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Ministerial Acts

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1. Introduction

References to merely ministerial acts occur surprisingly frequently. There is no shortage of synonyms; the same idea is conveyed by references to persons being 'conduits',[1] 'mere messengers',[2] an 'instrument',[3] 'mediums of communication',[4] acting equivalent to 'a postman',[5] or doing 'mechanical' acts.[6] Specialised terms may be preferred in specific contexts. 'Amanuensis' is typically used in connection with the production of written documents: text may be dictated to an amanuensis who transcribes it;[7] an amanuensis may take meeting minutes[8] or affix engravings of the principal's signature onto documents.[9] The language of 'messenger', on the other hand, is most apt when referring to the conveyance of messages or documents between one person and another.[10] While statements might pass through a 'conduit', equally, so can money: in *Agip (Africa) Ltd v Jackson*, Millett J described an agent who receives a mistaken payment on behalf of the principal as 'a mere conduit pipe'.[11]

References to ministerial acts are scattered widely across the leading work on agency law, *Bowstead & Reynolds on Agency*. They appear in discussing whether a person who simply follows specific instructions falls within a classic definition of agency.[12] They also appear as an exception to the *delegatus non potest delegare* rule (an agent cannot delegate discretions).[13] Someone appointed to do only 'ministerial' acts may owe relatively limited duties to his principal.[14] The 'ministerial' nature of acts arguably appears to play the most significant role in the relationship between agents and third parties. It is suggested that an agent who receives payments for his principal may have a defence of 'ministerial receipt' to restitutionary claims brought by the payor;[15] an agent who does only 'ministerial acts' to property may escape liability for conversion,[16] and possibly,

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[1] *Charles Russell Speechlys LLP v Pieres* [2018] 7 WLUK 476; *R v Varley* [2020] 4 WLUK 554.

[2] *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933.

[3] *Lord v Hall* (1848) 2 Carr & K 698, 175 ER 292.

[4] *Hollins v Fowler* (1874-75) LR 7 HL 757 (HL) 800.

[5] *Solomon Lew v Kaikhushru Shiavax Nargolwala* [2021] SGCA(I) 1.

[6] *Parkin v Williams* [1985] NZCA 112, [1986] 1 NZLR 294.

[7] Eg *Lord St John v Boughton* (1838) 9 Sim 219, 59 ER 342; *Reed v Columbia Fur Dressers & Dyers Ltd* [1965] 1 WLR 13 (QB) (hospital records entered on behalf of doctors); *Shuck v Loveridge* [2005] EWHC 72 (Ch) (will). In Scotland, see eg *Joseph Evans & Sons v John G Stein & Company* (1904) 12 SLT 462 (Ct of Session, Inner House) (amanuensis writing letters on business), 464-65; *Moffat v Hunter* (1972) SLT (Sh Ct) 42 (statements typed up by amanuensis).

[8] *Lee Panavision Ltd v Lee Lighting Ltd* [1991] BCC 620 (CA) 627 (company secretary).

[9] *Jenkins v Gaisford and Thring* (1863) 3 S & T 93, 164 ER 1208.

[10] *Lake v Simmons* [1927] AC 487 (HL) 489; *Coldunell Ltd v Gallon* [1986] QB 1184 (CA) 1206; *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) [321]. Though it can also be used in different circumstances eg *Whittaker v Forshaw* [1919] 2 KB 419 (KB) 423 (farmer's daughter delivered pints of milk to customers); *Patel v Willis* [1951] 2 KB 78 (Div Ct) 81 (if goods delivered to messenger to collect, possibly no 'supply' of goods to messenger under statute).

[11] *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch).

[12] Peter Watts and Francis Reynolds (eds), *Bowstead & Reynolds on Agency*, 22nd ed (London, Sweet & Maxwell 2020) paras 1-005, 1-047.

[13] *Bowstead & Reynolds* (n 12) paras 5-001–5-003.

[14] *Bowstead & Reynolds* (n 12)para 6-037.

[15] *Bowstead & Reynolds* (n 12) paras 8-174, 8-214. Compare also *Bowstead & Reynolds* para 9-106.

[16] *Bowstead & Reynolds* (n 12) paras 9-127, 9-129.

knowing receipt.[17] Agents of trustees may avoid liability for 'inconsistent dealing' where they follow the instructions of their principals honestly.[18]

The idea of ministerial acts is itself of considerable antiquity. In the past, it might have been necessary to use an amanuensis when a person was uneducated and unable to even write his name;[19] secretaries or clerks had to deliver share certificates.[20] Illiteracy is, happily, greatly reduced today. The move towards share dematerialisation obviates the need to send messengers around with physical share certificates. But other reasons for the use of ministerial actors still hold. Illness or infirmity is one: in *Lord St John v Boughton*, an attack of gout in the hand led an amanuensis to be employed, but poor health was also the reason for using an amanunesis in *Shuck v Loveridge*, where the testator of a will had been admitted to a hospital psychiatric ward.[21] Increasing use of bank transfers means that payments will frequently be made through banks, and cross-border transactions may require intermediaries for communication where the parties do not speak the same language.[22]

The idea of ministerial acts is thus unlikely to disappear; it may even increase in importance. In the future, increasing numbers of ministerial acts will also be done by machines. A relatively primitive example is a 'signature writing machine' with the trademark of 'Ghostwriter'[23] in *Ramsay v Love*, used to produce the signature of the celebrity chef Gordon Ramsay on legal documents.[24] (A different 'Ghostwriter' was used to sign autographs on books and photographs.)[25] Machines may sign documents, make, or receive payments via automated payment systems;[26] algorithmic trading software may automatically execute trades following pre-set parameters.[27]

The wide range in which the idea of 'ministerial' acts is relied on raise some interrelated questions. What is a ministerial act? Is there a single, uniform conception of ministerial acts across these different areas? If not, should we be more precise in our usage of the term?

This paper tackles these questions. After considering six different areas where ministerial acts appear relevant, it shows that there are at least four different conceptions of ministerial acts. Ministerial acts in conversion are not the same as ministerial acts in sub-agency; both differ from ministerial acts in knowing receipt. These four conceptions differ from each other in multiple ways: they may be used for different purposes, some are questions of degree while others adopt a bright-line approach, and some require special justification while others do not.

In principle, two options are available. The first is to retain the different meanings of a 'ministerial act', simply taking care not to use them interchangeably. Plurality in meaning is not a problem if we are not deceived into thinking that the same word bears the same meaning. A second, more reformative option is

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[17] *Bowstead & Reynolds* (n 12) para 9-139.
[18] Lynton Tucker, Nicholas Le Poidevin QC, and James Brightwell, *Lewin on Trusts,* 20th ed (London, Sweet & Maxwell, 2020) para 42-117.
[19] *King v John Morris* (1814) 2 Lea 1096, 168 ER 644.
[20] *Ruben v Great Fingall Consolidated* [1906] AC 439 (HL) 444.
[21] *Shuck v Loveridge* [2005] EWHC 72 (Ch). See also *Barrett v Bem* [2012] EWCA Civ 52 (testator unable to sign will himself when given pen due to his hand shaking); *Fulton v Kee* [1961] NI 1 (testator suffered from severe disseminated sclerosis which made movement difficult).
[22] Eg *Amoutzas v Tattersalls* [2010] EWHC 1696 (QB), where the principal spoke virtually no English and was heavily reliant on agents to interpret, speak, and write on his behalf.
[23] *Ramsay v Love* [2015] EWHC 65 (Ch) [74].
[24] ibid [77].
[25] ibid.
[26] See the Australian Royal Commission, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 150–51.
[27] *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2, [2020] 2 SLR 20.

to limit the use of the label 'ministerial acts'. In this chapter it is suggested that the second approach ought to be preferred. Three reasons in its favour are given: it is likely to be less productive of error and mistake, it enables accurate labelling of distinct concepts, and perhaps most importantly, it helps identify aspects of the law in need of further investigation. In particular, it suggests that the label of 'ministerial act' has concealed difficulties with when and why the actor performing 'ministerial acts' can avoid liability to third parties in conversion, knowing receipt, restitutionary claims, and inconsistent dealing.

Sections 2, 3, and 4 examine areas where references to 'ministerial acts' are frequently seen. Section 2 examines 'ministerial acts' which are treated as the principal's own. Section 3 examines 'ministerial acts' involving little or no exercise of discretion, trust, and confidence in their performance, and Section 4 examines the wide range of cases where the actor incurs no personal liability to third parties for his 'ministerial acts'. Section 5 concludes that there is no single conception of ministerial acts, but at least four different ones. Section 6 explores possible ways forward, concluding that it is best to limit the term 'ministerial act' to acts which do not require discretion, trust, or confidence for their performance.

2. Ministerial Acts as Instances of Agency

First, a 'ministerial act' may simply refer to one which can be treated as the principal's own. This is just the standard outcome of agency: *qui facit per alium, facit per se* (he who acts through another, acts himself). The agent acts for the principal; his acts are treated as the principal's own. This sense of 'ministerial act' is no different from any other authorised act done by an agent for his principal.[28] Examples include some standard agency cases, the 'ministerial receipt' doctrine in unjust enrichment, and in sub-agency.

a) Ministerial acts as the principal's own

Ministerial acts are frequently seen when they are treated as the principal's own. This is just the standard outcome of agency. Some examples illustrate. An insurance agent who fills out insurance forms for proposed insureds, acts as the insureds' amanuensis or agent, so the statements he makes in the forms are the insureds' own.[29] In the classic case of *Winter v Irish Life Assurance plc*,[30] the proposed insureds, a married couple, had cystic fibrosis. They were advised by their insurance agent to leave questions about their medical condition unanswered. He told them that he would fill in the blank questions. The agent was aware of the insureds' medical condition but did not disclose it on the forms. When the husband tried to enforce the policy, it was held that the agent's statements in filling out the forms were the insured's. Thus, the insurer could set aside the policy for non-disclosure.

This use of ministerial acts may also occur in a wide range of cases, as cases on statement-making show. In *R v Kishor Derodra*, a criminal case, the accused had been the victim of a burglary. He subsequently took out insurance and then made a claim for the losses of the burgled items, for which he was charged under the Theft Act 1968. The issue was whether a police record of the burglary could be admitted into evidence even if the police officer could not be found. This turned on whether the statement-maker could give evidence. It was concluded that when information had been provided to a police officer who wrote it up in a report, the maker of the document was the officer, but the maker of the statement was the information-supplier.[31] The police officer had acted only as 'a mere conduit pipe or amanuensis for the recording of information given by another'.[32] Thus, the record could be admitted, since the accused was present. Similar

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[28] See eg *Bowstead & Reynolds* (n 12) para 1-005.
[29] See also *Newsholme Bros v Road and Transport and General Insurance Co* [1929] 2 KB 356 (CA); *Zurich General Accident and Liability Insurance Co* v Leven (1940) SC 406 (Ct of Session, Inner House).
[30] *Winter v Irish Life Assurance plc* [1995] CLC 722 (QB).
[31] *R v Kishor Derodra* [2000] 1 Cr App R 41 (CA) 47-48.
[32] ibid 45.

reasoning can be found in the earlier Scottish case, *Moffat v Hunter*.[33] Again the case concerned the admissibility of written statements made to an investigating insurance company. A statement had been written by a Mr Stewart, who took it to the insurance company's secretary to be typed. He then signed the typed copy. Some months later he died. It was recognised that "[t]he words are wholly those of Mr Stewart though passed, as I say, through an amanuensis'.[34] No conflict of interest arose by the insurance secretary's typing of the statements, and the evidence could thus be admitted.

A 'ministerial act' for this purpose includes both acts where the agent has little discretion and those where it had great discretion. The former includes cases where the principal specifically directs an amanuensis to sign for him[35] or endorse his name to a bill of exchange.[36] The latter includes cases such as *Charles Russell Speechlys LLP v Pieres*, where a wife entrusted proceedings to her husband to be taken in her name.[37] In the latter case, we seem to be squarely in the realm of standard cases of agency. Indeed, some cases stress this point. In *Pieres*, it was said that

> 'The conduit for providing instructions to Speechlys was Mr Pieres… One textbook definition of agency is "a body of general rules under which one person, the agent, has the power to change the legal relations of another, the principal." This is clearly the power demonstrated by Mr Pieres.'[38]

Here, ministerial acts seem to mean nothing more than acts, done by another, which can be regarded as the principal's. It involves nothing but the standard result of agency.

b) Ministerial receipt in unjust enrichment

Similar is one version of the doctrine of 'ministerial receipt' in unjust enrichment. Well-known but surprisingly complicated, 'ministerial receipt' may be used for two distinct purposes. Sometimes it is used to explain why a claim lies against the principal. Other times it explains why no claim lies against the agent. The former concerns the principal-third party relationship, explaining how the ministerial agent's acts are the principal's own, while the latter concerns the agent-third party relationship. Here we consider only the former; the latter is considered later.

An instance of 'ministerial receipt' being used to establish the payor's right to restitution against the principal the former can be seen in *Agip (Africa) Ltd v Jackson*, where Millett J explained that:

> 'Money paid by mistake to [an agent who has accounted to his principal] cannot afterwards be recovered from the agent but only from the principal… In such a case the agent is treated as a mere conduit pipe and the money is taken as having been paid to the principal rather than the agent.'[39]

Later in *Portman Building Society v Hamlyn Taylor Neck (a firm)*, Millett LJ (as he had then become) reiterated:

> 'The general rule is that money paid (e.g. by mistake) to an agent who has accounted to his principal without notice of the claim cannot be recovered from the agent but only from the principal… At common law the agent recipient is regarded as a mere conduit for the money, which is treated as

[33] *Moffat v Hunter* 1974 SLR (Sh Ct) 42.
[34] ibid 43.
[35] *Jenkins v Gaisford* (1863) 3 Sw & Tr 93, 164 ER 1208 (HC of Admiralty).
[36] *Lord v Hall* (1848) 2 Car & K 698, 175 ER 292 (Assizes).
[37] *Charles Russell Speechlys LLP v Pieres* [2018] 7 WLUK 476 (Senior Courts Costs Office).
[38] ibid [30].
[39] *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch) 288, not addressed on appeal: [1991] Ch 547 (CA).

paid to the principal, not to the agent. The doctrine is therefore not so much a defence as a means of identifying the proper party to be sued.'[40]

Similar statements of more ancient origin can be found. A classic case is *Sadler v Evans*, where sums were paid to the agent of Lady Windsor in the mistaken belief that those sums were due.[41] In an action to recover them from the agent, Lord Mansfield held that: 'the plaintiff ought not to recover against the defendant, in this action; and that the action ought to have been brought against Lady Windsor herself, and not against her agent'.[42] Similarly, in *Edgell v Day*, Erle CJ concluded that: 'The general principle of law is, that a payment of money to an agent is payment to the principal'.[43]

The modern explanation is that while the agent physically receives the sums, it is the principal who has been enriched at the payor's expense. In a unanimous judgment in *Investment Trust Companies v HMRC*, the Supreme Court emphasised the general requirement that enrichment of the defendant at the claimant's expense requires a direct provision of a benefit by claimant to defendant. Lord Reed, delivering the sole reasoned speech, explained that:

> 'where the agent of one of the parties is interposed between them… the agent is the proxy of his principal, by virtue of the law of agency. The series of transactions between the claimant and the agent, and between the agent and the defendant, is therefore legally equivalent to a transaction directly between the claimant and defendant'.[44]

In this sense, 'ministerial receipt' only means that the agent's acts will be treated as the principal's own; the principal is then obliged to make restitution of the sums. The underlying principle is the same as that in the earlier category.

c) Sub-agency

In a third area, sub-agency, ministerial acts again refers to acts which can be treated as the principal's own. Here, the question is: when can agents delegate their authority to act for the principal to another agent (a sub-agent)?[45] The general rule, *delegatus non potest delegare*, prohibits agents from delegating their authority to act for the principal except with the principal's express or implied authority to do so. But this rule does not apply to 'purely ministerial acts'.[46] An agent may thus appoint another to perform purely ministerial acts even without the principal's authority to do so.

In sub-agency, a ministerial act is one where performance requires no exercise of trust, confidence, or discretion. The general rule applies because there is trust, confidence, or discretion reposed in the agent.[47] Where trust, confidence, or discretion is absent, the justification for the general rule does not apply.[48]

Examples of such ministerial acts include a daughter endorsing a signature to a bill of exchange on her mother's instructions in *Lord v Hall*,[49] a real estate agent executing a memorandum in writing as a mere formality when all terms of the contract had been agreed,[50] signing a bill of lading,[51] giving notice to

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[40] *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] PNLR 664 (CA) 669.
[41] *Sadler v Evans* (1766) 4 Burr 1984, 98 ER 34.
[42] ibid 1986.
[43] *Edgell v Day* (1865) LR 1 CP 80, 84.
[44] *Investment Trust Companies v HMRC* [2017] UKSC 29, [2017] 2 WLR 1200 [48].
[45] On distinguishing between co-agency and sub-agency, see *Bowstead & Reynolds* (n 12) paras 5-008–5-011.
[46] Hugh Beale (ed), *Chitty on Contracts*, vol 2, 33rd ed (London, Sweet & Maxwell 2018) para 31-041.
[47] *De Bussche v Alt* (1878) 8 Ch D 286 (CA) 310.
[48] Eg *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 WLR 638 (Ch) 642.
[49] *Lord v Hall* (1848) 2 Car & K 698, 175 ER 292 (Williams J).
[50] *Parkin v Williams* [1985] NZCA 112, [1986] 1 NZLR 294.
[51] *The Berkshire* [1974] 1 Lloyd's Rep 185 (QB) 188.

licensees to terminate their licences,[52] giving instructions to dispose of funds,[53] clerks receiving money and doing other acts for an attorney,[54] and a secretary bidding at an auction pursuant to her boss's instructions.[55]

In these cases, the performance of the act requires no exercise of trust, confidence, or discretion. The *delegatus* rule is not triggered. The agent can thus procure another to do these ministerial acts without the principal's express or implied authority to do so. The ministerial acts are treated as the agent's acts, which in turn are the principal's.[56] Again, *qui facit per alium, facit per se*.

3. Ministerial Acts as Acts Not Requiring Trust, Confidence, or Discretion

'Ministerial acts' might also refer to acts which can be performed without requiring the exercise of trust, confidence, or discretion. This meaning is found in sub-agency and when assessing the duties an actor owes, particularly fiduciary duties.

a) Sub-agency

As seen earlier, 'ministerial acts' in sub-agency are important because their performance can be delegated by an agent without the principal's express or implied authority. The *effect* of a ministerial act being done is that the ministerial act is treated as the agent's own, which can then be treated as the principal's own where it falls within the agent's scope of authority. However, the *test* used for a ministerial act in that context is that the act is one which does not require trust, confidence, or discretion. As Buckley J explained in *Allam & Co Ltd v Europa Poster Services Ltd*,

> 'Where the principal reposes no personal confidence in the agent the maxim has no application, but where the principal does place confidence in the agent, that in respect of which the principal does so must be done by the agent personally, unless, either expressly or inferentially, he is authorised to employ a sub-agent or to delegate the function to another.'[57]

Similarly, in the New Zealand case of *Parkin v Williams*, it was said that:

> 'Certainly if there is an element of discretion or confidence involved the signing will not be a mechanical or ministerial act and other considerations will apply. But if the skill and discretion reposed in the agent has been exercised it is immaterial who performs the necessary mechanical acts needed to implement the agent's decision.'[58]

Examples of ministerial acts for purposes of sub-agency have already been discussed earlier. They are generally acts which the ministerial actor has been specifically directed to do, in narrow and precise terms which leave little room for the actor to exercise any independent judgment.

b) Agents' fiduciary duties to the principal

A similar meaning of ministerial acts is adopted in discussions of when agents owe duties to their principals, especially fiduciary duties. It is generally accepted that most, even if not all, agents owe fiduciary duties to their principals.[59] In discussing fiduciary duties, *Bowstead & Reynolds* suggests that a person who is an agent

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[52] *Allam* (n 48).
[53] *Amoutzas v Tattersalls* [2010] EWHC 1696 (QB).
[54] *Hemming v Hale* (1859) 7 CB NS 487, 141 ER 905.
[55] *Bremner v Sinclair* [1998] NSWSC 552. But here it could not be shown that the secretary was so acting and that the ultimate bid was the product of the boss's personal judgment, so the act was not merely ministerial.
[56] See eg the reasoning in *Ex parte Sutton* (1788) 2 Cox 84, 30 ER 39.
[57] *Allam* (n 48) 642.
[58] *Parkin* (n 50).
[59] See in this volume, Matthew Conaglen's chapter on 'The Fiduciary Status of Agents'.

but 'is authorised to carry out an exactly specified act, may… act in no more than a ministerial capacity, even if in so doing the principal's legal position is altered.[60] The implication: the agent may owe only limited duties to the principal. This restates the general rule that the precise duties owed in any given agency relationship will depend on factors such as the extent of authority given to the agent, and any agreements between principal and agent.[61] The Singaporean case of *Tonny Permana v One Tree Capital Management Pte Ltd* provides an excellent statement of the principles:

> 'The legal term "agent" is not homogeneous or monolithic… Simply using the terms "agent", "relationship of agency" or "duties as agent", however, sheds little to no light on the nuances of the relationship between a specific agent and his or her principal… agents and agency relationships exist across a spectrum. This must be borne in mind. It is therefore unsurprising that each unique agency relationship will be accompanied by distinct sets of rights and obligations. It is not the case that every agent will owe, for example, fiduciary duties… In general, it may be said that the more extensive the agency relationship, ie, the greater an agent's authority or ability to affect the principal's interests, the more onerous the duties imposed upon the agent will be.'[62]

An individual authorised to carry out a precisely specified act will still owe some duties, including to carry out the task instructed, to act with due care and skill, and, possibly, to inform the principal if the agent no longer wants to do the act.[63] But there will likely be little scope for other duties, such as fiduciary ones. Much ink has been spilt on fiduciary law, with most accounts focusing in some way on the fiduciary's powers to be exercised for other-regarding purposes[64] and the special vulnerability of the principal to misuse of these powers.[65] It seems uncontroversial that the more limited the ministerial agent's powers, the less scope for fiduciary duties to bite. Again, as explained by Chan Seng Onn J in *Tonny Permana*:

> 'Where an agent is able to unilaterally and significantly influence his/her principal's position or interests and has been conferred such powers in trust and confidence, extensive fiduciary duties may arise. On the other hand, where the agent has limited authority and discretion, the agent will owe few, if any, fiduciary duties.'[66]

4. Ministerial Acts as Explaining why Agents are not Personally Liable to Third Parties

Perhaps the most frequent references to 'ministerial acts' occur when where the agent's personal liability to third parties is considered. Although it is sometimes said that agents 'drop out', this is only clearly true in a limited range of situations such as the formation of contracts by agents who objectively undertake no

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[60] *Bowstead & Reynolds* (n 12) para 6-037.
[61] See eg *Kelly v Cooper* [1993] AC 205 (PC). In relation to fiduciary duties, see also *Re Coomber* [1911] 1 Ch 723 (CA).
[62] *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] SGHC 37 [91]-[94] (Chan Seng Onn J), appealed on other grounds: [2021] SGHC(A) 8.
[63] *Volkers & Midland Doherty* (1985) 17 DLR (4th) 343 (British Columbia CA) [12] (salesman of stockbroker agreed to purchase shares at market price first thing in the morning but chose not to because he was concerned about the wisdom of the order).
[64] Eg Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 *LQR* 608; Paul Miller, 'The Fiduciary Relationship', in Andrew S Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford, Oxford University Press 2014).
[65] Eg Paul B Miller, 'Justifying Fiduciary Duties' (2013) 58 *McGill LJ* 969; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41329 (Mason J). This feature is typically relied on by deterrence-based accounts of fiduciary law, see eg Robert Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Rev* 35; Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford, Hart Publishing, 2010). For a useful discussion of different types of theories of fiduciary duties, see Lionel Smith, 'Parenthood is a Fiduciary Relationship' (2020) 70 *University of Toronto LJ* 395, 401-18.
[66] *Tonny Permana* (n 62) [99].

personal responsibility under the contract.[67] An agent who makes fraudulent misrepresentations for his principal is still personally liable for deceit; he does not drop out.[68]

But sometimes references are made to the ministerial nature of acts to indicate the agent is not personally liable to third parties. Four examples are considered: conversion, ministerial receipt in unjust enrichment claims, the beneficial receipt requirement in knowing receipt, and inconsistent dealing.

a) Conversion

We first consider conversion, 'by a very considerable margin the most important of the property torts'.[69] Conversion is concerned with the protection of superior possessory rights in personal property.[70] Although a conversion is difficult to define, it has been described as covering acts done with 'an intention on the part of the defendant… to deny the owner's right or to assert a right which is inconsistent with the owner's right'.[71] Similarly, in the leading case of *Hollins v Fowler*, a conversion was said to be 'acts done with the intention of transferring or interfering with the title to or ownership of [goods], or which are done as acts of ownership of them'.[72]

But ministerial acts are not conversions. There exists 'a long line of authority' showing that 'possession of goods by an agent on the instructions of their apparent owner for the purpose of carrying out what have been described as ministerial acts such as storage of carriage does not amount to conversion'.[73] This principle was stated by Blackburn J in the Divisional Court in *Hollins v Fowler*:

> '"I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the bona fide belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody."[74]

Blackburn J continued to give some examples of ministerial acts:

> 'Thus a warehouseman with whom goods had been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner ... And the same principle would apply to... persons 'acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger'.[75]

Here, a person doing only 'ministerial' acts does not commit the wrong of conversion; he is thus not personally liable. Ministerial acts, for conversion's purposes, are those done without intention to act inconsistently with the rights of the person with the superior possessory right (for ease of reference, the 'true owner').

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[67] See generally Robert Stevens, 'Why Do Agents "Drop Out"?' [2005] *LMCLQ* 101, 101.
[68] *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] UKHL 43, [2003] 1 AC 959.
[69] Michael Bridge, Gerard McMeel, Louise Gullifer, and Kelvin Low, *The Law of Personal Property*, 2nd ed (London, Sweet & Maxwell 2018) para 32-013.
[70] Sarah Green and John Randell, *The Tort of Conversion* (Oxford, Hart Publishing, 2019) 46.
[71] *Lancashire and Yorkshire Railway Co v MacNicoll* (1918) 88 LJ KB 601, 605.
[72] *Hollins v Fowler* (n 4) 785.
[73] *Marcq v Christie Manson and Woods Ltd (t/a Christies)* [2003] EWCA Civ 731, [2004] QB 286 [14].
[74] *Hollins v Fowler* (n 472) 766-67.
[75] ibid 767.

One common ministerial act is the moving of goods, suggested in *Hollins v Fowler*.[76] In *Re Samuel*, a solicitor who handed jewellery on the instructions of his (bankrupt) principal to another of the principal's servants did not commit conversion; he 'merely transferred the possession of it from one agent of the bankrupt to another agent of the bankrupt'.[77] Similarly, in the Singaporean Court of Appeal decision of *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd*,[78] Tat Seng was found not to have committed conversion when it moved a machine, the 'Heidelberg 4C', from its original premises to a new location on the instructions of movers who had been hired by the apparent owners of the machine. The apparent owners had in fact obtained the machine on hire-purchase.[79] Nor was there any conversion where Tat Seng eventually redelivered the machine to those who entrusted it with the goods.[80] Again, Tat Seng's involvement was described as only 'ministerial':[81] it did not intend to act inconsistently with the owner's rights.

Likewise, merely storing goods is ministerial if the storer does not demonstrate an intention to act inconsistently with the rights of the true owner.[82] Where the intermediary has no knowledge of the true owner, he commits no conversion. Thus, a warehouseman who keeps goods or returns them to the depositor without knowledge of any competing claims to the goods commits no conversion,[83] and a carrier who stores goods temporarily because the intended new warehouseman refuses to accept the goods also commits no conversion.[84]

Another intermediary generating much attention in the cases is the auctioneer. Despite some early authorities to the contrary,[85] an auctioneer who sells goods and delivers them to a purchaser converts them, whether he sells under the hammer,[86] or following a provisional bid.[87] By delivering to complete the sale to a new buyer, his acts demonstrate an intention to act inconsistently with the rights of the true owner. But he does not convert goods which he is unable to sell and returns to the prospective seller:[88]

It should already be evident that the sense in which an act here is 'ministerial' certainly diverges in some respects from the earlier categories. While a 'ministerial' act is one where there is some act done to personal property without an intention to act inconsistently with the rights of the true owner, the earlier instances of 'ministerial' we saw bear no such property focus.

b) Ministerial receipt

The next example concerns 'ministerial receipt' in unjust enrichment claims. As explained earlier, 'ministerial receipt' might be used either to explain why a claim for restitution lies against the principal of an agent who receives a mistaken payment for the principal, or to explain why no such claim lies against the agent. We now turn to the latter.

Two immediate difficulties arise. First, it is far from clear whether 'ministerial receipt' applies uniformly to all restitutionary claims in the latter use. There is some suggestion that it does not.[89] This difficulty can be

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[76] ibid.
[77] *Re Samuel* [1945] Ch 408 (CA) 415.
[78] *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] SGCA 42, [2009] 4 SLR(R) 1101.
[79] ibid [68].
[80] Ibid.
[81] ibid [84].
[82] *Clayton v Le Roy* [1911] 2 KB 1031 (CA).
[83] *Hollins v Fowler* (n 4) 767.
[84] *Tat Seng* (n 78) [68].
[85] *National Mercantile Bank v Rymill* (1881) 44 LT 767; *Turner v Hockey* (1887) 56 LJ QB 301. For criticism, see *Barker v Furlong* [1891] 2 Ch 172 (Ch) 183-84; *RH Willis & Sons v British Car Auctions Ltd* [1978] 1 WLR 438 (CA) 443-44.
[86] *Consolidated Co v Curtis & Son* [1892] 1 QB 495 (QB); *Cochrane v Rymill* (1879) 40 LT 744.
[87] *RH Willis* (n 85).
[88] *Marcq* (n 73).
[89] See Stevens (n 67) 116-18 (failure of consideration).

put to one side for now as we focus on the core case of a mistaken payment received by an agent for his principal, where the existence of 'ministerial receipt' is most widely accepted.

The second difficulty is that there appear to be two versions of 'ministerial receipt'. On the first, narrower formulation, no claim will lie against the agent only where he has paid away the sums to the principal or otherwise dealt with it irreversibly in good faith without notice of the claimant's claim to the money.[90] Sometimes described as 'agent payment over', it might be regarded as an early predecessor of the change of position defence.[91] The wider, more controversial formulation is that no claim will lie against any disclosed agent who receives sums for his principals, even if the agent still retains those sums in his hands.

All accept that no claim for restitution lies against the agent where payment over without notice has occurred.[92] But the correctness of the wider formulation remains difficult. Cases supporting it date back to at least *Sadler v Evans*.[93] For Lord Mansfield, the key was simply whether the agent received for another, not whether he still had the sums. As he said, 'The money was paid to the known agent of Lady W. He is liable to her for it; whether he has actually paid it over to her, or not: he received it for her.[94] But nearly as old is *Buller v Harrison*, which goes the other way.[95] The agent was thus ordered to make restitution where he received sums, kept them, but gave the principal credit against sums which the principal owed him. The modern cases are no different: some say the agent can be ordered to make restitution unless he has paid over without notice,[96] others say that he cannot be so ordered even if he still has the sums, as long as he received as agent.[97]

The latest word on ministerial receipt prefers the wider formulation, indicating that payment over is unnecessary. In *Skandinaviska Enskilda Banken AB (Publ) v Conway*, the Privy Council concluded that 'Agents may or may not act as trustees of moneys held for their principals, but they are not in either event enriched by payments made to them for the account of their principals.'[98] This suggests that the reason why no claim lies against the agent is that a necessary element of the claim is missing: enrichment (at the claimant's expense): no right to restitution arises.[99]

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[90] On irreversibility, see eg *Jones v Churcher* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep 94 [66]. In cases like *Buller v Harrison* (1777) 2 Cowp 565, 98 ER 1243 and *Colonial Bank v Exchange Bank of Yarmouth* (1885) 11 App Cas 84 (PC), the agent did not deal with the sums irreversibly.

[91] Established in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL). See eg Elise Bant, *The Change of Position Defence* (Oxford, Hart Publishing, 2009). Rejecting the view that the two are the same, see *Portman BS* (n 40) 207; *Jones v Churcher* [2009] EWHC 722 (QB) [67], but see also [78].

[92] Eg *Holland v Russell* (1863) 4 B&S 14, 122 ER 365.

[93] *Sadler v Evans* (1766) 4 Burr 1984, 98 ER 34.

[94] ibid 35.

[95] *Buller v Harrison* (1777) 2 Cowp 565, 98 ER 1243. See also *Cox v Prentice* (1815) 3 M & S 344, 348.

[96] *Agip* (n 11) 288 (suggesting that a claim would lie against an agent who accounts after notice of the claimant's claim); further developed in *Portman BS* (n 40) 669 ('If the agent still retains the money, however, the plaintiff may elect to sue either the principal or the agent, and the agent remains liable if he pays the money over to his principal after notice of the claim.'); *Jones v Churcher* (n 90) [67] (assuming payment over or irreversible change was required); *High Commissioner for Pakistan v the 8th Nizam of Hyderabad* [2016] EWHC 1465 (Ch) [140]-[150] (striking out application, suggesting that the claim against the agent could not be dismissed as unarguable without any real prospect of success) and after trial, *High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah* [2019] EWHC 2551 (Ch), [2020] Ch 421, [286]-[290].

[97] *Jeremy D Stone Consultants Ltd v National Westminster Bank plc* [2013] EWHC 208 (Ch), [240]-[243]; *Sixteenth Ocean GmbH & Co KG v Société Générale* [2018] EWHC 1731 (Comm), [2018] 2 Lloyd's Rep 465 [109]. Criticising *Jeremy Stone*, see *Bowstead & Reynolds* (n 12) para 9-106, describing it as *per incuriam*; Peter Watts, "Unjust Enrichment' – the Potion that Induces Well-meaning Sloppiness of Thought' [2016] *CLP* 289, 315.

[98] *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36 [87].

[99] A different enrichment-based explanation was suggested by Charles Mitchell, Paul Mitchell, and Stephen Watterson (eds); *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (London, Sweet & Maxwell, 2017) para 28-04 argues that the agent is not enriched because although it receives the sums, it comes under an equivalent obligation to account for

c) Knowing receipt

If a recipient receives trust property or their traceable proceeds in breach of trust with sufficient knowledge of the breach, he is subject to a personal claim in knowing receipt for the value of that received.[100] Many aspects of the doctrine raise persistent difficulties: its doctrinal basis,[101] the precise level of knowledge required,[102] and available remedies.[103] These concerns need not detain us. Our interest is in one requirement: beneficial receipt. It requires the recipient to have received the trust property for his own use and benefit for him to incur knowing receipt liability. Its flipside: merely ministerial acts of receipt are excluded.

The leading case is *Agip (Africa) Ltd v Jackson*.[104] Setting out the general principle, Millett J explained:

> 'The essential feature [of knowing receipt]… is that the recipient must have received the property for his own use and benefit. This is why neither the paying nor the collecting bank can normally be brought within it. In paying or collecting money for a customer the bank acts only as his agent. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it receives the money for its own benefit.'[105]

The requirement is generally accepted. Some Court of Appeal support exists,[106] though its force may be slightly blunted by Millett J being the first instance judge in both cases. The leading practitioner text *Lewin on Trusts* concludes that 'in a case where trust property is received in breach of trust by an agent in a ministerial capacity for onward transmission to his principal, while the principal will be exposed to liability for knowing receipt, the agent will escape liability under this head'.[107]

Here, the relevant ministerial acts seem to consist of receiving for the use and benefit of another. The most likely beneficiaries of this rule are collecting banks acting for customers whose accounts are in credit.[108] The bank receives payment, but only for the customer's account.[109] But its application is wider, encompassing all agents who receive payments for others. Consider *Agip* itself. Agip's chief accountant defrauded Agip by amending payment orders, substituting the intended recipients for those of his choosing. One such payee was Baker Oil. Acting on the payment order, Agip's bank, the Banque du Sud, paid out to Baker Oil's

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those sums to the principal. This was adopted in *Jeremy Stone* (n 97); *Sixteenth Ocean* (n 97). However, it has rightly been pointed out that this argument cannot explain ministerial receipt. An obligation to pay is less valuable than the sums themselves, so the agent would still be enriched by the difference: see Andrew Burrows, *The Law of Restitution* (Oxford, Oxford University Press 2011) 566-67.

[100] *El Ajou v Dollar Land Holdings plc* [1994] BCC 143 (CA); *BCCI v Akindele* [2001] Ch 437 (CA) 448.

[101] Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish, Richard Nolan, Janet O'Sullivan, and Graham Virgo (eds), *Restitution: Past, Present and Future* (Oxford, Hart Publishing, 1998); Lionel Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 *LQR* 412; Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Oxford, Hart Publishing, 2002); Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2010); Robert Chambers, 'The End of Knowing Receipt' (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 1; William Swadling, 'The Nature of 'Knowing Receipt'' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Oxford, Hart Publishing, 2017). See most recently *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) [107]-[110].

[102] *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 (CA); *In re Montagu's Settlement Trusts* [1987] Ch 264 (Ch); *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 (Ch); *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484 (Ch); *BCCI v Akindele* [2001] Ch 437 (CA).

[103] Closely linked to knowing receipt's doctrinal basis, see above references at n 101.

[104] *Agip* (n 11).

[105] ibid 292.

[106] Eg *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 (CA) 777; *El Ajou* (n 100) 154.

[107] *Lewin on Trusts* (n 18) 42-059.

[108] For criticism of the different treatment between accounts in credit and those in overdraft, see Michael Bryan, 'When Does a Bank Receive Money?' [1996] *JBL* 165.

[109] See similar reasoning in *Polly Peck* (n 106) 777.

account with Lloyds Bank. The payment was then transferred to an accountancy firm's Lloyds Bank account, and thereafter dissipated. The funds being lost, Agip sought unsuccessfully to recover the payments from the partners of the accountancy firm, Jackson and Bowers, and its employee, Mr Griffin, in knowing receipt. As Millett J explained:

> '[Mr Bowers] was a partner in Jackson & Co. but he played no active part in the movement of the funds. He did not deal with the money or give instructions in regard to it. He did not take it for his own benefit. He neither misapplied nor misappropriated it. It would not be just to hold him directly liable merely because Mr. Jackson and Mr. Griffin, who controlled the movement of the money from the moment it reached Baker Oil, chose on this occasion to pass it through his firm's bank account instead of through [another company's] account as previously. Mr. Griffin did not receive the money at all, and Mr. Jackson and Mr. Bowers did not receive or apply it for their own use or benefit. In my judgment, none of them can be made liable to account as a constructive trustee on the basis of knowing receipt.'[110]

There is some evidence that, in England, this requirement excludes not just agents from liability, but also trustees.[111] In *El Ajou v Dollar Land Holdings*, no beneficial receipt was found when the recipient received it on trust to apply for a specific purpose.[112]

There are reasonable grounds for thinking that the beneficial receipt requirement in knowing receipt is simply misplaced.[113] The requirement might be justified if knowing receipt liability is a species of unjust enrichment, which Lord Millett (as he later became) appeared to support,[114] as a parallel doctrine of 'ministerial receipt' applies to such claims. But the unjust enrichment analysis of knowing receipt was doubted in *BCCI v Akindele*[115] and might be criticised on other grounds.[116] A second justification for the requirement is the protection of banks from liability. But that objection is already met by the knowledge requirement. The real question then is whether we have good reason to protect banks from knowing receipt liability where they receive money with knowledge that it was acquired in breach of trust. We probably do not. If so, then the best move may be to abolish the beneficial receipt requirement.

d) Inconsistent dealing

A final area to consider is 'inconsistent dealing', a doctrine closely related to knowing receipt. Just how closely related they are is an open question we will return to later. The leading case is *Lee v Sankey*.[117] A firm of solicitors was employed by trustees to receive proceeds of the testator's real estate, which had been compulsorily acquired by a railway company. They paid over the money to one of the trustees without the authority of the other. The recipient trustee later became bankrupt and died; the money was lost. The surviving trustee and beneficiaries sued the solicitors. Bacon VC held that they were personally liable for the monies received. He explained:

> 'It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to *cestuis que trust* in respect of trust moneys coming to his hands merely in his

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[110] *Agip (HC)* (n 11) 292.
[111] Supported also by Swadling, 'The Nature of Knowing Receipt' (n 101) 314. Cf in New Zealand and Australia, *Gathergood v Blundell & Brown Ltd* [1992] 3 NZLR 643; *Springfield Acres Ltd v Abacus (Hong Kong) Ltd* [1994] 3 NZLR 502; *Port of Brisbane Corporation v ANZ Securities Ltd (No 2)* [2001] QSC 466, [2002] QCA 158; *Quince v Varga* [2008] QCA 376.
[112] *El Ajou* (n 100) 155.
[113] Describing it as 'bizarre', see Swadling, 'The Nature of Knowing Receipt' (n 101) 314.
[114] Eg *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 (HL) [105].
[115] (n 100) 448.
[116] Eg Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 *LQR* 412.
[117] *Lee v Sankey* (1873) LR 15 Eq 204 (Ch).

> character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing.'[118]

Buried for some time in obscurity, inconsistent dealing made a reappearance in *Agip*, where Millett J distinguished it from knowing receipt:

> 'The second, and in my judgment, distinct class of case is that of the person, usually an agent of the trustees, who receives the trust property lawfully *and not for his own benefit* but who then either misappropriates it or otherwise deals with it in a manner which is inconsistent with the trust. He is liable to account as a constructive trustee if he received the property knowing it to be such, though he will not necessarily be required in all circumstances to have known the exact terms of the trust.'[119]

This statement emphasises a similar requirement to that in knowing receipt: for the recipient to escape liability, he must receive the trust property for the benefit of another. Sometimes this requirement is framed as explaining that the recipient must be an agent.[120] Although the language of ministerial agency is not used here, it could well be in just the same way as knowing receipt: the agent receiving not for his own benefit but for another's receives ministerially, not beneficially.

Thus, an agent who lawfully receives trust property and follows his principal's instructions will not incur liability for inconsistent dealing. In *Mara v Browne*, a solicitor proposed investments on mortgage to the trustees, who accepted.[121] They drew cheques on the trust funds which were received by the solicitor and then paid over to the intended mortgagors. The 'speculative and risky'[122] investments were a breach of trust. Though the trustees might be liable, the solicitor was not; he purported to act throughout as solicitor and was understood to be doing so.[123] The agent's acts must be 'in strict conformity with his duty as agent'.[124] Where the agent must be 'merely carrying out the directions of their principal in the matter, no inconsistent dealing was found,[125] but if there were multiple principals and only one directed the act done by the agent, as in *Lee v Sankey*, the agent was found to have dealt with the property inconsistently.[126] These cases potentially provide another illustration of acting 'ministerially', explaining how the agent escapes liability.

5. Four Different Conceptions of a 'Ministerial Act'

Despite sharing the same name, ministerial acts have different meanings in different contexts. At least four possible meanings can be identified. These four different conceptions of ministerial acts also differ in other ways: the purposes for which they are used, whether they are a question of degree, and whether special justification is required for the concept.

a) Different meanings

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[118] ibid 211.
[119] *Agip* (n 11) 291
[120] Eg *Lewin on Trusts* (n 18) para 42-114.
[121] *Mara v Browne* [1896] 1 Ch 199 (CA).
[122] ibid 209.
[123] ibid 207.
[124] *Morgan v Stephens* (1861) 3 Giff 226, 66 ER 392; *Williams-Ashman v Price and Williams* [1942] Ch 219 (Ch).
[125] *Brimsden v Williams* [1894] 3 Ch 185 (Ch).
[126] (n 117) 210-11.

First, as Section 2 shows, a ministerial act may just mean an act which can be treated as the principal's own. In this meaning, a ministerial act is no different from other acts done by agents for their principals. References to 'ministerial' here are otiose; 'ministerial act' is merely another way of saying act done as agent'.

Second, as in Section 3, a ministerial act may refer to acts where trust, confidence, or discretion is not required for their performance. This meaning is adopted in sub-agency and in assessing the duties which the actor owes. Standard examples are cases where the actor was given very specific instructions to do particular acts. Examples include signing a document where the decision to enter the transaction has been made by another,[127] transcribing or recording another's statement,[128] handing another documents,[129] conveying messages,[130] drawing[131] or accepting bills of exchange,[132] or purchasing a set number of shares at a fixed price on the principal's instructions.[133]

Two further meanings of a ministerial act can be found in Section 4, where the agent's personal liability to third parties is examined.

A third meaning is that a ministerial act is an act done for the benefit of another. This meaning is adopted in the ministerial receipt doctrine and in knowing receipt. The use of the term here might plausibly have derived from the verb 'to minister', ie to attend to the needs of another. While superficially similar to the first meaning, this third meaning is broader. It includes both agents acting for their principals' benefit and trustees who act for their beneficiaries' benefit. The first includes only the former – trustees, although acting for the benefit of others, act as principals.[134] This definition is thus the broadest of the four.

Conversely, the fourth, and most narrow is the meaning adopted in conversion. This unique meaning is adopted nowhere else. It refers to acts done to chattels without intending to act inconsistently to the true owner's rights or to assert the actor's own rights. As mentioned earlier, this is quite clearly distinct from the others, bearing a property focus.

b) Different purposes, different relationships

Implicit in these four different meanings is that an act might be called ministerial for different purposes and in establishing different legal relationships. Some meanings are adopted in explaining the legal relations between principal and third party, some concern the principal-agent relationship, and some are used in the agent-third party relationship.

Acts may be called 'ministerial' in treating them as the principal's own, as in Section 2. Here, describing an act as 'ministerial' is used to establish the principal's rights and duties against a third party with whom the ministerial actor has been dealing. The relevant relationship is that between principal and third party.

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[127] Eg *Lord v Hall* (n 36); *Town Investments Ltd v Department of the Environment* [1976] 1 WLR 1126 (CA) (Secretary of State for the Environment executing document on behalf of the Queen).
[128] Eg *R v Solihull Metropolitan Borough Council Housing Benefit Review Board* (1994) 26 HLR 370 (QB) (chairman of Board under personal obligation to record the necessary elements of reasoned decision which the Board came to but can dictate to amanuensis); and the statement-making cases in Section 2.
[129] Eg *Ruben v Great Fingall Consolidated and ors* [1906] AC 439 (HL) (secretary delivering share certificates to the owners of shares); *R v Varley* [2020] 4 WLUK 554 (dossier handed to accountant).
[130] Eg *Solomon Lew* (n 5) [45] ('mere intermediary or agent for each party in conveying their messages to the other – in the manner of a postman – coupled at best perhaps with an understanding on each side that he might seek to persuade the other of the good sense of a deal – in the manner of a mediator, without any authority to bind'.)
[131] *Ex parte Sutton* (1788) 2 Cox 84, 30 ER 39.
[132] *Re London and Mediterranean Bank ex parte Birmingham Banking Co* (1868) LR 3 Ch App 651 (CA).
[133] *Volkers* (n 63).
[134] Eg *Skandinaviska* (n 98) [89].

By contrast, other acts are described as ministerial when they determine the rights and duties between principal and agent. This use, seen in the discussion on fiduciary duties, is used when assessing the agent's fiduciary and other duties owed to the principal.

The third possibility, seen in Section 4, is that acts are described as ministerial as short-hand for saying that the actor doing the ministerial act does not incur personal liability to third parties. This may be for different reasons: no wrong is committed (conversion), no duty to make restitution arises (ministerial receipt), or some other explanation.

c) Bright-line classification or a question of degree?

The four meanings may also differ as to whether the ministerial nature of an act is a bright-line classification or a question of degree.

In the first, third, and fourth meanings of ministerial acts, an act either is ministerial or not. In the first, one's act can either be treated as the principal's own or not. In the third, one acts for another's benefit or not. In the fourth, acts are done with the intention of interfering with the true owner's rights or not. In these meanings, a bright-line classification is adopted. There is no halfway house.

But in the second meaning, whether an act is ministerial is a question of degree. An act can be more ministerial or less ministerial. The less discretion, trust, and confidence the actor has, the more ministerial his acts are. The converse is also true. A stockbroker specifically instructed to 'buy 100 shares in ABC Ltd at $10 only, and if no such shares are available, do not buy' is doing acts which are certainly ministerial under this meaning. But a stockbroker instructed to 'buy 100 shares in ABC Ltd at between $9.90 and $10 per share, and if no such shares are available, do not buy' clearly has more discretion. The latter might still be described as performing ministerial acts, though less ministerial than in the first example. In this meaning, there is a spectrum of ministerial acts.

d) Justifications

Finally, the meanings of 'ministerial acts' also differ on whether 'ministerial acts' are simply cases where a general rule does not apply, or whether special public policy-based justifications are required for the concept.

Where the 'ministerial act' is being treated as the principal's own, no special justification is necessary. A ministerial act is treated as the principal's own for the same reasons that other acts done by agents are so treated. The general rule is that through the agent's acts, the principal himself acts. Ministerial acts require no exception to this rule; they merely illustrate it. This is also true where ministerial receipt is used to explain why the principal owes a duty to make restitution of mistaken payments received by his agent. Through the agent's receipt, the principal is enriched at the payor's expense. Again, no special rule is required: the principal is bound through a combination of the standard requirements for restitutionary claims and agency rules.

Similarly, no exceptions to the general rule are required where 'ministerial acts' refer to acts where little trust, confidence, or discretion is reposed in the actor. In sub-agency, the general rule is that delegation to a sub-agent requires the principal's authority. The justification is that as the principal's legal relations can be affected by acts which the sub-agent has discretion over, the principal's consent should be required. But where the acts do not involve the exercise of discretion, then the justification for requiring the principal's authority is absent. Ministerial acts here reinforce the general rule. Likewise, onerous fiduciary duties are justified by the discretion, trust, and confidence being reposed in the actor, which make the principal especially vulnerable to misbehaviour by the actor. Where discretion, trust, and confidence are absent or present in only an attenuated form, that justification has less bite and either no or more limited fiduciary duties are owed.

While no special justification is necessary for ministerial acts in establishing the principal's rights and duties to third parties or principal-agent legal relations, special justifications do seem to be at least implicitly relied on in considering when the agent comes under duties, breaches them, or is liable to third parties.

There is some evidence for this in conversion, where the development of 'ministerial acts' seems motivated by the protection of innocent intermediaries acting in good faith. *Hollins* singled out for protection those commercial intermediaries who deal with goods in carrying out a business or profession, such as warehousemen and carriers. In *Tat Seng*, the Singapore Court of Appeal expressly recognised concerns about those intermediaries being held liable, saying that:

> 'wise judicial minds in due course came to recognise that the rigorous and unthinking application of such a rule of strict liability could lead to injustice, and perhaps even constrict the growth and flow of commercial dealings; especially amongst those involved in the transportation and storage of goods industries… if the tort is not sensibly circumscribed in the context of present day commerce, it could end up raising business costs by necessitating increased insurance coverage and premiums and perhaps, even stultifying trade flow.'[135]

Recognising 'ministerial acts' which did not constitute conversions seems aimed at protecting innocent agents, protecting against the consequences identified by the Singapore Court of Appeal.

Similar trends might be observed in knowing receipt and ministerial receipt. As discussed earlier, it is plausible that Millett J introduced the beneficial receipt requirement to protect banks, who frequently receive payments. The modern explanation for ministerial receipt's operation does not rely on special justification for the doctrine, only on the agent's lack of enrichment at the principal's expense, but there have long been arguments justifying it on public policy grounds.[136] *Goff & Jones* suggests that ministerial receipt that its justification is that 'it is desirable to protect agents from being caught in the middle of disputes between their principals and third parties'.[137] An agent may face competing claims from both the principal and the third party for the benefit and may thus be faced with an 'impossible dilemma'.[138] Enabling agents to 'drop out' is thought to enhance the ability of agents to act as intermediaries, make the law simpler, and reduce the multiplicity of suits.[139]

6. Reserving 'Ministerial Act' for One Meaning

Despite a single label being used, there is considerable diversity in what constitutes a 'ministerial act'. At least four conceptions of ministerial acts can be identified. They differ further as to whether they concern the legal relationships between principal-third party, principal-agent, or agent-third party. The ministerial nature of an act may be a question of degree or a bright-line classification. Whether special justification is required for 'ministerial acts' again depends on which meaning is adopted, with special justifications being invoked most where 'ministerial acts' are used to indicate that the ministerial agent should 'drop out'.

The greatest problem that this plurality of meanings poses is potential confusion. Using a single label may wrongly suggest that 'ministerial acts' consist only of one concept with one meaning, when the phrase conceals several distinct meanings used for different purposes. The risk is that the conception of ministerial act in one context may then be inappropriately applied to another.

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[135] (n 78) [43].
[136] Eg in the context of banks, see Jonathon Moore, *Restitution from Banks* (unpublished DPhil thesis, University of Oxford, 2000).
[137] *Goff & Jones* (n 99) para 28-04.
[138] ibid.
[139] ibid.

In response to this problem, there are two main options. The first is to say that there is no difficulty with a plurality of meanings under the same label so long as no one is confused or misled. On this view, the solution is education. Judges, commentators, and practitioners should be regularly reminded that there are different meanings of ministerial acts which must be kept separate. This solution is a moderate one, seeking not to change uses in existing language or law, but merely striving to avoid associated problems. This approach is not entirely unknown. For example, we still use a single label of 'agents' to refer to a wide range of intermediaries, not all of whom exhibit the same features.[140] The second approach is to reserve the term 'ministerial act' for one meaning only. The advantage of this suggestion is greater precision. Different labels can be used to capture different concepts, with the use of different words already signifying that the concepts are not interchangeable. There is less risk of confusion and error. This solution is bolder, more reformative in character.

Of the two, the second appears to be the better route forward. First, it is doubtful whether education, however well-implemented, will be enough to avoid the risks of mistakes and inappropriate borrowing from one context to another. Accuracy is itself a good thing: reserving distinct concepts their own name promotes accurate labelling. But perhaps the most important reason for reserving the label 'ministerial act' to one specific meaning is it enables us to see problems in the present law which are currently hidden from view. The greatest problem is that the label of 'ministerial act' has sometimes been used as a substitute for legal reasoning. This problem is most pronounced in the examples discussed in Section 4, where 'ministerial acts' are used to signify when the agent is not liable to the third party. Calling an act 'ministerial' may sometimes be used as a substitute for reasoned justification, when there is either no or insufficient explanation for why this act is one which should not trigger liability.

Recall Millett J's invocation of a beneficial receipt requirement in knowing receipt. No reasons were given for the requirement. It is difficult to justify why a bank receiving payments which it knows are proceeds of fraud should not incur knowing receipt liability simply because it receives for another. The concern that banks may be put in a difficult position is more apparent than real. When faced with competing claims, the bank can always interplead, as Millett LJ himself pointed out later in *Portman BS v Hamlyn Taylor Neck*.[141]

Similar difficulties exist with conversion, inconsistent dealing, and restitutionary claims. All involve causes of action which are somewhat controversial. Conversion arguably lacks a satisfactory definition, inconsistent dealing's independent identity is doubted, and the scope and justification for different restitutionary claims is controversial. The concern again is that the phrase 'ministerial act' papers over existing difficulties by conveying a veneer of doctrinal respectability.

In conversion, there are occasional hints that 'ministerial acts' are not conversions so as to protect innocent commercial intermediaries who deal with goods as part of their business. If this is the justification, it should be addressed more openly. After open discussion, it might be criticised and hence rejected. Conversely, it might be endorsed, in which case reform of the present law is probably necessary. Not all innocent commercial intermediaries are currently protected, with the most obvious example being the auctioneer who successfully sells auctioned goods and delivers them to the purchaser.

Likewise, the scope of 'ministerial receipt' faces its own difficulties. Does 'ministerial receipt' establish that the agent is not enriched or is it a public policy-based defence? If the former, then 'ministerial receipt' is really tied to the concept of enrichment at the claimant's expense, a more difficult concept than it initially

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[140] See *Bowstead & Reynolds* (n 12) para 1-001, and compare Rachel Leow, 'Understanding Agency: A Proxy Power Definition' (2019) 78 *CLJ* 99; Francis Reynolds and Tan Cheng-Han, 'Agency Reasoning – A Formula or a Tool?' [2018] *Singapore Journal of Legal Studies* 43.
[141] *Portman BS* (n 40) 669-70.

appears.[142] If the latter, it seems plausible that this reasoning should be extended from mistake to other reasons for restitution (ie unjust factors), though this has been doubted by Stevens.[143]

Inconsistent dealing too appears motivated by a desire to protect agents (typically solicitors) who carry out their principals' instructions in dealing with trust property, but it suffers from a larger identity crisis. It is not clear whether inconsistent dealing is an independent doctrine or part of knowing receipt. *Lewin on Trusts* takes the former view, saying that the difference between inconsistent dealing and knowing receipt is that in the former the recipient receives the trust property 'lawfully',[144] ie the transfer 'involves no breach of trust or other wrongful act'.[145] This assumes that in knowing receipt, the transfer to the recipient does involve a breach of trust or other wrongful act. This assumption appears incorrect. Consider the following scenario: in breach of trust, trustee transfers the trust property to A1, who then transfers to A2, who still has it. All the transfers are gifts, so that the recipients are not bona fide purchasers. A1 did not know of the breach of trust when he received and transferred the property to A2. Assume also that A2 did not know of the breach of trust when he received the property, but that he has now acquired knowledge. In principle, A2 is liable for knowing receipt, but it is difficult to say that A1's transfer to A2 involved a breach of trust or wrongful act. A1 arguably owed no duties as trustee when he lacked knowledge,[146] so his transfer to the innocent A2 was not in breach of trust or wrongful. This casts doubt on *Lewin's* distinction between the two. More work is needed here. It may be that inconsistent dealing and knowing receipt are not so separate after all.[147]

These problems cannot be meaningfully worked out if they are hidden under the blanket of apparent doctrinal respectability. Once we remove the label of 'ministerial act', we can then see more clearly that the key question is why these 'ministerial' acts have the effects that they do. This is not controversial in working out the principal's legal relations with the third party and the duties owed by agent to the principal, but it is in the agent's legal relations with the third party.

If ministerial act is limited to one specific meaning, then there is a secondary question which follows: which? It is suggested that 'ministerial acts' should be used to refer only to acts which do not involve the actor's discretion, trust, or confidence in performing them. These will typically be acts which are specifically dictated or prescribed by another. Some support can be drawn from comparative law. The United States' Legal Information Institute's legal encyclopaedia defines a ministerial act as 'an act performed in a prescribed manner and in obedience to a legal authority, without regard to one's own judgment or discretion'.[148] The Legal Information Institute cites examples such as the collection of taxes, the recording of documents and filing of papers, and the preparation of ballots as examples of ministerial acts, which it describes from the US *Restatement Second of Torts*.[149] This meaning also seems to be adopted by *Bowstead & Reynolds* when describing cases where agents simply have specific instructions to do one thing as involving ministerial functions.[150] Furthermore, this seems to be the most distinctive but general sense of 'ministerial act'.

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[142] See eg the problems discussed in Andrew Burrows, 'At the Expense of the Claimant': A Fresh Look' [2017] *RLR* 167; Stephen Watterson, 'At the Claimant's Expense' in Elise Bant, Kit Barker, and Simone Degeling (eds) *Research Handbook on Unjust Enrichment and Restitution* (Northampton, Edward Elgar, 2020).
[143] Stevens (n 67) 116-18.
[144] *Lewin on Trusts* (n 18) para 42-111.
[145] *Lewin on Trusts* (n 18) para 42-112.
[146] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 705.
[147] For a similar conclusion, see Swadling, 'The Nature of Knowing Receipt' (n 101).
[148] Cornell Law School, Legal Information Institute, available: https://www.law.cornell.edu/wex/ministerial_act/.
[149] ibid.
[150] *Bowstead & Reynolds* (n 12) para 1-005.

What then of the other meanings of 'ministerial act'? The broadest meaning can be found in knowing receipt, referring to acting for another's benefit. It can simply be referred to as such. In ministerial receipt and the principal being bound by the agent's acts, 'ministerial act' seems to be used interchangeably with 'act done as agent'. Here the language of 'ministerial' can be replaced with 'agency' with no loss in meaning, as the *Pieres* case discussed at the start of the article suggested. In the last and most specific meaning of 'ministerial act' in conversion, it might be most helpful to think of these acts as 'acts not interfering with ownership'. Each can be given their own label, clearly demarcating one from each other.

7. Conclusion

This paper is aimed as a corrective to the undiscerning use of the phrase 'ministerial act' and its many synonyms. Vivid metaphors of 'conduits' and 'postboxes' add colour but do little to improve understanding. Even where the core phrase, 'ministerial act', is used, examination shows that at least four conceptions of 'ministerial acts' are used. These conceptions differ again in which legal relationship is being considered, whether a ministerial act is a matter of degree or an absolute, and the justifications for the concept.

The problem is that using the same phrase to capture different meanings is a trap for the unwary. It risks unnecessary errors. While this problem might be managed with education, it has been argued that a better way forward is to limit 'ministerial act' to acts which do not require discretion, trust, or confidence in their performance. The most important reason for taking this bolder step is that it means that the label of 'ministerial act' cannot be used in place of justifications when explaining when and why the actor (agent) does not owe duties, breach them, or incur liability to third parties in respect of the act. Using the right labels enables us to see more clearly where the current law requires further work.