

# "Estoppel in Agency" and " Estoppel outside Agency" : Getting it Wrong and Putting it Right'

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# '"Estoppel in Agency" and "Estoppel outside Agency": Getting it Wrong and Putting it Right'.

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**ABSTRACT**

Analyses the laws of agency and estoppel from an international comparative law perspective and highlights inconsistencies which have given rise to hardship in certain commercial cases. Discusses how this problem has arisen due to a lack of appreciation of the differences between these two concepts which are often blurred and considers the matter by reference to cases concerning real property. Suggests where things have gone wrong and makes suggestions for putting things right.

## I. INTRODUCTION

The relationship between the laws of agency and estoppel has not received much scholarly attention from an international comparative law perspective and the purpose of this article is to redress that balance. It will begin by analysing the laws of agency in respect of the liability of undisclosed principals to third parties in commercial contracts. This will reveal discrete approaches in different common law jurisdictions based on similar factual matrices. The analysis will reveal that a reason for this is because insufficient attention has been paid to the fact that the laws of agency and estoppel are different, and this has sometimes been overlooked. The article takes the position that this lack of appreciation in the commercial law setting can give rise to hardship and highlights an inconsistency in approach in some common law jurisdictions in the field of the laws of real property leading to seemingly irreconcilable decisions. This myopia has been brought about by a lack of awareness of broader views across jurisdictions. As will be seen, the different common law jurisdictions which have been selected for this comparative study share a similar legal history.[1]

The case law reveals an assimilation of the two concepts, as described above, in *both* commercial law *and* in the laws of real property. In truth, they should be treated separately from one another. In some areas of legal history one can point to certain concepts being

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[1] The English common law was received in the jurisdictions under discussion in the following section of the article.

inextricably linked together, e.g., the modern law of contract in common law jurisdictions has evolved from *assumpsit*, which in the 17th century went its own way, leaving the trespass actions in *assumpsit* to go their own way to develop into the modern law of torts. However, in respect of the issues under consideration in this article, the estoppel and agency issues did not evolve from any kind of common source, as did contract and tort with *assumpsit*. As Ibbetson has stated:

> From its inception, the emergent action on the case for breach of contract was held in tension between its trespassory and contractual aspects. This tension was not to be fully resolved until the first half of the seventeenth century, and the developed form of the action was never to lose the scars of its passage through the thicket of tort.[2]

As will be contended, the estoppel and agency issues are *and always have been* distinct from one another. In the authors' view, estoppel has sometimes been suffocated in the thicket of agency principles. It will be suggested that it is the lack of recognition of this basic fact which has caused confusion in the commercial and real property laws of some common law jurisdictions. The root of the problem lies in the fact that courts have failed to distinguish between 'estoppel in agency' and 'estoppel outside agency'. The article begins by analysing the problem by reference to cases in the laws of agency from the point of view of the undisclosed principal in which the courts have often got things wrong. As will be seen, the courts have erred either by framing the case in the wrong terms, or by neglecting to consider an independent estoppel argument.

## II. THE UNDISCLOSED PRINCIPAL-GETTING IT WRONG

What lies at the heart of the problem across the various jurisdictions which this article will consider is the English case of *Watteau v Fenwick*.[3] Briefly put, in that case B (the agent, Humble), a manager was appointed by C (the undisclosed principal, Fenwick), a firm of brewers. C forbade B to buy certain items. In breach of C's instruction, B placed an order with A (the third party, Watteau), the supplier, for articles in contravention of an agreement between B and C. A did not know of the existence of C when contracting with B and genuinely believed B to be the owner of the business as the licence was in B's name, and his name appeared over the door of the premises. A gave credit for the goods to B alone. B had previously owned the hotel and business but later sold out to C without A's knowledge. After A found out that C was the real owner of the premises and that B was C's manager, A brought an action against C for the unpaid price of the goods supplied which action was successful, even though A did not know about C. The decision has been specifically rejected in some Canadian provinces and disapproved in the High Court of Australia. These cases are analysed first and a criticism of the reasoning of the decision in *Watteau v Fenwick* follows at the end of this section of the article.

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[2] D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999) 130.

[3] [1893] 1 QB 346.

A. *Canada*

A similar scenario to *Watteau v Fenwick* arose in a case heard by the British Columbia Court of Appeal, in *Sign-O-Lite Plastics Ltd. v Metropolitan Life Insurance Company*[4] concerning rental payments in respect of an electronic sign situated in a shopping arcade in Calgary. In 1978, the respondents, Sign-0-Lite, and a company by the name of Calbax Properties Ltd entered into an agreement whereby Sign-O-Lite would erect and maintain the sign and Calbax Properties Ltd agreed to pay the rental payments. It should be noted that Calbax Properties Ltd was a company within the Baxter Group of companies and by 1983 Metropolitan Life had acquired ownership of the shopping arcade from another company within the Baxter Group. At that point in 1983, two things happened: firstly, Metropolitan Life became responsible for the rental payments under the terms of the agreement with Sign-O-Lite in place of Calbax Properties Ltd. Secondly, Metropolitan Life entered into an agreement with yet another company in The Baxter Group called The Baxter Group Ltd whereby The Baxter Group Ltd would manage the arcade as agents for Metropolitan Life. Metropolitan Life provided The Baxter Group Ltd with limited authority to enter contracts on its behalf. Sign-O-Lite were not aware of the change of ownership of the arcade from Calbax Properties Ltd to Metropolitan Life. In 1985 Sign-O-Lite and The Baxter Group Ltd entered into a new rental agreement to replace the 1978 agreement. When entering into the 1985 agreement, Sign-O-Lite thought that it was signing a contract with just another member of the Baxter Group.

It is important to note that whereas the rental remained unchanged the term was for a longer period and, crucially, the agreement was entered into between Sign-O-Lite (the third party) and The Baxter Group Ltd (the agent) without the knowledge of Metropolitan Life (the undisclosed principal). Further, The Baxter Group Ltd exceeded the authority given to it by Metropolitan Life in that The Baxter Group Ltd did not disclose to Sign-O-Lite that they were acting as agents for Metropolitan Life, nor did the 1985 agreement contain a clause whereby it could be cancelled by Metropolitan Life on 60 days' notice. For the purposes of this article the main issue in the case was whether Metropolitan Life was liable to Sign-O-Lite under the terms of the 1985 agreement. The reader will readily appreciate the similarity between this Canadian case and the English case of *Watteau v Fenwick*. Based upon that authority, Metropolitan Life would have been held liable but at first instance the trial judge found in favour of Metropolitan Life, and it was that decision which brought about a cross-appeal by Sign-O-Lite, which was unsuccessful. In his judgment the judge at first instance said:

> Where there is an undisclosed principal, which is the situation here, the first area to consider is [whether] there is actual authority, but I have found there is none in the circumstances before me. The concept of apparent or ostensible authority does not apply where there is an undisclosed principal as those concepts are mutually exclusive. I proceed to consider undisclosed principals and implied authority. These are the two concepts where most of the difficulty has arisen in cases like the Watteau v. Fenwick decision *because of the unfortunate use of estoppel language* [emphasis added]. It is open to conclude that an undisclosed principal is liable for contracts entered into by an agent exercising this authority. But in these proceedings, first there is the

[4] (1990) 73 DLR (4th) 541. The detailed judgment was delivered by Mr. Justice Wood with whom the two other Justices agreed. For discussion of the case, see G H L Fridman, 'The Demise of *Watteau v Fenwick'* (1991) 70 Can Bar Rev 329-334 and Case Notes (E R Edinger ed.,) 'AGENCY-Liability of Undisclosed Principal-New Agreement Replacing Old', Vol 49 Part 2 March 1991, The Advocate 309-311.

> difficulty presented by the lack of evidence as to what is usual with respect to mall managers and what is the usual authority in respect of matters of the kind involved in these proceedings…

There are three points to note about this extract of the judgment at first instance. Firstly, as noted by the appeal court, it is not clear if the court was saying that an undisclosed principal could not be held liable for unauthorised acts of its agent or whether liability could attach for the acts within the implied or usual authority of agents in the given circumstances of a particular case. Secondly, it is not clear if the court at first instance was saying that there was insufficient evidence of implied or usual authority in this case. What is clear is that neither the court at first instance nor the appeal court chose to apply the reasoning in *Watteau v. Fenwick*. When arriving at its decision the appeal court referred to several academic authorities.[5] It is also important to note a third point concerning the judgment at first instance. It will have been noted that trial judge referred to *the unfortunate use of estoppel language*. No further analysis of estoppel language was undertaken. Crucially, estoppel was not considered by the appeal court. Therefore, the appeal court came to its decision on the footing that the principle established in *Watteau v Fenwick* had no place in the laws of agency in the province of British Columbia. Mr. Justice Wood said:

> It is astonishing that, after all these years, an authority of such doubtful origin, [*Watteau v Fenwick*] and of such unanimously unfavourable 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 concluding that it is not part of the law of this province [British Columbia].

There have been cases from other Canadian jurisdictions in which the reasoning in *Watteau v Fenwick* has been rejected.[6] In another Canadian case concerning an undisclosed principal, *McLaughlin v Gentles,*[7] the Ontario Court of Appeal rejected the reasoning in *Watteau v Fenwick*, but it had little to say concerning estoppel. Hodgins, J.A. said:

> It seems to be straining the doctrine of ostensible agency or of holding out, to apply it in a case where the fact of agency and the holding out were unknown to the person dealing with the so-called agent at the time, and to permit that person, when he discovered that his purchaser was only an agent, to recover against the principal, on the theory that he is estopped from denying that he authorised the purchase…no equity should be raised in favour of the vendor as against the principal so as to make the latter liable.

The estoppel points raised in these Canadian cases are analysed at the end of this section of the article. The article now goes on to consider an Australian case.

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[5] F M B Reynolds, *Bowstead on Agency* (15th ed, 1985) 318; 'The Undisclosed Principal', (1892-93), 37 Sol. J. 280; 'Recent Cases', (1893-94), 7 Harvard L R 49-50; 'Notes', (1893) 9 LQR 97, 111; J L Montrose, 'Liability of Principal for Acts Exceeding Actual and Apparent Authority' (1939), 11, Can. B. Rev., 693; *Lindley on Partnership* (15th ed 1984) 286 *et seq*; and R Powell, *The Law of Agency* (2nd ed 1961) 76-77.

[6] *Becherer v Asher* (1986) 23 O.A.R 202; and *Massey Harris Co. Ltd v Bond* [1930] 2 D.L.R. 57 (Alta. S.C.).

[7] (1919) 51 D.L.R. 383. In this case an agent, Chisholm, (a member of a syndicate) had limited authority from his principals (the other members of the syndicate) to make a contract on behalf of the syndicate with McLaughlin, the third party, for materials to be delivered to the site of a mine which was being developed by the syndicate. When making the contract in his own name with Chisholm, the third party, McLaughlin, was unaware of the existence of the other members of the syndicate. Chisholm was judgment proof, so McLaughlin sued the other members of the syndicate. The court did not find in McLaughlin's favour.

B. *Australia*

*International Paper Co v Spicer* [8] came before the High Court of Australia on appeal from the Supreme Court of New South Wales. International Paper was a company based in New York and had appointed agents by the name of Carmichael Wilson & Co to contract on its behalf in Australia. Spicer had made a contract with Carmichael Wilson for the supply of paper; and the third-party purchaser, Spicer, sued International Paper as principal for breach of contract. At first instance, Spicer was unsuccessful, and the court did not admit into evidence certain material discussed below. In the judgment of the High Court there is no evidence that *Watteau v Fenwick* was considered at first instance. In fact, that court had found that Spicer had no cause of action against International Paper. Spicer appealed to the Supreme Court of New South Wales on the basis that the court below had not allowed into evidence certain material. Spicer contended this evidence should have been put to the jury which Spicer contended proved that Carmichael Wilson were being held out as agents by International Paper.

The Supreme Court set aside the order of the court below which stated that Spicer had no cause of action and granted a new trial to allow Spicer to bring an action to recover damages against International Paper. Again, there is no evidence in the notes of the judgment of the High Court that the Supreme Court considered *Watteau v Fenwick*. International Paper then appealed to the High Court asserting that a new trial should not have been ordered by the Supreme Court and argued the non-existence of any contract (*non assumpsit*) between it and Spicer. In the notes to the High Court judgment it is stated that Griffith C.J. referred to *Watteau v Fenwick* in argument but he did not refer to the case in his judgment. Isaacs JJ. referred to *Watteau v Fenwick* but only very briefly at the end of his judgment stating *obiter* that 'I am not prepared to assent to it' and referred to an academic authority questioning the decision.[9]

*International Paper Co v Spicer* does not appear to be a case involving an undisclosed principal as there is evidence contained in the notes of the case indicating that Spicer knew that Carmichael Wilson were acting as agents for International Paper. For example:

> To the public they appeared merely as agents to make sales of the principals' goods on the spot, and the contract was not an unusual or ordinary one for such agents.[10]

and again…

> The form in which the documents were drawn up showed that the agents, with the knowledge of the defendants, called themselves the Australian Division of the International Paper Company, and that they were the sole agents for the sale of paper in Australia. As such agents they would be looked upon by the public as having authority to make contracts like that now in question.[11]

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[8] (1906) 4 CLR 739.
[9] *Lindley on Partnership,* 7th ed., p. 146.
[10] (1906) 4 CLR 741.
[11] (1906) 4 CLR 742.

Therefore, it is not entirely clear why references were made in the case to *Watteau v Fenwick.* That said, the case is significant for this article from the point of view of the dicta made concerning estoppel which will be considered at the end of the section concerning criticisms of *Watteau v Fenwick*. For now, the following dicta should be noted:

Griffith C.J. said one method of creating an agency by a principal was:

> …by evidence of conduct on the part of the alleged principal of such a nature as to induce the person contracting with the agent to infer that he was an agent for that purpose.

Isaacs J. also referred to the estoppel point:

> If the defendants cannot ride off on this point, then there remain the questions of general authority…and estoppel by holding out.

Commentators point out that *Watteau v Fenwick* was disapproved in this case but, in truth, it was hardly mentioned. [12] The High Court ordered a new trial to allow evidence to be put to a jury to enable Spicer to contend that Carmichael were holding themselves out as agents for International Paper. At the new trial this would have enabled Spicer to have proceeded by way of attempting to raise an estoppel against International Paper based on an estoppel associated with ostensible authority (agency) which will be discussed further in the section below dealing with criticisms of *Watteau v Fenwick*.

We have seen how some Canadian provinces and The High Court of Australia have disapproved of *Watteau v Fenwick*. Canadian jurisprudence reveals how in the case of an undisclosed principal, although rejecting *Watteau v Fenwick*, the Canadian courts did not consider any point on raising an estoppel against the undisclosed principal in favour of the third party. It does not appear that the Australian case we have considered concerned an undisclosed principal, so it is difficult to give any weight to the dictum of Isaacs J. in the case disapproving *Watteau v Fenwick* but the dicta in the case concerning estoppel are of importance to the themes being pursued in this article as will be seen below.

### C. *Criticisms of Watteau v Fenwick*

As has been shown by reference to Canadian and Australian authorities, *Watteau v Fenwick* has not been well received over the years, and as we have seen has been rejected by some Canadian jurisdictions and by the High Court of Australia. It still stands [it is not binding on superior courts including the High Court] in England and Wales,[13] although it went against an earlier Privy Council decision.[14] What lies at the heart of the problem is the fact that, in

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[12] For example, see R Goode, *Commercial Law* (6th edn, Penguin 2020) , p.215. The book states the law to be as at 1 June 2020.

[13] But the decision was questioned in *The Rhodian River* [1984] 1 Lloyd's Rep 373.

[14] *Miles v McIlwraith* (1883) 8 A.C. 120. In this case it was held that an undisclosed principal was not bound by the acts of his agents who exceeded their authority in circumstances in which it could not be said that the third

truth, *Watteau v Fenwick* is not really an agency case notwithstanding what was said by Wills J. in his judgment:

> …once it is 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−which cannot be said of a case where the person supplying the goods knew nothing of the existence of the principal. 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 would prevail and defeat the action of the person dealing with the agent and then discovering that that he was an agent and had a principal.

Notwithstanding the above dictum of Wills J. it cannot be right to say that a third party has relied on any usual authority 'confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority', when the agent does not even know of the existence of the principal and genuinely believes the agent to be the principal. It cannot be said that in such circumstances the third party relied on the appearance of authority (ostensible authority in agency law), which the principal gave to the agent in the absence of knowledge of the principal's very existence by the third party, to raise an estoppel in favour of the third party. On that basis, the factual matrix does not conform to any relationship of third party/agent/principal which is required in the laws of agency in a common law jurisdiction. Therefore, *Watteau v Fenwick* cannot be an agency case.[15]

The questions which now arise are, firstly if *Watteau v Fenwick* is not an agency case, then what type of case is it;[16] and secondly if the court's reasoning in the case was flawed was the outcome an unjust outcome? The article now moves on to analyse these questions.

By reference to the cases analysed above from various Canadian jurisdictions and the High Court of Australia we have seen references to ostensible authority and estoppel. Ostensible authority concerns the laws of agency and any reference to estoppel in that regard is a reference to estoppel in the context of the laws of agency. In the Canadian cases it was held that *Watteau v Fenwick* had no application; that no liability attached to the principal, on the basis that the principal was undisclosed, and consequently the issue of ostensible authority and any estoppel associated with it was not discussed in those cases on the footing that there had been no holding out. In the case in the High Court of Australia it was ordered that a new

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party knew of the agency. The court in *Watteau v Fenwick* was not bound to follow the decision in *Miles v McIlwraith* even if it had been cited, which it was not.

[15] See Goode (n 12) p.215 who provides the following satisfactory explanation: '…the true position is that A is an indirect representative, or commission agent, who has a purely internal mandate from P and is left to contract with third parties on his own behalf, albeit with a duty to account to P in respect of his dealings'.

[16] See also A M Tettenborn, 'Agents, Business Owners and Estoppel' [1998] Cambridge Law Journal 274, 276-278 who rejects two arguments suggesting that *Watteau v Fenwick* is an agency case; (1) it is argued that a principal can be held liable where he has provided the agent with the indicia of ownership to the property and the agent sells *that property* to the third party. However, this only applies in the case of disposals of property and not in the case of the *creation of liability in the owner of property* as was the case in *Watteau v Fenwick*; and (2) it is suggested that the principal in cases such as *Watteau v Fenwick* is vicariously liable but '[b]usinessmen who voluntarily extend credit [as Watteau did to Humble, the agent] to those who turn out to be men of straw are generally left to bear the risk themselves, … and need no extra protection.'

trial should take place to enable fresh evidence to be adduced by the third party to enable the third party to prove holding out by the principal based on ostensible authority and to try and raise an estoppel on the basis of conventional principles of the laws of agency. None of this had anything to do with *Watteau v Fenwick* which, as we have seen, had been ignored at all stages in the various stages of the case. Therefore, how can the decision in *Watteau v Fenwick* be justified?

For the reasons already given, the reasoning of the court in *Watteau v Fenwick* does not hold water but that does not mean to say that the outcome was unjust. After all, the third party, Watteau, had extended credit to Humble because he believed Humble to be the owner of the hotel and business and A had extended credit to B on that basis. It is therefore correct to say that upon acquiring the hotel and business, Fenwick had given Watteau the impression that Humble continued to own the hotel and business since it was Humble's name which continued to appear above the door of the premises as the licensee.[17] Watteau provided credit to Humble in the belief that he had sufficient assets upon which Watteau could distrain should Humble not make payment.[18] This could extend not only to distraining on chattels but also the land. Whereas the authors subscribe to this view, it is not free from difficulty. One can argue that a small goods supplier cannot be expected to bargain for a security, where traditional estoppel by apparent ownership might work, but some might argue that it is quite an extension of current case law to say that an unsecured creditor should have rights to sue in contract based on an assumed right to distrain (based on apparent ownership). However, the authors do not premise their arguments based upon apparent ownership.

To justify the outcome (i.e., not the reasoning) in *Watteau v Fenwick* one must argue an estoppel being raised in Watteau's favour, but outside of the estoppel associated with ostensible authority in the laws of agency,[19] as it has been argued that *Watteau v Fenwick* is not an agency case. So, what kind of estoppel can be argued in these circumstances? Tettenborn provides a satisfactory explanation:[20]

> …what Fenwick represented by leaving Humble in charge was not that Humble was Fenwick's agent, but rather *that Humble and the owner of the Victoria Hotel (whoever that might be) were one and the same person.*

Therefore, this is a representation sufficient to raise an estoppel in Watteau's favour which has nothing to do with estoppel in agency law associated with ostensible authority. The estoppel may be viewed as an estoppel by encouragement, especially as Fenwick allowed Humble's name as licensee to remain over the door of the premises after the sale of the premises by Humble to Fenwick.[21] On the basis that *Watteau v Fenwick* can be justified as a case in which an estoppel could be justifiably raised by the third party, but an estoppel outside

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[17] The case note does not expressly state that the supplier had in fact visited the premises. However, it is highly likely that he did as the case note does state that "[t]he action was brought to recover the price of goods delivered at the Victoria Hotel over some years".

[18] Tettenborn, *op cit*, 278: …" Fenwick had led Watteau to believe that the resources of that business, whoever they belonged to, would be available to meet his claim".

[19] Ibid 279.

[20] ibid 279.

[21] The distinction between estoppel by encouragement and estoppel by acquiescence has been re-evaluated by Irit Samet 'Proprietary Estoppel and Responsibility for Omissions', (2015) 78(1) MLR 85-111.

of the estoppel associated with the laws of agency attached to ostensible authority, the time has now come to answer whether the outcome on *Watteau v Fenwick* was a just decision. Based upon an estoppel which could have been raised outside of the laws of agency, it is suggested, and for the reasons already given, that the outcome in *Watteau v Fenwick* was just. Watteau would not have provided credit to Humble if he had known that Humble was judgment proof, and it was Fenwick who had put Humble in that position to induce Watteau to make that fallacious decision. This is the reason why Watteau was able to sue on the contract.[22]

It should be noted that the above analysis of *Watteau* has been challenged. The analysis is based upon the outcome in *Lease Management Services Ltd v Purnell Secretarial Services*.[23] In that case a secretarial firm, Purnell, hired a photocopier through a company called Canon. Canon made representations to Purnell that the photocopier supplied to them would be just as good as the demonstration model which Purnell has inspected. This proved not to be the case and Purnell rejected the machine supplied to them. In the hire agreement Purnell signed the agreement with whom they thought to be Canon whose name featured prominently on the face of the agreement. However, tucked away in very small writing, the agreement said that the lessor was a company by the name of Lease Management Services Ltd, trading as Canon.

The lessors sued for the hire charges on the footing that the representations made by Canon had nothing to with them, and the court held that there was no relationship of agency between Canon and Lease Management Services Ltd. However, the court did find in Purnell's favour on the basis of a broader notion of estoppel outside of agency, on the footing that the lessor and Canon did not appear to be two separate entities except, in the words of Nicholls V.-C in the case, of a reading of the agreement 'with the finest of toothcombs'.[24] This appears to justify the above analysis of applying a broader application of estoppel as a means of justifying Watteau.

However, Tan Cheng-Han has challenged this view contending that *Lease Management* may be distinguished from *Watteau* on the basis that *Watteau* was a case 'where the owner did not have any dealings with the supplier and therefore made no representations to him other than allowing the manager to run the business'.[25] Adopting this line of reasoning Tan Cheng-Hen contends that a broader application of the principles of estoppel cannot be used as a means for justifying *Watteau*, and that *Watteau* was incorrectly decided. We respectfully disagree with this view. The factual matrix of Watteau is 'very close'[26] to that of *Lease Management*. In both cases, the owners had acted in such a way to lead the third party to believe that the owners were one and the same person as Humble in the case of *Watteau* and Canon in the case of *Lease Management*. In the same way that Watteau was unaware of the existence of Fenwick, Purnell were unaware of the existence of Lease Management Ltd., in view of the small print on the agreement. In the authors' view the facts of the two cases have

[22] Tettenborn, *op cit*., 279. This view is supported by Goode. See Goode, *op cit*., p. 215, fn 66.
[23] [1994] C.C.L.R 217. See also Tettenborn, *op cit*, 279-280.
[24] Ibid., pp. 338-339 of the judgment.
[25] Tan Cheng-Han, 'Estoppel on the law of agency', L.Q.R. 2020, 136 (Apr), 315-333, at p. 333. This article is not considered in the latest edition of Goode (n22).
[26] Tettenborn, *op cit*., 280.

sufficient proximity to justify the conclusions which we have reached concerning *Watteau*, and we will proceed on the footing that our analysis is correct. However if, which is not admitted, we are incorrect on this point, then it would not be correct to assert that *Watteau* masked the broader application of the principles of estoppel. But *Lease Management* is authority for the proposition that courts should, where possible, look to the broader principles of estoppel in cases outside of agency, i.e., where there are intermediaries, but one cannot point to an agency relationship. This point is very relevant when making the comparison with certain property law cases analysed in part III of the article where there can be little doubt that the laws of agency have been masking the application of the broader concept of estoppel. Of course, such estoppel arguments may not always succeed, and we return to this point later in the article when considering *nemo dat quod non habet* in an attempt to give a balanced account.

Another question now arises, namely if the outcome in *Watteau v Fenwick* was just, notwithstanding the court's reasoning, are some of the decisions in the cases analysed above themselves hard cases based upon a mere rejection of the outcome in *Watteau . Fenwick*? The article now proceeds to briefly re-examine some of these cases based upon the above analysis of *Watteau v Fenwick*.

Dealing first with some of the Canadian cases, we saw how in *Sign-O-Lite Plastics Ltd. v Metropolitan Life Insurance Company*[27] the appeal court of British Columbia based its decision on a rejection of *Watteau v Fenwick*. Whereas it is understandable that the appeal court should have rejected the reasoning of the court in *Watteau v Fenwick*, as this article has attempted to show, it should be remembered that the appeal court in *Sign-O-Lite* did not go on to consider the issue of estoppel outside of estoppel in the context of ostensible authority (agency). It is contended that this caused hardship to Sign-O-Lite, the third party. Had the appeal court considered the broader estoppel point (i.e., outside of and not associated with ostensible authority), the court could have found that had Sign-O-Lite known that the Baxter Group Ltd was not the real owner, it would not have contracted with them and would have insisted on entering a contract with Metropolitan Life instead. This situation was brought about by Metropolitan Life and it is difficult to see why an estoppel could not have been raised in favour of Sign-O-Lite in this respect.[28]

The authors have referred to the Canadian case of *McLaughlin v Gentles* [29] but have not analysed that case in this article, other than to provide the basic factual matrix of the case. As has been seen, *Watteau v Fenwick* was rejected in that case and like in the case of *Sign-O-Lite* the third party was denied a remedy against the third party. However, unlike in *Sign-O-Lite*, had the case been decided by reference to broader issues of estoppel (i.e., beyond estoppel associated with ostensible authority in agency law), it may be argued that there was no hardship as it could not be said on the facts of the case that the undisclosed principal had done anything which would have represented to the third party that the agent was the owner of the business.[30] Therefore, applying broader notions of estoppel it is possible to distinguish

[27] (1990) 73 DLR (4th) 541.
[28] This is a view shared by Tettenborn (n 16) 283.
[29] (1919), 51 D.L.R. 383.
[30] This point is made by Tettenborn (n 16) 282. Presumably, this was because the agent, Chisholm, was already a member of the syndicate, see (n 7).

these two cases on their facts. This is an important distinction as it might be said that the authors pick and choose the cases they like, such as *Watteau*. Also, it might be argued that it is not clear how one chooses who will win, other than the fact that the winner seems to be the little guy and the loser the big guy. By reference to the way the authors distinguish *McLaughlin v. Gentles* from *Sign-O-Lite*, it will be seen that on the authors' argument everything boils down to the particular facts of the case, irrespective of the standing of the parties.

Turning now to the High Court of Australia's judgment in *International Paper Co v Spicer*[31], it will be remembered that *Watteau v Fenwick* did not feature prominently in that case so no great weight should be placed on anything said about *Watteau v Fenwick* in the Australian case which we have considered, especially as it does not even appear to deal with an undisclosed principal on the facts. However, it is of interest from the point of view of estoppel. Naturally, it does not concern estoppel in the wider sense we have considered as there does not appear to have been an undisclosed principal. What is surprising is that it is an agency case and yet the court at first instance did not admit into evidence material to allow the third party to try and establish ostensible authority and to raise an estoppel in his favour as against the principal based upon that authority. This was prejudicial to the third party who then had to engage in expensive litigation to get a fair hearing of his case by way of another trial.

To conclude this part of the article, we have seen by reference to the decision in *Watteau v Fenwick* how the wider principles of estoppel law have been masked by an incorrect application of the laws of agency. By reference to those wider principles of estoppel, the decision in *Watteau v Fenwick* is not only intelligible but also just. Crucially, applying those wider principles of estoppel can also explain how third parties can be denied a remedy against an undisclosed principal as in the Canadian case of *McLaughlin v Gentles*. [32] Conversely, we have seen how a third party such as Sign-O-Lite can suffer hardship by a reluctance of the court not to even consider the application of those broader principles of estoppel. Finally, not only have we seen how estoppel law has been suffocated by an incorrect application of agency law, surprisingly we have also seen, by reference to the decision of the court at first instance in *International Paper Co v Spicer*, how even in a case all to do with ostensible authority (agency) the court at first instance did not allow the third party to permit evidence to be led to try and make out an estoppel in his favour, giving rise to considerable expense and hardship to the third party in having to go all the way to the High Court of Australia to get an order for a fresh trial in which this evidence could be adduced. [33]

The discussion now moves on to pull through the analysis of the problems highlighted above by reference to problems which have been encountered in the laws of real property in England and Wales in two seemingly irreconcilable cases. It will be suggested that these

[31] (1906) 4 CLR 739.

[32] (1919), 51 D.L.R. 383.

[33] For other interesting articles concerning this section of the paper, see A L Goodhart and C J Hamson 'Undisclosed Principals in Contract' (1932) 4 C.L.J. 320, 326 and 336; M Conant 'Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership (1968) 47 Neb.L.R. 678, 687-688; K M Rogers 'A Case harshly treated? Watteau v Fenwick re-evaluated Hertfordshire Law Journal 2(2), 26-29; I. Brown 'The significance of general and special authority in the development of the agent's external authority in English law', J.B.L. 2004, Jul, 391-422; and I.Brown,'The agent's apparent authority: paradigm or paradox? J.B.L. 1995, Jul, 360-372.

problems have been brought about by failing to apply correctly principles of estoppel in a discrete part of the laws of agency in England and Wales, thereby suffocating its efficacy. As will be seen, the above analysis approached from an international comparative law perspective, brings this into a sharper focus. These cases will be considered in brief, but necessary detail, and the authors will not provide a full account concerning the relevant real property laws of England and Wales associated with these cases so as not to deviate from the main international comparative law theme of the article. For readers who may be interested in going into more detail concerning the points raised, relevant specialist articles will be set out in the footnotes for the benefit of the reader. The purpose of dealing with these cases here is twofold, firstly to show how the same problems, albeit with different factual matrices, are repeating themselves in another area of law, and secondly to draw attention to the suggestion that a broader view from an international comparative law perspective would be beneficial in looking at a solution to the problem raised in the next section of the article.

The factual matrices of the cases analysed in the next section have some similarities with what has been considered above but there are certain differences. Adopting the A B C scenario once again, in the real property law cases what we have is a situation in which B either sells or mortgages A's property to C and B goes beyond what A asked B to do, with C believing B to be the owner of the property. The issue is whether A's rights bind C if B exceeds his authority. The two-common links between the next section of the article and what has been analysed in the commercial law setting above are: firstly, whether A can enforce rights against C; and secondly as to where the loss should fall between two innocent parties, A and C. However the difference is that unlike in this section, the cases in the following section 'concern the validity of disposals of property, rather than the creation of liability in the owner of it'.[34] This is the domain of apparent ownership in the law of agency and is different from the cases concerning undisclosed principals discussed above. A satisfactory explanation of this difference is provided by Tettenborn:[35]

> Although belief in the existence of a principal is normally necessary in apparent authority situations, there is one case where it is not: namely where *P*, an owner of property, clothes someone else (*A*) with the indicia of title to that property and *A* subsequently disposes of that property to *T*, a bone fide purchaser. Here *T* gets a good title on the basis that *P* is precluded from setting up his own interest in the goods concerned.

## III. REAL PROPERTY LAW-GETTING IT RIGHT AND THEN GETTING IT WRONG

The two seemingly irreconcilable decisions in the laws of England and Wales are the cases of *Skipton Building Society v Clayton*[36] and, *Wishart v Credit & Mercantile plc*[37] both of which are decisions of the Court of Appeal. Until *Wishart* it was thought that A's rights should bind C unless A consented to B's actions. Mere knowledge by A is not enough. In *Skipton*, the court held that there had been *no consent* even though A *knew* what B intended to do. A's claim was successful. Yet, in *Wishart* the court held A was precluded from asserting his rights against C, even though A did *not know* what B intended to do and A's claim was unsuccessful. On this

[34] Tettenborn (n 16) 276.
[35] ibid
[36] (1993) 25 H L R 596.
[37] [2015] EWCA Civ 655.

basis, it is difficult to reconcile the decisions in *Wishart* and *Skipton.* The *Wishart* decision was based on the application of a principle of law in the case of *Brocklesby v Temperance Permanent Building Society* (the Brocklesby principle)[38] which is derived from a discrete part of the law of agency in England and Wales in relation to property law, and this will be explained later in tying in the themes being pursed in this article from a broader international comparative law perspective.

In *Skipton Building Society v Clayton*, the property was in the sole name of Mr Browne. He sold the property on the basis that the purchasers (Barry Leonard Clayton and Gary Nicholas Thomas t/a The Mortgage Advice Centre, the first defendants in the proceedings) would grant Mr Browne and his wife the right to occupy the property for their joint lives. Following the sale of the property, by way of a fraudulent scheme, the purchasers got Mr Browne to relinquish his right of occupation and Mr Browne forged his wife's signature to relinquish her rights of occupation as well. The purchasers then mortgaged the property to the Skipton Building Society. The first defendants fell into arrears with the mortgage repayments and the building society brought possession proceedings against the first defendants and Mr and Mrs Browne. They were successful against the first defendants but not against Mr and Mrs Browne. The building society argued that both Mr and Mrs Browne by their conduct had consented to the grant of the mortgage by the purchasers in favour of the building society and were therefore estopped from asserting their rights of occupation as against the society.

The court found that Mr Browne had been told by the purchasers of their intention to mortgage the property but that he had not consented to the mortgage and that he had been assured that neither his rights nor his wife's rights would be prejudiced. Further, the court held that the letter signed by him and containing his wife's forged signature was not shown to the building society.[39] In the case of Mr Browne his mere knowledge of the mortgage did not amount to consent and in the case of Mrs Browne at all material times she knew nothing of the proposed mortgage nor of the fact that her signature had been forged. On this basis, the building society failed in their action for possession against Mr and Mrs Browne.

There was a different outcome in *Wishart v Credit & Mercantile plc*. In this case Mr Wishart and a Mr Sami Muduroglu (Sami) were friends and business partners. The facts of the case are rather convoluted but suffice it to say that Mr Wishart trusted Sami to purchase a family home for Mr Wishart, and he transferred monies to Sami for this purpose. Mr Wishart did not trouble to take any interest in the contract of sale and relied on his understanding between himself and Sami that Sami would act in Mr Wishart's best interests. In fact, Sami arranged for the property to be purchased in the name of a company wholly controlled by him. The court held that Mr Wishart had rights of occupation in the property based upon the monies which he had transferred to Sami. What happened next was that Sami, through his company which owned the property, mortgaged it to Credit & Mercantile plc. It is important to note that *Mr Wishart had no knowledge that this was being done* and did not consent to the mortgage by Sami's company in favour of Credit & Mercantile. The company defaulted on

[38] [1895] A C 173.

[39] The Court of Appeal held that had this happened it might have been said that Mr Browne would have clothed the purchasers with apparent authority to mortgage the property to the building society as this would have been tantamount to telling the society that the purchasers had vacant possession of the property, thereby raising an estoppel in favour of the building society.

the mortgage payments and brought possession proceedings against Mr Wishart. The court held that he had consented to the mortgage and that his rights of occupation therefore ranked behind the mortgage with the result that Credit & General were successful in their possession action.

The decision in *Wishart* is surprising. The authors arrive at this conclusion not by choosing which cases they like to suit their argument but by carefully distinguishing between the cases, as was done when analysing *McLaughlin* and *Sign-O-Lite*. In *Skipton,* Mr Browne had knowledge of the mortgage but was held not to have consented to it. Mrs Browne had no knowledge and was held not to have consented. In *Skipton*, Sir Christopher Slade said:

> As against Mrs Browne, the plea of estoppel or consent is even more hopeless. According to the judge's findings she knew nothing of the transaction of … and the forgery of her signature until a considerable time…later. By that time the mortgage in favour of the society had already been executed without any consent or even knowledge on her part. In my judgment, the submission that she subsequently ratified the creation of a charge which was to take priority over her own interest simply because she took no steps to make any complaint to the society or to other persons in regard to the transactions of…is unsustainable.

Similarly, Mr Wishart had no knowledge of the charge and yet he was held to have consented and, unlike with Mr and Mrs Browne in *Skipton*, the plea of estoppel by the bank was upheld. The court in *Wishart* based its decision on the operation of the Brockelsby principle. In *Thompson v Foy*[40] Lewison J referred to this as being 'akin to estoppel'. In *Wishart*, Sales LJ explained the principle in the following way:[41]

> The Brocklesby principle is not based on actual authority given to the agent, but rather on a combination of factors: actual authority given by the owner of an asset to a person authorised to deal with it in some way on his behalf; where the owner has furnished the agent with the means of holding himself out to a purchaser or lender as the owner of the asset or as having the full authority of the owner to deal with it; together with an omission by the owner to bring to the attention of a person dealing with the agent any limitation that exists as to the extent of the actual authority of the agent.

It is contended that in this area of the law of property in England and Wales that the distinction between the law of agency and estoppel has become rather blurred. As we have seen Lewison J refers to the so called rule of law in *Brocklesby* as 'akin to estoppel'[42] and one theory advanced by the learned editor of *Chitty on Contracts* explains the Brocklesby principle as ' the doctrine of apparent ownership or something akin to it, which like apparent authority can be related to estoppel'.[43] There has been recent judicial support for this theory in the High Court judgment of Sarah Worthington QC (Hon) in *Ali v Dinc* [44] where the judge states[45]

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[40] [2009] EWHC 1076 (Ch).

[41] [2015] EWCA Civ 655 at [52].

[42] The heading of *Brocklesby* in the law reports refer to the case as one of '*Principal and Agent*'.

[43] See HG Beale (ed), *Chitty on Contracts*, vol 2 (32nd edn*,* Sweet & Maxwell 2015) 41.

[44] [2020] EWHC 3055 (Ch). The relevant paragraphs of the judgment for the purposes of this article are paras: 291, 325, 334, 338-339, 341, 346-347, 354-356, 357-361 and 360.

[45] Para 346 of the judgment. It should be noted that in *Ali v Dinc* it was held that no agency arose on the facts and that the equitable owner's interest was never intended to survive the disposition in favour of the third-party mortgagee (para 360 of the judgment).

that the "*Wishart* line of cases," based on ostensible authority is an estoppel based doctrine. The judge stated[46] that these cases are distinct from the other line of cases (as illustrated by *Skipton*) that merely seek to determine the nature of a beneficial interest. This is based on the judge's statement[47] that the (*Wishart*) strand of authority is directed at agency relationships. In these agency cases, the focus is to determine whether there is an agency relationship between A and B, and then to consider whether B has made the necessary representations to C to bind A, even if B's actual authority has been exceeded. If so, A's equitable interest is then deferred to C. It should be noted that the High Court judgment was recently upheld by the Court of Appeal[48] .

Therefore, the position in respect of the real property cases in England and Wales, considered above may be reconciled by drawing a distinction between 'estoppel in agency' and 'estoppel outside of agency'. On this basis, *Wishart* falls into the former category and *Skipton* into the latter. On that basis, drawing upon what has been contended in this article when dealing with the commercial law cases, broader notions of estoppel could not be applied in *Skipton* as evidence could not be led to prove that the building society had seen the letter signed by Mr Browne which contained his signature relinquishing his rights, and Mrs Browne's forged signature purporting to relinquish her rights. However, as the court found *Wishart* to be an agency case, then estoppel based on estoppel in agency applied, i.e., based upon ostensible authority.

As has been stated, it is not the purpose of this article to analyse in detail the intricacies of the property laws of England and Wales on this point. However, *Wishart* does give rise to problems in the property laws of England and Wales,[49] and for reasons set out in the quotation in the following paragraph, the authors do not agree with the judge's statement that the distinction between the *Wishart* and *Skipton* line of cases 'fits neatly within the structure of the statutory priority rules in the LRA', (Land Registration Act).[50]

By reference to what has been contended in this article, a solution to the problems raised by the English and Welsh property law cases might be to apply the broader notions of estoppel to the English property cases, even in cases which are held to be agency based. Notwithstanding the decision in *Ali*, *Wishart* still looks unjust when contrasted with *Skipton*. Dixon has said:

> Alternatively, we could recognise that the *Brocklesby* principle, in so far as it is a "rule of law", has been modified in the context of registered land, such that it is triggered only when the equitable owner has in some way participated in, or acknowledged, the existence of the mortgage. This is entirely consistent with the case law cited by the Court of Appeal in *Credit & Mercantile*, and all

[46] Para 347 of the judgment.
[47] Para 355 of the judgment.
[48] [2022] EWCA Civ 34.
[49] For the reader who wishes to learn about the technical problems raised in *Wishart* by reference to the laws of real property of England and Wales, see: M. Dixon, 'The Boland requiem', Conv. 2015, 4, 285-290; A.I. Televantos, ' Trusteeship, ostensible authority, and land registration: the category error in Wishart', Conv. 2016, 3, 181-196; J..Sampson, 'Estoppel and the Land Registration Act 2002', C.L.J. 2016, 75(1). 21-24; and E. Lees, *The Principles of Land Law* (Oxford 2020), pp.535-6.
[50] Para 356 of the judgment.

previously decided cases…It would mean, with respect that this decision is wrong , unless such participation or acknowledgement can be found.[51]

Therefore, by applying broader notions of estoppel to the English and Welsh property law cases, *Brocklesby* would be modified in its operation in registered land transactions in that jurisdiction. It would allow for estoppel to operate in the *Skipton* line of cases if the facts justified it, as has already been explained. However, it was unjust to apply an estoppel in *Wishart* on the facts. Although the explanations by the trial judge in the High Court in *Ali* give due consideration to the existence of estoppel in the rule of law, a broader application of estoppel was needed in *Wishart*. In that case a more just consideration of estoppel was suffocated by the agency aspects of the rule of law enunciated in the Brocklesby principle. The authors suggest that more just principles of estoppel were applied in *Skipton* but not in *Wishart*, giving rise to hardship and creating problems in the laws of real property in England and Wales.

By setting the problem in the context of the international comparative nature of this article we can now make a comparison with the issues discussed in the first section of the article. We saw how the reasoning in *Watteau v Fenwick* was not applied in *Sign-O-Lite Plastics Ltd. v Metropolitan Life Insurance Company* and in *McLaughlin v Gentles*. It was contended that *Watteau v Fenwick* was not an agency case but a decision which could be justified based on the wider application of estoppel which had been masked by an incorrect application of the law of agency. On that basis, it was concluded that by not applying principles of estoppel to the facts of *Sign-O-Lite* hardship had been caused by wrongly denying a remedy to Sign-O-Lite. Conversely, by an application of the principles of estoppel to the facts of *McLaughlin* it was argued that no hardship had been caused in denying McLaughlin a remedy. In the context of the two real property cases analysed in this section of the article, the rule of law pertaining to the discrete law of agency was not allowed to mask the application of a more just application of the principles of estoppel in *Skipton.* However, the opposite was the case in *Wishart*, causing hardship as we saw in *Sign-O-Lite*.

However, as we pointed out earlier in this article, estoppel arguments do not always provide a remedy in such circumstances, as we have seen by reference to the analysis distinguishing *McLaughin* and *Sign-O-Lite*. To provide a balanced account at the conclusion of this section, it might be said that notwithstanding the arguments advanced in this article, decisions such as those in *Sign-O-Lite* and *Wishart* should stand. In this respect, an analogy with the concept of *nemo dat quod non habet* is instructive as it shows that estoppel arguments are not always successful as a workaround to the principle of *nemo dat*, as will be seen below. Therefore, it might be said that the pendulum should swing back to the *nemo dat* principle. By parity of reasoning, therefore, the decisions in *Watteau v Fenwick* and *Skipton* should swing to the positions in *Sign-O-Lite* and *Wishart,* respectively. However, and for the reasons put forward in this article, that is not the authors' view.

In the context of *nemo dat*, it will be recalled in *Farquharson Bros & Co v King & Co*[52] how timber merchants gave authority to their clerk to sell to their known customers. Fraudulently, the clerk sold under an assumed name to a purchaser who knew nothing of the timber merchants nor the true identity of the clerk. On appeal to the House of Lords, it was held that the purchasers were liable to the timber merchants in the tort of conversion. This was because the timber merchants had not acted in such a way to hold out the clerk as their agent

[51]M.Dixon, *op cit*., p. 290.
[52] [1902] AC 352.

to sell the goods to the purchaser. This authority was applied in *Jerome v Bentley & Co*.[53] In this case the plaintiff, a general dealer, asked a private individual to sell a diamond ring at a certain price on his behalf but, crucially, to return the ring if not sold within seven days. In breach of the agreement the private individual sold the ring to the defendant for less than the agreed amount and outside of the seven-day period. It was held that the defendants were liable to the plaintiff in conversion. The estoppel by apparent ownership point taken against the plaintiff failed because it could not be said that the private individual entrusted with the sale had any apparent authority to raise an estoppel against the plaintiff.

## IV **CONCLUSION-PUTTING IT RIGHT**

Now that we have a bird's eye view of decisions from cases across various common law jurisdictions, we can now pull together some overarching conclusions based upon the foregoing analysis. We have seen in the *Watteau* case concerning the undisclosed principal that it has been portrayed as an agency case, based upon ostensible authority. This article has taken the position that this analysis is incorrect, which has been masking its real nature, namely that *Watteau* is in truth an estoppel case, but estoppel in a broader context to the one associated with ostensible or apparent authority. On this basis, we saw how the decision in *Watteau v Fenwick* could be justified by reference to estoppel in this broader sense. Had this reasoning been applied in the Canadian case of *Sign-O-Lite* the appeal court could have come to a different conclusion, but the decision in *McLaughlin* can still be justified.

Turning to cases which really are to do with ostensible or apparent authority in the laws of agency, we saw how estoppel is very much aligned to this concept. However, even here, the notion of agency masked principles of estoppel as was seen in the Australian case of *Spicer*. There, the court at first instance declined to admit evidence which would have enabled the plaintiff to have led evidence to show the existence of an agency relationship to form the basis of a case on ostensible authority. Spicer had to appeal to the High Court of Australia to get an order for this evidence to be adduced and for a new trial of the action.

Finally, in the second section of the article we considered a discrete aspect of the laws of agency at work in two cases concerning real property in England and Wales. The similarities and differences between the factual matrices of these cases and the ones considered in the first section of the article were explained. Here, we saw how notions of agency and estoppel became blurred with the result that principles of estoppel were applied more justly in *Skipton* but not so in *Wishart*.

Therefore, in summary, broader notions of estoppel should have been applied in the Canadian case of *Sign-O-Lite*; the court at first instance was wrong to deny the plaintiff the opportunity of adducing evidence to argue ostensible authority in the Australian case of *Spicer*; and there was too narrow an application of principles of estoppel in the English

[53] [1952] 2 All E.R. 114. *Farquarson Bros & Co v King & Co* was also followed in *Debs v Sibec Developments Ltd* [RTR 91, (1989) Times, 19 May.

property law case of *Wishart*. In all these cases it has been contended that the laws of agency in their various guises have been masking the correct application of principles of estoppel, leading to hard cases. It has been contended that this situation has been brought about by a lack of appreciation of the fact that agency and estoppel should be treated separately; their legal historical development has been quite different. The lack of recognition of this basic fact has given rise to hard cases across jurisdictions, brought about by agency masking estoppel, leading to incorrect applications of principles of estoppel, or not applying them at all . A complicated pattern has emerged with judicial reasoning going off in the wrong direction on occasion, and it is hoped that this analysis will assist in putting matters right in future cases across common law jurisdictions concerning agency and estoppel.