenue and Customs v Secret Hotels2 Ltd* [2014] UKSC 16 (statutory concept of “agent”); *Williams v Central Bank of Nigeria* [2014] UKSC 10 (limitation periods for claims against third parties implicated in breaches of equitable duty); *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9 (misrepresentation to agent before appointment); *Prest v Petrodel Resources Ltd* [2013] UKSC 34 and *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5 (corporate principals); *New Falmouth Resorts Ltd v International Hotels Jamaica Ltd* [2013] UKPC 11 (authority of a company director); *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56 (vicarious liability); *Kelly v Fraser* [2012] UKPC 25 (apparent authority to communicate a principal’s approval); *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No. 2)* [2012] UKSC 17 (agency of necessity); *Emile Elias and Co Ltd v Att.-Gen. of Trinidad and Tobago* [2011] UKPC 19 (capacity in which agent is acting); and *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13 (contracting out of agents’ duties).

Among a large number of decisions of the Court of Appeal of England and Wales, in subject order, are: *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265 and *Hudson Bay Apparel Brands LLC v Umbro International Ltd* [2010] EWCA Civ 949 (actual authority); *Adams v Ford* [2012] EWCA Civ 544 and *Gelley v Shepherd* [2013] EWCA Civ 1172 (ratification); *Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314 (signature by agent); *Quinn v CC Automotive Group Ltd* [2010] EWCA Civ 1412, *UCB Home Loans Corp Ltd v Soni* [2013] EWCA Civ 62 and *Newcastle International Airport Ltd v Eversheds LLP* [2013] EWCA Civ 1514 (apparent authority); *Day v Harris* [2013] EWCA Civ 191 (power of attorney); *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2013] EWCA Civ 45, *Davisons Solicitors (a firm) v Nationwide Building Society* [2012] EWCA Civ 1626 and *Santander UK Plc v RA Legal Solicitors* [2014] EWCA Civ 183 (breach of mandate); *Generics (UK) Ltd v Yeda Research & Development Co Ltd* [2012] EWCA Civ 726 and *Caterpillar Logistics Services (UK) Ltd v de Crean* [2012] EWCA Civ 156 (use of confidential information); *Towers v Premier Waste Management Ltd* [2012] 1 BCLC 67 [2011] EWCA Civ 923 (secret profit); *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 (principal’s right to information); *Brink’s Global Services Inc v Igrox Ltd* [2010] EWCA Civ 1207 and *JGE v The English Province of Our Lady of Charity* [2012] EWCA Civ 938 (vicarious liability); *MCP Pension Trustees Ltd v Aon Pension Trustees Ltd* [2010] EWCA Civ 377 (notice to agent); *Knight Frank LLP v Du Haney* [2011] EWCA Civ 404 and *Bank of Scotland v Qutb* [2012] EWCA Civ 1661 (warranty of authority); *Bailey v Angove’s Pty Ltd* [2014] EWCA Civ 215 (termination of agency); *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2012] EWCA Civ 1021, *Crocs Europe BV v Anderson* [2012] EWCA Civ 1400 and *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd* [2013] EWCA Civ 365 (commercial agents); *Sharab v Al-Saud* [2009] EWCA Civ 353,

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Berliner Verkehrsbetriebe (BVG) Anstalt Des Offentlichen Rechts v JP Morgan Chase Bank NA [2010] EWCA Civ 390 and *Fiona Trust & Holding Corp v Skarga* [2013] EWCA Civ 275 (conflict of laws). There were also more than 12 Court of Appeal decisions on aspects of agents' entitlements to remuneration and to exert a lien.

I remain most grateful for the continuing involvement in the book of Professor Francis Reynolds. He has contributed material on breach of warranty of authority, and on freight forwarders, and has continued to carry full responsibility for Chapter 11 (Commercial Agents) and Chapter 12 (Conflict of Laws).

I am grateful for the support of the University of Auckland, including for the period of research leave that allowed me to complete this edition. Thanks are also due to my research student, Keegan Lopez, who updated the many references to other texts to be found in the footnotes. Last but certainly not least, I am greatly indebted to my family for their forbearance and support through the never-ending task of keeping *Bowstead and Reynolds* afloat.

The cut-off date for this edition was May 31, 2014, but it has been possible to fit in at the production stage some later material, not least the decision in *FHR European*.

Peter Watts
The University of Auckland,
and Fountain Court Chambers, London

August 12, 2014

STANDARD ABBREVIATIONS

Books on the Law of Agency

As with previous editions, certain standard works are referred to throughout this book without further description.

Bennett	H. Bennett, <i>Principles of the Law of Agency</i> , Hart Publishing, 2013. This is a good treatment of the general principles of agency.
Dal Pont	G.E. Dal Pont, <i>Law of Agency</i> , 2nd ed., LexisNexis, 2008. This is a substantial work, written in Australia, and containing much more Australian material than can be cited here.
Fridman	G.H.L. Fridman, <i>Canadian Agency Law</i> , LexisNexis, 2009. This is a substantial work in student book form. As its title suggests, it is based on Canadian law.
Munday	R. Munday, <i>Agency—Law and Principles</i> , OUP, 2010. This is another good account of the general principles of agency.
Powell	Raphael Powell, <i>The Law of Agency</i> , 2nd ed., Pitman, 1961. The 2nd edition (quite different from the 1st) was a pathfinding work in its time, and unlike other English books on the topic took account of <i>Restatement, Second</i> . It was however never subsequently rewritten.
<i>Restatement</i>	Restatements of Agency published by the American Law Institute: see below.
Stoljar	S.J. Stoljar, <i>The Law of Agency</i> , 1961. This is a useful book for the study of the history of agency law. It was written in Australia, but largely concerns nineteenth-century English legal history. No subsequent edition was produced.

Books on the Commercial Agents Regulations 1993

There are now several specialised works dealing with these Regulations. They are listed in the first footnote of Chapter 11, which deals with the Regulations, and within that chapter, reference back to a work by name is to that footnote. The Chapter also continues a short bibliography of some relevant continental European books.

The American Restatements

The American Restatements consist of formulations of legal principle in the style of a code (“blackletter”) accompanied by comments interleaved with illustrations, and Reporter’s notes, which refer to relevant case law. They are published by the American Law Institute, a prestigious body with its headquarters in Philadelphia, and have been formulated by a Reporter, subjected to various forms of consultation and finally approved at a meeting of the members of the Institute

itself as representing the Institute's position. They have in general no legal status, but are available as influential guidance for lawyers and courts, by which they are frequently cited.

The first *Restatement of Agency* was published in 1933. The first Reporter was Professor Floyd R. Mechem of the University of Chicago, and he was succeeded, before publication of the final version, by Professor Warren Seavey of the Harvard Law School. Mechem had been the author of *A Treatise on the Law of Agency*, published in 1889 (a few years before the present work) and succeeded by a second edition in 1914, which was lengthy and very much in the style of *Pomeroy's Equity Jurisprudence* (1881) and Williston's later (1920) treatise on contract. He also wrote a shorter book, *Outlines of the Law of Agency*, which was after his death edited by his son Professor Philip Mechem of the University of Pennsylvania. At any rate in its 4th edition of 1952, the only one available to us, this was a perceptive work. But after 1914 no treatise of any comparable size was published in the United States, and it can be said that the *Restatement* itself represented from 1933 an authoritative treatise. A very substantial second version, *Restatement, Second*, serving the same purpose, was published in 1957. The Reporter was again Professor Seavey, and the whole document is strongly influenced by his views (which never outside of this document became the subject of a systematic book, though he published frequent articles and comments).

Restatement, Third, was published in 2007. The Reporter is Professor Deborah DeMott of Duke University, North Carolina. This aims partly to produce something considerably less detailed than *Restatement, Second*, which occupies three heavy volumes and (to take an example) had separate treatment for each topic in the contexts of disclosed principal and of undisclosed principal. *Restatement, Third* seeks to set out many fewer, and more generalised principles, and also to pay more attention to the significance of statutes in agency law, and to agents acting for organisational principals, whether corporate or not.

It is obviously intended that *Restatement, Third* should supersede *Restatement, Second*, completely, just as that superseded the first *Restatement*. It can provide guidance outside the United States too. In this book therefore the main statements of issues of general principle are accompanied by footnote citations to *Restatement, Third* (as was true of *Restatement, Second* in the previous five editions). However, for the purposes of a book on English law (referring also to material in other common law systems outside the United States) it has proved undesirable to omit all references to *Restatement, Second*. An obvious purpose for citing it is to emphasise changes in approach which are to be found in *Restatement, Third*: most conspicuously, in the selection of the word "manifestation" for certain basic propositions regarding an agent's authority, and also because the new version makes no use of Seavey's notion of "inherent agency power", a controversial way of dealing with certain difficult decisions which do not readily yield to orthodox analysis. But *Restatement, Second* also expressed specific views on a large number of detailed points on which guidance, at any rate outside the United States, may still be found to be of value. In the end it has seemed inadvisable to delete all reference to all of them, even if pursuing the *Restatement* into a superseded version is likely to be an activity for researchers only.

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Modern European “Codes”

There have been produced in Europe in the last decade or so a number of sets of non-statutory “codes”. The first two listed below were produced for the purposes of a putative European law, and the third as a guiding law for international arbitration. All have short sections on Agency and for a common lawyer are useful not only as formulations (rather like the *Restatements*) but also as giving indications of the sort of propositions that may be regarded as generally acceptable to continental European legal systems. On Agency they differ between themselves in significant respects. In particular, the Principles of European Contract Law (“PECL”) and the Draft Common Frame of Reference (“DCFR”) makes use of the distinction between direct and indirect representation, which the UNIDROIT Principles seek specifically to avoid. The PECL and the UNIDROIT Principles are confined to agency in contract law, but the scope of the DCFR is wider, albeit that agency and representation appear in connection with contract. Only DCFR deals in detail with the internal relationship between principal and agent.

PECL	The Principles of European Contract Law (ed. Lando and Beale, Kluwer, 2000).
DCFR	Draft Common Frame of Reference. The Outline version of the text of this can be downloaded free from http://www.storme.be/2009_02_DCFR_OutlineEdition.pdf . The six volume commentary that accompanies the code is published as <i>Principles, Definitions and Model Rules of European Private Law</i> (ed. Von Bar and Clive, OUP, 2010).
Unidroit Principles	UNIDROIT Principles of International Commercial Contracts (UNIDROIT, 2004).

Commonwealth Case Law Abbreviations

The citations to cases from the United Kingdom use standard abbreviations, which it is not necessary to set out herein. However, it may be useful for the reader to have an explanation of some of those used for Commonwealth cases. All recent Australian and New Zealand cases that are cited are available free at <http://www.austlii.edu.au>. Many Singapore cases are available free at <http://www.commonlii.org/> and Hong Kong cases at <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>.

Abbreviations with points refer to report series; those without are neutral citations.

A.C.L.C.	Australian Company Law Cases
A.C.S.R.	Australian Company and Securities Reports
A.L.R.	Australian Law Reports
A.T.R.	Australian Tax Reports
A.N.Z.	Australian and New Zealand Conveyancing Reports
Conv.R.	
B.P.R.	Butterworths Property Reports
C.L.R.	Commonwealth Law Reports

STANDARD ABBREVIATIONS

D.L.R.	Dominion Law Reports
FCAFC	Federal Court of Australia Full Court
F.C.R.	Federal Court Reports
F.L.R.	Federal Law Reports
G.L.R.	Gazette Law Reports (New Zealand)
HCA	High Court of Australia
H.K.C.F.A.R.	Hong Kong Court of Final Appeal Reports
HKCU	Hong Kong Cases Unreported
H.K.L.R.	Hong Kong Law Reports
H.K.L.R.D.	Hong Kong Law Reports & Digest
NSWCA	New South Wales Court of Appeal
NSWSC	New South Wales Supreme Court
N.Z.C.L.C.	New Zealand Company Law Cases
N.Z.C.P.R.	New Zealand Conveyancing and Property Reports
NZHC	New Zealand High Court
N.Z.L.R.	New Zealand Law Reports
NZSC	New Zealand Supreme Court
P.R.N.Z.	Procedure Reports of New Zealand
QSC	Queensland Supreme Court
QCA	Queensland Court of Appeal
SCC	Supreme Court of Canada
S.L.R.	Singapore Law Reports
VCA	Court of Appeal of Victoria
V.R.	Victorian Reports
VSC	Supreme Court of Victoria
W.A.R.	Western Australia Reports

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