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MSH LTD V HCS LTD: A REFRESHER ON THE DOCTRINE OF UNDISCLOSED PRINCIPAL

A team from Stephenson Harwood successfully defended our client, HCS Ltd, in an application before the Commercial Court made by MSH Ltd, challenging an arbitration award under section 67 of the Arbitration Act 1996¹. The case discusses the doctrine of undisclosed principal.

WHAT WAS THE APPLICATION ABOUT?

The underlying dispute concerned an alleged repudiatory breach of a contract (the "**Contract**") for the sale and purchase of Colombian nut coke between MSH Ltd, the named seller, and CTW Ltd, the named buyer who intended to act as agent of HCS Ltd. HCS Ltd was an "undisclosed principal" (i.e. MSH Ltd was unaware that CTW Ltd was acting as agent for HCS Ltd and believed CTW Ltd to be its counterparty). The dispute was subject to arbitration.

Before commencing proceedings HCS Ltd had attempted to persuade CTW Ltd to assign the

cause of action it had as agent under the Contract to HCS Ltd and permit the use of CTW Ltd's name in the arbitration proceedings. Had that occurred no issue on jurisdiction would have arisen. CTW Ltd refused and HCS Ltd took the decision to commence proceedings.

Arbitration proceedings were commenced by HCS Ltd against MSH Ltd under the Contract. The award found (a) MSH Ltd was in repudiatory breach of the Contract and (b) HCS Ltd was the undisclosed principal (MSH Ltd having challenged the Tribunal's jurisdiction on the basis that CTW Ltd and not HCS Ltd was the principal). MSH Ltd challenged the award under section 67 of the Arbitration Act 1996; the basis being that the Tribunal had lacked substantive jurisdiction because there was no undisclosed principal or that any right to sue as such was excluded by the terms of the Contract.

Section 67 applications are re-hearings. As well as the witness statements other evidence before the Tribunal was revisited. As there was no written agency agreement in this case, the evidence comprised witness statements referencing

¹ MSH Ltd v HCS Ltd [2025] EWHC 815 (Comm)- [MSH Ltd v HCS Ltd \[2025\] EWHC 815 \(Comm\) \(07 April 2025\)](#)

exchanges between MSH Ltd and CTW Ltd and CTW Ltd and HCS Ltd. These were exchanges (often cryptic) by phone, text and WhatsApp. CTW Ltd was the only alleged agent arranging many contracts both where CTW Ltd or HCS Ltd could be named as buyer or seller and with other third parties. The trade deals arranged by CTW Ltd for HCS Ltd were both "back to front" and "front to back". The latter were where the purchase is arranged before the sale and for that CTW Ltd required specific authority from HCS Ltd on a "deal-by-deal" basis. The Contract here came within that category and so specific authority to be given by HCS Ltd to CTW Ltd to agree the Contract needed to be proven.

Did HCS Ltd have the right to sue under the Contract as an undisclosed principal? The Court held that it did.

WHAT IS THE LAW?

Provided an undisclosed principal exists and the right of suit has not been expressly or impliedly excluded by the contract, the undisclosed principal may sue or be sued under the contract (in addition to the agent) as if it were the contracting party.

To determine the existence of an undisclosed principal the Court had to consider the following key elements.²

1. What was the actual authority given to CTW Ltd as the agent (acting within scope);
2. When entering the Contract did CTW Ltd intend to act as agent for the HCS Ltd (the undisclosed principal);
3. Whether the terms and circumstances surrounding the Contract negated the existence of an agency relationship.

The doctrine of ratification does not generally apply to undisclosed principals. In other words, if an agent lacks authority or an intention to act as an agent at the time the contract was entered into, this cannot later be retrospectively cured by the principal. That issue was discussed at the hearing and although a decision on this question was not necessary to find for CTW Ltd, the Court

did consider the doctrine to be a confined one. That subject is beyond this note.

WHAT DID THE COURT DECIDE AND WHY?

To determine 1-3 above the Court determined various questions of fact including the date the Contract was made and the terms finalised, whether the required authority was given and when and whether CTW Ltd intended to contract on behalf of HCS Ltd. Although the case was very fact and case-specific, a number of helpful principles emerged from the Judgement which are summarised below.

In the absence of an express agency agreement, the Court adopted an approach by attaching particular importance to "inherent probabilities" to decide whether an agency agreement existed at all. In the end it did so decide and did determine the extent of the authority of CTW Ltd based on various factors including:

- + The agent's overall business strategy: CTW Ltd's business was always to act as an agent;
- + The relationship history: All of the other contracts entered by CTW Ltd with third parties indicated a relationship that an agency relationship existed between CTW Ltd and HCS Ltd;
- + The existence of any other contracts relating to the same trade: There were no other contracts between CTW Ltd and HCS Ltd suggesting any different relationship between the parties (e.g. seller and sub-buyer) in relation to this particular trade;
- + The remuneration of the agent: Invoices sent by CTW Ltd to HCS Ltd on other contracts indicated that the relationship was of agent and principal.

A further factor which becomes "*part of the mix*" was the Contract itself and whether terms of the Contract reflected an intention (or lack of intention) by CTW Ltd to contract as an agent only and excluded another party from being able to rely upon its terms to enforce it.

In determining whether and when specific authority was given to CTW Ltd and therefore CTW Ltd's intention to contract as agent, the

² As summarised in *Kaefer v AMS Drilling* [2019] 1 WLR 3514

Court had to consider the date of the formation of the Contract. Here, key terms had been agreed between MSH Ltd and CTW Ltd on 28 September 2020 in writing but unsigned. In arbitration HCS Ltd had successfully argued that specific authority was given before 28 September. This was challenged under section 67. As is usual in most commodity trades, a full set of terms was not executed until a later date and this included an entire agreement clause. HCS Ltd argued that if CTW Ltd did not have specific authority by the 28 September it had obtained that authority prior to the execution of the Contract (which was when the Contract was executed on the 13/14 October). The Court found that in circumstances where the agent had always intended to act on behalf of the undisclosed principal, then so long as the specific authority (as required by such "front to back" deals) was granted by the time the signed agreement (and which contained an entire agreement clause) was executed, it would have been prepared to find that the undisclosed principal applied and the award would have been upheld. What this meant was that the signed agreement which, by the 13/14 October, contained an entire agreement clause superseded the Pagnan category of contract agreed on the 28 September. In the words of Lightman J in *Inntrepeneur Pub Co v. East Crown*³: "such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere".

In this case the Court found that specific authority was granted before 28 September and while the point did not require addressing, the Court did say that in any event it would have still upheld the award even if specific authority was given after 28 September but prior to the 13/14 October. That said, the Court would have then been prepared to grant MSH Ltd permission to appeal to the Court of Appeal as to the Court, this would have raised the question of whether the doctrine of ratification not applying in favour of an undisclosed principal should apply.

The Court did consider whether the terms of the Contract negated the undisclosed agency or HCS Ltd's rights (in particular the right of suit) under the Contract. In this way, the terms of the

Contract were not only considered during the factual enquiry but also again, during the legal enquiry when determining HCS Ltd's legal rights.

The Court could not find any implied terms in the Contract to exclude the doctrine of undisclosed principal and further acknowledged that it is generally rare for this to arise. As with the express terms, the Court's general attitude appears to be in favour of the doctrine's inclusion. In this case the Court considered four specific express terms none of which on its own or in combination with others was sufficient to negate the application of the doctrine. The following points arising from the Judgment on this issue are of general application:

- + An exclusion on assignments would not ordinarily exclude the doctrine of undisclosed principals in commercial contracts.
- + An entire agreement clause does not necessarily exclude the doctrine.
- + Generally, boilerplate clauses would not be sufficient to negate the doctrine unless they specifically and explicitly exclude the doctrine.

WHAT ARE THE KEY PRACTICAL TAKEAWAYS?

There are two key practical takeaways from this case which could minimise risk of dispute and save time and costs for commercial counterparties:

1. As between agents and undisclosed principals, the parties should record the agency agreement in writing and document and keep all instructions.
2. As between parties to a sale contract, the parties should consider whether it would be in their interest to exclude the doctrine of undisclosed principal and if so, exclude the doctrine in express and unequivocal terms. Further, if a third party is or even is suspected to be involved in the contractual relationship between the parties, any required due diligence should be carried out on that third party as well as the named counterparty.

³ [2000] 2 Lloyd's Rep. 611

CONTACT US



PETER BENNETT

Partner

+ 44 20 7809 2665
peter.bennett
@stephensonharwood.com



NAZ TAJBAKHSH

Managing Associate

+ 44 20 7809 2180
naz.tajbakhsh
@stephensonharwood.com



KELLY HUBBLE

Associate

+ 44 20 7809 2214
kelly.hubble
@stephensonharwood.com