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Introduction

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Commercial transactions often involve third parties. A classical model of face-to-face contracting between two individuals is no longer dominant. Instead, deals involve a number of parties, often acting through intermediaries. It is important to consider the role played by intermediaries in a range of commercial contexts. Yet beyond well-established intermediaries such as agents and trustees, the broader topic of intermediaries has received scant attention. This is a lacuna, but an understandable one given the wide range of intermediaries and the potential issues that can arise. Nevertheless, a greater awareness of intermediaries and the legal issues that can arise is of value. The chapters in this book analyse key concepts and themes, and it is to be hoped that they will provoke wider and further studies.

Situations involving intermediaries are often difficult. This is because the intermediary, Janus-like, faces two ways towards both sides of a transaction. Indeed, where any transaction concerns more than two parties, the obligations owed by intermediaries may similarly multiply. Careful analysis of different fact-patterns is therefore crucial to understand the rules that apply.

However, some general themes must be borne in mind. It is important to determine on whose behalf the intermediary acts. The intermediary may be able to act in an entirely self-serving and self-interested manner, and their only obligations may arise under contractual arrangements. In other situations, the intermediary will owe fiduciary duties to their principal, sometimes in the context of agency or a trust relationship.

Yet a blinkered view of an intermediary's duties to the party for whom they act should be avoided. The intermediary's conduct as regards the party, or parties, on the other side of the transaction must also be considered. This is an area that may drive forward developments regarding good faith in commercial law; it is invariably difficult for an intermediary to escape sanction when acting in bad faith. However, traditional private law-enforcement mechanisms may prove ineffective in ensuring an appropriate balance is struck between competing interests, and there appears to be an increasingly significant role for regulation governing different types of intermediaries. The interest of regulators and legislators in the role played by intermediaries in financial contexts, for example, is both welcome and unsurprising. Similarly, there is now greater interest in and support for the regulation of internet platform intermediaries that stand

at the intersection of much that is being consumed today, whether information or goods: as commercial structures increasingly employ intermediaries for reasons of efficiency and expertise, so must the law keep pace.

One well-established category of intermediary concerns agency. Expositions of the law of agency often draw a divide between the 'internal' and 'external' dimensions of the subject. The former focuses on the relationship between principal and agent, and the latter considers the rights of, and duties towards, third parties. In chapter 2, 'The Fiduciary Status of Agents', Matthew Conaglen concentrates upon the internal dimension and the question of whether all agents are fiduciaries. Neither the term 'agency' nor the term 'fiduciary' is free from controversy, but Conaglen's careful analysis of earlier case law concerning the accounting process in equity provides a stable foundation for some of the more recent discussion of this issue.

Determining whether a party is a fiduciary is inevitably a fact-sensitive exercise, and bold statements that all agents are fiduciaries appear too sweeping. This is perhaps reinforced by observing that the label 'agent' is often used by commercial parties to refer to a party who may not have the power to bind their principal to a contract with a third party. For example, it is increasingly common in complex commercial transactions for the parties to employ experienced negotiators to act as their 'agents' in drafting the terms of an agreement. Such negotiators have neither actual nor apparent authority to bind their principals. Yet even in those circumstances, they may well owe fiduciary obligations, albeit moulded by the terms of their relationship with their principal: it all depends on context. In any event, it seems unlikely that those branded 'agents' would be able to act in bad faith. Conaglen's thorough analysis provides support for recent decisions that conclude that some agents may be permitted to act in their own interest and therefore should not be subject to the standard fiduciary prohibitions on conflict and profit-making. This demands a very focused, fact-specific inquiry. Nevertheless, in the vast majority of situations where an agent can alter the position of their principal, the agent should owe a duty of loyalty to their principal and be considered a fiduciary – even though the scope of those fiduciary duties may be narrow.

An intermediary may also not owe fiduciary duties where they act 'ministerially'. As Rachel Leow observes in chapter 3, 'Ministerial Acts', someone appointed to undertake only 'ministerial' acts may owe relatively limited duties to their principal. The language of 'ministerial acts' is well entrenched in the law, but can mean different things in different contexts. This is problematic: using the same term to mean different things is a recipe for confusion. Leow usefully clarifies the different ways 'ministerial acts' are used in commercial

law, and how the concept can be used both to explain why the intermediary does not owe extensive duties to their principal (the internal dimension) and why they should not be liable to third parties (the external dimension).

Leow concludes that it would be better if the language of 'ministerial acts' were used to refer only to acts that do not involve the intermediary's discretion, trust or confidence in performing them. This definition may assume greater importance as machines (automatically) carry out various 'ministerial' tasks. Narrowing the scope of 'ministerial acts' in this way could also help to clarify existing private law doctrine. So, for instance, there should be no need to talk of 'ministerial receipt' in the context of claims for knowing receipt. This would be welcome: the idea that a recipient who knowingly, or unconscionably, receives trust property should be permitted to escape liability simply because they are acting for a principal is a blunt and unsatisfactory tool to protect financial institutions from private law claims.

In chapter 4, 'Justifications for and Limitations on Interventions by Undisclosed Principals', William Day considers an important aspect of the 'external dimension' of agency and vexed questions surrounding undisclosed principals. In particular, Day considers whether the 'Intervention Rule' is justified, under which an undisclosed principal may sue the third party under the contract, and may in turn be sued if either the agent or principal fails to perform their side of the bargain. The latter has been said to afford the third party an 'unexpected godsend'[1] as soon as they learn about the undisclosed principal. The former may seem just as generous to the principal.

The Intervention Rule is well-entrenched, but Day gives fresh reasons to re-evaluate its basis and questions its continuing importance, arguing that the difficult decision in *Said v Butt*[2] should be sidelined. Day highlights that some recent decisions have been very willing to find that the rule has been excluded by implication. This raises tricky questions about how easy it should be to exclude the rule, balancing considerations such as the reasonable expectations of the parties and commercial certainty. Where the personality of the contracting parties is objectively immaterial, it may be an uphill struggle to argue that the Intervention Rule should be excluded. Interestingly, Day suggests that the effect of undisclosed agency is that the principal is subject to a *non*-contractual liability to the third party created by the exercise of the agent's authority and that, by authorising the agent so to act, the principal obtains a *non*-contractual power to enforce the agent's contractual rights against the third party. This would

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[1] *Armstrong v Stokes* (1872) LR 7 QB 588, 604 (Blackburn J).

[2] *Said v Butt* [1920] 3 KB 497 (KBD).

have an impact upon the remedies available against the undisclosed principal by the third party, for example: the orthodox view is that the remedies are contractual in nature, but again this would need to be revisited under Day's approach.

Day's chapter underscores the importance of party autonomy, and a desire to ensure that parties are not bound (through intermediaries) to other parties to whom they did not (expressly) agree to be bound. Gerard McMeel picks up the theoretical debate about the basis of important aspects of agency in chapter 5, 'Agency Theory Revisited and Practical Implications'. McMeel illustrates the importance of public policy in explaining commercially significant doctrines such as apparent authority, and that agency law is not solely explicable on the basis of the parties' consent. This is a further reason why agency law cannot readily be subsumed within other private law compartments and should be viewed as an independent subject, albeit under the broader umbrella of intermediaries. The law of agency has developed pragmatically in response to evolving commercial pressures, and continues to display the flexibility required to ensure it matches up to modern commercial structures.

One area on which McMeel focuses as an illustrative example is section 39(3) of the Financial Services and Markets Act 2000, which addresses some of the problems that arise where self-employed individuals or independent corporate intermediaries are appointed representatives of either a product provider firm or a financial advisory network. Section 39(3) provides:

> The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.

This has given rise to difficult questions of interpretation, and McMeel is critical of decisions[3] that have not interpreted this provision to provide a safeguard to consumers who deal with appointed representatives, such that they are ultimately unable to seek redress from the party that granted permission to the appointed representative in the first place. The desire to ensure satisfactory redress for those who are wronged by intermediaries from those who cloak the intermediaries with authority is understandable. However, there is also the pragmatic consideration that Independent Financial Advisers (IFAs) increasingly find it difficult and expensive to obtain indemnity insurance: if IFAs were unable to afford proper insurance, that would lead to judgments that could not be enforced, and to a reduction in consumer choice, perhaps even leading them to unregulated 'introducers'. These are not easy considerations for

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[3] Notably *Anderson v Sense Network* [2019] EWCA Civ 1395, [2020] Bus LR 1.

a court to grapple with, and it is to be expected that, beyond the courts, regulators and legislators will continue to take a keen interest in this area.

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Improvements to the infrastructure underpinning the Internet, most notably high-speed fibre-optic backbones and last-mile broadband access available at low cost, together with the rise of Internet-enabled mobile devices, have led to high Internet penetration rates, cloud computing and an 'always-on' culture, with far-reaching effects on human consciousness and social interaction. Online content and services have proliferated as a consequence, so that today many people socialise, obtain news and entertainment, and transact online. Businesses are also heavily reliant on the Internet today. In many industries, traditional intermediaries and gatekeepers, such as news agencies, broadcasters, and bricks and mortar retailers, have found themselves diminished by Internet platforms that have emerged as powerful intermediaries and gatekeepers.

While this has given rise to many benefits, it has also led to an upsurge in criminal activity and other socially undesirable activities online. Many of these activities are not new, but their effects are now capable of being magnified exponentially, thereby causing far greater regulatory concern. A good example relates to disinformation and misinformation. Where an individual's means of reaching out to large groups of people are limited, the capacity to spread false information is restricted. Broadcasters and news agencies have the means to do so but are bounded by the need to preserve their reputations for integrity and accuracy. Less reputable ones may not care about their reputations, but their stories have less credibility to begin with. In any event, many jurisdictions have laws that allow for some degree of regulation of broadcasters and news agencies, and can take action in serious cases of disinformation and misinformation. In the real world, the most pernicious spread of false information is likely to be state-sponsored, but that can be mitigated in places where the press is relatively free. However, where every person has the means to disseminate information, and the ability for others to spread such information is virtually costless, the spread of false information is a much greater problem today.

Another example involves the dissemination of terrorism-related material and propaganda, often with a view to recruiting active participants to the cause. Online social media platforms have been frequently used to such ends, as outlined by Ying Hu in chapter 6, 'Platform Liability for Terrorist Activities'. They have many advantages, including anonymity,

network effects and low cost. The social costs imposed by activity on online social media platforms are increasingly leading to calls for some form of gatekeeper liability to be imposed on such platforms. Sometimes these platforms are the lower cost providers to detect content that facilitates harmful terrorist activities, which the platforms can then remove. They are also unlikely to have sufficient incentives on their own to take adequate steps to curb undesirable activities. Given these factors, there is a prima facie case for some degree of oversight or regulation, including imposing some degree of gatekeeper liability. Notwithstanding this, the chapter posits that imposing such liability can only be justified if the benefits of imposing such liability outweigh those costs. Such costs could include a less vibrant and competitive ecosystem if smaller and less established platforms do not have the financial or human resources to effectively detect unlawful use of their services. There are also concerns about over-removal of content and the deleterious effect on free speech, as well as potentially significant litigation costs that have to be borne by online platforms. Hu suggests that, taking these considerations into account, a platform should only be liable for content if it has knowledge that the content is likely to cause serious harm to others. At the same time, online platforms should be subject to rules that incentivise them to monitor harmful content on their platforms.

While few will argue with the latter, the former arguably sets the standard too high. Also, given the risk of terrorist activity today and the highly deleterious effect of it, the burden may be on online social media platforms to establish clearly that the costs of imposing oversight on them outweigh any benefits. This, it is suggested, will be a heavy burden.

Another undesirable outcome of the rise of Internet platforms has been the abuse or potential abuse of a dominant market position. This is well illustrated by Roger Alford in chapter 7, 'How Intermediaries Entrench Google's Position in the Advertising Display Market'. Focusing on Google and the online advertising display market, Alford explains that this market benefits from significant network effects that entrenches the market power of a dominant intermediary such as Google. It has monopoly power on the sell side, the buy side, and the exchange and adjacent markets. Despite the inherent conflicts of interest that this creates, Google uses its monopoly power throughout these different markets to advantage itself at the expense of its own clients. It leverages its power through its intermediaries, strategically located in different segments of the ad tech stack to exercise market power. In almost every case, the function of these intermediaries is to advantage Google rather than to enhance consumer welfare or promote competition.

To address Google's anticompetitive conduct, Alford outlines two possible responses. The first, unsurprisingly, is legislative, which features in a number of the other chapters dealing with online platforms. Indeed there are proposals in the United States (US) House of Representatives to make it illegal for companies to give preferential treatment to their own products over the products of a competitor hosted on the same platform, thereby discouraging discriminatory treatment against business competitors. The other avenue is litigation, particularly actions that allege breach of competition law. There are existing cases underway, but one disadvantage of this response is that litigation is usually a long-drawn-out affair that can take many years to resolve. Accordingly, while the prospect of litigation can exercise a restraining effect on dominant platforms, the length of time taken to come to a conclusion could lead to a situation where the market has moved on, rendering the practical effect of the result moot save for a substantial financial penalty imposed on the platform.

Many Business-to-Consumer (B2C) e-commerce platforms exist, and some of the more established include Alibaba's TMall, Farfetch, Mercado Libre, Sea Limited's Shopee, and Shopify. But perhaps the best known and most established is Amazon.com. Focusing on Amazon.com in chapter 8, 'The Platform as Agent', Deborah DeMott discusses the unsettled US law around products liability when goods sold through transactions intermediated by online platforms lead to physical harm when a defect in a product causes personal injury. The uncertainty arises from how to characterise such a platform. Is it a seller, an agent on behalf of third-party sellers, a neutral provider of services or a conduit for information? Unsurprisingly, how a B2C platform is characterised will determine if it incurs any liability for defective products sold on the platform. In the case of Amazon.com, some uncertainty has arisen because retail sales via its platform take place in an environment characterised by its all-encompassing participation, in which it serves as the face of the sale rather than simply connecting buyers to external vendors. Related to this, it is the sole channel of communication for customers and third-party sellers on its website. Also, unlike many other e-commerce platforms, a significant portion of its sales are goods from inventory it owns.

The Amazon model has led to mixed results in products liability cases for defective goods purchased that have led to personal injury. Cases accepting Amazon.com's argument that its business model places it beyond the reach of products-liability law may emphasise, in relation to goods sold for third parties, that it does not hold title to goods sold via its platform, or that its capacity to control product quality is limited, or that it does not fit within definitions – in particular that of 'seller' – of actors who are subject to liability. Other courts were not so persuaded, for instance, that Amazon.com was only an 'interactive computer service provider'

under a provision in the federal Communications Decency Act that grants immunity to providers for claims arising from their publication of information created by third parties, or that it was not a seller of goods that were shipped directly to the plaintiff by a third-party seller.

In DeMott's view, Amazon.com is not a tangential participant in the business of selling. Its omnipresence in the transactional environment its platform creates is integral to sales effected through the platform. In this regard, she suggests that introducing insights gleaned from agency doctrine can enrich and deepen the analytic framework. The doctrines and vocabulary of agency law that address the consequences of constructing an appearance are instructive in assessing responsibility for creating the widely-held perception that Amazon.com is the seller of goods on its platform subject to a seller's ordinary responsibilities for product liability. For instance, like an agent acting for an undisclosed principal, it may be a party to the contract just as its principal is. The more vexed question is whether its principal can disclaim liability if Amazon.com acted outside the scope of its authority. This brings us to the difficult case of *Watteau v Fenwick*,[4] where an undisclosed principal was liable for acts of its agent outside authority even though there could have been no manifestation of authority to the third party given that the latter did not know of the existence of any principal. However, it may be that in practice this will not be an issue, as the contractual terms between Amazon.com and its third-party sellers are likely to repose a great deal of authority in Amazon.com. Where it is clear to the purchaser that Amazon.com is merely an intermediary, the doctrines of apparent authority and apparent agency under US law may also constrain third-party sellers from denying the consequences of sales through the platform.

Moving beyond B2C platforms, particularly the less common Amazon.com variety, to platforms more generally, in chapter 9, 'Online Intermediary Platforms and English Contract Law', Christian Twigg-Flesner focuses on the question of whether contract law can sufficiently put limits on the ability of Online Intermediary Platforms (OIPs) to act without constraints vis-à-vis users, whether suppliers or consumers. Successful platforms can wield a substantial amount of market power though network effects as a result of the two-sided markets in which many operate. This leaves them with considerable ability to determine the terms of contracts entered into with users. Aside perhaps from the possible control over an OIP operator's exercise of discretionary powers under contracts entered into with its users, Twigg-Flesner expresses

[4] *Watteau v Fenwick* [1893] 1 QB 346.

the view that the ability of contract law to constrain OIPs from fully utilising contract law in their favour is limited.

Given this, regulatory responses are in his view likely to grow in importance. One such response is the European Union's Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services. This implements a specific regulatory objective aimed at limiting the unfettered freedom of an OIP operator by regulating aspects of the contract between said operator and its business users, rather than by imposing a set of obligations directed at the operator's conduct. Examples of this are that the contract must set out how access to the OIP might be suspended, terminated or otherwise restricted, and information provided about additional distribution or marketing channels through which the OIP operator might market the goods and services offered by business users. The objective is not to impose substantive obligations but to increase transparency on the part of the OIP. However, where the contract provides the OIP with certain powers, the exercise of such powers is controlled by the Regulation. For instance, prior to taking a decision to restrict or suspend a business user from the platform, a statement of reasons must be given no later than the moment when this decision becomes effective. If the decision is to terminate the contract, a minimum of 30 days' notice must be given together with reasons. Some requirements are also imposed to ensure that contractual relations are conducted in good faith and based on fair dealing, such as requiring that an OIP operator must not impose retroacting changes to the terms of the contract.

As Twigg-Flesner points out, how some provisions in the Regulation might co-exist with existing principles of contract law will have to be thought through, for example the exercise of an OIP operator's discretion with respect to restriction, suspension or termination with how the courts police the exercise of discretion under the common law, and the remedial consequences of a breach by an OIP operator of one or more of the obligations inserted into the terms and conditions by the Regulation or some other regulatory measure. Twigg-Flesner concludes that it is likely Parliament will ultimately have to step in to address more of the legal challenges of online platforms. The editors believe this is inevitable. We are in an era of significant and rapid technological change, and the typical development cycle of the common law as well as its present state may not be best placed to resolve many of the issues that have arisen and will emerge.

In chapter 10, 'Agency, Artificial Intelligence and Algorithmic Agreements', Tan Cheng-Han also considers the strain that technology can place on existing common law principles. Like chapter 9 on 'Online Intermediary Platforms and English Contract Law', he

first considers the role of contract law, but in the context of agreements entered through a platform's use of artificial intelligence, where the algorithm used by the platform has operated in error and no human input was involved. In a decision of the Singapore Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd*,[5] the majority held that there was no operable mistake that vitiated such contracts, as the trades were entered into pursuant to deterministic algorithmic programs that acted exactly as they had been programmed. In any event, even if there was an operative mistake, the respondent had no requisite knowledge of the mistake as the trades were executed in accordance with its algorithm without any human intervention. The evidence did not suggest that the respondent's algorithm had been designed to take advantage of mistakes of the kind that arose in *Quoine*. From a doctrinal perspective the decision fits into existing notions of unilateral mistake in common law, but it is difficult not to sympathise with the dissenting judgment of Mance IJ that the law must be adapted to the new world of algorithmic programmes and artificial intelligence in a way leading to results that reason and justice would lead one to expect. It is suggested that the final word on this is yet to be written, and future courts may prefer the more robust approach of Mance IJ.

The potential difficulties that the law may face in this new world of algorithms powered by artificial intelligence has led some commentators to suggest that platforms/algorithms/artificial intelligence (collectively 'platforms') should be equated as agents at law, so that agency principles can assist in determining the rights and obligations (if any) of the parties that are brought together through such intermediation. While it is possible that in some instances the entity that owns or licenses the platform may be an agent,[6] the argument goes further than this and equates the platform itself as an agent. Tan is sceptical of this for a variety of reasons, not least because the law as it stands requires a legal agent to have legal personality, and this will require legislative intervention as the common law has been reluctant to ascribe such personality to non-human entities.

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Another area that seems likely soon to require regulation concerns crypto-assets, which are the subject of Hin Liu, Louse Gullifer and Henry Chong's chapter 11 on 'Client-Intermediary Relations in the Crypto-Asset World'. The spot-trading volume for crypto-assets is roughly

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[5] *Quoine Pte Ltd v B2C2 Ltd* [2020] SLR 20.

[6] See *Ruscoe v Cryptopia Ltd* [2020] 2 NZLR 809.

equal to that of global equities, and is increasingly well-established in the commercial sphere. Most crypto-assets are held in ways involving intermediaries but, despite increasing litigation, there is little certainty as to the possible legal relationships that can arise between crypto-asset intermediaries on the one hand, and clients such as investors on the other. The authors rightly observe that the nature of the legal relationship will depend upon the intention of the parties, so in some situations there may be an outright transfer of title, or a mere contractual obligation, but in most circumstances the likely legal relationship will involve the venerable trust. The authors sensibly reject the idea that a bailment relationship could exist between a client and an intermediary of crypto-assets, since the common law does not allow a party to create a bailment of an intangible asset. Even less appealing is the idea of a 'quasi-bailment'; the unhappy history of 'quasi-contract' illustrates the problems that can arise when fictions are introduced into foundational areas of private law, and such a concept is simply unnecessary. If crypto-assets are a recognised form of property, they can be held on trust.

However, that premise has not yet been thoroughly tested. Cases seem to have simply accepted the proposition that, in principle, a crypto-currency *could* be held on trust without this being challenged.[7] Yet the public and private keys necessary for crypto-assets such as Bitcoin to function may be viewed as essentially forms of information, which is not (normally) thought of as proprietary. It was (and perhaps still is) a feature, rather than a bug, of Bitcoin that it is unregulated, and largely operates outside the legal system. Nevertheless, as a matter of commercial reality, the direction of travel is clearly shifting towards acceptance of a need to regulate digital asset intermediaries, as Liu, Gullifer and Chong point out. But it may require legislation, or at least suitable litigation where the point truly needs to be decided, to persuade some doubters that crypto-assets really are a form of property that can be held on trust.

The use of trusts and sub-trusts is of crucial importance in the context of intermediated securities.[8] The relevant intermediary may only have an equitable interest in the shares they hold on trust. In those circumstances, if the intermediary's equitable interest is transferred to a third party, can that third party avail itself of the defence of bona fide purchaser for value without notice? The instinctive response is 'No', since the third party does not acquire legal title. However, in chapter 12, 'As Complex as ABC? Bona Fide Purchasers of Equitable Interests', Ben McFarlane and Andreas Televantos, following a thorough review of the history of the bona fide purchaser defence, argue that the response should really be 'Yes'. This

[7] See recently *Zi Wang v Graham Darby* [2021] EWHC 3054 (Comm).

[8] See generally L Gullifer and J Payne (eds), *Intermediation and Beyond* (Oxford, Hart Publishing, 2019).

relatively modest extension of the rule would be commercially desirable given the prevalence of sub-trusts where securities are held by intermediaries.

It would, however, take a bold judge to adopt the authors' approach – at least below the level of the Supreme Court. The traditional requirement that the bona fide purchaser defence only protects those who acquire legal title is too well-engrained for it to be abandoned by puisne judges. But legislation in this area would be welcome. The importance of protecting third parties who deal with intermediaries is clear, and this small, incremental extension of the bona fide purchaser defence would be valuable.

The role of good faith is also important in the context of partnership, as recognised by Laura Macgregor in chapter 13, 'The Partner's Fiduciary and Good Faith Duties: More than Just an Agent?'. In a similar vein to Conaglen, Macgregor notes that it is too quick simply to assume that all partners owe fiduciary obligations. As active participants in their own business, partners are unlikely simply to sit back and trust the work of their fellow partners; nevertheless, as with agency more generally, in the vast majority of cases fiduciary obligations will probably arise. And even if the relationship is not fiduciary, it seems likely that obligations of good faith will arise. The development of good faith in the law of contract in both England and Scotland has reached an interesting juncture; in *Al Nehayan v Kent*,[9] Leggatt LJ was clear that even though a joint venture did not give rise to fiduciary obligations, meaningful duties of good faith could still bite under the contract. These principles of good faith could help to inform how new types of partnership, such as the Private Fund Limited Partnership, could operate.

Debt collectors are one type of intermediary that often does not seem to act in good faith as regards third parties. This is explored by Jodi Gardner and Chee Ho Tham in chapter 14, 'Debt Collection and Assignment of Debts: Navigating the Legal Maze'. Debt collection is a significant and fast-growing industry in the United Kingdom, dealing with £200 billion in loans. Debt collectors are an important intermediary in contracts between creditors and debtors. Generally, a debt-collecting firm 'purchases' the debt from the original creditor at a significant discount and then obtains a profit from collecting the original debt in full, often with additional fees and charges added.

The freedom of creditors to assign their debts is important. Receivables financing helps businesses to ensure necessary cash flow; engaging debt collectors as intermediaries can be a commercially efficient means of shifting the risk of non-payment on to the intermediary, whilst

[9] *Al Nehayan v Kent* [2018] EWHC 333 (Comm), [2018] 1 CLC 216.

still ensuring some of the money owed by the debtor is received by the creditor. However, as the authors point out, this can have a deleterious effect upon individual debtors, particularly those already in financial distress, which may be exacerbated by the COVID-19 pandemic. It is unlikely that private law litigation will be able to take into account the wide range of policy factors in play here; moreover, the sums owed are typically small and unlikely to be the subject of appellate consideration. If individual debtors need further protection, and if there were to be restrictions on a creditor's ability to assign its debts, then legislation (or more stringent regulation) would be required.

Further regulation may also be required of those intermediaries providing financial advice to individual consumers. In chapter 15, 'Financial Wellbeing – the Missing Link in Financial Advice under Private Law and Statute', Andrew Godwin, Wai Yee Wan and Qinzhe Yao argue that current regulation is too focused on the process of giving advice, rather than on outcomes. The authors examine the challenges inherent in achieving good consumer outcomes in the area of financial advice, and how those challenges might be overcome through the adoption of a statutory duty to consider financial wellbeing. Using Australia as a case study, they argue that incorporating the concept of financial wellbeing into the regulatory framework would be advantageous for two reasons. First, it would give substance to, and assist to operationalise, the existing responsibilities and duties of financial advisers under private law and statute, such as the obligation to act in the client's 'best interests' and the obligation to provide advice that is appropriate to the client. This is because it would enable advice to be tailored to individuals and households by reference to their own financial wellbeing, and would therefore direct attention towards outcomes and beyond the traditional focus on conduct obligations and the process for complying with those obligations. Second, the inclusion of financial wellbeing as a factor in financial advice would enable consumers to make financial decisions on an informed basis and to assume an appropriate level of responsibility for the financial decisions they make since they would be in a better position to determine outcomes.

The concept of financial wellbeing would, accordingly, act as a yardstick against which the appropriateness of financial advice and the satisfaction of the 'best interests' obligation could be measured. Admittedly, it seems difficult to define 'financial wellbeing' with great precision, but given the difficulties consumers face in even formulating the 'correct' questions to ask their advisers, it is appropriate to go further than simply demanding that advisers adhere to their instructions. From a regulatory perspective, it would be desirable for financial institutions and advisers to disclose how they implement the financial wellbeing framework

and satisfy continuous reporting requirements by reference to an agreed set of indices for financial wellbeing.

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While commercial life benefits significantly from the use of intermediaries, it also brings about costs, including those that are borne by third parties when the acts of intermediaries are not binding on their principals. This arises not only in three-party situations but also in two-party cases involving the indoor management rule and rules of attribution. In chapter 16, ‘Adjudicating Intermediary-Related Losses’, Hans Tjio explores how informational costs on third parties can be reduced without unduly increasing the costs of adjudication. He rightly points out that much of the work today in resolving disputes over the acts of intermediaries is done through the doctrines of notice and burden of proof. This can often be onerous for third parties, and can increase overall transactional costs unless principals are in some way incentivised to control agency costs. He suggests that there needs to be more responsibility placed on principals to disclose information and greater use of technology for more notice-creating mechanisms to ease the informational burdens of third parties. An analogue to the latter suggestion can be found in other areas, such as from advocates of the use of technology to reduce harmful activity online. A further suggestion that also deserves consideration is that perhaps it is time to develop notions of proportionate liability, so that in certain cases a principal ought to bear some responsibility for the third party’s belief even if the third party is to bear primary responsibility for their incorrect premise. This may incentivise principals to lower agency costs themselves *ex ante*.

While the focus on intermediaries is often targeted towards the facilitation of commercial enterprise, intermediaries perform other roles as well. In chapter 17, ‘Intermediaries as “Gatekeepers” in International and Domestic Regulation’ and chapter 18, ‘A Fine Balance: Insolvency Practitioners and the Leveraging of Intermediary Power’, Alexander Loke and Sarah Paterson explore the gatekeeping role of intermediaries in financial markets and the insolvency context respectively. As Paterson points out, core characteristics of any gatekeeping intermediary are independence and integrity. Yet, as both chapters highlight, actual and potential conflicts of interest are never far away and require measures to maintain a fine balance. In the case of capital markets gatekeepers such as auditors and credit-rating agencies, the risk of reputational loss has been found wanting because business considerations often trump reputational risk. This has led to legal reform, giving rise to more regulation and

oversight, sometimes through new regulatory organisations such as the Public Company Accounting Oversight Board. To this the editors would add that clearer and stricter rules can also play an important role in providing gatekeepers such as auditors with a shield with which to resist pressure brought by clients. The relatively successful regulation of financial intermediaries in global anti-money laundering and counter-terrorism financing also illustrates the effectiveness of even soft norms where real consequences follow non-compliance. Loke's chapter is a sobering reminder of the limits of intermediary self-regulation.

Paterson points out that the way in which insolvency practitioners leverage their intermediary power to get more work is under-theorised. In recent years, there have been complaints that although the insolvency practitioner in legislation governing Company Voluntary Arrangements (CVAs) is conceived of as a gatekeeper intermediary between companies in financial distress and creditors, the objectivity of insolvency practitioners may be impacted by their role as advisers to companies that approach them for assistance in developing a viable proposal. Yet curiously, even if this amounts to gatekeeper failure, it does not appear that anyone has been harmed by it. In part this is because CVAs may be contested, and landlords can exercise rights to break the lease and re-enter. The courts have also held that CVAs cannot remove a landlord's right of forfeiture. It is argued that insolvency practitioners must take their statutory intermediary gatekeeper role seriously if they wish to retain their privileged status in the fight for insolvency work. If they do not, this will amount to a breach of duty and may lead to further calls for regulation or the involvement of others in the process. It is a timely reminder that exogenous calls for reform ever threaten the roles of gatekeeper intermediaries who do not discharge their functions adequately.