



COMPANY AND COMMERCIAL LAW

LST5CCL



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Answer 1a

Facts of the case:

“Le Petit Gâteau” is a sole proprietorship concern owned by Jack. Jack is therefore ultimately responsible for the direct and indirect actions conducted in the name of the bakery and the consequences of those actions. Michelle is recently hired by Jack to manage the available chefs, culinary assistants and to assist Jack in supply related decisions. Michelle would perform her duties in her role as the head chef manager. Glitzy Touch is a regular supplier for the Le Petit Gâteau bakery. The standard operating procedure (SOP) for making a purchase comprises of first Jack signing the purchase order (PO), Michelle dispatching the PO to the supplier, and the supplier delivering the goods and billing the bakery by sending their invoice.

The events that took place in the given scenario have all their separate legal repercussions and are therefore studied in detail in the IRAC format hereunder.

Issue 1:

Does an agency relationship exist between Jack and Michelle?

Rule:

Agency relationship can be established in many ways, including express agency through execution of legal deed, informal spoken or written agreement, implied agency which is often applied in case of employer and employee, and agency by estoppel where the principal's behavior is such which gives an apparent impression that an agency relationship exists.

The concept of ‘agency by necessity’ may also apply under certain circumstances where one party (agent) is entrusted with the property of another (principal), and he has to take

certain actions to prevent damage/loss to that property or avoid liability of the other (principal). However certain criteria is required to be fulfilled in this case.

Principles laid down in *Sachs v Miklos* (1948) also apply here.

Application:

In the given scenario Jack has appointed Michelle as his employee and she would assist Jack in the performance and execution of certain defined work procedures which inter alia includes, maintaining and controlling the staff of chefs and culinary assistants, executing and moving the purchase of supplies and making sure sufficient stock of ingredient exists to fulfil the purpose of the bakery. It may be safely assumed that during the course of performing her work duties, Michelle would have represented herself as the employee of the bakery and would have maintained frequent contact with the supplier Glitzy Touch. A part of her duties would also include inventory management for the bakery and she would be expected to take certain steps to ensure everything goes well and customer orders are swiftly met.

This employee employer relationship is generally sufficient to establish the agency relationship. The order placed by Michelle in the absence of Jack is done in good faith with the intention of gaining customer satisfaction / thereby avoiding customer dissatisfaction and at the same time helping Jack prevent business losses while he is away on a business trip to Montreal. The discussion that they kept having relating competitive challenges and making the baked goods more attractive for the customers perhaps laid the foundational idea in her mind to place an order of edible gold leafs in the absence of the bakery owner. Although she bypassed the authorization step of the SOP, she could

plea the agency by necessity argument to whereby the following conditions, as held in the decision in *Sachs v Miklos* (1948), are also fulfilled:

1. One party is in the possession of other's goods – Considering business assets combinely as constituting the part of the wealth of the owner this condition is met.
2. An emergency occurs – although difficult to establish, Michelle can plead that it was a one-time discount that Jack could never have thought of missing.
3. Action taken for the benefit of the other – As mentioned above, Michelle's actions were bona fide as she was acting in the interest of the bakery owner Jack.
4. It is impossible to communicate with the owner – this is stated in the facts of the case as Michelle could not communicate with Jack in any way whatsoever.

Conclusion:

In view of the above, an agency relationship exists between the Michelle (agent) and the Jack (principal). All acts of Michelle, undertaken in the course of her job at the bakery, should be binding on Jack and would apparently make him liable. However the question of liability is dealt in the next part as well.

Issue:

- What authority does an agent have? Has Michele oversteps the bounds of the authority assigned to her?
- If Jack is liable for the actions of Michele in the usual course of the business, does that make the Jack liable for the payment of invoice received from Glitzy Touch?

Rule:

- *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* (1964).
- Doctrines of respondeat superior and vicarious liability

Application:

According to the doctrine of Respondeat Superior, an employer may be held principally liable for the acts of employee conducted in the course of the job/work. Also known by the name of "Master-Servant Rule", this principle is widely recognized in legal jurisdictions around the world. Although this principle comes into force when the employee commits a civil wrong, tort, causes malfeasance or a misdeed within the course of employment, the same principle could be applied to the facts of the case, considering that Michelle has overstepped the bounds of authority assigned to him.

Secondly the case of Freeman and Lockyer v Buckhurst Park Properties lays down the principles for persons dealing with the agents stating that it is not the responsibility of the dealing persons to ensure that the authority to transact business was properly delegated and assigned to the agent by the principal employer. In this connection following four elements ought to be present, and they are compared with the facts of the instant case in tabular form below.

Condition	Application to the instant case
The person intended to contract with the third persons as an agent of the principal and not on their own account.	Most definitely this is the case with Michelle as she is representing head chef of the bakery while placing an order and not acting in her personal capacity.
The principal intended the agent to do whatever possible to achieve the best possible result for the business of the principal.	This appears to be the intention in the absence the contrary intention. Authorization was only a formal process and the person responsible for

	management and control of stock was in fact Michelle.
The agent was throughout acting as an agent/employee of principal and representing the business.	This condition is clearly met as Michele had been regularly dealing, communicating, and placing orders with the suppliers for stock.
Agent acting in that capacity was known to the principal.	Since Jack had gone on a business trip, he ought to know that in his absence Michele would be dealing with the business and performing her usual duties without his oversight. All her steps are as per discussion with Jack and are also necessary to keep the bakery going for good.

Conclusion:

Since it is provided in the given scenario that the Michelle assisted Jack in the initial placement of purchase orders being the head of chefs, an agency relationship can be established. While placing the order in the absence of Jack, she is only acting in her capacity as employer (agent) of Jack (principal) acting diligently in Jack’s absence in his best interest. Her acts have later proved to be useful for the business of the bakery and has even helped Jack earn some more customers.

Without prejudice to above, even if it is assumed that no apparent agency relationship exists, Jack (owner of the bakery) can be held responsible for the conduct of

Michelle (worker) and be vicariously liable on the basis of ostensible agency or agency by estoppel principle because Glitzy Touch (the supplier of the goods) has the reasonable belief that Michelle is acting under the authority and supervision of the bakery owner Jack (Thornton, 2010).

Under the principles laid down under *Freeman and Lockyer v Buckhurst Park Properties* and the doctrine of ostensible authority, vicarious liability for even the wrongful acts of the agent could be established for the principle. Therefore while Michelle (the agent) has placed an order bona fide in the usual course of business dealings, Jack (the principle) can be held responsible with utmost certainty. Jack would be liable to make payment for the goods ordered from Glitzy Touch in his absence.

Answer 1b

Jack's options under agency's contract

Since Michelle and other employees appointed by Jack are considered as his agents and would bind them during the course of their work/job. This includes actual authority which is expressly given by Jack to the employees as well as apparent authority which means the ways in which employees have previously acted under the supervision of employers, and which may have created valid expectations among the third parties who rely on the principle. This however does not mean that employee can (and would never) overstep the bounds of authority and make unusual or extraordinary contracts. The test for apparent authority laid down by the courts is whether a reasonably diligent person would believe that an employee or agent had the authority to make the agreement/contract he is being entered into.

A clear way of avoiding the confusion both for the employee/agent and for the third parties dealing with the business is to communicate in clear terms at the outset of the relations who has the authority and how much of it. Setting the limits of the authority and communicating them to the employees in the form of job descriptions, internal memos and notices seeking to limit or setting boundaries on the authority. This means Jack should essentially decide what SOPs should be essentially followed even in his absence. These rules would therefore become stringent and the contract could not proceed further if all the procedures are adequately done.

Similarly, the apparent authority of the employees is not ended simply by terminating their employment or when they quit the job. The employer should give a formal notice terminating the apparent authority earlier assigned to the employee/agent to all the concerned third parties.

Moreover, employees who often act outside the scope of the authority assigned to them need to be formally and informally counselled telling them the risk that this behavior poses to the good reputation of the company and its owner (principal). This could even lead of sub-optimal business decisions as in competitive bidding process, loss or rights or remedies, and giving rise to unintended contractual obligations. These corrective measures should therefore be a part of formal business process of every organization.

Answer 2a

Issue:

- Has Michelle breached any of the statutory duties of the directors by not reading the financial reports and not being aware of the liquidity and financial position of the company?
- What is expected of a director of a company and to what extent is he required to have financial know-how and fundamentals of the company?

Rule:

- Section 180(1) of the Corporations Act 2001 (CA) – Duty of directors to act diligently and with care in all matters concerning the business of the company
- ASIC v Healey (2011)
- Section 295A of the Corporations Act 2001 – Declaration statement required from directors and CEO of the listed company

Application:

The duty of care of the directors is laid down under section 180 of the CA and lays some foundational requirements for the directors to act diligently and in the best interest of the company while dealing on its behalf with the outsiders. The courts have construed the meaning of the requirement to act with “care” in a way that a person acting in the same capacity would ordinarily possess and is expected to apply.

Based on the above requirement, directors are generally held negligent by the courts in performing their duties, if it results in mismanagement or loss. What constitutes this negligence, however, is a subjective matter and depends on case to case. In the case of Centro Properties Group cited as ASIC v Healey (2011), the courts have held the director

negligible for omission in the financial statements of the material piece of information. This according to the courts was a sheer act of negligence in that case. In certain other cases, the courts have construed the meaning of the cases as “ordinary prudence” which is also a subjective and term specific to circumstances of the case.

Apart from the above requirement, there is an specific requirement in section 295A of the CA that deals with the director’s know-how and understanding of the financial management and position of the company. These requirements are further clarified by the decision in ASIC v Rich (2003), which elaborates the requirements as the requirement on board of directors of the company to sign off the financial statements of the company stating that the accounts and financial records including the allied records:

- a) are properly maintained as per the requirements of section 286 of CA;
- b) financial statements, and the allied notes and disclosures contained therein are made for the whole financial year and they also comply with the requirements of accounting standards applicable in Australia; and
- c) give a true and fair view as per the requirements contained in section 297 of CA,
- d) any other matters and regulations prescribed by the ASIC and other regulatory and standard setting bodies are satisfied.”

It turns out that these immense declaration about the financial statements of the company could not be made in the absence of thorough and thoughtful knowledge relating to financial position and affairs of the company. Hence, these responsibilities, according to judge Middleton in the ASIC v Healey lawsuit, includes having a questioning critical mind/aptitude and application of relevant knowledge and skills about the company in reviewing the financial information that is presented to the general public. Hence every single piece of material financial information contained in the accounts and financial statements of the company is to be necessarily known and applied by the board in making business decisions of the company. With regard to reading and inspecting the financial statements, Judge Middleton, specifically stated

that barely relying on the skills and expertise of financial experts and accountants would not suffice to fulfil the duty of care; “directors are intelligent, experienced and conscientious people” and they are expected to apply their very own knowledge in the specific circumstance of every transaction and also consider its possible effects on the business entrusted to them by the shareholders.

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