

CHAPTER 10

The Principal's Relationship with the Third Party

A. INTRODUCTION

From what has been discussed in the preceding chapters, it will be clear that where an agent acting within his scope of authority has entered into a transaction with a third party on behalf of his principal, the principal and third party are brought into a legal relationship to which the agent is generally not a party. Whether the relationship between the “principal” and “agent” is one of agency, and if so, what the scope of the agency relationship is, will be determined objectively in accordance with general contractual principles.¹ 10.001

Where the agent has not acted within the scope of his actual authority, whether express or implied, the principal will generally not be bound for the principal has not authorised the agent's act and can therefore not be held responsible for it. To hold otherwise would be to place an onerous obligation on principals beyond what could be reasonably contemplated. This general rule does not apply where the agent has apparent authority as the principal has through a representation led the third party to believe that the agent was authorised. The general rule also does not apply where the principal has ratified the agent's act. Where there is apparent authority, the third party may enforce the contract that the agent entered into on behalf of the principal because the principal will be stopped from denying the agent's lack of authority. Where there is ratification, both the principal and third party may enforce the contract. In apparent authority cases, and possibly with ratification too, the third party may also bring an action against the agent for breach of an implied warranty of authority though damages are likely to be nominal since 10.002

1 *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 502; *Garnac Grain Co Incorporated v HMF Faure & Fairclough Ltd* [1968] 1 AC 1130 at 1137.

the absence of real authority has not in itself caused any loss to the third party because the latter can sue the principal to enforce the contract.

B. THE UNDISCLOSED PRINCIPAL²

- 10.003 The doctrine of the undisclosed principal is a well-known one, though considered anomalous by many. Essentially, where an agent enters into a contract with a third party, intending to do so on behalf of the agent's principal, the principal may as a general rule sue and be sued on the contract even though his existence was unknown to the third party. The undisclosed principal differs from the unidentified principal in that for the latter the third party knows that the agent is acting for a principal though his identity is not disclosed to the third party. In the case of an undisclosed principal, the third party believes that he is only contracting with the agent since he does not know that the agent is acting on behalf of a principal.³ The general principle is framed in the following manner by *Restatement of the Law Third, Agency*:⁴

When an agent acting with actual authority makes a contract on behalf of an undisclosed principal, (1) unless excluded by the contract, the principal is a party to the contract; (2) the agent and the third party are parties to the contract; and (3) the principal, if a party to the contract, and the third party have the same rights, liabilities, and defences against each other as if the principal made the contract personally.⁵ [footnote added]

- 10.004 Similarly, in *Siu Yin Kwan v Eastern Insurance Co Ltd*, Lord Lloyd of Berwick said:⁶

For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's

2 See generally Tan Cheng Han, "Undisclosed Principals and Contract" (2004) 120 LQR 480 from which parts of this section are drawn.

3 *Restatement of the Law Third, Agency* (American Law Institute, 2006) defines an undisclosed principal in §1.04(2)(b) as follows: "A principal is undisclosed if, when an agent and a third party interact, the third party has no notice that the agent is acting for a principal."

4 *Restatement of the Law Third, Agency* (American Law Institute, 2006) §6.03. See also *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) Article 76.

5 The latter point is subject to various exceptions which will be discussed below.

6 [1994] 2 AC 199 at 207. This summary was adopted by the Singapore Court of Appeal in *Hongkong & Shanghai Banking Corp v San's Rent A-Car Pte Ltd* [1994] 3 SLR(R) 26 at [23].

behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

Although the historical evidence of the undisclosed principal doctrine is "painfully meagre",⁷ it is clear that the undisclosed principal doctrine dates back to at least the 18th century and perhaps even earlier.⁸ 10.005

Notwithstanding this, the doctrine is regarded by many scholars as anomalous. This is because the doctrine allows a person who is not ostensibly a party to a contract to sue and be sued on the contract, which appears to offend general principles of contract. Sir Frederick Pollock, in a note, wrote thus of the doctrine of the undisclosed principal:⁹ 10.006

The plain truth ought never to be forgotten that the whole law as to the rights and liabilities of an undisclosed principal is inconsistent with the elementary doctrines of the law of contract. The right of one person to sue another on a contract not really made with the person suing is unknown to every other legal system except that of England and America.

Such views are also to be found in judicial pronouncements. For example, in *Armstrong v Stokes*,¹⁰ Blackburn J said that while it has often been doubted whether it was right to hold an undisclosed principal liable to the seller, such doubts came too late as the doctrine was too well settled.¹¹ And in *Keighley, Maxsted & Co v* 10.007

7 Oliver Wendell Holmes, "The History of Agency" in *Select Essays in Anglo-American Legal History* vol III (Oceana, 1968) at p 390.

8 See, for example, the famous case of *Scrimshire v Alderton* (1743) 2 Stra 1182. See also S J Stoljar, *The Law of Agency* (Sweet & Maxwell, 1961) at pp 204–211; W Muller-Freienfels, "The Undisclosed Principal" (1953) 16 MLR 299; *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199.

9 (1887) 3 LQR 358 at 359. See also Oliver Wendell Holmes, "The History of Agency" in *Select Essays in Anglo-American Legal History* vol III (Oceana, 1968); J B Ames, "Undisclosed Principal – His Rights and Liabilities" (1909) 18 Yale LJ 443; W D Lewis, "The Liability of the Undisclosed Principal in Contract" (1909) 9 Col L Rev 116 at 118; F R Mechem, "The Liability of an Undisclosed Principal" (1910) 23 Harvard L Rev 513 at 515; B Geva, "Authority of Sale and Privity of Contract: The Proprietary Basis of the Right to the Proceeds of Sale at Common Law" (1979) 25 McGill LJ 2 at 3; G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 2nd Ed, 2008) at para 19.33.

10 (1872) LR 7 QB 598.

11 (1872) LR 7 QB 598 at 604.

Durant,¹² Lord Lindley opined that “as a contract is constituted by the concurrence of two or more persons and by their agreement to the same terms, there is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not, in fact, intend to contract”.¹³ It can be seen from these academic and judicial statements that notwithstanding the long existence of the doctrine it is tolerated more for its antiquity than its doctrinal purity. In *Family Food Court v Seah Boon Lock*,¹⁴ Andrew Phang JA observed: “This intervention by ... the undisclosed principal, has been heavily criticised as it offends against many contractual principles, including (most notably) the principle of privity of contract.”

10.008 To some extent, such criticisms are unfair. As stated earlier, the doctrine of the undisclosed principal dates back to at least the 18th century.¹⁵ At that time, contract theory had not yet evolved the necessity of actual mental assent; that the creation of contractual rights and duties arose only from the deliberate consensus of the parties, even if on an objective basis.¹⁶ From this standpoint, it is clear that the continued applicability of the doctrine of the undisclosed principal, notwithstanding the development of the idea of mutual assent, stems from the widespread recognition that the strict rules of privity of contract ought not to apply to the undisclosed principal. The doctrine is therefore no more inconsistent or anomalous than the rule allowing assignees to bring an action in contract.¹⁷ They constitute well-recognised exceptions to the privity doctrine and need no further justification. Thus, it makes no more sense to say that the undisclosed principal doctrine is anomalous when measured by contract principles than it is to say that the doctrine of privity of contract is anomalous because it is inconsistent with the undisclosed principal doctrine. The two co-exist and each recognises the validity

12 [1901] AC 240.

13 [1901] AC 240 at 261. See also *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 at 207 where Lord Lloyd of Berwick, delivering the opinion of the Privy Council, said that the doctrine ran counter to fundamental principles of privity of contract.

14 [2008] 4 SLR(R) 272 at [29].

15 See also *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199.

16 W Muller-Freienfels, “The Undisclosed Principal” (1953) 16 MLR 299 at 311; Powell, *The Law of Agency* (Pitman, 2nd Ed, 1961) at p 153; *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) at para 8-071. See also Gordley, *The Philosophical Origins of Modern Contract Doctrine* (US: Oxford University Press, 1991), especially chs 6 and 7.

17 A L Goodhart & C J Hamson, “Undisclosed Principals in Contract” (1932) 4 Camb LJ 320 at 346; W A Seavey, “The Rationale of Agency” (1920) 29 Yale LJ 859 at 879; E J Weinrib, “The Undisclosed Principle of Undisclosed Principals” (1975) 21 McGill LJ 298 at 298–299.