

Unexpected Contracts versus Unexpected Remedies: The Conceptual Basis of the Undisclosed Principal Doctrine

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It is often said that the law should resist slavishly following commercial practice. The undisclosed principal doctrine is but one uncomfortable instance of its tendency not to do so. While the commercial imperative for allowing a principal to sue a third party who is ignorant of the principal's existence is well-recognised, the conceptual rationale for the doctrine has rarely been identified, let alone explored. This article examines the two possible conceptual bases upon which the principal sues or is sued under the undisclosed principal doctrine. The first is that there is an implied contract arising directly between the third party and the principal. The second is that the principal intervenes on a contract existing between the third party and the agent. This article argues that the latter approach should be preferred in order to bring the law more in line with commercial expectations, civil law practice and common sense.

I INTRODUCTION

In a standard agency relationship, the principal's right to sue is based on direct contractual privity between the principal and third party. The right is premised on the third party understanding that the agent he or she deals with is acting on behalf of a principal. Where the agency is undisclosed, this rationale cannot hold: the principal may sue the third party even though the third party is ignorant of the principal's existence. While the justice of allowing a stranger to enforce a contract against a party who believes he is dealing solely with the agent has been considered disputable,¹ there is no denying that the ability to sue on the contract is commercially convenient and sensitive to the realities of modern trade.

There are many commercial reasons why a principal may wish to deal through intermediaries in a manner that keeps her existence undisclosed. She

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¹ Peter Watts (ed) and FMB Reynolds *Bowstead and Reynolds on Agency* (19th ed, Sweet & Maxwell, London, 2010) at [8-071]. The intuitive aversion to such a possibility was reflected very early in the doctrine's development: see *Scrimshire v Alderton* (1743) 2 Str 1182, 93 ER 114 where the jury, despite Lee CJ's direction, twice found against an undisclosed principal who had asked a third party to account to him directly and subsequently pursued the third party for the contract price after the third party had nevertheless accounted to the agent.

may want to avoid the unattractive conditions or higher prices that would follow if third parties knew they were negotiating with a more powerful, or more desperate, market player.² Alternatively, an agent might conceal the fact that he acts on behalf of a principal to avoid a third party bypassing him to deal directly with the principal in future transactions.³ Provided the agent and third party fulfil their obligations under the contract in the contemplated way, there is little reason for an undisclosed principal to make her existence known. However, there are two main situations in which this arrangement is a potential issue and in which it is valuable to be clear as to who the true parties to the contract are. First, where considerations of party identity are material to the transaction; and secondly, where the agent goes bankrupt or is otherwise unable to perform the contract on the principal's behalf.⁴

Given that such hard cases do arise, it is perhaps surprising that few legal commentators have grappled with the basis upon which an undisclosed principal exercises rights against a third party in the first place. Does the undisclosed principal intervene on and enforce a contract of the agent against the third party? Or is the principal liable and entitled on an implied contract arising directly between him and the third party?

The tension is essentially between two organising theories: the first treats the contract as that of the agent; the second considers it that of the principal.⁵ In this article, these theories will be referred to as the intervention thesis and the direct contract thesis, respectively. The latter theory has received some modern academic support: Tan Cheng Han has argued that adopting it would bring the irregular doctrine more in line with the standard rules of agency.⁶ Still, much of the case law and theory offered to justify the undisclosed principal doctrine has failed to make this preliminary conceptual distinction. Consequently, neither organising theory has been predominantly applied over the other.⁷ Some commentators have even dismissed the question as academic and of little practical import.⁸

This article disagrees. It argues that the clarification and conceptual separation of these two theories is essential for a clear and consistent application of the undisclosed principal doctrine, particularly where an undisclosed principal's right to sue or be sued is challenged.

This article takes the position that an intervention thesis, which posits

2 Deborah A DeMott "Do You Have the Right to Remain Silent?: Duties of Disclosure in Business Transactions" (1994) 19 *Del J Corp L* 65 at 94.

3 However, the agent will be liable for her misrepresentation if she expressly represents to be acting only for herself and denies the principal's interest in the transaction: see *Kelly Asphalt Block Co v Barber Asphalt Paving Co* 105 NE 88 (NY Ct App 1914).

4 The undisclosed principal doctrine is traced back to the right of a principal to intervene in the bankruptcy of his factor: Watts, above n 1, at [8-071].

5 Watts, above n 1, at [8-070].

6 Tan Cheng Han "Undisclosed Principals and Contract" (2004) 120 *LQR* 480. For an historical example of this view, see William Draper Lewis "The Liability of the Undisclosed Principal in Contract" (1909) 9 *Colum L Rev* 116.

7 Kelly Quinn "Undisclosed Principals" in Kelly Quinn and Peter Watts "Contracting with Companies, Trusts, Partnerships and Nominees" (paper presented to NZ Law Society Seminar, Wellington, August 2010) 85 at 87.

8 Randy E Barnett "Squaring Undisclosed Agency Law with Contract Theory" (1987) 75 *Cal L Rev* 1969 at 1983.

the contract as that of the agent, best reflects the approach of case law and affords the most appropriate practical consequences. While this has been accepted as the better view by the leading Commonwealth agency law text,⁹ it has rarely received judicial recognition. This might explain why some current rules found in the case law are inconsistent with the intervention thesis.

The article will seek to establish why it is desirable to think of the contract as that of the agent and draw out some modifications that could be made to bring the law in line with this preferred view. It will begin by examining the dynamics of the undisclosed agency arrangement and its position against the standard case of disclosed agency. It will then briefly introduce some theories advanced in justification of the undisclosed principal doctrine and assess where they sit in relation to either underlying rationale. The article will then explore the substantive case for an intervention thesis, and the changes which its unqualified acceptance would entail, in relation to three features of undisclosed agency: first, situations where the undisclosed principal is precluded from exercising rights under, or being sued on, the contract; secondly, the doctrine of election; and thirdly, the defences (focusing on settlement and set-off) that each party may employ. The arguments raised by Tan in favour of the contract being that of the principal will be addressed as they arise throughout the examination of these three features. Finally, the civil law practice of indirect representation will be discussed in illustration of the international consistency that only an intervention thesis would support.

II THE ANOMALY OF THE UNDISCLOSED PRINCIPAL DOCTRINE

It has been alleged that the undisclosed principal doctrine “violates some of the basic tenets of the laws of agency and contract”.¹⁰ It is worthwhile to examine briefly why.

The Dynamics of the Relationship

1 The Internal Aspect

The paradigmatic case of undisclosed agency falls squarely within the working definition of standard agency, as accepted in *Bowstead and Reynolds on Agency*.¹¹ Namely, it requires a relationship between two parties: one (the principal) consents to the other affecting her legal relations with third parties, and the other (the agent) consents to doing so. From this “limited access”

⁹ Watts, above n 1, at [8-110] and [9-012].

¹⁰ Martin Schiff “The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract” (1983) 88 Com LJ 229 at 229.

¹¹ Watts, above n 1, at [1-001].

arrangement arise fiduciary duties owed by the agent to the principal.¹² On this internal definition, there is nothing irregular about undisclosed agency that makes its acceptance anomalous. As with disclosed agency, the relationship of principal and agent can only be established by a manifestation of mutual consent of principal and agent.¹³ The difficulty arises in considering the consequences to be derived from this relation: to what extent are the acts which the agent performs with the principal's authority and on the principal's behalf to be treated as acts of the principal? The quandary is brought out by examining the external aspect of the tripartite relationship.

2 The External Aspect

The distinguishing feature of undisclosed agency is that the third party does not know of the principal's existence.¹⁴ The third party must believe that the agent is dealing with him or her on the agent's own behalf. A direct implication is that the agent's authority must always be actual (express or implied) and cannot be apparent: it cannot come from a representation made by the principal to the third party as to the agent's power to affect the principal's legal relations.¹⁵ Clearly, the third party cannot profess to rely on representations made by a person of whom he is ignorant.

The most significant consequence of the undisclosed principal doctrine is that the agent does not drop out of the picture once the transaction is complete.¹⁶ The agent acquires personal rights and liabilities, and the third party may elect to hold either the agent or the principal liable on the contract. Similarly, subject to any adverse consequences for the third party, either the agent or the principal may enforce the contract against the third party.¹⁷

For this reason, it is important that true undisclosed agency is distinguished from situations where the principal is simply unnamed. The case law has often been careless in making this distinction.¹⁸ It is crucial, however, as the impact on the respective liabilities of the principal and agent is significant. If the principal is undisclosed, a third party may elect to pursue their contractual rights against either the principal or the agent. If the third party is aware of the principal's existence but neglects to determine his identity, the case is equivalent to that of standard agency: only the principal is liable and entitled on the contract. In unidentified principal transactions, the

12 The relationship between the principal and agent is thus classified as "fiduciary". Still, it is perhaps more correct to distinguish between the fiduciary obligations (arising as a response to the risk of opportunism inherent in the limited access relation and existing concurrently with duties owed in contract and tort) and the relationship itself, which is simply one of agency: see Robert Flannigan "The Boundaries of Fiduciary Accountability" (2004) 83 Can Bar Rev 35.

13 *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 (HL) at 1137 per Lord Pearson.

14 Watts, above n 1, at [1-035].

15 An exception may be cases where a general agent has usual or necessary authority but acts outside it or contrary to his instructions: see *Watteau v Fenwick* [1893] 1 QB 346 (QB), where the principal's liability was found on the basis of usual authority although the principal was undisclosed and the agent's purchase unauthorised.

16 Although, as Tan points out, this is not exceptional in the law of agency: Tan, above n 6, at 491.

17 *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 (PC) at 207.

18 See, for example, *Irvine v Watson* (1880) 5 QBD 414; and *Davison v Donaldson* (1882) 9 QBD 623.

third party bears the risk of a principal's insolvency, whereas in undisclosed principal transactions, the third party benefits from something of a windfall in being able to pursue either principal or agent. While the correct classification may often be disputed on the facts, there is no doubt that the cases falling under the rules of undisclosed agency would be narrowed significantly were the correct test for distinguishing the two more robustly applied.¹⁹

Tan argues that the agent's liability is unremarkable and does not make the contract any less the principal's. He observes, correctly, that it is entirely consistent with standard agency principles that an agent in a disclosed agency transaction may undertake personal liability to perform the principal's contract.²⁰ Whether they have done so will fall on the intention of the parties, as deduced from the nature and terms of the contract, the surrounding circumstances and any binding custom.²¹ A court's interpretation of the contract may demonstrate that the agent is solely liable on his own contract,²² jointly and severally liable on the principal's contract, alternatively liable with the principal, or liable on a collateral contract.²³ Unfortunately, most cases involving disclosed agents have not engaged with the nature of the agent's liability beyond holding that the agent is or is not liable.²⁴

While significantly minimising the anomalous consequences of the undisclosed principal doctrine against the rules of agency law, Tan's point does not carry his argument for the direct contract thesis as far as he would contend. As mentioned above, courts may interpret a contract of disclosed agency so the agent is the sole party liable. Simply observing that an agent may be personally liable depending on the intention of the parties in each case does not tell us much about what happens in the paradigmatic undisclosed agency transaction. It does not make the contract any less that of the agent than that of the principal.

Privity of Contract and Certainty of Parties

One of the foundational principles of contract law is that each party must objectively manifest an intention to enter into contractual relations with the other.²⁵ Such a meeting of minds can exist only between the third party and the agent, and still only objectively, for the agent must at all times intend to act on behalf of the principal.

That the agent who fails to disclose his true position should be

19 *Siu Yin Kwan* is perhaps the most influential case that arguably should have been classified as one of unnamed agency: *Siu Yin Kwan*, above n 17, at 206–207.

20 Tan, above n 6, at 491.

21 Watts, above n 1, at [9-005], citing as authority *Maritime Stores Ltd v HP Marshall & Co Ltd* [1963] 1 Lloyd's Rep 602 (QB) at 608.

22 Watts, above n 1, at [9-006] notes: "The majority of the cases seem to assume this as the main interpretation of a situation involving the agent's personal liability".

23 At [9-006].

24 At [9-006].

25 Jeremy Finn "Historical introduction" in John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) 1 at [1.5].

personally liable as a party under the contract is consistent with privity of contract. Under this doctrine, only the parties to the contractual promise can sue or be sued on it.²⁶ As Stephen Todd remarks, subject to misrepresentation on the part of the agent, “[t]he existence of an enforceable contract between the agent and the third party is scarcely deniable”.²⁷

Undisclosed agency arrangements require that the agent have the authority to create privity of contract as between the principal and third party, without disclosing to third parties that he is doing so.²⁸ The undisclosed principal doctrine does not answer the question of whether privity immediately exists between the principal and third party because rights and liabilities between them will arise by operation of law, without, and sometimes against, either’s intentions.²⁹

Allowing an undisclosed principal to sue on a contract that was entered into in the agent’s name means that privity of contract and certainty of parties cede to commercial convenience.³⁰ Still, most commentators point out that the mental assent or *ad idem* theory of contract law reached prominence some time after the undisclosed principal doctrine had been widely accepted.³¹ This makes attempts to accommodate the doctrine vis-à-vis privity of contract somewhat redundant: internal tensions only arose once the underlying justification of contractual liability changed and courts themselves became uncomfortable with the doctrine.

If one accepts the intervention thesis, there is no privity of contract between the principal and the third party at least until the principal’s existence is made known. This is consistent with the fact that the principal may, and will often wish to, remain undisclosed throughout the performance of the contract and any potential actions for its enforcement. As Kelly Quinn points out, the fact that such situations are common makes it hard to speak meaningfully of the contract being that of the undisclosed principal.³²

III LEGAL JUSTIFICATIONS

Lord Blackburn observed as early as 1872 that any doubts about the correctness of the undisclosed principal doctrine were too late.³³ Conceding this unquestionable entrenchment, numerous theories offering a legal

26 Stephen Todd “Privity of contract” in John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) 563 at [15.1].

27 Stephen Todd “Privity of contract under the law of agency” in John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) 621 at [16.3.2].

28 Watts, above n 1, at [8-071].

29 Schiff, above n 10, at 231.

30 Danny Busch, echoing the view of many commentators, believes the undisclosed principal doctrine is “best explained simply as an exception to [privity of contract], which is justified on grounds of commercial convenience”: D Busch “Indirect Representation and the Lando Principles” (1999) 7 ERPL 319 at 331.

31 See Tan, above n 6, at 481.

32 Quinn, above n 7, at 95.

33 *Armstrong v Stokes* (1872) 7 LR QBD 598 at 603–604.

justification for the perceived anomaly have been advanced. While such attempts to cure the discomfort have been condemned as “a study in futility”,³⁴ it is nevertheless worthwhile to examine briefly a limited selection of theories in order to draw out the underpinning rationale for the principal’s liability. The three justifications that will be considered are that of assignment, trust and consideration. As will be seen, both assignment and trust, while advanced as legal justifications and engaged with by the courts and commentators on that basis, are in fact better thought of as analogous modes of structuring similar transactions.³⁵

Assignment

It has been suggested, most famously by Goodhart and Hamson, that the undisclosed principal doctrine can be considered as “a primitive and highly restricted form of assignment”.³⁶ This view is consistent with an intervention thesis, positing a contract with the agent that is susceptible to assignment to a principal. Clearly, if the principal was an immediate party to the contract there would be no right of assignment. Goodhart and Hamson argue that an undisclosed principal may only sue a third party where the benefits of the contract can be assigned and the burden performed vicariously.³⁷ Where the rights of the agent are personal, such as the painting of a portrait, the undisclosed principal may not sue because assignment would be excluded.³⁸

While this justification — or more precisely the analogy — is appealing, its utility is limited. From a theoretical perspective, it cannot explain why the principal takes burdens and not just rights under the contract or why the agent’s rights are not extinguished upon the principal’s intervention. From a practical perspective, Lord Lloyd in *Siu Yin Kwan v Eastern Insurance Co Ltd* expressed the view that a contract that provides that its rights and obligations are unassignable will preclude assignment, but will not necessarily preclude an undisclosed principal from exercising rights under the contract.³⁹

While assignment fails as a theoretical justification, it is nevertheless a useful analogy to bear in mind, particularly when considering the defences that are available to the third party upon discovering the principal’s existence.⁴⁰

Trust

In a 1909 article, James Barr Ames argued that the undisclosed principal doctrine can be explained on the basis of a trust: the agent has legal title

34 Michael L Richmond “Scraping Some Moss from the Old Oaken Doctrine: Election Between Undisclosed Principals and Agents and Discovery of Net Worth” (1983) 66 Marq L Rev 745 at 751.

35 I am grateful to Professor Peter Watts for raising this point.

36 AL Goodhart and CJ Hamson “Undisclosed Principals in Contract” (1932) 4 CLJ 320 at 352.

37 At 356.

38 At 340.

39 *Siu Yin Kwan*, above n 17, at 210.

40 See below: Defences, Rights of Set-off and Settlement with Agent.

as trustee but the undisclosed principal retains equitable ownership.⁴¹ The theory has some appeal, not least because the agent is, like a trustee, under fiduciary obligations of loyalty to the principal. As Higgins observes, the agent of an undisclosed principal “can take action against a third party to recover a benefit due to his principal in equity in the same way that a trustee can sue to recover benefits due to his *cestui que trust*”.⁴²

Entertaining such an analysis must entail thinking of the contract as being legally the agent’s. Speaking of the undisclosed principal as simultaneously the beneficiary and trustee would be superfluous and probably impossible: a trust requires some separation between equitable and legal title.⁴³

The trust reasoning was adopted in the context of an undisclosed principal transaction in the New Zealand High Court (then the Supreme Court) decision of *A Levy Ltd v Tracey*.⁴⁴ There, an agent who had acquired a tenancy in his own name but on behalf of an undisclosed principal was held to hold it on trust for that principal. The result was that the agent was precluded from claiming the interest for himself, despite being the legal tenant. The tenancy, as well as other elements related to the running of the business, was consistent with a high level of trust reposed in the agent, something which pointed strongly to him holding the tenancy in a fiduciary capacity.⁴⁵ Smith J thus stated the law:⁴⁶

It is clear that, where an agent purchases land in his own name or on his own behalf, and the land is transferred to him, he becomes a trustee of the land for the principal[.]

It is submitted that the analysis employed in *Tracey* should be limited to situations where the agent and the principal agree that the agent will hold money or property on behalf of the principal, in which case “the agent is a trustee in respect of that money or property”.⁴⁷

Because parties are largely free to set the terms of their agency relationship, it would be possible for the agent and principal to agree to an agency and an express trust arising simultaneously.⁴⁸ Depending on the particular facts, the categorisation of the relationship as being of this dual nature may have significant ramifications.⁴⁹ Whether such an agreement would make a practical difference depends on whether one accepts that

41 James Barr Ames “Undisclosed Principal — His Rights and Liabilities” (1909) 18 Yale LJ 443 at 444.

42 PFP Higgins “The Equity of the Undisclosed Principal” (1965) 28 MLR 167 at 170.

43 Andrew Butler “The Trust Concept, Classification and Interpretation” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [3.1.2].

44 *A Levy Ltd v Tracey* [1948] NZLR 317 (SC).

45 At 321.

46 At 322.

47 Butler, above n 43, at [3.1.6].

48 At [3.1.6].

49 See [3.1.6(3)] for an illustration of where the correct classification as between an agency or a trust (in that instance considered as alternatives) was instrumental.

a trustee's duties are more onerous than those imposed on an agent — a fascinating debate outside the scope of this article.

The fact that vesting of property is unnecessary to the agency relationship may explain why the dominant approach of the case law is contrary to that of *Tracey*. Speaking of the nature of the agent's rights in an undisclosed principal transaction in *Allen v O'Hearn*, Lord Atkin observed:⁵⁰

The supposed agent's rights would be to recover the damage suffered by him on the footing that he had been principal. He has no claim against the other party in the capacity of trustee: and though there have been countless actions in which an agent for undisclosed principals has sued in his own name, there appears to be no precedent for such an agent suing as trustee for his principals.

This position was unequivocally affirmed by Ungood-Thomas J in *Pople v Evans*.⁵¹ His Lordship held that there was no legal substance in the argument that there was a trust relationship between an undisclosed principal and an agent vis-à-vis a third party.⁵² The agent was not a trustee of rights under the contract for the principal and his claim against the third party was not in the capacity of trustee.⁵³ As such, there was no foundation for the third party's plea of *res judicata*: the previously undisclosed principal was not prevented from pursuing a fresh action for specific performance of a contract for the sale of land against the third party, notwithstanding an order for dismissal of the same action pursued, but later abandoned, by the bankrupt agent.

The duties to which a trustee and an agent are subject are similar in a number of respects, stemming largely from the fiduciary roles they occupy. In an undisclosed agency transaction, the similarity is particularly striking because a trustee, like the undisclosed principal's agent, always contracts in a personal capacity.⁵⁴ Still, there are a number of important differences that demand that the two not be confused.⁵⁵ Such differences lend weight to the main line of authority: that agents are not trustees.⁵⁶ Three main differences may be identified. First, as already mentioned, it is not necessary that property vest in an agent, whereas a trustee receives legal ownership of specific property. Secondly, as Tan rightly observes, the beneficiary of a trust, unlike an undisclosed principal, is not contractually liable to a party who contracts with the trustee.⁵⁷ Similarly, the control which an intervening principal exercises goes beyond that which a trust beneficiary could

⁵⁰ *Allen v O'Hearn* [1937] AC 213 (PC) at 218.

⁵¹ *Pople v Evans* [1969] 2 Ch 255 (Ch).

⁵² At 264.

⁵³ At 263.

⁵⁴ *NZHB Holdings Ltd v Bartells* (2005) 5 NZCPR 506 (HC) at [34] per Baragwanath J.

⁵⁵ Butler, above n 43, at [3.1.6].

⁵⁶ See *Allen*, above n 50; and *Pople*, above n 51.

⁵⁷ Tan, above n 6, at 499.

command:⁵⁸ a trustee, unlike an agent, is not a delegate of her beneficiaries.⁵⁹ Thirdly, while “[i]t is not possible to say that all agents owe the same duties to their principals”,⁶⁰ with such duties being largely negotiated in contract, in general terms imposing trustee obligations on an agent would put him under a more onerous burden than that role has traditionally borne.⁶¹

As with assignment, the trust justification turns out to be little more than a useful analogy. It is unlikely that equity would step in to supplement the undisclosed principal doctrine. There is little need for it to do so. The undisclosed principal doctrine is perfectly capable of standing solely (and anomalously) in the common law.⁶² Still, there is no doubt that equity does play a role, particularly in the absence of an express contract, in ensuring the correct functioning of the internal relationship: the benefit of the agent’s contracts, and any damages recovered in suing on them, must ultimately flow to the principal by virtue of the agent’s fiduciary obligations.⁶³

Consideration

Müller-Freienfels has argued that the undisclosed principal doctrine is explained and justified by the principle of consideration, necessary for a valid simple contract in English law.⁶⁴ Consideration is “the essential link in the relationship between the undisclosed principal and the third party”.⁶⁵ The rationale is consistent with a contract existing immediately between the principal and the third party: the principal provided the *quid pro quo*, so it follows that they are to take the immediate benefit of the bargain and any rights and obligations arising therefrom.

The fact that undisclosed agency does not apply to deeds (where consideration is not required) is consistent with this explanation. Still, the theory cannot account for a key feature of the undisclosed principal doctrine: unlike in standard agency where the contract is clearly between the principal and the third party, in undisclosed agency the agent does not drop out of the picture but can still sue and be sued on the contract. Even though consideration flows from and to the principal, both the agent and the principal possess

58 At 499.

59 Butler, above n 43, at [3.1.6].

60 *Kelly v Cooper* [1993] AC 205 (PC) at 214 (a case involving the duties owed by a real estate agent).

61 Reasoning from first principles, the obligations on, and remedies against, a trustee are wider and thus more onerous because the trustee holds property belonging in equity to the beneficiary: see generally Flannigan, above n 12. Of course, as already mentioned, an agent holding property for the principal, being a custodian fiduciary, will be held to the strenuous obligations of a trustee.

62 But see Higgins, above n 42, who argues that the undisclosed principal doctrine can only be understood through equity.

63 *Allen v O’Hearn*, above n 50, at 218. See also Watts, above n 1, at [8-071]: “Nevertheless, some aspects of the relation between principal and agent are undoubtedly to be accounted for ... on the basis of trust, or at least of analogous fiduciary duties.”

64 W Müller-Freienfels “The Undisclosed Principal” (1953) 16 MLR 299.

65 At 306.

independent rights against the third party, although the agent's rights are subordinate to those of the principal.⁶⁶

Thus one cannot maintain, as Müller-Freienfels does, that in a contract of undisclosed agency "the agent is the stranger to the contract, a mere conduit".⁶⁷ Nevertheless, Müller-Freienfels's identification of the crucial role of consideration is perceptive. As will be argued later,⁶⁸ it should be understood as one of the justifying bases for the principal's intervention.

IV THE CASE FOR AN INTERVENTION THESIS

The preceding discussion has contextualised the conceptual issue posed by the undisclosed principal doctrine. This article now turns to assess both organising theories as they relate to three of the distinguishing features of the undisclosed principal doctrine.

Precluding Intervention

The starting position, applied by the English Court of Appeal in *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd*⁶⁹ and affirmed by the Privy Council in *Siu Yin Kwan v Eastern Insurance Co Ltd*,⁷⁰ is that in ordinary commercial contracts one can presume the willingness of the third party to treat as a party to a contract anyone on whose behalf the agent may have been authorised to act. However, as Lord Lloyd set out in *Siu Yin Kwan*, the terms of the contract or the surrounding circumstances may exclude an undisclosed principal's right to sue or be sued and establish the agent as the true and only principal.⁷¹

This situation most commonly arises when a third party wishes to deny liability to the principal, although situations in which the principal disavows responsibility have arisen.⁷² Exactly when the principal is precluded from interfering is perhaps the most difficult question in practice and has usually been the central issue in undisclosed principal cases. However, the recognition of this limitation lends strong weight to the intervention thesis, under which the principal has no immediate and direct contractual relationship with the third party. The agent's contract is *res inter alios acta*.⁷³ In so far as the implied contract thesis requires that an undisclosed principal is always and immediately liable and entitled, it can only explain such situations on the

66 *Pople v Evans*, above n 51, at 261–262; and Todd, above n 27, at [16.3.2].

67 Müller-Freienfels, above n 64, at 306.

68 See below: Why Should the Principal Be Allowed to Intervene?

69 *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 (CA) at 555 per Lord Diplock.

70 *Siu Yin Kwan*, above n 17, at 208–209 per Lord Lloyd.

71 At 207. See also *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL) at 516.

72 See, for example, *Diamond Stud Ltd v New Zealand Bloodstock Finance Ltd* [2010] NZCA 423.

73 A thing done between others. W Müller-Freienfels "Comparative Aspects of Undisclosed Agency" (1955) 18 MLR 33 at 33.

basis that no agency relationship existed — a significantly artificial analysis.

The question to be asked is: was the third party “willing to treat as a party to the contract anyone on whose behalf [the agents] were in fact authorised to contract”⁷⁴ This test might suggest a contract to which the undisclosed principal is an immediate party. Indeed, this very conclusion is drawn from the statement by Tan.⁷⁵ Still, as Quinn rightly observes, a *willingness to treat* as a party is distinguishable from a willingness to contract with that party *simpliciter*.⁷⁶ In the absence of vitiating circumstances, a principal is *treated*, by operation of law, as if they were a party to the contract, “but that still falls short of saying that T is actually contracting with P”.⁷⁷ It is worthwhile to mention some circumstances which may rebut this presumption.

1 Intervention Precluded by Construction of Contract

Whether the substitution of one party for an undisclosed principal is permitted is a question of contractual construction.⁷⁸ The New Zealand Court of Appeal recently held that clear words are needed to exclude the undisclosed principal’s usual liability arising at common law.⁷⁹ The terms of the contract may expressly or implicitly preclude intervention,⁸⁰ although simply providing that a contract should be unassignable will not be sufficient.⁸¹

Case law establishes that a term of the contract describing the agent as “owner”⁸² or “proprietor”⁸³ will impliedly exclude intervention. Conversely, the words “tenant”,⁸⁴ “charterer”,⁸⁵ “landlord”⁸⁶ or “employer”⁸⁷ have not given rise to such an inference.

The principles enumerated by the Privy Council in *Siu Yin Kwan* also make reference to the possibility of personal contracts that preclude intervention. Their Lordships observed that in a contract to paint a portrait, for example, the principal’s intervention “would be a breach of the very contract in which he seeks to intervene”.⁸⁸ This statement only makes sense if the contract is that of the agent: a principal exercising his rights under a contract to which he is an immediate party could not amount to a breach.

74 *Teheran-Europe Co Ltd*, above n 69, at 556.

75 Tan, above n 6, at 509.

76 Quinn, above n 7, at 91. Tan also recognises this “qualitative difference” but dismisses it with elaboration: Tan, above n 6, at 502.

77 Quinn, above n 7, at 91.

78 See *Davis v Capel* [1959] NZLR 825 (SC).

79 *Diamond Stud Ltd v New Zealand Bloodstock Finance Ltd*, above n 72, at [22].

80 At [22].

81 *Siu Yin Kwan*, above n 17, at 210.

82 *Humble v Hunter* (1848) 12 QB 310, 116 ER 885 (QB); and *Murphy v Rae* [1967] NZLR 103 (SC).

83 *Formby Brothers v Formby* (1910) 102 LT 116 (CA).

84 *Danziger v Thompson* [1914] 1 KB 654 (KB).

85 *Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] AC 203 (HL).

86 *Epps v Rothnie* [1945] 1 KB 562 (CA).

87 *Siu Yin Kwan*, above n 17, at 208–209.

88 At 210.

2 *Intervention Precluded by Principal's or Agent's Knowledge of the Third Party's Unwillingness*

Usually, and particularly in commercial transactions, the identity of a party is a matter of description not affecting the validity of the contract.⁸⁹ Still, it seems that undisclosed agency will be invalid where the principal uses an agent to enter into a contract which he knows the third party would refuse if he knew of the principal's existence or identity. In *Said v Butt*, a theatre critic employed an undisclosed agent to purchase tickets to an opening night performance after the proprietors had expressly refused to sell him a ticket on two occasions.⁹⁰ On the night, he was refused entry. The plaintiff sued Butt, the theatre manager, for inducing a breach of contract. McCardie J held that the identity of the contracting party was a material element in the formation of the contract: the theatre proprietors reserved the right to sell opening night tickets to selected persons,⁹¹ and the failure to disclose the fact that the ticket was bought for the plaintiff prevented its sale from forming the contract alleged.⁹²

The Court's consideration of whether Said had established a valid contract between himself and the theatre upon which he could have sued⁹³ is consistent with an acceptance of the possibility that a direct contract existed. As Quinn notes, however, "the truth of the proposition appears to have been assumed rather than analysed".⁹⁴ The fact that the contract was said to be vitiated due to mistake is further indicative of the contract being thought to be that of the principal. The problem with such an analysis is that it fails to acknowledge that there must exist a valid contract between the agent and third party that would have been breached had the agent himself been refused entry.

While the contract in this case did not fit into the category of truly personal contracts that are incapable of being vicariously performed, one feels that the ultimate conclusion of the case — that the manager was entitled to refuse entry — is sound. It is therefore worth noting that the same result could have been reached more efficiently had the intervention thesis been adopted. Said's intervention could have been precluded by demonstrating that an implied term of the oral contract excluded Said and established the agent as the true and only principal,⁹⁵ or, alternatively, that such intervention would be detrimental to the theatre.⁹⁶

On the intervention thesis, mistake as to party identity would be an

89 See *Fawcett v Star Car Sales Ltd* [1960] NZLR 406 (CA).

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

91 At 501.

92 At 503.

93 At 502–503.

94 Quinn, above n 7, at 89.

95 This would require evidence that the theatre manager had communicated to the agent that he would not sell a ticket to the principal and that the theatre reserved the right to sell opening night tickets to select persons (making it non-assignable).

96 This is based on the principle that the principal's intervention cannot adversely affect the third party: Watts, above n 1, at [8-099]. Appropriate evidence might have included the negative publicity that Said's presence would elicit or the significant damage that the theatre would have suffered were Said to publish a gratuitously scathing review.

invalid defence: the third party contracts with the agent, who is indeed the person with whom they intended to contract.⁹⁷ Cases where mistake as to identity justifies rescission of the contract are already rare. Adopting an intervention thesis would ensure that third parties could never plead mistake as a means of escaping an otherwise valid contract.

The high water mark for allowing intervention is perhaps set by *Dyster v Randall*.⁹⁸ In that case it was held that, because the contract for sale of land was assignable, an undisclosed principal was entitled to specific performance as purchaser, despite knowing that the third party vendor was unwilling to sell the land to him. Deborah DeMott agrees with this approach, pointing out that it will be hard for a property vendor to prove that they would not have sold or only settled for a higher price had they known with whom they were truly dealing.⁹⁹ Even if they could sell for a higher price, it would seem their position is no better than that of a vendor who regrets, but is unable to rescind, a contract on the basis of their ignorance of the property's resale potential.¹⁰⁰

DeMott's concern over an easy out from an unfavourable contract is justified. Indeed, it is reflected in the law's starting presumption of willingness to accept anyone as a party. But the same risk does not apply in situations where the third party has made her unwillingness known. It is therefore respectfully suggested that the Court's flexibility in *Dyster* erodes freedom of contract a measure too far. A person should not be able to force an unwilling party to deal with him through the use of an undisclosed agent.¹⁰¹

In sum, the advantage of adopting an intervention thesis here is twofold. First, instances where intervention is precluded could be logically accounted for without having to deny the existence of an agency relationship outright. Secondly, freedom of contract could be preserved as a principal's suit on the agent's contract could be admitted less hastily. The principal is a third party whom the law *allows* to intervene, rather than a party who has existing rights under the contract. Consequently, the justice of such intervention must be demonstrated if challenged.

The reverse must also apply. As Danny Busch points out, if the third party is unwilling to deal with the undisclosed principal and the principal is aware of this, the third party should not be entitled to change his mind and sue the principal upon discovering his existence: "he should take the full consequences of this unwillingness".¹⁰²

3 Why Should the Principal Be Allowed to Intervene?

In support of the contract being directly that of the principal, Tan raises what he considers to be an inconsistency in the intervention thesis: outside the

97 Busch, above n 30, at 336–337.

98 *Dyster v Randall* [1926] 1 Ch 932 (Ch).

99 DeMott, above n 2, at 94.

100 At 94–95.

101 Busch, above n 30, at 337.

102 At 337.

undisclosed principal doctrine, the law does not allow a stranger to sue or be sued on a contract even when it would clearly be commercially convenient to do so.¹⁰³ For example, a beneficiary cannot intervene to enforce a contract entered into by trustees on the beneficiary's behalf. Subject to modification by statute, the law does not allow a third party to sue on a contract made by another. If one accepts that the contract is that of the agent, on what basis does the law permit the principal's intervention?

The answer to Tan's concern lies in the agent's fiduciary duties to the principal¹⁰⁴ and the requirement of consideration, which flows between the principal and the third party through the agent. It is because of the necessary mutual consent between agent and principal that the agent may alter the principal's legal relations. And it is because the principal provides the *quid pro quo* for those relations that the law condones her subsequent intervention, without requiring that privity immediately exist between the principal and the third party. Further, the element of control exercised by the principal over the agent, while not always classified as an essential element of the agency relationship,¹⁰⁵ is present to a much stronger degree than in other relationships in which a party may act on behalf of another (for example, the control that a beneficiary can exercise over a trustee).

One might contend that an acceptance of the intervention thesis renders speaking of the principal as exercising *his* rights under the contract a fiction. In *Welsh Development Agency v Export Finance Co Ltd*,¹⁰⁶ Dillon LJ — who expressly adopted the view that the contract is that of the agent¹⁰⁷ — drew out this subtle semantic distinction when he noted that “Exfinco's right was to intervene and enforce against the overseas buyer the very contract which Parrot had made with the buyer”.¹⁰⁸

Tan argues that implicit in Dillon LJ's judgment is the position that allowing the principal's intervention is not the same as allowing him to exercise substantive rights under the contract.¹⁰⁹ But that need not necessarily be so. Once the principal exercises a right to intervene, her position is superior to that of the agent and so substantive rights to enforce the contract against the third party must be recognised as vesting in the principal. Were they not, one could not make sense of the fact that the principal's rights upon intervention supersede that of the agent,¹¹⁰ such that the third party will have a defence

103 Tan, above n 6, at 496.

104 See Higgins, above n 42, where a similar point is made, albeit drawing different conclusions.

105 Watts, above n 1, at [1-017].

106 *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148 (EWCA).

107 At 173.

108 At 173.

109 Tan, above n 6, at 495.

110 Watts, above n 1, at [9-012]. See also *People v Evans*, above n 51, at 261 where Ungood-Thomas J goes as far as saying that “[t]he agent's rights against the third party are lost by the intervention of the principal”. It is suggested that the dictum must be read narrowly to refer to instances where the principal enforces the contract or settles with the third party — the agent will not lose his rights against the third party when the principal simply reveals her existence. This is consistent with the position that parol evidence is only admissible to introduce a new party (the principal); it is not admissible to discharge an apparent party (the agent): see Todd, above n 27, at [16.3.2].

against the agent's suit by proving "that the principal has intervened and claimed payment or damages, or that the agent's authority to sue is otherwise terminated".¹¹¹

Election

Once the existence of the undisclosed principal is discovered, the third party may continue to hold the agent liable on the contract or sue the principal.¹¹² The third party's ability to recover the price directly from the principal is usually posited as an unexpected *remedy* for the third party¹¹³ and its enforceability justified by the unique role played by the apparent principal. As Lord Blackburn famously elucidated in *Armstrong v Stokes*:¹¹⁴

[I]f on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend.

1 An Implied Contract?

Because the agent does not drop out of the picture, one could theoretically conceive of the principal's liability as based on an implied contract separate to the one under which an agent is liable. On this account, when a third party enters into a contract with the agent, two contracts arise simultaneously: one with the agent and another with the undisclosed principal.

Tan believes that positing the principal's liability as arising under an implied contract — distinct from that which arises expressly between the third party and the agent — is the most appropriate rationale for reconciling the undisclosed principal doctrine with privity of contract. Seizing upon Diplock LJ's dicta in *Teheran-Europe* as to the third party's willingness to treat as a party anyone on whose behalf the agent may have been authorised to contract, Tan argues that:¹¹⁵

... although the fact that the agent is acting for a principal is unknown to the third party, the latter agrees implicitly that he is contracting with the agent *and* the agent's principal, should there be one.

With the practice of not disclosing the existence of a principal being common in commercial transactions, one can agree with Tan's observation that the "real possibility of [an undisclosed] principal can be said to be within the

111 Watts, above n 1, at [9-012].

112 *LC Fowler & Sons Ltd v Stephens College Board of Governors* [1991] 3 NZLR 304 (HC) at 308.

113 Quinn, above n 7, at 87.

114 *Armstrong v Stokes*, above n 33, at 604.

115 Tan, above n 6, at 502 (emphasis in original).

third party's contemplation".¹¹⁶ Further, the view is consistent with the fact that the undisclosed principal doctrine applies only in instances of actual authority and ratification is not permitted¹¹⁷ — if the agent has no authority at the time of contracting, no implied contract can arise.¹¹⁸

2 *The Requirement of Election*

It does not follow from such apparent analytical harmony, however, that an implied contract should necessarily arise. Respectfully, what Tan omits to consider is that the application of the doctrine of election to undisclosed agency disposes of the possibility of a distinct implied contract. While the operation of the doctrine of election to undisclosed agency is controversial and has been rejected by an increasing number of American states,¹¹⁹ in England and New Zealand it remains very much part of the law. Under it, the third party who becomes aware of the principal's existence must make a choice to sue either the principal or the agent and can obtain judgment against one alone, the other being thereby absolved of liability, notwithstanding the absence of actual satisfaction.¹²⁰ In *Kendall v Hamilton*, Lord Cairns LC explained the natural justice rationale for allowing such an election in the context of undisclosed agency before observing:¹²¹

[I]t would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so.

His Lordship argued that if actions could be brought and judgments recovered against the agent and afterwards against the principal, one would have two judgments in existence for the same debt or cause of action, potentially for a different quantum and without any way of determining whether the satisfaction of one was the satisfaction of both.¹²² It is possible that this argument overstates the concern. Indeed, liability under a contract could be, and often is, recognised as joint and several, such that “a release or other satisfaction from either the principal or agent will discharge the other to the extent of the payment made”.¹²³ In the absence of detrimental reliance, it is hard to see any legally justified basis for giving the third party an unexpected remedy (in the form of an extra debtor) while simultaneously curtailing its

116 At 504.

117 As established unequivocally, if hastily, in *Keighley Maxsted & Co v Durant* [1901] AC 240 (HL).

118 Tan, above n 6, at 505, where Tan justifies the preclusion of ratification: “The relationship between the third party and the agent has crystallised; to allow ratification would be to effect a modification of the existing contractual relationship which will require fresh consideration.”

119 Richmond, above n 34, at 769.

120 Watts, above n 1, at [8-114].

121 *Kendall v Hamilton* (1879) 4 App Cas 504 (HL) at 514.

122 At 514–515.

123 Richmond, above n 34, at 770.

practical benefit by requiring binding, and uninformed, election.¹²⁴

As the law currently stands, however, the requirement of election posits the respective liabilities of the agent and principal as inconsistent and choice between rights as necessary.¹²⁵ As such, it can only be consistent with there being one contract, on which the principal and agent are alternatively, rather than jointly and severally, liable. Thomas J left no doubt on this point in the case of *LC Fowler & Sons v St Stephens College Board of Governors* when he observed that “[o]nly one person can be liable on the one obligation under the one contract.”¹²⁶ If there is only one contract, speaking of the principal as being the sole person liable under it while he remains undisclosed throughout its performance and enforcement is clearly nonsensical. Such an implication is avoidable if one adopts the view that the first party to the contract is the agent.

Defences, Rights of Set-off and Settlement with Agent

1 Defences and Rights of Set-off

Where the third party believes herself to be contracting solely with an agent, she may raise any defences (including set-offs) against the principal that accrued against the agent before she had reasonable notice of the principal’s existence.¹²⁷ Martin B succinctly summarised the law:¹²⁸

[W]here a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal.

The law allows this exception, which favours the third party in undisclosed principal transactions, “on the ground that the principal intervenes on the agent’s contract and must do so, like an assignee, subject to equities”.¹²⁹ To square this unexceptionable rule with his position that a third party must be treated to be impliedly contracting with the principal, Tan is forced to conclude that it exists “because it causes no injustice to the third party and is a pragmatic approach that balances the rights of all the parties”.¹³⁰ While

124 Information about the solvency of each defendant (their respective ability to pay on judgment) is crucial to making an informed decision, but it is usually not available when an election must be made: *Richmond*, above n 34, at 772–773.

125 *Watts*, above n 1, at [8-115].

126 *LC Fowler & Sons Ltd*, above n 112, at 308.

127 *Watts*, above n 1, at [8-099].

128 *Isberg v Bowden* (1853) 8 Ex 852 at 859, 155 ER 1599 at 1602.

129 *Watts*, above n 1, at [8-110].

130 *Tan*, above n 6, at 508.

this is clearly true, it is an awkward concession for something that, on the intervention view, is a logical implication flowing from the contract being that of the agent. Obviously, no such defences may be claimed in disclosed agency transactions, where the third party knows they are dealing with an agent and ultimately contracting with a principal, whether or not they inquire as to the principal's identity.

The common law's concession goes further. It allows the third party all the defences against the principal (disclosed or undisclosed) that she would have had, had the principal himself made the contract.¹³¹ It follows that the third party may have the benefit of defences that they never expected to have. For this reason, Busch has referred to it as a "sweeping rule" unnecessary for the third party's protection.¹³² It can be contrasted with the European position under the Lando Principles, which allows a third party to set up only such defences against the principal as she would have had against the intermediary.¹³³ It is respectfully submitted that allowing such unexpected defences is consistent with an intervention account and does not amount to excessive protection. The possibility mirrors the consequences of assignment and is an important trade-off for the undisclosed principal's right to sue. Further, the protection applies on the other side of the coin: in defending an action by the third party, the principal can plead defences arising out of the transaction between agent and third party,¹³⁴ as well as any defences personal to himself, including set-off.¹³⁵

2 Settlement with Agent

Historically, there has been a degree of confusion over whether settlement with the agent will discharge the principal or third party from liability. There is a line of authority, notably accepted in the *Restatement of the Law of Agency (Third)*,¹³⁶ holding that an undisclosed principal who pays an agent, who then goes bankrupt or absconds before paying the third party, is still liable to suit by the third party.¹³⁷ Such analysis suggests a direct contract under which the principal is personally responsible to account to the third party.

The continued application of this line of cases to undisclosed principal transactions is doubted.¹³⁸ Even the *Restatement* observes that the rule's rationale is not highly compelling and many US states have taken a different

¹³¹ Watts, above n 1, at [8-108].

¹³² Busch, above n 30, at 333.

¹³³ At 332-333.

¹³⁴ Watts, above n 1, at [8-109].

¹³⁵ Although not defences personal to the agent: Watts, above n 1, at [8-098].

¹³⁶ American Law Institute *Restatement of the Law: Agency* (3rd ed, American Law Institute Publishers, St Paul (MN), 2006) § 6.07.

¹³⁷ *Heald v Kenworthy* (1855) 10 Ex 739, 156 ER 638; *Irvine v Watson*, above n 18; and *Chamberlain v Donovan* [1950] NZLR 850 (SC). See also Todd, above n 27, at [16.3.3].

¹³⁸ But see Tan, above n 6, at 496, who favours the *Irvine* line of authority.

view.¹³⁹ Again, much of the inconsistency is probably due to a failure to distinguish adequately between the distinct rules applicable to unnamed and undisclosed principals. The precedents usually cited for this rule¹⁴⁰ in fact involved unnamed principals and were thus correctly governed by the implications arising when the contract is that of the principal. In such cases, subject to any express guarantees given by the agent, it is irrefutably the principal's duty to ensure that the third party is actually paid. The rule's application to undisclosed agency, however, seems something of a sleight of hand.

The better line of authority, consistent with the underpinning rationale of the intervention thesis, is set by *Armstrong v Stokes*.¹⁴¹ In that case, Lord Blackburn acknowledged an exception to the third party's rights to enforce the contract against an undisclosed principal where the principal settles with his agent in fulfilment of the contract before the third party learns of his existence. The Court opined that holding the undisclosed principal liable to double payment would produce "intolerable hardship".¹⁴² Essentially, the principal does not guarantee the agent's solvency.

Commentators have retorted that it is equally intolerable for the loss resulting from an agent's failure to perform on a contract to fall on the third party.¹⁴³ Such argument proceeds on an implicit acceptance of the contract being between the principal and the third party, so that no obligations can be discharged by simply settling with the agent. This argument is inaccurate in that it employs the rules of standard agency, under which a third party intends and expects to contract only with the principal, to justify the principal's liability where no such intention is possible. Indeed, it is hard to see how the third party is any worse off than they expected. As Busch points out: "the law should have no sympathy for the third party, since he did not rely on the credit of a principal of whose existence he was unaware at the time of contracting".¹⁴⁴ It does not follow from the fact that a third party may get an unexpected windfall by being able to sue the undisclosed principal in the standard case that such a right should be guaranteed where there exist sound reasons, such as prior settlement with the agent, to deny it. Only an intervention thesis allows such a limitation.

As established in *Coates v Lewes*,¹⁴⁵ the dynamic should be consistent in the converse situation. If the third party settles with the agent before the

139 See, for example *Fradley v Hyland* 37 F 49 (Circuit Court SD NY 1885) at 51 where it was held that a seller could not hold an undisclosed principal liable where the principal had settled with the agent before the existence of an agency was disclosed: "Under such circumstances, it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent."

140 Most notably *Irvine v Watson*, above n 18, in which the Court reserved the right to reconsider the decision in *Armstrong v Stokes*, above n 33, and limited it to a very narrow ratio.

141 *Armstrong v Stokes*, above n 33.

142 At 610.

143 GH Treitel *The Law of Contract* (9th ed, Sweet & Maxwell, London, 1995) at 648.

144 Busch, above n 30, at 332.

145 *Coates v Lewes* (1808) 1 Camp 444, 170 ER 1015.

existence of the principal is known, the principal cannot then sue the third party should the agent fail to account to him. The reverse was suggested in *Pople*.¹⁴⁶ In that case, Ungoed-Thomas J seemed to accept that the contract entered into was that of the principal when he observed that the principal does not lose his rights against the third party where that party settles with the agent, unless such settlement is made within the scope of the agent's actual or apparent authority.¹⁴⁷ This view is clearly applicable to disclosed agency¹⁴⁸ where third parties know they are ultimately liable to the principal. It would, however, cause significant injustice in situations where the third party has been reasonably led to believe that the agent is the true and only principal.

The authority of *Coates* was also doubted in *Ramazotti v Bowring*,¹⁴⁹ where it was held that the third party is discharged only where they had been misled by the principal. In applying an estoppel analysis, the case seems to be another confused application of rules governing standard agency, under which the contract is always the principal's, to the exceptional circumstances of undisclosed agency. Again, it is difficult to see how one can be said to rely on misleading conduct of someone whose existence is unknown. For this reason it has been submitted that such reasoning should not be followed.¹⁵⁰ The encroachment of estoppel to limit the defences that the third party may set up against the previously undisclosed principal is firmly rejected by the authors of *Bowstead and Reynolds on Agency*.¹⁵¹

Where the third party knows of no principal and this is reasonable in the circumstances it seems inappropriate and indeed unfair to him to require fault in the principal before set-off against the agent may be valid or settlement with the agent effective. The third party may have dealt with the agent precisely because the agent was indebted to him.

The estoppel view contemplates cases where, by dint of the agent having disobeyed a principal's direction to act in the principal's name, the principal's action could not be countered by any defences that the third party has against the agent, including set-offs or payment.¹⁵² This approach goes against the overarching principle that the third party should not be prejudiced by the principal's intervention. It is a result easily avoided by accepting the intervention thesis.

¹⁴⁶ *Pople v Evans*, above n 51.

¹⁴⁷ At 262.

¹⁴⁸ *Watts*, above n 1, at [8-109].

¹⁴⁹ *Ramazotti v Bowring* (1859) 7 CB (NS) 851, 141 ER 1050. See also *Cooke v Eshelby* (1887) 12 App Cas 271 (HL).

¹⁵⁰ *Busch*, above n 30, at 331.

¹⁵¹ *Watts*, above n 1, at [8-112].

¹⁵² At [8-112].

Indirect Representation and the Commission Agent

There is one other way in which such transactions might be constructed, although it is so far found only in civil law countries.¹⁵³ A principal may appoint an agent to represent her indirectly, being “‘authorised’ to deal in his own name, but for the account and at the risk of the principal”.¹⁵⁴

Such arrangements traverse the fine line between direct agency and an adverse seller/buyer relationship. While the internal aspects of assent, fiduciary duties, and some level of control are present, the external elements are lacking: the principal for whom such an agent acts is not usually liable to third parties.¹⁵⁵ In such indirect transactions, the principal may expressly refuse the agent any authority to establish privity of contract as between the principal and the third party,¹⁵⁶ or the agent’s attempt to establish such privity may simply fail.

Under civil law, only the party to the contract is bound by it, so there is no equivalent to the undisclosed principal doctrine under which the principal can be bound by a contract in which he is not named.¹⁵⁷ While standard agency in the common law sees one contract, between the principal and third party, through the agent, civil law recognises two contracts: between the principal and agent, and agent and third party.¹⁵⁸ No contractual relationship is created between the third party and the principal.¹⁵⁹ This is similar to the dynamic arising when the intervention thesis is recognised.

Insofar as it is particularly desirable to aim for consistency in laws governing international trade, the intervention thesis is clearly more in line with indirect representation. Indeed, the contract being the agent’s contemplates a parallel situation to that of indirect representation: an agent can enforce a contract in his own name and then account back to the principal, being obliged to do so on the basis of the fiduciary duties owed to him. Similarly, an agent sued by the third party will usually have a right to be indemnified by the principal.

V CONCLUSION

The intervention thesis should be recognised expressly as the conceptual basis of the undisclosed principal doctrine. The fact that doing so would take the relationship of undisclosed agency further away from standard agency principles, which are firmly rooted in the maxim *qui facit per alium facit per*

153 At [1-021], although the authors find no reason in principle that indirect representation should not be recognised at common law.

154 At [1-020].

155 There are exceptions that allow the principal to sue and be sued: see Danny Busch *Indirect Representation in European Contract Law* (Kluwer Law International, The Hague, 2005) at 44–48.

156 *Robinson v Molten* (1875) 7 LR HL 802 at 809–810 per Blackburn J.

157 For example, art 119C of the French Civil Code binds only the person in whose name the contract is made.

158 John Avery Jones “Liability of customs representatives” (1997) 3 BTR 144 at 144.

159 Busch, above n 30, at 341.

se, might explain the historical resistance against consistent adherence to this view. Such hesitation leads to uncertain law. Once the intervention thesis is recognised, the confusion that subsumes the exceptional case of undisclosed agency under standard agency principles would be avoided. In reality, undisclosed agency sits somewhere between standard agency and simply a chain of principals. For this reason, it must be acknowledged as more than just a different way for principals using agents to enter contracts: its peculiar dynamic should entail a different set of rights and liabilities.¹⁶⁰

Only the intervention thesis can adequately account for situations where a contract directly precludes an undisclosed principal's intervention. This is an important qualification on the undisclosed principal doctrine and strikes an adequate compromise. It positions the undisclosed principal's rights as subservient to the freedom of contract of third parties by allowing third parties to exclude their liability against direct actions.¹⁶¹ Were privity of contract between the undisclosed principal and third party immediately established, no such limitation could be enforced without voiding the contract entirely.

Similarly, the alternative liability established by the doctrine of election in transactions of undisclosed agency is only consistent with there being one contract, and the fact that an agent and third party can be held liable on it — without ever directly implicating the principal — makes it only logical to think of it as that of the agent.

Finally, acknowledging that the principal intervenes on an agent's contract would avoid inconsistency in cases where either principal or third party has settled with the agent before the principal's identity is known. Their liability under the contract is at that point discharged and the fact that the agent might subsequently become insolvent and fail to account is a risk the other must bear. An undisclosed principal cannot sue a third party who has settled with the agent, and vice versa, because there is no direct contract between them.

The failure to apply one conceptual approach clearly and consistently has caused confusion. The simultaneous application of both approaches has resulted in common law rules that at times favour the interests of the third party and at other times those of the principal, but often go beyond what is necessary for either's protection. Such concessions would be avoided if the intervention thesis were applied consistently.

¹⁶⁰ Quinn, above n 7, at 96.

¹⁶¹ Busch, above n 30, at 335.