

APPARENT OR OSTENSIBLE AUTHORITY IN AGENCY RELATIONSHIP LAW

[Name of Student]

[Name of University]

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Introduction

The purpose of this essay is to critically examine the three elements of ostensible or apparent authority as identified in *Rama Corp Ltd v Proved Tin and General Investments Ltd* [1952]. The essay begins with analysis of definition of apparent authority and how it relates to law of agency in English context and then continues to mention legal provisions supporting it. The next section discusses the notion of estoppel followed by critical examination of the elements using references from case law. The essay ends with a brief conclusion.

Discussion

In the United Kingdom, the notion of apparent authority or the ostensible authority is grounded in the founding principles of the agency law. Particularly in constitutional law and corporate law it is very important. The apparent authority as described by Whelan and colleagues is a situation in which a third party reasonably assumes that an agent possesses adequate authority to perform actions on behalf of the principal such as to enter into contract. It implies that the actions of the agent bind the principal, whether or not the principal vested said authority into the agent, either implied or express.¹ An estoppel has been raised by the principal raises that the third party receives an insurance, relying upon which the third party makes the contract. It implies that if the third party would be wronged if the principal denies to deliver the obligations and saying that there was no actual authority possessed by the agent to make the contract. As per the apparent authority the principal is bound to the contract even if his agent did not have actual power to enter into contract on his behalf.²

¹Whelan, John W., and Thomas L. Dunigan. "Government Contracts: Apparent Authority and Estoppel." *Geo. LJ* 55 (1966): 830.

²Conant, Michael. "The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership." *Neb. L. Rev.* 47 (1968): 678.

It is critical that the principal must act or omit regarding the omniscient, to show that the actions of the agent were himself alone and to show that the perception of the third party was not reasonable and hence there is no legal binding on the principal. Provided that the agent conducted transactions while the principal was present and the principal kept silence and failed to dissuade the third party from making wrong assumption and perceptions regarding agent's authority or power, the principal is still legally bound by the contract. Furthermore, the apparent authority remains established even if the principal terminates the authority of the agent but fails to notify concerned third parties. This situation is referred to as the persistent apparent authority.³ One of the ways for business owners (principal) to avoid liability is to give public notice regarding the cessation of the authority of the agent, and to have proper communication with all relevant third parties who may assume that the agent continues to have authority. Furthermore, when it comes to corporations, the directors and officers of the company are assumed to have apparent or ostensible authority.⁴

Legal provisions

The legal principle of apparent authority doctrine is grounded in the concept of estoppel, which basically prohibits the principal to deny legal binding from a contract committed by an agent to bind the principal with the third party. However, it is essential to establish that there were three elements a) representation, b) the agent possessed the authority that can be observed from the actions or words of the principal. Within the context of law, Dal Pont described apparent authority as the authority possessed by an agent that is perceived by other parties, through which the agent functions, both in case of having such actual authority or not having actual

³Sharrock, Robert Douglas. "Authority by representation—a new form of authority?." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 19.1 (2016).

⁴Koh, Pearlle. "Agency law." *SAL Ann. Rev.* (2017): 50.

authority.⁵ Within the context of the corporate law (considering corporations as legal persons, who always function through human agents), there is a specific body of jurisprudence.

Consider the example of a case in 1964⁶ in which a director who was responsible to manage the property of the corporation and acted on corporation's behalf as described by his employment role hired some architects for a project. Later the project collapsed and the architects did not receive their due fees. The architects once realised that the project was closed sued the company claiming that the corporation was legally bound by the actions of the director. The corporation denied that the director had any power to hire plaintiffs. The court held that although the manager in question was not hired as director general (and therefore lacked the authority to hire architects, implied or express) yet his actions showed that he had the ostensible authority and that corporation was legally bound by his actions.⁷ Diplock LJ mentioned four factors that bind a corporation legally through actions of an agent who lacks actual power but has formed an agreement with a third party on behalf of principal:⁸

1. The first is the representation indicating that agent possessed suitable power to conduct transactions for the principal;
2. The representation ought to be demonstrated by a person who has actual authority to enter into such a contract and the power to manage affairs of the corporation, either in general or in specific circumstances that are presented in the case;

⁵Dal Pont, G. E. "The Law of Agency." (2018): 155.

⁶*Freeman and Lockyer v Buckhurst Properties Park (Mangal) Ltd [1964] 2 QB 480*

⁷Cassim, Farouk HI, and MalekaFemidaCassim. "The authority of company representatives and the Turquand rule revisited." *South African Law Journal* 134.3 (2017): 639-664.

⁸Televantos, Andreas. "Trusteeship, Ostensible Authority, and Land Registration: the category error in Wishart." (2016).

3. There must also be an induction of the third party to the representation that leads the third party to reasonably assumed that the agent had authority (apparent authority); and
4. There is no clause in the memorandum of the corporation that deprive the ability of the corporation either, a) to delegate power to its officers prohibiting them to make contract or b) the ability of the corporation to enter into such a contract.

Basically it is important to establish that the agent must be representing a person who had the real authority on behalf of the corporation and that the representation was made by the person of real authority. The corporation as principal must have acted to constitute a representation (either by conduct or in writing) to show to the third party that the principal (a person with real authority or the corporation itself) was being represented by the agent.⁹ The court establishes the representation by evaluating the actions and conducts of the business and may ignore whether the agent had or not the actual authority. The commonly cited form of tending is an agent who acts consistent with normal/general conduct of a business, and in several cases, it can be assumed that the agent is allowed to act as or on behalf of a person having real authority such as financial director.¹⁰

The ostensible authority ought not to be compromised through constraints on the powers or capacity of a corporation in the statutes or memorandum, though in various countries the impact of such restrictions is minimised through reforms in the corporate law that explicitly abolish or restrict the use of the ultra vires doctrine. Nonetheless, the legislative reforms have no impact on the general legal principles indicating that a third party may not depend on apparent

⁹Pont, GEDal. "The law of agency [Book Review]." *Singapore Journal of Legal Studies* Mar/Sep 2018 (2018): 155.

¹⁰Worthington, Sarah. "Agents Behaving Badly?." (2017).

authority despite having the awareness about limitations that prohibit the authority emerging from the scope of the regulation.¹¹

The notion of Estoppel

At the forefront of the specific doctrines that protect confidence deceived comes that of estoppel. It deserves special attention as it plays an important role in law: common law rights, international law, and even some civil law rights. Estoppel has a familiar name for civil law lawyers. This word, which comes from the old French *tow*, would have crossed the Channel, in 1066, with William the Conqueror. Stopping or stopping means butchering (hence the phrase to slit the slits of a barrel or to slit the ears). The rule is based on the prohibition of profiting from one's own contradictions, to blow both hot and cold, to affirm on one side and to deny on the other. Estoppel does not, however, embody a general prohibition on contradicting itself; it is necessary to have created in others a legitimate expectation and that the restoration of the truth is detrimental to the latter. Originally, it was a blocking mechanism that worked in the manner of a failure to receive. For example, one that suggests to his co-contractor that he agrees to reduce his debt by half, and that the latter had legitimate reasons to confide to him, will no longer be able to demand full payment in court. It is estopped or even simply stopped. But the doctrine of estoppel has changed considerably in the twentieth century. In addition, it is presented under different names depending on the country: very framed in English law, it is less so in American law where it identifies more with reliance, whereas in Australian law it has become a true general principle, with unconscionability as its foundation, which is not without evoking the good faith of the civilist countries.

¹¹Worthington, Sarah Elizabeth. "Corporate Attribution and Agency: Back to Basics." (2017).

In England, the country of origin of the doctrine, estoppel remains one of the most elusive institutions. As the national report shows, behind the common general idea, there is no such thing as Too often, we believe, a single institution, but a multitude of estoppels whose regimes and functions are very heterogeneous. In fact, all these estoppels are locked in such special limits that the attraction they exert is matched only by their inability to found a general principle of prohibition against contradicting oneself to the detriment of others.¹²

The civil law lawyer who studies the estoppel of English law must explore this 'Amazonian forest' sometimes evoked by English law to discover the various species of estoppels: estoppel per rem judicatam (estoppel by record), estoppel by convention, estoppel by deed, promissory estoppel, and estoppel by representation, among others.¹³ To the extent that English jurists are not very keen on theoretical classifications, it is probably best to study them separately, keeping in mind these two questions - both of which are strange to one another. The first, which invites us to put estoppel back in its historical perspective: estoppel, is to ask whether estoppel is a common law or equitable institution? The second, which can be surprising with its pictorial terms and warriors that evoke medieval wars, is of paramount importance: estoppel, shield or sword?¹⁴

The first estoppels appeared in common law from the 12th and the 13th century (estoppel by record, estoppel by deed, estoppel by matter in pais); locked within narrower limits than equitable estoppels, they normally played only in the presence of a representation based on real facts (such as the existence of a contract), as opposed to a mere declaration of intent (statement

¹²Jurkevičius, Vaidas, and YuliiaPokhodun. "The doctrine of apparent authority as a precondition for sustainable business." (2019).

¹³Ramokanate, L. L. "Distinguishing apparent authority from agency by estoppel: a commentary on the decision of Makate v Vodacom (Pty) Ltd [2016] ZACC 13." *Lesotho Law Journal* 24.1 (2016): 177-190.

¹⁴Swart, Christiaan WJC, and M. Lombard. "Representation of Companies Under the Companies Act 71 of 2008." *Journal of Contemporary Roman-Dutch Law* 80 (2017): 666-682.

Of course, many of them, linked to the binding procedure of the time, have become archaic. Others have been transformed.¹⁵

Common law estoppels include estoppel by convention, which does not confer new rights but may have the effect, especially where the parties are both victims of a common error as to the legal consequences of their contract or of one of its clauses, to cause the contract or any of its clauses to produce the effect which they wrongly thought they could obtain.¹⁶

Another form of estoppel, called estoppel by representation, has developed considerably. Based on the idea that a person who has made a 'representation' to another with intent on the basis of that representation, the other acts to his or her detriment, and that this is indeed the case, is 'estopped': it can no longer deny the content of its representation, which would later found a general principle of estoppel, but this time in equity.¹⁷ After limiting the scope of this estoppel to mere representations of existing facts, excluding statements of intent or promises (so this estoppel was often presented as a rule of evidence: the one who made the representation of a fact can no longer provide evidence that would contradict this fact), this estoppel has developed in two directions and in the form of two new sets of estoppels.¹⁸

Elements identified in Rama Corp Ltd v Proved Tin and General Investments Ltd [1952]

Provided that a representation has been established then the law legally binds the principal and thus principal cannot reject the contract made by agent. This is based on the notion that it was apparent for the third party through actions and behaviour of principal that the agent

¹⁵Cohen, George M. "Law and Economics of Agency and Partnership." *The Oxford Handbook of Law and Economics* 2 (2017): 399.

¹⁶Koh, Pearlie. "Agency and partnership law." *SAL Ann. Rev.* (2015): 87.

¹⁷Koh, Pearlie. "Independent directors in Asia: A historical, contextual and comparative approach [Book Review]." *Singapore Journal of Legal Studies* Mar/Sep 2018 (2018): 157.

¹⁸Ramokanate, L. "Reliance on apparent authority as the basis of the Liggett doctrine: a critical analysis of the decision of the Court of Appeal in Hata-Butle (Pty) Limited V Kpmg and Harley & Morris Joint Venture No Lac (2000-2004) 399." *Lesotho Law Journal* 26.2 (2018): 105-142.

possessed the power to form contract, even if actual power is not vested in the agent. The fundamental point here is that the authority of the agent arises out of estoppel and does not dependent upon consent from principal. This implies that anywhere the apparent authority of agent is shown, and the principle did deliberately allow him/her to conduct transactions on behalf of principal then the law has to determine whether the misrepresentation was done allowed by the principal intentionally and what type of business did the third party observed that led to the assumption that the said agent had the apparent authority.

The aforementioned can be observed in another case¹⁹. The case shows that apparent authority can also include hospital liability. Like a hospital is held liable for the negligence committed by doctors, as the medical doctor is considered to be an agent of the hospital and the patient (third party) accepts treatment from the doctor within the belief that the doctor put the best of faith and that patients are being looked for.

In *Rama Corpn Ltd v Tin and General Investments Ltd* [1952] the court identified three elements to establish estoppel. The first is the representation. The second is the reliance and the third is the representation and alteration of position resulting from such reliance. It is critical that the principal makes the representation and the agent did not act in itself. It is also important to show that the third party had reliance and their position changed or altered as a result of such reliance. The case showed that the principal has legal binding to the contract even if the conditions and elements of apparent authority are not met, provided that the conduct excludes due to disagreement with the contract if he himself made the contract.

¹⁹*Irving v. Doctor's Hospital of Lake Worth, Inc.*, [1982] 415 So. 2d 55 (Fla. 4th DCA 1982)

Similarly in another case²⁰ the problem of an individual possessing authority on behalf of corporation to hire third party (the architects) on behalf of company (principal) was evaluated. It was held by the trial judge that the agent (company director) possessed the apparent authority and therefore the firm was legally bound to pay the fee of the architects who were wronged when the project in which they were involved collapsed. Later the court of appeal also dismissed the appeal from the company to revert the decision in trial court.

The Turquand case rule²¹ the court disallowed the third party to legally bind a firm to an unauthorized transaction. According to this rule it can be assumed by a third party that a transaction is supported by the apparent authority of the directors of the firm, however, it is required that the third party establishes the power of the agent, apparent or real, as the first element. This brings us to the notion of ratification. It relates to the notion of ratification of an unauthorised agreement formed by the agent. The term ratification is an explicit action or implicit action conducted by the principal to accept the actions of the agent after unauthorized actions. The principal ratifies to show willingness to accept legal binding with the third party. However, until ratification is expressed by the principal there is no legal binding with the third party, in the unauthorized contract formed by an agent without possessing apparent authority, unless there is ratification by the principal.

Finally it is worth mentioning that this part of the law is rather based on reason than logic because this depends on each individual situation. It can be inferred that the apparent authority actually reflects legal relationship of the principal to a third party through a contract that was made by an unauthorised agent. The third party had reasonable reason to perceive that the agent had actual power to perform such contract. The principal must have intended to be and acted in a

²⁰*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1946]

²¹*Royal British Bank v Turquand* 6 E&B 327

way that encouraged the third party to assume that the agent has authority to assume adequate authority vested in agent. Hence the principle legally liable to deliver any obligation that is mentioned in the contract. When the agent act upon with the representation is operating within the scope of an estoppel, and thereby preventing the principle from denying any obligations that are mentioned in the contract.

Conclusion

In conclusion it can be inferred that for apparent authority to establish there must be adequate reasons and suitable circumstances so that the third party perceivesthe agent to had authority to form contract. The third party must have been induced by the principal through his actions to show that third party can have reliance based on the representation made by the principal. There are three main elements as established in *Rama Corp Ltd v Proved Tin and General Investments Ltd* [1952]and even four in other cases.²²

²²as established in *Freeman and Lockyer v Buckhurst Properties Park (Mangal) Ltd* [1964]

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