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A Case harshly treated? Watteau v Fenwick re-evaluated

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The decision of Wills J in the case of Watteau v Fenwick[1] has met with a vast amount of criticism throughout the course of the last century. Academics have condemned the decision because the case decided that an undisclosed principal could be held liable for an act of the agent, which had been expressly forbidden. Furthermore the judiciary, both within the United Kingdom and the Commonwealth, have on the whole decided to either to distinguish the case or ignore the decision. However despite this, the case has yet to have been overruled and so currently stands as good law. This article seeks to provide a re-evaluation of the decision. It examines many of the references to the case over the last 110 years and provides a conclusion, which virtually stands alone in the modern legal world.

An agency agreement is a tripartite agreement between a principal, agent and third party. Agency agreements are commonplace within the modern commercial world. It is not unusual for a company, or even an individual, to employ a third party to negotiate a contract on their behalf. The agent acts for the principal in completing the contract, usually following guidelines outlined by the principal. The agent may act for the principal under different types of authority, for instance actual, usual or apparent. Each type of authority has its own guidelines of applicability. However, a problematic issue within this area is found in the decision of *Watteau v Fenwick*. This case has been criticised by academics and distinguished in the courts, yet has not been overruled, and perhaps should not be overruled, and so is still good law.

The case centred on an agent, Humble, who was appointed licensee of a hotel by the principal, Fenwick. The agent had restrictions placed upon his authority by the principal, including that he could not purchase cigars on credit. However, the agent did purchase cigars on credit and when the sellers, Watteau, discovered he was in an agency agreement, he proceeded to sue Fenwick for recovery of the debt. The court decided that the principal was liable for acts of his agent, even if the agent acted beyond his actual authority. The principal was liable as the agent was deemed to have usual authority – in this case, it was usual for a hotel licensee to purchase cigars.

Wills J had difficulty in applying the correct legal rules to the case. Humble had exceeded his express actual authority, as he was forbidden to purchase cigars on credit. It is certain Humble was acting with the usual authority of someone in his position as it is more than arguable that it is usual for a hotel licensee to purchase cigars.[2] Wills J could not have applied apparent (or ostensible) authority because it requires that the principal was known, and in this case the principal was undisclosed. However, Goodhart and Hamson (1931) believe it was decided upon apparent authority,[3] yet as stated it is doubted whether this contention is valid because the principal was not known. An agency by ratification, which allows a known principal

[1] [1893] 1 QB 346
[2] *Panorama Developments (Guildford) Ltd v Fidelis Furnishing* [1971] 3 All ER 16
[3] [1931] Cambridge Law Journal 320

to ratify a contract and be bound by it could not be inferred because Humble did not contract as an agent.[4] Furthermore, an agency of necessity could not be used because Humble made no attempt to contact Fenwick[5] and it is unlikely the court would have considered the purchasing of cigars a commercial necessity.[6] Therefore, Wills J decided that:

Once it has been established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies – that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority…But I do not think so. Otherwise in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.[7]

Therefore, this decision means that in the case of an undisclosed principal, the agent is deemed to have the usual authority given to a character of that nature. Wills J used the analogy of a partnership arrangement. If there is a dormant and active partner there can be no limitation of authority and he believed the same should be true for agency agreements. It has been contended however this analogy is flawed because in a partnership agreement, a third party will know the existence of the dormant partner, yet in an agency agreement, the third partner will not necessarily know about the existence of a principal. Also, a dormant partner is liable to the same extent as an active partner, whereas in an agency agreement, should the situation arise, the third party has to elect whether to sue the principal or agent.

This case has been criticised since it was decided.[8] It is believed the decision was *per incuriam* because it failed to take into account earlier cases which had similar facts, yet were decided in the alternative. *Miles v McIlwraith*[9] decided that an undisclosed principal cannot be liable for acts of his agent, who has acted beyond their authority.[10] This view is supported by Montrose (1939) who states the *"…decision was the result of unsound reasoning, the errors in which involved a misstatement of the existing law."*[11]

Since the decision, the courts have generally been unwilling to follow the ruling. In *Jerome v Bentley*[12] Donovan J stated that *"it is difficult to apply that reasoning to the*

[4] *Keighley Maxstead v Durrant* [1901] AC 240
[5] *Arthur v Barton* (1840) 6 M & W 138
[6] See: *Prager v Blatspiel & Heathcock Ltd* [1924] 1 KB 556
[7] *Supra n.* 1, 348
[8] See *Case Comment* [1893] Law Quaterley Review 111 in which it was stated: "We do not feel clear that the *Watteau v Fenwick* '93 1 QB 346 is right." See also *Recent Cases* 1893/4 Harvard Law Review, page 49/50.
[9] [1883] 8 App Cas 120
[10] The case of *Daun v Simmins* (1879) 41 L.T. 783 was also not referred to in the final decision and was decided oppositely to the present case.
[11] Montrose, J.L *Liability of Principal for acts exceeding actual and apparent authority* (1939) 17 Canadian Bar Review 693, 695.
[12] [1952] 2 All ER 114

present case"[13] he then proceeded to distinguish *Watteau* on the grounds that Humble had been an agent and had exceeded his authority, whereas in *Jerome* there had been no agency and therefore no authority to breach. This decision in *Jerome* was followed by *Rhodian River Shipping Co. SA v Halla.*[14] Bingham LJ stated, referring to the *Watteau* case that:

The true ratio of the decision is not altogether easy to perceive, and certainly the case does not appear to have a sired line of authority…I would myself be extremely wary of applying this doctrine, if it exists.[15]

There have been other decisions, which have either criticised or distinguished *Watteau*.[16] However, the first instance decision in *Kinahan v Parry*[17] stands alone in supporting the decision. In this case the judge decided the principle that a third party can sue an undisclosed principal was good law.[18] However as shown, the majority of cases have criticised and rejected the decision. Woods JA in the Canadian case of *Sign-O-Lite Plastics Ltd v Metropolitan Life Insurance Co.*[19] went as far to say:

It is astonishing that after all these years, an authority of such doubtful origin, and of such unanimously unfavoured reputation, should still be exhibiting signs of life and disturbing the peace of mind of trial judges. It is surely time to end any uncertainty, which may linger as to its proper place in the law of agency. I have no difficulty in concluding that it is not part of the law of this province.[20]

The decision is no longer applicable in Canada and it has been suggested by some academics that should another case arise in the United Kingdom a similar judgement would be made.[21]

Since the decision in *Watteau* academics have questioned its correctness. Collier (1985) believes *"controversy and puzzlement"* surround the decision.[22] Furthermore, Hornby (1961)[23] believes the decision is incorrect, however, it is contended this article is flawed because Hornby believes the decision was based on apparent authority[24] and it is submitted that this is incorrect because for apparent authority to be applicable the principal needs to be disclosed and in the *Watteau* case the principal was unknown. Many academics are opposed to the decision for, primarily, bad reasoning in the actual decision. It is believed that, following established company law principles, Wills J got partnership law wrong. Furthermore, it is difficult to grasp

[13] *ibid*. page 116
[14] [1984] 1 Lloyd's Rep 373
[15] *ibid*. page 379
[16] For instance, see *Becherer v Asher* (1896) 23 OAR 202; and also *McLauglin v Gentles* (1919) 51 DLR 383
[17] [1910] 2 KB 389
[18] However, on appeal the decision was reversed (see [1911] 1 KB 459) – however, the reason was that there was no agency agreement in the first place and made no reference to the decision in *Watteau v Fenwick* being incorrect.
[19] [1990] 73 DLR 541
[20] *ibid.* page 548
[21] See Stone, R.T.H *Usual and Ostensible Authority – One concept or two?* (1993) Journal of Business Law 325, 330.
[22] Collier, J.G *Authority of an Agent – Watteau v Fenwick revisited* (1985) Cambridge Law Journal 363
[23] Hornby, J.A *The Usual authority of an agent* (1961) Cambridge Law Journal 239
[24] *ibid*. page 245

the idea that an undisclosed principal may be liable for acts by the agent, which exceed his power.

However, whilst it is contended that the reasoning behind the decision by Wills J may be factually flawed, the actual decision is correct. Tettenborn (1998) states:
despite the rather mixed press it has received – it is not only correct, but can be justified entirely in accordance with accepted principles.[25]

Tettenborn believes the second string to Wills J's decision (that an undisclosed principal is liable for acts of the agent) is correct, provided the agent acts within the usual authority attributed to an agent of that type. Tettenborn submits the purchasing of cigars, as in *Watteau* is within the usual authority of that type of agent. Tettenborn believes the decision in *Watteau* was correct. He contends that Fenwick had placed Humble in a position where he appeared to own the business, as opposed to just managing it. Therefore it would be unfair for Fenwick to exclude his liability. The set up of the arrangement made it appear that Humble was the owner of the business. As Fenwick had placed Humble in that position, Fenwick should be liable for acts of Humble. A further reason pointing to the *Watteau* decision being correct is outlined by Cohen (1998):

If agency law did not step in, the undisclosed principal could collude with the agent to misrepresent not only the creditworthiness of the principal, but also the creditworthiness of the agent…If the case [*Watteau*] had come out the other way, undisclosed principals would be able to hire insolvent agents to make contracts for them, then claim that the contracts were unauthorised while secretly splitting the goods or money with the agent.[26]

Whilst the reasoning behind the actual decision may be flawed, the actual outcome is very beneficial to third parties. The outcome is also fair on the grounds of public policy. As the principal hires the agent, it is fair that the principal should carry the burden of risk, as opposed to a third party who is totally unaware of any restriction.
In conclusion, the decision in *Watteau* has received criticism. It has been set aside in Canada, yet still remains good law within the United Kingdom, however has only been followed once. A majority of academics have also criticised the case. However, the main contention of the criticisms is that the reasoning behind the decision is incorrect, therefore it is inferred that the decision is wrong. However, it is submitted whilst the reasoning may be flawed, the decision is correct, fair and equitable. In effect, the reasoning was a means to an end. If the decision were to be reversed, unscrupulous principals could arrange his exclusion of all liability with the help of an agent. Furthermore, it should not be up to third parties to establish if an agent is acting correctly. Therefore, it is contended the decision is correct, had it been decided otherwise, other more serious problems could arise. The courts and academics need to look behind the reasoning and see the real and actual benefits of the decision.

[25] Tettenborn, A *Agents, business owners and Estoppel* (1998) Cambridge Law Journal 274.
[26] Cohen, G. M *The Collusion problem in agency law* (1998). Found at: http://www4.law.cornell.edu/working-papers/open/cohen/cohen.htm .