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BOWSTEAD AND REYNOLDS

ON AGENCY

NINETEENTH EDITION

BY

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THOMSON REUTERS

First Edition	(1896)	By William Bowstead.
Second Edition	(1898)	„ „ „
Third Edition	(1907)	„ „ „
Fourth Edition	(1909)	„ „ „
Fifth Edition	(1912)	„ „ „
Sixth Edition	(1919)	„ „ „
Seventh Edition	(1924)	„ „ „
Eighth Edition	(1932)	„ „ „
Ninth Edition	(1938)	By Arthur H. Forbes.
Tenth Edition	(1944)	„ „ „ „
Eleventh Edition	(1951)	By Peter Allsop.
Twelfth Edition	(1959)	By E. J. Griew.
Thirteenth Edition	(1968)	By F. M. B. Reynolds and B. J. Davenport
Fourteenth Edition	(1976)	„ „ „
Fifteenth Edition	(1985)	By F. M. B. Reynolds.
Sixteenth Edition	(1996)	„ „ „
Seventeenth Edition	(2001)	„ „ „
Eighteenth Edition	(2006)	„ „ „
Nineteenth Edition	(2010)	By Peter Watts and F. M. B. Reynolds

Published in 2010 by Thomson Reuters (Legal) Limited
(Registered in England & Wales, Company No 1679046. Registered Office
and address for service: 100 Avenue Road, London, NW3 3PF)
trading as Sweet & Maxwell

Typeset by Interactive Sciences Ltd, Gloucester
Printed in the UK by CPI William Clowes, Beccles NR34 7TL

For further information on our products and services, visit
www.sweetandmaxwell.co.uk

ISBN: 978 1 847 03745 9

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THE LAW OF AGENCY

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Phipson on Evidence

Benjamin's Sale of Goods

Jackson & Powell on Professional Negligence

Goff & Jones, The Law of Restitution

Arlidge, Eady & Smith on Contempt

PREFACE

This is the first edition of *Bowstead* to involve a new author since the 13th, in 1968. That edition by Professor Reynolds (FMBR) and Mr Davenport added to the Articles and Illustrations the Commentaries which now make up most of the book. Over the succeeding decades the book has for all intents and purposes been rewritten by FMBR. In this edition there is a myriad of minor (updating) changes and quite a number of significant ones, but where possible I have tried to retain the existing text. In a work which aims more to state and explain the law than to reshape it, there is no place for wilful revision. But, in any event, the work has become as authoritative as it is only because of the mastery that FMBR has brought to the subject, with its links to every branch of private law.

The book remains one on the relevant law of England and Wales. However, the book has attained wide use outside England, in part because agency law is one area of private law where there is still a great deal of commonality amongst the common law jurisdictions, not just those within the Commonwealth but also those of the United States. At the same time, it is no exaggeration to say that FMBR has made a major contribution to the maintenance of this harmony. Over the six previous editions, he has consistently incorporated significant Commonwealth authorities and made comparative references to the U.S. *Restatements of Agency* (for the most recent of which, the *Third*, he was an Advisor). This edition continues this practice, with incorporation of significant new decisions from Australia, Canada, Hong Kong, New Zealand, Singapore, and one or two from Scotland. That said, the book is not at all comprehensive of Commonwealth law—cases have been selected mainly because they deal with particular points not yet addressed in English case law or because they relate to issues on which there has been few English cases for some time. Some have been sufficiently interesting to warrant addition to the Illustrations.

Over past editions FMBR also introduced some points of comparison with civilian systems, and this edition includes brief references, at various points, to the recent European “codes” insofar as they address aspects of agency law, in particular the *Principles of European Contract Law*, the *Unidroit Principles of International Commercial Contracts*, and the *Draft Common Frame of Reference* (see the Abbreviations section for further details). It should be emphasised that the book does not, however, attempt to be a comparative work.

There have been a surprising number of new cases to incorporate in this edition, even without the overseas cases, and every chapter has been affected. About 150 new English cases have found their way into this edition. A small selection of significant cases is given below. As far as substantive changes to the body of book are concerned, the following are amongst the most important.

First, there has been a major revision of Chapter 6, dealing with the duties an agent owes his principal. Some new material on the common law side has been introduced, but the larger part of the chapter is devoted to the equitable duties, and revision here has entailed both considerable rearrangement of the material, and the addition of new material on such matters as: the concept of disloyalty in equity and its relationship to the fiduciary duties; what matters are encompassed

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by a conflict of interest and the duty not to profit from position; the “corporate opportunity doctrine”; the range of compensatory and restitutionary remedies for breach of duty; such positive duties as equity might impose on fiduciaries; the concept of “fraud on a power”; the position of agents who attempt to act for competing principals; and the “fair dealing” principle. A considerable number of new Illustrations have also been added. In undertaking this revision account has been taken of the steady flow of new case law in this area, and of important recent scholarship, in particular that of Dr Matthew Conaglen and Mr Richard Nolan. Unfortunately, Dr Conaglen’s new book *Fiduciary Loyalty* (2010) arrived too late to be fully comprehended by the revision.

Secondly, there is increased reference throughout the book to the application of agency law in the operation of companies. Again, there is no intention to turn the book into one on company law, but given the ubiquity in trade of companies and the fact that they have to operate through agents, somewhat greater reference to them has seemed warranted. Hence, there has been expansion of the discussion of the general position of companies in Chapter 1, including consideration of the extent to which shareholders as a body and the board of directors can be conceived of as agents of the company. Then at various points throughout Chapters 2 to 10 notice has been taken when there is something significant to say as to the position of companies. A number of Illustrations involving companies have also been added, especially in Chapter 6 as to the obligations in equity of directors. The particular agency law issues that arise in relation to receivers, administrators and liquidators have, however, been left to more specialist books.

A third development is that, in addition to maintaining the chapter on Commercial Agents, FMBR has written a new chapter on the conflict of laws in agency law, Chapter 12. There was formerly merely an extended note on the subject. Not only has there been a growing body of cases in the area, but the many issues that arise are often intractable and not always discussed in other works. We hope that this attempt to give an account of a difficult topic will prove of assistance.

Other important but less conspicuous new material has been added on such subjects as: the imputation of an agent’s knowledge to the principal; the connections between illegality and an agent’s authority; the liabilities of agents to third parties (again with contributions from FMBR on the action for breach of warranty of authority); dual agency; the position of stakeholders; and fraudulent agents.

Very few parts of the book have failed to acquire new case law. In terms of hierarchy, the following decisions of the House of Lords are included: *Premium Nafta Products Ltd v. Fili Shipping Co Ltd* (severance from his other authority of an agent’s power to bind a principal to an arbitration clause); *OBG Ltd v. Allan* (liability of agent in tort to principal for exceeding his mandate); *Scottish and Newcastle International Ltd v. Othon Ghalanos Ltd* (undisclosed principals); *Stone & Rolls Ltd v. Moore Stephens* (application of *ex turpi causa* maxim to corporate principals); and *Lonsdale v. Howard & Hallam Ltd* (entitlements of commercial agents under the Commercial Agents Regulations). Privy Council authorities include: *General Legal Council, Ex p. Whitter v. Frankson* (affidavits made by agents); *Lebon v. Aqua Salt Co Ltd* (imputed knowledge); *Hanna v. Imperial Life Assurance Co of Canada* (agent an employee despite remuneration

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by commission); and *Morrell v. Workers Savings & Loan Bank* (principal overriding general mandate given to agent).

There have been many new decisions of the Court of Appeal. Three of the most notable, though all less than straightforward, are *Imageview Management Ltd v. Jack, So v. HSBC Bank Plc*, and *Foxtons Ltd v. Bicknell*. The first of these extends the circumstances in which an agent may find his remuneration forfeit (at the same time as being accountable for profits connected to an undisclosed conflict of interest); the outcome is penal. The second would confine to the tort of deceit the reasoning of the House of Lords in *Armagas Ltd v. Mundogas SA* that apparent authority is needed to make a principal vicariously liable for the employee who causes a claimant loss by misstating the extent of his authority. The third gives a narrow construction to the phrase “introduction” where in a standard form the introduction of a buyer is used as the trigger for commission. This is the most significant of a steady stream of cases on commission that have occupied the superior courts. Some are so routine, others one-off, that I have omitted them altogether. But other Court of Appeal decisions on commission that have been included are: *Coupers Partnership Ltd v. Basarik*, and *Adler v. Ananahall Advisory & Consultancy Services Ltd* (no implied right to commission where express conditions for commission not met); *Standard Life Health Care Ltd v. Gorman* (prevention of earning commission); *The County Homesearch Company (Thames & Chilterns) Ltd v. Cowham* (effective cause in a transaction).

On the core issues of actual and apparent authority, there have since the last edition been significant new cases on: ratification (*Ing Re (UK) Ltd v. R&V Versicherung AG*; *Sea Emerald SA v. Prominvestbank-Joint Stockpoint Commercial Industrial and Investment Bank*); authority by estoppel where the principal stands by (*AJU Remicon Co Ltd v. Alida Shipping Co Ltd*); what constitutes a holding out of authority by a company (*Lovett v. Carson Country Homes Ltd*); usual authority (*Lexi Holdings (In Administration) v. Pannone and Partners*); and being put on inquiry where otherwise there might have been apparent authority (*Re Moulin Global Eyecare Holdings Ltd*, HK Ct of Final Appeal).

Without burdening this Preface with yet more case names, other areas that have seen very considerable activity are the law on bribe-taking, conflicts of interest, the duties of agents who leave to compete with their former principals, and the imputation to a principal of an agent’s acts and knowledge across a range of contexts.

As far as statute law is concerned, the chief developments have been: the coming into force of the Mental Capacity Act 2005 and the Gambling Act 2005; the enactment of the Companies Act 2006, requiring a host of updating to text and footnotes; and the enactment of the Bribery Act 2010, most of which is yet to come into force. There have in addition been significant agency cases under other statutes, including: the Statute of Frauds Amendment Act 1828, Lord Tenterden’s Act (*Contex Drouzhba Ltd v. Wiseman*; and *Lindsay v. O’Loughnane*); the Law of Property Act 1925 in respect of the need for writing in land sales (*McLaughlin v. Duffill*); and the Unfair Terms in Consumers Contracts Regulations 1999 (*Office of Fair Trading v. Foxtons Ltd*). A number of new cases under the Commercial Agents (Council Directive) Regulations 1993 have been incorporated by FMBR in Chapter 11.

PREFACE

The manuscript for this edition was submitted on March 31, 2010, and the law addressed is as at that date. However, it has been possible to take account of one or two subsequent developments. The Bribery Act was passed in early April and could not be ignored. Later still came another instalment in the litigation under the name *Sinclair Investment Holdings SA v. Versailles Trade Finance Ltd.* This may prove to be the dispute that determines for the United Kingdom whether the narrow approach to proprietary remedies in equity, best represented by *Lister & Co v. Stubbs*, still has life. Lewison J. considered himself bound to follow *Lister* and other decisions of the Court of Appeal in preference to the New Zealand Privy Council decision in *Att.-Gen. for Hong Kong v. Reid*, which favoured a broad reach for the constructive trust in the context of breach of fiduciary duty. In fact, this edition notes that the early decision of the House of Lords in *Tyrrell v. Bank of London* supports the narrow view of proprietary remedies, which suggests that the issues need to be fully re-canvassed at the highest level.

Lastly some thanks are due. I owe the greatest debt to FMBR, both for recommending to the publishers that I assume principal responsibility for the preparation of this edition, and for his continuing role in its production. Apart from his responsibility for Chapters 11 and 12 and the other contributions I have referred to, FMBR has read through every chapter in proofs, making many useful comments on points of substance and helping to identify many typographical errors. I expect that he has not agreed with all the changes to text and new material that I have added, but he has not sought to restrain change, and indeed on occasion has urged me not to be too reticent with the revision. I am grateful to my university, the University of Auckland, both for its library resources and for providing a student assistant to assist with the updating of references to other texts, of which there are an enormous number, and with checking for relevant changes to the U.K. statute book. The assistant was Jonathan Hooper, whom I thank for his good services. I appreciate too the support that the publishers have given to my editorship, and they have accommodated very well my providing manuscript and proof corrections from New Zealand. Taking on a work such as *Bowstead and Reynolds* is, as I have found, a large and time-consuming task, and the latter stages take place under considerable time pressure. In these circumstances, my final thanks must go to my family for being so forbearing and supportive throughout the process.

Peter Watts
The University of Auckland
July 31, 2010

STANDARD ABBREVIATIONS

Books on the Law of Agency

As with previous editions, certain standard works are referred to throughout this book without further description. Another text, Roderick Munday, *Agency—Law and Principles*, OUP, 2010 was published too recently to be taken into consideration.

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| 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. |
| 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. |
| 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. |
| 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. |
| <i>Restatement</i> | Restatements of Agency published by the American Law Institute: see below. |

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.

STANDARD ABBREVIATIONS

Modern European “Codes”

There have been produced in Europe in the last decade three 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 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
D.L.R.	Dominion Law Reports

STANDARD ABBREVIATIONS

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
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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