

THE UNDISCLOSED PRINCIPAL DOCTRINE: RATIONALISATIONS, JUSTIFICATIONS AND ORIGINS

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The undisclosed principal doctrine is anomalous in the common law. The doctrine enables a principal to sue and be sued on a contract made by his or her agent with a third party who did not know the principal existed. In so holding, the doctrine appears to fly in the face of fundamental contract law principles. Commentators have provided a range of explanations for the doctrine's existence despite its apparent anomalous nature. This article critically analyses four explanations for the doctrine: the principal impliedly intends to contract with the third party; the principal provides the consideration to support the contract; the doctrine is a primitive form of assignment; and an "intervention thesis" that justifies the doctrine by coupling the consideration justification with the nature of the principal-agent relationship. All four of these theories are found not to withstand analysis. This article then considers a theory that the doctrine evolved out of the foreign principal doctrine in the mid-19th century due to changing customs and practices in international trade. While this theory is found wanting evidentially, this article agrees that the doctrine's origins almost certainly lie in mercantile custom, incorporated into the common law via the law merchant, most likely in the 17th to 18th centuries, from which point it ossified into a standard agency doctrine of general application. The article concludes by suggesting that the doctrine ought simply to be recognised as anomalous and exceptional to the standard rules of contract formation, rather than unconvincingly rationalised or justified on grounds that only act to further reduce its doctrinal coherence.

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I THE UNDISCLOSED PRINCIPAL DOCTRINE

The undisclosed principal doctrine is rarely mentioned without being called anomalous.¹ The doctrine holds a third party to owe and be owed legally enforceable obligations to and by a person whom the third party never knew existed, and in doing so seems to fly in the face of fundamental common law principles of contract centred on objective intention of the parties.² Given this, it is perhaps surprising that the doctrine has not been subject to more academic scrutiny, and that a judicial explanation for the doctrine has never been given in any convincing detail.³

This absence of explanation in the case law has created a theoretical vacuum, into which a plethora of explanations has rushed over the last hundred years. Commentators have relied on aspects of the nature of the undisclosed principal,⁴ the agent,⁵ and the third party⁶ as providing the key to the doctrine, and both legal and equitable answers have been proposed.⁷ However, a common theme amongst proposed theories is the attempt to find a principled rationalisation for the doctrine, rather

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- 1 For such descriptions in textbooks see for example Stephen Todd "Privity and Agency" in Jeremy Finn, Stephen Todd and Matthew Barber (eds) *Burrows, Finn & Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) 615 at [16.3.2] ("Even after the coming into force of the Contracts (Privity) Act 1982 (now pt 2, sub-pt 1 of the Contract and Commercial Law Act 2017) the doctrine still looks anomalous ..."); and GHL Fridman *The Law of Agency* (2nd ed, Butterworths, London, 1966) at 172 ("This anomalous doctrine has been heavily criticised ..."). For such judicial descriptions see for example *Taylor v Van Dutch Marine Holding Ltd* [2019] EWHC 1951 (Ch), [2019] Bus LR 2610 at 2657 per Deputy Judge Julia Dias QC ("[T]he doctrine of undisclosed agency is undoubtedly anomalous ..."); *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 WLR 4041 at [12] per Lord Sumption SCJ ("The rule of English law that an undisclosed principal may declare himself and enter upon a contract is an anomalous legacy of eighteenth and nineteenth century jurisprudence, which survives in the modern law on account of its antiquity rather than its coherence."); and *Durant & Co v Roberts* [1900] 1 QB 629 (CA) at 635 per AL Smith LJ ("... the law relating to authorized agents with undisclosed principals behind them is far more anomalous than that relating to [another agency doctrine]"). For such descriptions in journal articles see for example James Barr Ames "Undisclosed Principal—His Rights and Liabilities" (1909) 18 Yale LJ 443 at 443 ("... it is highly important that [the undisclosed principal doctrine] should be recognised as an anomaly ..."); PFP Higgins "The Equity of the Undisclosed Principal" (1965) 28 MLR 167 at 167 ("... the doctrine is clearly anomalous in the context of the strict common law rules of contract ..."); and Martin Schiff "The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract" (1983) 88 Comm LJ 229.
 - 2 Peter Watts (ed) and FMB Reynolds *Bowstead and Reynolds on Agency* (19th ed, Sweet & Maxwell, London, 2010) [*Bowstead and Reynolds on Agency*] at 404.
 - 3 *Taylor v Van Dutch Marine Holding Ltd*, above n 1, at 2657.
 - 4 See for example Wolfram Müller-Freienfels "The Undisclosed Principal" (1953) 16(3) MLR 299.
 - 5 See for example Ames, above n 1; and partly Ania Lang "Unexpected Contracts versus Unexpected Remedies: The Conceptual Basis of the Undisclosed Principal Doctrine" (2012) 18 Auckland U L Rev 137.
 - 6 See for example Tan Cheng-Han "Undisclosed Principals and Contract" (2004) 120 LQR 480.
 - 7 For examples of theories based on equitable principles see Ames, above n 1; and partly Lang, above n 5. Most other theories are based on legal principles.

than to explain its existence on historical grounds and with regard to evidence in the earliest cases concerning the doctrine. In fact, as this article attempts to show, the diversity of rationalisations suggests a strictly legal explanation for the doctrine divorced from historical context will struggle to explain the doctrine's existence on its own.

Part II of this article briefly describes the legal nature of the undisclosed principal doctrine. Part III analyses four of the most prominent explanations for the existence of the doctrine: namely, that (a) it is based on the third party's implied intention to contract with the undisclosed principal; (b) it is justified by the undisclosed principal providing consideration for the contract; (c) it is a primitive form of assignment; and (d) it is justified by combining the nature of the principal-agent relationship with the fact that the principal provides consideration for the contract. None of these explanations are found to withstand analysis. Part IV discusses a theory that the doctrine evolved out the foreign principal doctrine. While this precise theory is found to be lacking evidentially, it is likely correct for suggesting the doctrine originated in the law merchant, and that it was assimilated into the common law no later than the late-18th century. Part V proposes that the undisclosed principal doctrine runs counter to agency law's purpose of enabling one person to act in the law through another without changing the general pattern of the law. The article concludes by suggesting that the doctrine ought to be recognised as anomalous and an exception to the standard rules of contract formation, rather than unconvincingly rationalised or justified on grounds that only act to further reduce its doctrinal coherence.

II LEGAL NATURE OF THE DOCTRINE

The legal nature of the undisclosed principal doctrine is as follows. Person P (principal) authorises person A (agent) to act as an agent in contracting on his behalf.⁸ A then contracts with person T (third party), intending to contract on behalf of P,⁹ without T knowing that A is acting as agent for P.¹⁰ In other words, T believes A to be contracting solely in her own right. The law holds P may nevertheless sue T to enforce the contract made with A.¹¹ Upon discovering P's existence, T may elect between suing either P or A, but may not sue both.¹² P and A both have independent rights to sue T, except that A's right is subordinate to P's.¹³ Further, if P sues T, T can set up any defences (such as rights of set-off) that would have been available to him had he been sued by A, so long as the defence is

8 *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 (PC) at 207. In this article, principals and third parties are given male pronouns; agents and all other parties are given female pronouns.

9 At 207.

10 *Bowstead and Reynolds on Agency*, above n 2, at 404.

11 *Sims v Bond* (1833) 5 B & Ad 389 at 393, 110 ER 834 (KB).

12 *Kendall v Hamilton* [1879] 4 AC 504 (HL) at 544; *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA*, above n 1, at 4049; and *Bowstead and Reynolds on Agency*, above n 2, at [8-078]. If one prefers to learn in verse, see Maurice H Merrill "Election (Undisclosed Agency) Revisited" (1954) 34 Neb L Rev 613.

13 *Pople v Evans* [1969] 2 Ch 255 (Ch) at 262.

connected with the relevant transaction.¹⁴ Parol evidence is admissible to show that P stands behind A in a written contract between A and T, but not to discharge A.¹⁵ However, the courts have held some written terms prevent P from suing on the contract, such as if A is described as the "owner"¹⁶ or "proprietor".¹⁷ There are also cases concerning the effect of payment or conferral of goods by either P or T to A and whether this discharges the obligation to the other, but the law in this area is not entirely settled and beyond the scope of this article.¹⁸

A Agent-Principal Relationship

The agency relationship between A and P is entirely normal.¹⁹ P and A mutually agree (expressly or impliedly) for A to represent P with regard to third parties.²⁰ A is thereby empowered to affect P's legal relationships with third parties,²¹ including to contract with others on P's behalf.²² The only qualification on the normality of the agency relationship is that A's authority must be actual rather than apparent, although this is only because it would be illogical for a third party to claim the agent had apparent authority to contract while also denying knowing a principal existed.²³ It is the effect of the concealed nature of this agent-principal relationship, rather than its form, that makes the doctrine unusual.

B Tripartite Contractual Relationship

The tripartite contractual relationship is where the anomaly arises. This is because the undisclosed principal doctrine exists at the nexus of two conflicting legal rules. On one hand, agency law holds that a contract made through an agent with a third party has the same legal effect as one made by the

14 *Siu Yin Kwan v Eastern Insurance Co Ltd*, above n 8, at 207; and *Bowstead and Reynolds on Agency*, above n 2, at 427.

15 Stephen Todd "Privity of contract under the law of agency" in John Burrows, Jeremy Finn and Stephen Todd (eds) *Burrows, Finn & Todd on the Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) 621 at 636.

16 *Humble v Hunter* (1848) 12 QB 310 at 310, 116 ER 885 (QB) at 885.

17 *Formby Bros v Formby* (1910) 102 LT 116 (CA) at 117.

18 For a discussion on this area of the law see *Bowstead and Reynolds on Agency*, above n 2, at [8-106] and [8-110].

19 Lang, above n 5, at 116.

20 *Bowstead and Reynolds on Agency*, above n 2, at [1-001].

21 At [2-017].

22 At [2-019].

23 At [8-072].

principal personally: that a contract forms between the principal and third party.²⁴ On the other hand, contract law requires two parties to manifest reciprocal objective intentions to contract with one another as an essential element for creating reciprocal contractual obligations between them,²⁵ and it is impossible to say the third party manifested an objective intention to contract with the principal whose existence was undisclosed. The doctrine's existence shows that the common law holds that agency prevails over contract. The common law might have held that the contract rule overrode the agency rule, and therefore the only contractual obligations formed are between the agent and third party. Nevertheless, by operation of the doctrine, the third party owes and is owed contractual obligations to and by a person whose existence he knew not.

III PROPOSED EXPLANATIONS FOR THE DOCTRINE

One commentator has described attempts to explain the doctrine's existence as a "study in futility".²⁶ Nevertheless, when a doctrine sits as uncomfortably in the law as the undisclosed principal doctrine does, desire for doctrinal consistency and coherence in the law makes it natural to wish to explain away some of this discomfort. As alluded to earlier, approaches by commentators to explain the doctrine vary considerably.²⁷ However, two general classes of theory can be distinguished: those that consider the undisclosed principal a bona fide party to the contract, and those that consider the contract solely between the agent and third party with the principal somehow "intervening" or otherwise being able to sue and be sued on the contract.

The former class has proven less popular, no doubt because of the difficulty in explaining how the third party can be considered party to a contract with someone entirely unknown to him. But judicial statements to the effect that the contract the third party enters into is "in truth, although not in form, that of the undisclosed principal himself",²⁸ and that the third party is liable to the principal because "he has in fact made a contract with him",²⁹ have seen this class garner some academic support.³⁰ This article considers one such theory: that the third party impliedly intends to contract

24 John Salmond and James Williams *Principles of the Law of Contracts* (2nd ed, Sweet & Maxwell, London, 1945) at 406.

25 At 21; and see *Smith v Hughes* (1871) 6 QB 597 at 607 per Blackburn J.

26 Michael L Richmond "Scraping Some Moss From the Old Oaken Doctrine: Election Between Undisclosed Principals and Agents and Discovery of Their Net Worth" (1983) 66 Marq L Rev 745 at 751.

27 Ross Cranston *Making Commercial Law Through Practice 1830–1970* (Cambridge University Press, Cambridge, 2021) at 148.

28 *Keighley, Maxsted & Co v Durant* [1901] AC 240 (HL) at 261.

29 *Gardiner v Heading* [1928] 2 KB 284 (CA) at 290.

30 See for example Tan, above n 6.

with the undisclosed principal, thereby forming a contract between them.³¹ Three distinct theories from the latter class are considered: the undisclosed principal provides the consideration for the contract;³² the principal's intervention is justified on the nature of the relationship between the principal and agent;³³ and the doctrine is a primitive form of assignment.³⁴

A Undisclosed Principal Party to the Contract

1 Third party's implied intention

Professor Tan Cheng Han argues the undisclosed principal is a bona fide party to the contract with the third party, and does not simply "intervene" on a contract ostensibly between the agent and third party.³⁵ Tan's primary explanation for the doctrine's anomalous nature is that it pre-dates the development of the doctrine of privity.³⁶ Its continued existence despite this inconsistency is simply because it was never overruled, and that it owes its existence to the laws and principles of agency rather than contract.³⁷

However, Tan proposes that the undisclosed principal doctrine and privity doctrine can nevertheless be reconciled through the concept of the third party's implied intention to contract with the principal.³⁸ Tan draws this idea from *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd*, where Diplock LJ said:³⁹

Where an agent has ... actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he disclosed to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, *if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to act*. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so willing.

31 Tan, above n 6.

32 Müller-Freienfels, above n 4.

33 Lang, above n 5.

34 AL Goodhart and CJ Hamson "Undisclosed Principals in Contract" (1932) 4 CLJ 320.

35 Tan, above n 6, at 487.

36 At 481.

37 At 490.

38 At 501.

39 At 501; and *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 545 (CA) at 554 (emphasis added).

Tan rightly points out there is a crucial difference between a "willingness to treat" and intention to contract.⁴⁰ He therefore clarifies Diplock LJ's point, suggesting that when the agent and third party contract, the third party "agrees implicitly that he is contracting with the agent *and* the agent's principal, should there be one".⁴¹ This is because, according to Tan, in ordinary commercial contracts it is "usually a matter of indifference to the third party whether there is an undisclosed principal or not".⁴² This, Tan says, makes the undisclosed principal doctrine fully compatible with the doctrine of privity.⁴³

Full compatibility with the privity doctrine means there is, in the ordinary sense of the term, a simple contract between the undisclosed principal and third party. However, Tan's theory fails to explain how a simple contract is formed between the undisclosed principal and third party when the principal never conveys an objective intention to contract with the third party, where the principal and third party never objectively agree to terms, and where the principal does not provide consideration for the contract. The principal's undisclosed nature makes it difficult to see how the principal can satisfy any of these three contract formation requirements. Further, it is not clear how it can be said that the agent leads the third party reasonably to believe she is contracting personally, while holding the third party to impliedly intend to contract with (and therefore have knowledge of) the principal.

Contract formation requires each party to objectively agree to sufficiently clear terms,⁴⁴ possess objective intentions to contract,⁴⁵ and provide consideration to support the contract.⁴⁶ In an undisclosed principal situation, to what extent can it be said that the principal and third party have agreed terms? In a disclosed agency situation, the agent negotiates terms with the third party, but it is understood by all parties that the agent is acting on behalf of the principal. Thus, when the agent and third party agree to terms it is really the principal and third party who have agreed terms. However, when the agency is undisclosed, the only terms agreed are those negotiated by the agent and third party. By all appearances these terms were negotiated by the agent for herself, and thus objectively it is the agent and third party who agree to terms, not the principal.

The same issue arises regarding the principal's intention to contract. When an agency relationship is disclosed, the agent communicates to the third party the principal's intention to contract. The principal's intention to contract is thereby manifested through the agent. Obviously in an undisclosed

40 At 502. For a discussion of the difference see Burrows, Finn and Todd, above n 15, at 43.

41 Tan, above n 6, at 502.

42 At 502.

43 At 504.

44 *Smith v Hughes*, above n 25, at 607.

45 Jeremy Finn "Historical introduction" in Burrows, Finn and Todd, above n 15, at [1.5].

46 Salmond and Williams, above n 24, at 18.

agency situation the agent cannot manifest the principal's intention to contract because this would reveal the principal's existence and it would no longer be a case of undisclosed agency. Thus, while the principal has conveyed *to the agent* an intention to contract with the third party by appointing her as agent, this intention forms no part of the objective contractual formation process between the agent and the third party.⁴⁷

Further, the undisclosed principal provides no consideration to support the contract. The undisclosed principal usually provides the funds or goods to perform the contract agreed to by the agent and third party. However, consideration is a *pre-requisite* for contract formation; it cannot be provided *after* contract formation. In a simple bilateral contract, the consideration each party provides is the reciprocal, mutual assumptions of legally enforceable obligations.⁴⁸ When the agency is disclosed, the principal reciprocally assumes this obligation through the agent; but when the agency relationship is undisclosed, objectively it is the agent that assumes this obligation and thus who provides consideration. This issue is discussed further below.⁴⁹

Tan's explanation purports to explain how it can be said that the third party objectively intends to contract with the undisclosed principal. Tan says that all businesspersons contracting in the commercial realm, simply by their nature, may be assumed impliedly to intend to contract with any party standing hidden behind the person with whom they contract. But for Tan's explanation to rely on a simple contract formed directly between undisclosed principal and third party, it must account for the principal's side of the contract formation process. Tan only accounts for the third party's side.

Finally, Tan fails to explain why the agent can sue and be sued on the contract if the third party impliedly intends to contract with the agent's principal. Tan explains that the agent contracts on behalf of her principal but "in such a manner as to assume personal liability under the contract".⁵⁰ Tan rightly points out that in ordinary disclosed agency circumstances an agent is free to contract in a manner that makes both her and the principal liable on the contract. The agent, Tan says, is equally empowered when acting for an undisclosed principal.⁵¹ This is true as a proposition,⁵² but it raises the question: what is it about the agent's behaviour that shows an objective intention to contract to make herself liable on the contract? This can only be the fact that the agent looks to all the world that she is acting in her own right. In a case of disclosed agency, the agent may express that, although she is an agent,

47 *Smith v Hughes*, above n 25, at 607.

48 Brian Coote "The Essence of Contract (Part II)" (1988) 1 JCL 183 at 192.

49 See section below titled "Consideration".

50 Tan, above n 6, at 490.

51 Tan cites *Collins v Associated Greyhound Racecourse Ltd* [1930] 1 Ch 1 (CA) at 20 per Luxmoore J.

52 *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370 (QB) at 372 as cited in *Bowstead and Reynolds on Agency*, above n 2, at [9-005].

she also intends to contract personally. However, here the fact that she is an agent cannot be disclosed or else it is no longer undisclosed agency. Therefore, how can the third party both be led reasonably to believe the agent is contracting in her own right, but simultaneously be treated as impliedly intending to contract with the agent's principal? The former requires the third party to believe the agent is *not* an agent; the latter requires the third party to believe the agent *is* an agent. Tan's solution to the privity doctrine issue therefore requires the third party to hold two inconsistent beliefs simultaneously.

Some of the deficiencies in Tan's explanation can be explained by the incorrect characterisation of the principal in the case from which the implied intention rationalisation derives. *Teheran-Europe* concerned Teheran-Europe Co Ltd, an Iranian import and export company, carrying on business in the United Kingdom through Richards Marketing Ltd, an English agent.⁵³ Belton Ltd, the third party, sold surplus government equipment.⁵⁴ A written contract was agreed via letters passing between Belton and Richards Marketing for the sale of 12 air compressors.⁵⁵ Teheran-Europe's name or identity was never revealed to Belton during negotiations, but Richards Marketing did inform Belton that the machines were for "our clients",⁵⁶ and that they had been "instructed to put forward an offer" to purchase the air compressors.⁵⁷ Teheran-Europe sued Belton for breach of contract, alleging the air compressors failed to comply with a number of terms of the written contract. Lord Denning MR and Diplock LJ both described the Iranian principal as "undisclosed",⁵⁸ whereas Sachs LJ characterised it as "unnamed".⁵⁹ It is submitted that Sachs LJ must be correct: the existence of the principal was *disclosed* to Belton, in that it was told that the agent was buying *for* and *on instructions from* its client. However, it is also submitted that in this situation the phrase "implied intention to contract with the agent's principal" is apt. Belton accepted Richards Marketing's offer having been informed that the agent was acting for and on instructions from a client in Iran. In this sense, because Richards Marketing never *expressly* referred to the principal by name but Belton knew it existed, it can nevertheless be said Belton *impliedly* intended to contract with Teheran-Europe by contracting with Richards Marketing.

53 *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd*, above n 39, at 545.

54 At 546.

55 At 547.

56 At 545.

57 At 551.

58 At 552 (per Lord Denning MR); and at 556 (per Diplock LJ).

59 At 561.

A further reason is that Tan and Diplock LJ have likely accurately described the real nature of many commercial transactions.⁶⁰ One can assume that in many circumstances commercial parties to a contract do not care who the counterparty is so long as it is performed. In fact, in most instances involving undisclosed principals, the agent will discharge the principal's contractual obligations without the third party ever knowing there was such a principal. Tan is probably right to say it is usually a matter of indifference to the third party whether there is an undisclosed principal or not,⁶¹ that the third party might be alive to the possibility that the person with whom they treat is in fact acting for someone else,⁶² and even that if this were the case the third party would be so willing to treat with the principal too.⁶³ But it is not enough to say a contract is formed because the parties to the contract would be indifferent to owing each other contractual obligations, and therefore the law ought to recognise that there is a contract. Contracts are not deemed; they are assumed, and the law prescribes a procedure by which they may be assumed.⁶⁴ This procedure is not, and cannot, for the aforementioned reasons, be performed by an undisclosed principal and third party and therefore no contract can arise between them by ordinary rules of contract formation.

B Undisclosed Principal Not Party to the Contract

1 Consideration

In *Smith & Snipes Hall Farm Ltd v River Douglas Catchment Board*, Denning LJ pronounced that the principle upon which the undisclosed agency rests is that:⁶⁵

... a man who makes a deliberate promise which is intended to be binding ... must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it.

Professor Wolfram Müller-Freienfels attempts to explain the undisclosed principal doctrine by reconciling it with two facts: that despite Denning LJ's principle the common law does not let third parties enforce a contract to which they are not privy,⁶⁶ and undisclosed principals may not enforce

60 This can only be assumed. Attempting to evidentially substantiate whether this is the case is outside the scope of this article.

61 Tan, above n 6, at 502.

62 At 503.

63 At 501.

64 Andrew Tipping "Obligations in Tort, Contract and Equity: Reliance, Responsibility, and the Moral Dimension" (2021) 52 VUWLR 643 at 646.

65 *Smith & Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 (KB) at 514–515.

66 Müller-Freienfels, above n 4, at 303, citing *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd* [1915] AC 847 (HL) at 853 per Lord Haldane: "My Lords, in the law of England certain principles are fundamental. One is

contracts under seal.⁶⁷ On the one hand, if Denning LJ's statement is true then contracts under seal seem a straightforward application of the aforementioned principle. One would, Müller-Freienfels says, *expect* undisclosed principals to be able to sue and be sued on contracts under seal, especially as there is no consent requirement between grantor and grantee.⁶⁸ However, contracts under seal are a well-known exception to the undisclosed principal doctrine.⁶⁹ On the other hand, in spite of Denning LJ's statement,⁷⁰ third-party beneficiaries of a contract cannot sue and be sued upon the contract at common law.⁷¹

Müller-Freienfels reasons that the concept of consideration provides the explanation: it is the essential link between the third party and undisclosed principal.⁷² Müller-Freienfels says in the context of an undisclosed principal to a simple contract:⁷³

... the principal is the man who pays the money and receives the benefit: the person who ultimately bears the burden of the detriment, which is the consideration moving to the third party.

Müller-Freienfels reasons that an undisclosed principal may not enforce a contract under seal because such contracts do not require the promisee to provide consideration, due to their belonging to a different, earlier family of contracts.⁷⁴ The undisclosed principal therefore lacks the "essential link" bringing him into direct legal relationship with the third party.⁷⁵ By contrast, Müller-Freienfels says, in a simple contract, because the undisclosed principal provides the consideration for the contract, he is brought into such a relationship with the third party.⁷⁶ This can be contrasted with mere third-party beneficiaries to a simple contract, who may not sue on the contract for want of providing

that only a person who is a party to a contract can sue on it. [English] law knows nothing of a *jus quaesitum tertio* arising by way of contract". See also *Tweddle v Atkinson* (1861) 121 ER 762 (QB); and *Beswick v Beswick* [1968] AC 58 (HL).

67 Müller-Freienfels, above n 4, at 304; *Bowstead and Reynolds on Agency*, above n 2, at 421; and *Schack v Anthony* (1813) 1 M&S 573, 105 ER 214 (KB).

68 Müller-Freienfels, above n 4, at 303–304.

69 *Sims v Bond*, above n 11, at 835.

70 Denning LJ's statement was overruled by the House of Lords in *Beswick v Beswick*, above n 66, and was indeed expressly contrary to previous decisions of the House of Lords: see Lord Pearce's speech in *Beswick v Beswick*, above n 66, at 92–93.

71 *Tweddle v Atkinson*, above n 66.

72 Müller-Freienfels, above n 4, at 304.

73 At 306.

74 At 305.

75 At 305.

76 At 305.

consideration.⁷⁷ Müller-Freienfels concludes it is on this basis that the law allows the undisclosed principal to enforce a simple contract, and that reconciles his proposed paradox.

However, Müller-Freienfels' reasoning misunderstands the concept of consideration. Consideration is a requirement for contract formation;⁷⁸ thus, it must be present *at the point of* contract formation.⁷⁹ While the undisclosed principal is the party who ultimately provides either goods or payment, this is contractual performance and occurs *after* contract formation. Instead, consideration for a simple bilateral contract is the reciprocal assumption by two parties of contractual obligations at the point of contract formation, intended to be legally binding: "What each party is seen to have bargained for is the assumption, by the other, of reciprocal legal obligation to him or her. Those assumptions are the consideration each provides for the other."⁸⁰

The principal, by reason of being undisclosed, is never party to the contract bargaining process. It is the agent who engages in the reciprocal exchange of assumed legal contractual obligations, and thus the agent, not the principal, who provides the consideration for the contract. While the agent *in fact* intends to assume a legal obligation on behalf of the principal, and to have the third party assume a legal obligation for the benefit of the principal, contract formation is determined objectively.⁸¹ The principal's undisclosed nature means objectively, and thus *in law*, the agent herself partakes in the mutual reciprocal assumptions of legal obligations and who therefore provides the consideration.

It might be said that this analysis is too formalist. The undisclosed principal is the person who performs the contract, and who, by operation of the doctrine, owes a contractual obligation to the third party for this performance. Surely by the former, latter, or by both, the principal can fairly be said to have provided the consideration for the contract. However, to consider contractual performance as consideration is to say an obligation's performance is the prerequisite necessary for its creation. Further, to consider the principal's contractual liability as consideration is to say an obligation itself is the prerequisite necessary for its creation. Neither of these propositions are logically possible.

Finally, if the principal provides the consideration, and the agent acts as a "mere conduit" for this consideration,⁸² what consideration does the agent herself provide that explains her ability to sue and

77 At 305; and *Tweddle v Atkinson*, above n 66.

78 Salmond and Williams, above n 24, at 97.

79 Coote, above n 48, at 192–193. Note also that this is only true in the case of executory bilateral contracts. In unilateral contracts, consideration from the obligor must be present *prior to* contract formation and from the obligee *at the point of* contract formation.

80 At 192.

81 *Smith v Hughes*, above n 25, at 607.

82 Müller-Freienfels, above n 4, at 306.

be sued on the contract? In attempting to explain away one stranger to the contract, Müller-Freienfels inadvertently creates another.⁸³

2 *Lang's intervention thesis*

Ania Lang proposes that her "intervention thesis" ought to be recognised as the conceptual basis underpinning the undisclosed principal doctrine.⁸⁴ Her thesis posits that there is a contract between the agent and the third party, and the principal "intervenes" on this contract. The principal is not party to this contract, having no "immediate and direct contractual relationship with the third party".⁸⁵

Lang refers to Tan's point that the undisclosed principal doctrine allows a stranger to the contract to sue or be sued on said contract, and that this is not possible in the general law of contract outside the doctrine.⁸⁶ On what basis, then, does the law permit the principal's intervention?⁸⁷ Lang believes the answer lies:⁸⁸

... in the agent's fiduciary duties to the principal 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 ... Further, the element of control exercised by the principal over the agent ... is present to a much stronger degree than in other relationships in which a party may act on behalf of another ...

Lang, like Müller-Freienfels,⁸⁹ has confused consideration with contractual performance for the reasons laid out in the previous section. The undisclosed principal often performs the contract, but this cannot provide the consideration necessary for contract formation because this occurs after the contract is formed.⁹⁰

It is true that the principal consents to the agent altering his legal relationships, thereby conveying to the agent an intention to contract with the third party. But the intention missing is the third party's

83 The agent is here a stranger only by Müller-Freienfels' definition. The agent is neither factually nor legally a stranger to the contract, being the person with whom the third party intends to contract, and who is the only counterparty present during contract formation. See also Lang, above n 5, at 123–124.

84 Lang, above n 5.

85 At 124.

86 Tan, above n 6, at 496 as cited in Lang, above n 5, at 127–128.

87 At 128.

88 At 128.

89 Lang expressly adopts Müller-Freienfels' reasoning insofar as it relates to the undisclosed principal providing consideration for the contract: see Lang, above n 5, at 124 and 128.

90 See section above titled "Consideration".

intention to contract with the undisclosed principal, not the principal's intention to contract with the third party. Further, it is not clear how the agent's fiduciary duties to the principal, or the stronger degree of control exercised by the principal over the agent, ought to affect the legal relationship between the principal and third party.⁹¹ The former proposition suggests equitable duties owed by the agent to the principal warrant the imposition of a legal duty owed by the third party to the principal. The latter proposition is simply a factual description of the principal's alleged behaviour. In any case, it is not clear in what way the relationship between undisclosed principal and agent is "stronger" than any other relationship where one party acts on behalf of another. Early cases involving undisclosed principals support the opposite conclusion, where many agents, having been conferred possession of goods, act with little control from the principal other than under a direction to sell the goods.⁹² At the least, there is no evidence of any general difference in control over an agent between a disclosed and undisclosed principal, and so this cannot explain the existence of the doctrine.

3 *Assignment*

Professors Arthur Goodhart and Charles Hamson say the undisclosed principal doctrine is "perhaps best described as a primitive and highly restrictive form of assignment".⁹³ This characterisation seems to stem from their description of the undisclosed principal doctrine as simply a limitation on the general legal rule that a person not party to a contract may not enforce said contract, similar to the way that an assignee with power to sue is a limitation on this rule.⁹⁴ They do not conceive of the doctrine as inconsistent with fundamental legal principles of contract law.⁹⁵

What of the principle of privity of contract? Goodhart and Hamson say that privity of contract simply means having the "right to sue or liability to be sued".⁹⁶ Thus, the undisclosed principal is privity to the contract because he may sue and is liable to be sued on it.⁹⁷ However, it is submitted that this definition is not an accurate description of the concept of privity of contract. The privity of

91 Lang, above n 5, at 128.

92 The archetypal early undisclosed principal case involves a principal who sends their goods to a factor to be sold on their behalf, frequently at a stipulated price. 18th and 19th century technology meant that the principal's ability to control the factor was essentially limited to whatever instructions accompanied the shipment of goods to be sold, prior dealings or understandings between the parties, trade customs, and the threat of legal action for breaches of law. For such cases see *Rabone v Williams* (1785) 7 TR 361, 101 ER 1020, n (a)¹ (KB); *George v Clagett* (1797) 7 TR 359, 101 ER 1019 (KB); *Carr v Hinchliff* (1825) 4 B&C 547, 107 ER 1164 (KB); and *Thomson v Davenport* (1829) 9 B&C 78, 109 ER 30 (KB).

93 Goodhart and Hamson, above n 34, at 352.

94 At 346.

95 At 346.

96 At 347.

97 At 347.

contract doctrine provides that a person may enforce a contract only if she has provided consideration for the promise made by the obligor.⁹⁸ An undisclosed principal's existence is never disclosed during the contract formation process, meaning a promise is never made to the principal. Instead, it is the agent that provides consideration for the contract.⁹⁹ This is different to when an agency relationship is disclosed. Here, while the third party may only deal with the agent, he knows the agent is acting for a principal and can therefore make a promise intended to be legally enforceable to the principal. Likewise, the agent can make a promise intended to be legally enforceable to the third party on behalf of the principal. Therefore, the reciprocal assumptions of obligations creating the contract are objectively made by the third party and principal (acting through the agent), instead of objectively made by the agent and third party. In this situation, the principal may enforce the contract consistently with the privity of contract doctrine. It is suggested that, since it is well-established that only persons privy to a simple contract may enforce it,¹⁰⁰ to define privity of contract as simply a "right to sue or liability to be sued" is circular. It supposes a right to sue or liability to be sued requires privity of contract which means a right to sue or liability to be sued.

Further, Goodhart and Hamson's analogy to the doctrine of assignment is surprising. There is superficial similarity between the undisclosed principal doctrine and assignment in that both allow person C to acquire an "interest" in a contract created by persons A and B.¹⁰¹ However, there are several important differences between the undisclosed principal doctrine and assignment that go undiscussed, and that make the two concepts quite distinct. Assignment is a legal procedure whereby a person (the assignor) transfers his contractual rights to a third party (the assignee).¹⁰² Assignment requires specific, intentional acts of the assignor; it does not happen automatically.¹⁰³ An undisclosed principal, however, acquires rights and liabilities on the contract upon contract formation between

98 *Price v Easton* (1833) 4 B & AD 433 at 433. The Court of King's Bench held that the plaintiff could not recover from the defendant because he was not privy to the contract. Patteson J said the plaintiff has no right of action because "[t]here is no promise to the plaintiff alleged": at 435. Denman CJ agreed, saying the declaration "does not shew any consideration for the promise moving from the plaintiff to the defendant": at 434; and see also *Tweddle v Atkinson*, above n 66, at 399: "consideration must move from the party entitled to sue upon the contract" (per Crompton J); and "no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made" (per Blackburn J). See section above titled "Consideration" for a more in-depth discussion of what consideration means.

99 See section above titled "Consideration".

100 See for example *Price v Easton*, above n 98, at 434 per Littledale J.

101 "Interest" is here used in a non-technical sense to mean some combination of rights or liabilities on the contract.

102 The procedure being the assignment is made in writing by the assignor, with express notice of the assignment made to the person from whom the assignor was entitled to receive the chose in action: see Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict c 66, s 25(6).

103 Section 25(6).

agent and third party.¹⁰⁴ No procedure of intentional acts by the agent is required to assign these rights and liabilities to the undisclosed principal.¹⁰⁵ Further, by performing said procedure the assignor relinquishes his right to contractual performance by the debtor and confers his right on a third party.¹⁰⁶ By contrast, an agent remains liable on a contract until the third party elects to sue the principal (having discovered his existence).¹⁰⁷ Finally, assignment only functions to assign the legal right to contractual performance; it does not assign legal liabilities.¹⁰⁸ An undisclosed principal, however, is liable for all the contractual rights to which the third party is entitled.¹⁰⁹

Goodhart and Hamson's description of the undisclosed principal doctrine as being a primitive form of assignment is perhaps most surprising because the common law strictly did not allow assignment of choses in action.¹¹⁰ Assignment at law was not possible until created by Parliament in 1873.¹¹¹ Goodhart and Hamson thus describe the undisclosed principal doctrine as being relatively normal by analogising it to a legal procedure the common law strictly forbade.¹¹²

IV HISTORICAL ORIGINS OF THE DOCTRINE

A The Law Merchant

Customary law rather than common law or statute has been the principal component of the legal system for much of English history.¹¹³ In commercial centres, customs arose amongst the mercantile community to regulate trade and commerce.¹¹⁴ These customs could differ from town to town and between trades, but were kept relatively consistent by the heavy influence of continental laws brought

104 *Bowstead and Reynolds on Agency*, above n 2, at 405.

105 At 405.

106 Supreme Court of Judicature Act (UK), s 25(6).

107 SJ Stoljar *The Law of Agency: Its History and Present Principles* (Sweet & Maxwell, London, 1961) at 216.

108 Supreme Court of Judicature Act (UK), s 25(6).

109 Stoljar, above n 107, at 211. Lang also makes this point: see Lang, above n 5, at 120.

110 WS Holdsworth "The History of the Treatment of 'Choses' in Action by the Common Law" (1920) 33 Harv L Rev 997 at 1015; and *Lampet's Case* (1625) 10 Co Rep 46 at 48a, 77 ER 994 (KB) at 997.

111 Supreme Court of Judicature Act (UK), s 25(6).

112 Goodhart and Hamson, above n 34, at 346.

113 Theodore FT Plucknett *A Concise History of the Common Law* (3rd ed, Butterworth & Co, London, 1940) at 272.

114 At 272.

to England by foreign merchants.¹¹⁵ This process of customary law making amongst the mercantile class grew into what is commonly referred to as the law merchant.¹¹⁶

Early case law on the undisclosed principal doctrine exclusively concerns disputes between merchant parties.¹¹⁷ Thus, it is almost certain that the doctrine's origin, like so much of agency law, lies in commercial custom. This theorised origin is bolstered by the fact that there are no early cases involving land, which one would expect had the doctrine had a common law origin.¹¹⁸ However, assuming this theory is true, the questions of why the doctrine arose and how the doctrine entered the common law still need to be addressed.

B Origin in the Foreign Principal Doctrine

Professor Hugh Fegan rejects that a purely legal explanation is sufficient to explain the existence of the doctrine, believing instead that its origin lies in commercial custom.¹¹⁹ Fegan argues that the undisclosed principal doctrine evolved out of the foreign principal doctrine:¹²⁰ a distinct but conceptually similar agency doctrine that held an agent acting for an overseas principal was assumed to pledge their own credit, and was thus solely held liable on the contract.¹²¹

Fegan identifies four 18th century cases that are generally credited as establishing the undisclosed principal doctrine: *Gonzales v Sladen*,¹²² *Garratt v Cullum*,¹²³ *Scrimshire v Alderton*,¹²⁴ and *de Gaillon v l'Aigle*.¹²⁵ As Fegan notes, none of these cases directly addresses the rule of the undisclosed

115 At 588–589.

116 Thomas Edward Scrutton "General Survey of the History of the Law Merchant" in Association of American Law Schools (ed) *Select Essays in Anglo-American Legal History* (Cambridge University Press, Cambridge, 1909) vol 3, 7 at 8; and RST Chorley "The Conflict of Law and Commerce" (1932) 48 LQR 51 at 52.

117 It is not until the 20th century that non-commercial cases begin appearing in the law reports.

118 Cecil Fifoot *Lord Mansfield* (Clarendon Press, Oxford, 1936) at 82.

119 Hugh J Fegan "Foreign Principals" (1932) 80 U Pa L Rev 858 at 858

120 At 874.

121 At 874.

122 *Gonzales v Sladen* (1707) (QB) in Francis Buller *An Introduction to the Law Relative to Trials at Nisi Prius* (Strahan and Woodfall, London, 1771) at 128.

123 *Garratt v Cullum* (1710) (QB) in Francis Buller *An Introduction to the Law Relative to Trials at Nisi Prius* (6th ed, Strahan and Woodfall, London, 1793) at 42. This case is frequently spelt "*Gurratt v Cullum*", including by Fegan himself.

124 *Scrimshire v Alderton* (1743) 2 Strange 1182, 93 ER 1114 (KB).

125 *de Gaillon v l'Aigle* (1797) 1 Bos & P 357, 126 ER 950 (Comm Pleas). See also the subsequent appeals: *de Gaillon v l'Aigle* (1798) 1 Bos & P 8, 126 ER 747 (Comm Pleas); and *de Gaillon v l'Aigle* (1799) 1 Bos & P 368, 126 ER 957 (Comm Pleas).

principal.¹²⁶ *Gonzales v Sladen* and *de Gaillon v l'Aigle* concern the relationship between an agent and third party, and in any case in neither of them was the principal undisclosed. *Garratt v Cullum* concerns the relationship between the agent and undisclosed principal. *Scrimshire v Alderton* allegedly involves an undisclosed principal, but Fegan believes this case was decided on the ground of a fraudulent payment to an insolvent agent instead of the rules of agency as they relate to contract law.¹²⁷ However, all four cases involve a "foreign principal": a principal based in a jurisdiction different to the agent and third party.¹²⁸

Fegan believes the evolution of the foreign principal doctrine into the undisclosed principal doctrine was a result of expanding English trade and the resultant effects this had on commercial behaviour and custom. There was a general dislike of foreign traders for much of the Middle Ages; they competed with local retailers and often avoided paying taxes in the towns they visited to sell.¹²⁹ Conversely, however, there were distinct advantages to trading with foreign merchants. England relied on the importation of foreign goods, and at the same time many industries relied on export to continental Europe.¹³⁰ These opposing attitudes caused regulatory policy on foreign merchants to oscillate between restricting and facilitating foreign trade. A statute passed in 1392 and in force until 1627 prohibited a "merchant stranger alien" from selling, buying, or merchandising with another foreign merchant in England, and from selling to retail.¹³¹ Fegan posits that this statute was not obeyed literally: foreign merchants simply acted through local traders who posed as principals, but who were really acting as agents. Thus, English merchants had strong motives to conceal their agent status when acting for foreigners in domestic commerce.¹³² Fegan suggests the foreign principal doctrine also existed because the collection of debts in foreign countries would have been difficult

126 Fegan, above n 119, at 862.

127 The case also reasonably bears the interpretation that it was decided as an action for money had and received, where money had been paid by the third party to the agent, and the agent had gone bankrupt. The jury's reluctance to follow the judge and find for the principal is often referred to as a layman's belief in the unfairness of the undisclosed principal doctrine (see for example *Lang*, above n 5, at 114), but equally can be interpreted as the jury's sympathy lying with the third party rather than the principal in deciding which innocent party should bear the cost of the agent's bankruptcy.

128 Fegan states that these four cases are cited as authority for the following proposition in the contemporary abridgement Matthew Bacon and Henry Gwillim *A New Abridgment of the Law* (5th ed, Strahan, 1798) vol 5 at 391: "And if a person, describing himself as agent for another residing abroad, enter into a contract here, he will be personally liable." However, this quote does not appear to be in this edition of Bacon's *Abridgment*, although it does appear in later editions citing *de Gaillon v l'Aigle*.

129 Clive Day *A History of Commerce* (Revised ed, Longmans & Green, New York, 1922) at 44 as cited in Fegan, above n 119, at 863.

130 Fegan, above n 119, at 864.

131 At 864. See Trade Act 1392 (Eng) 16 Rich II c 1.

132 At 865.

logistically. Customarily holding the English agent liable on the contract more easily ensured the third party received performance.¹³³

Fear of the foreign merchant began to wane by the 17th century when the growth of English commerce meant native merchants were able to compete internationally with European traders. Fegan suggests that the application of the foreign principal doctrine slowly evolved to reflect these changing attitudes, and that this change brought about the undisclosed principal doctrine. Fegan points to 19th century litigation involving the Spanish merchant Gandasequi to illustrate this change.¹³⁴ Gandasequi had employed Larrazabal & Co trading house to purchase goods from London merchants on his behalf. Goods were procured from two merchants, who sued the Spaniard when payment was not made.¹³⁵ Gandasequi pled the foreign principal doctrine in defence: he was not liable on the contract as he was a foreign merchant, and thus the contract was solely enforceable between the London merchant plaintiffs and the agent, Larrazabal & Co.¹³⁶

Two cases arose out of the dispute. In *Addison v Gandasequi*, a special jury presided over by Mansfield CJ¹³⁷ in the Common Pleas found that the plaintiffs knew of Gandasequi's interest in the goods, and thus he was not an undisclosed principal.¹³⁸ Mansfield CJ left the question of whether the foreign principal doctrine ought to apply to the jury, who chose to apply it, thereby relieving Gandasequi of contractual liability.¹³⁹ In *Paterson v Gandasequi*, Lord Ellenborough in the King's Bench directed the jury to find for the Spaniard on the same grounds.¹⁴⁰ Lord Ellenborough treated the foreign principal doctrine as one of absolute non-liability, stating his Lordship had applied the doctrine in countless cases before.

Fegan says these two cases mark the beginning of the foreign principal doctrine developing into the undisclosed principal doctrine.¹⁴¹ While Lord Ellenborough had applied the doctrine as a rule of law, Mansfield CJ was prepared to leave the question to the jury members. This represented a doctrinal

133 At 865.

134 At 865.

135 At 865–866.

136 At 866.

137 Note this is Sir James Mansfield, Chief Justice of the Common Pleas from 1804–1814, not Lord Mansfield, Lord Chief Justice of the King's Bench from 1756–1788, who is referred to later in this article and with whom Fegan confuses Sir James Mansfield.

138 *Addison v Gandasequi* (1812) 4 Taunt 574, 128 ER 454 (Comm Pleas) as cited in Fegan, above n 119, at 866.

139 *Addison v Gandasequi*, above n 138, at 457.

140 *Paterson v Gandasequi* (1812) 15 East 62, 104 ER 768 (KB) as cited in Fegan, above n 119, at 866.

141 Fegan, above n 119, at 866.

shift in the foreign principal's treatment by the law, whereby the once-strict rule was evolving into a presumption of intention: a third party was presumed to give credit to an English merchant instead of the foreign principal unless evidence showed an intention on behalf of the third party to give credit to the foreigner instead. A question of law became a question of fact, and this question of fact was left for the jury to decide.¹⁴² Fegan says this change was driven by the undermining of the reason for the doctrine. Previously, the courts had disregarded the intention of the parties, favouring economic and commercial policy that burdened the English agent who acted for foreigners, thereby discouraging such behaviour. As the need to deter this behaviour waned, so did the strictness with which the foreign principal doctrine was applied.¹⁴³ The line of foreign principal cases Fegan traces culminates with the courts simply inquiring into the intention of the parties to determine who ought to be held liable.¹⁴⁴

C Issues with Fegan's Theory

1 Conceptual issues

The first issues with Fegan's theory are conceptual. The closest Fegan comes to articulating precisely *why* the undisclosed principal doctrine arose out of the foreign principal doctrine is in his conclusion:¹⁴⁵

... when the merchant class no longer opposed the foreigner, the injustice of the [foreign principal] rule became apparent. The foreigner had authorized the contract; why not hold him liable upon it, provided the third party be willing. Of course if he was disclosed, the third party dealt with him and not the agent. If he was not disclosed then let the third party elect between them. The rule of foreign principal, then, bound the agent only. The rule of the undisclosed principal took over the liability of the agent, but added to it, in the alternative, the liability of a principal.

It seems Fegan believes the undisclosed principal doctrine was simply the logical endpoint for the evolution of the foreign principal doctrine. However, it is proposed that this conclusion does not seem as obvious as he suggests.

Fegan's historical analysis convincingly shows the courts putting an increasing emphasis on the objective intention of the parties in situations involving foreign principals, culminating in the fact that

142 *Mahoney v Kekule* (1854) 14 CB 390 at 392–396, 139 ER 161 (Comm Pleas) at 162–164 as cited in Fegan, above n 119, at 867 and 871.

143 Fegan, above n 119, at 875–876.

144 This evolution from question of law to one of fact is subject to a brief revival of a hard-line application of the doctrine by Blackburn J (as his Lordship then was): see *Ireland v Livingston* (1871) LR 5 HL 395 (HL); *Armstrong v Stokes* (1872) LR 7 QB 598 (QB); and *Die Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel v Claye* (1873) LR 8 QB 313 (QB). This view was briefly followed in a few cases such as *Hutton v Bulloch* (1874) LR 9 QB 572 (Exch Ch).

145 Fegan, above n 119, at 876.

by the 1890s: "the courts said that the question whether the English agent of a foreign principal was liable depended on the intention of the parties".¹⁴⁶ By contrast, the undisclosed principal doctrine holds the principal and third party to owe each other contractual obligations in the complete absence of any objective intention to this effect. If the common law was gradually giving primacy to the intention of the parties in cases involving foreign principals, it seems completely opposed to this progression for the doctrine to morph into a rule applied contrary to the intention of the parties. A more logical endpoint for the evolution of the foreign principal doctrine would be for liability of a principal to depend entirely on the intention of the parties, regardless of whether the principal was foreign, disclosed, or undisclosed.

Further, there is little evidence for this theory in the case law. In contrast with Fegan's convincing use of cases to show a gradual emphasis placed on intention by the courts, he does not provide any cases in which the courts grapple with whether to hold an undisclosed principal liable on the contract. In other words, there is a "missing link" between the foreign principal cases and the undisclosed principal cases. Such a case would have perhaps acknowledged that the contractual liability of a foreign principal was now a question of intention of the parties, and while the third party did not know the foreign principal existed, so cannot have intended to contract with him, the principal shall nevertheless be liable on the contract. It is suggested that Fegan provides no such case because no such case exists.

2 Temporal issue

The second issue with the theory is temporal. Fegan places the turning point in the evolution from foreign principal doctrine to undisclosed principal doctrine at around 1812.¹⁴⁷ The earliest case in the law reports definitively concerning an undisclosed principal appears to be *Rabone v Williams* in 1785. The case is not reported in its own right, but appears in a footnote of *George v Clagett* as follows:¹⁴⁸

... Action for the value of goods sold to the defendant by means of the house or Rabone, sen and Co at Exeter, factors to the plaintiff. The defendant, the vendee of the goods, set off a debt due to him from Rabone and Co, the factors, upon another account alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by Rabone and Co, and not by the plaintiff. Lord Mansfield, Ch J—"Where a factor, dealing for a principal but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the

146 At 871. Fegan discusses four cases that exemplify this changing emphasis: *Hahn v North German Pitwood Company* (1892) 8 TLR 557 (QB); *Glover v Langford* (1892) 8 TLR 628 (QB); *Flinn v Hoyle* (1893) 63 LJ(NS) 1 (CA); and *Harper v Keller* (1915) 84 LJKB 1696 (KB).

147 Fegan, above n 119, at 866.

148 *Rabone v Williams*, above n 92 (emphasis added).

purchase of the goods, yet that purchase may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled."

Two features of the case are important. Firstly, this case shows that in 1785 the undisclosed principal doctrine was "long settled", though admittedly Lord Mansfield refers to no authority so holding, so his Lordship's assertion must be taken at face value. Nevertheless, Oliver Wendell Holmes Jr suggests that the doctrine was "known to Holt",¹⁴⁹ and Ernest Huffcut describes the doctrine as "as old as the Year Books".¹⁵⁰ Secondly, there is no indication the case involves a foreign principal. *George v Clagett*, a case with materially identical facts, certainly does not feature a foreign principal. These cases taken together show that Fegan's timeline is off by at least several decades.

However, *Carr v Hinchliff*, a case decided in 1825 in the King's Bench, suggests that Fegan is off by even longer. In the case, Hinchliff is sued by Carr for the price of goods sold to him by Summers. Summers was an agent of Carr, an undisclosed principal.¹⁵¹ The Court applied the rule in *Rabone v Williams* in allowing Hinchliff to set-off a debt owed to him by Summers against the debt he owed to Carr.¹⁵²

The case is most interesting, however, because Hinchliff argued in the alternative that Carr's suit must fail because he did not owe Hinchliff contractual obligations, due to Carr not having appeared in the transaction. In other words, Hinchliff put forth precisely the main doctrinal argument against the existence of the undisclosed principal doctrine.¹⁵³ The Court rejected this argument, in part, it seems, because it was pleaded incorrectly,¹⁵⁴ but also because the justices were bound by the rule in *Rabone v Williams*.¹⁵⁵ Nevertheless, Bayley J, in discussing the nature of the plaintiff's plea, states that the plea "admits a sale to the defendant by the plaintiff's factor; that at common law gives a right of action to the plaintiff".¹⁵⁶ Further, Holroyd J states that assuming the contract was as stated in the plea: "Considering this case upon principles of law, as they stood before the Statute of Set-Off, ...

149 Oliver Wendell Holmes Jr "The History of Agency" in Association of American Law Schools (ed) *Select Essays in Anglo-American Legal History* (Cambridge University Press, Cambridge, 1909) vol 3, 368 at 369.

150 Ernest W Huffcut *The Law of Agency: Including the Law of Principal and Agent and the Law of Master and Servant* (2nd ed, Little, Brown and Co, Boston, 1901) at 162.

151 *Carr v Hinchliff*, above n 92, at 553.

152 At 548.

153 See the argument made by Hinchliff, recorded at 550 as: "[T]he sale of the goods by the factor cannot be considered as a sale by the plaintiff, and never created a debt due to him."

154 At 554 per Littledale J: "The plea does not deny the plaintiff's right of action; on the contrary, it admits a prima facie right ... and then avoids it by shewing a debt of a larger amount due to the defendant from the plaintiff's agent and factor."

155 At 551.

156 At 552.

either the plaintiff or Summers might have brought an action for the price of the goods sold".¹⁵⁷ Thus, it appears that by the law before 1729 (when the Statute of Set-Off was passed),¹⁵⁸ a contract made by a factor for an undisclosed principal could be enforced by either the factor or the principal, meaning the doctrine was already incorporated into the common law by this year.

While *Rabone v Williams* shows the doctrine was well-established in the common law by 1785, *Carr v Hinchliff* is strong evidence that it had been known to the common law for at least half a century longer than that. Further, it was at this time conceptually distinct from the foreign principal doctrine. This is crucial because the foreign principal doctrine survives in the case law until the beginning of the 20th century, and so if the undisclosed principal doctrine evolved out of the foreign principal doctrine as Fegan suggests, it seems unlikely the two doctrines would coexist for at least 150 years. Thus, instead of one doctrine evolving out of the other, it seems more likely the two doctrines are distinct but conceptually similar mercantile customs, operating concurrently in the same commercial context and therefore prone to cropping up in factually similar cases.¹⁵⁹

D Why Did the Custom Arise?

Commercial convenience is the explanation usually given for why the undisclosed principal doctrine arose.¹⁶⁰ This explanation, however, is somewhat superficial: a custom would hardly arise amongst the mercantile class if it were not at least somewhat convenient for the community that created and self-imposed it. Assuming it was convenient, a more thorough explanation for its existence would explain *why* it was convenient.

However, practical limitations make this question difficult to answer. Early primary material is sparse in commentary on the doctrine. The oldest judgments touching on the doctrine are brief,¹⁶¹ and it is not until 100 years of consistent application of the doctrine that the judiciary questions its

¹⁵⁷ At 553.

¹⁵⁸ See Set-Off Act 1729 (GB) 2 Geo 2 c 22.

¹⁵⁹ See for example *Thomson v Davenport*, above n 92.

¹⁶⁰ See for example *Siu Yin Kwan v Eastern Insurance Co Ltd*, above n 8, at 207 per Lord Lloyd ("It seems to be generally accepted that, while the development of this branch of the law may have been anomalous, since it runs counter to fundamental principles of privity of contract, it is justified on grounds of commercial convenience."); Lang, above n 5, at 119 ("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."); and Danny Busch "Indirect Representation and the Lando Principles: An Analysis of Some Problem Areas From the Perspective of English Law" (1999) 7 ERPL 319 at 331 ("The exact legal basis of the English doctrine is, however, unclear and is hard to reconcile with the doctrine of privity of contract. It is probably best explained simply as an exception to the doctrine, which is justified on grounds of commercial convenience.").

¹⁶¹ See for example the 150-word decision of *Rabone v Williams*, above n 92.

existence.¹⁶² Even 18th and 19th century agency and commercial law treatises comment little on the doctrine, other than to explain its nature and refer to cases in which it is applied. A further hindrance is that almost all early case law concerns issues ancillary to the doctrine's central feature: the reciprocal duties and liabilities of the undisclosed principal and third party to one another. Instead, it is disputes over the application of the doctrine's subsidiary elements that are litigated, such as the third party's right to set-off against the principal,¹⁶³ or the right to elect between suing the agent and third party.¹⁶⁴ These rights are not particularly useful in explaining the existence of the central feature, because so long as the undisclosed principal has the right to enforce the contract against the third party, they are not particularly anomalous. It is perfectly normal for a creditor to be able to elect between his two debtors,¹⁶⁵ and the third party's right of set-off is not anomalous in the common law because this right is statutory.¹⁶⁶

Nevertheless, some hypotheses can be made based on the limited information that is available. The 12th century saw a shift in the way international trade was conducted. Itinerant sellers operating under a face-to-face barter system, personally taking their goods overseas to be sold, were replaced by a system where the seller remained at home and relied on overseas agents to sell on their behalf.¹⁶⁷ The cornerstone of this new form of international trade was the "factor":¹⁶⁸ an agent to whom "goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale" and who "usually sells in his own name, without disclosing that of his principal".¹⁶⁹

162 See *Armstrong v Stokes*, above n 144, at 604 per Blackburn J.

163 See for example *George v Clagett*, above n 92; and *Rabone v Williams*, above n 92.

164 See for example *Paterson v Gandasequi*, above n 140; and *Thomson v Davenport*, above n 92.

165 See *Bowstead and Reynolds on Agency*, above n 2, at 547.

166 S Rory Derham *Set-off* (Oxford University Press, New York, 1987) at 176; and see *Carr v Hinchliff*, above n 92, at 1165. Note that the relevant provisions of the two Statutes of Set-Off are still in force in New Zealand: see Imperial Laws Application Act 1988, sch 1, containing therein the Set-Off Act 1729 (GB) 2 Geo 2 c 22, s 13; and Set-Off Act 1735 (GB) 8 Geo 2 c 24, s 5. The fact that this right is statutory has eluded some commentators: see for example Lang, above n 5, at 131–132, where Lang uses the third party's right to set-off to justify her "intervention thesis".

167 Laura Macgregor "Agency law: continuity and change" in Andrew Hutchison and Franziska Myburgh (eds) *Research Handbook on International Commercial Contracts* (Edward Elgar Publishing, Cheltenham (UK), 2020) 281 at 282.

168 At 282.

169 *Baring v Corrie* (1818) 2 B & Ald 137 at 143, 106 ER 317 (KB) at 319. But see Cranston, above n 27, at 131.

It is not immediately clear why it was the custom for factors to sell without disclosing their principal, though that this was the case is beyond doubt.¹⁷⁰ Fegan's explanation concerning the dislike of the foreign trader is one reason for a person not to disclose their agent status, but this reasoning does not apply to non-foreign principals. Perhaps similar sentiments existed regionally, so that, for example, a London merchant was incentivised to hide his acting as agent for a Liverpool principal, just as he was for a continental principal.¹⁷¹

Further, the fact that the merchant principal often resided far from where the goods were sold meant that practical difficulties for the principal and third party to pursue claims against one another may have led to a custom developing whereby the third party gave credit to the local factor instead of the distant principal. The factor therefore had no reason to disclose his agency status. This accords with the reasoning partially underpinning the foreign principal doctrine as discussed earlier,¹⁷² and the ability for a third party to recover payment from a known agent to whom payment had been made mistakenly.¹⁷³

Another underlying reason could lie in the desire for agents to protect their businesses. By disclosing the identity of their principals, agents risked third parties bypassing them and dealing directly with the principal without using an agent as middleman. The undisclosed principal doctrine thus ensured agents retained their customers. Finally, it is noticeable that many undisclosed principal cases arose after a factor had gone bankrupt.¹⁷⁴ Merchants' livelihood depended on their ability to sell goods, and so perhaps it was simply inconceivable to the merchants that one could not sue to enforce payment from the purchaser of their goods, regardless of the nature of the agency relationship that brought about the sale. It may have been that the law merchant would simply not entertain principled rules concerning contractual intention at the expense of a merchant's ability to be paid.

E Path of the Doctrine into the Common Law

This leaves the issue of how the doctrine made its way into the common law. The hypothesis, based on the dicta in *Carr v Hinchliff*, that the doctrine entered the common law at, or at least by, the early 18th century aligns with the three stages Sir Thomas Scrutton identifies in the development of the law merchant. Scrutton states that the first stage ranges from time immemorial until the

170 See United Kingdom House of Commons Select Committee *Report from the Select Committee on the Law Relating to Merchants, Agents, or Factors* (13 June 1823) at 113 per Mr Yates, who gave considerable oral evidence that it was the custom of factors to sell in this manner.

171 See Fegan, above n 119, at 860.

172 At 865.

173 Raphael Powell *The Law of Agency* (2nd ed, Pitman & Sons, London, 1961) at 275–276; and *Newall v Tomlinson* (1871) LR 6 CP 405 (Comm Pleas). I am grateful to Peter Watts for pointing this out to me.

174 Macgregor proposes that it is such situations of a merchant intervening on his bankrupt factor that the doctrine arose: see Macgregor, above n 167, at 291.

appointment of Lord Coke as Lord Chief Justice in 1606.¹⁷⁵ During this period, the law merchant was a substantive body of law governing the mercantile community and administered in special courts, such as the courts of piepowders held at fairs.¹⁷⁶ Scrutton shows that because the common law and law merchant were administered in different court systems, there was little overlap between the two systems.¹⁷⁷ Thus, remarkably few cases concerning mercantile disputes appear in the early law reports.¹⁷⁸ This explains why there is no case in the law reports involving an undisclosed principal during this period.

The next stage of development runs from 1606 until the appointment of Lord Mansfield as Lord Chief Justice of the King's Bench in 1756.¹⁷⁹ During this period the specialist mercantile courts disappeared, and administration of the law merchant was transferred into the common law courts. However, it was administered as custom rather than as law,¹⁸⁰ meaning questions of fact and custom were decided by special merchant juries.¹⁸¹ It is during this time that mercantile issues begin appearing in the law reports.¹⁸² Holroyd J's statement suggesting the doctrine was known to the common law in the early 1700s sits comfortably in the middle of this period. The fact no cases applying the doctrine survive from this period might be because the law merchant, while now under the jurisdiction of the common law courts, was still applied as custom as a question of fact. As such, there was minimal point in reporting the cases for use in future cases: a judge was bound to leave the question of whether the doctrine ought to apply to the special jury, and was not able to apply previous decisions on the doctrine as a rule of law. Thus, during this period there was little practical point in recording a decision involving an undisclosed principal for posterity of the common law.

However, this changed during the law merchant's final stage of development: Lord Mansfield's 30-year tenure as Lord Chief Justice.¹⁸³ Until Lord Mansfield's appointment, though the law merchant was administered in the common law courts it lacked any real structure or coherence, mostly because the system of pleading custom and leaving the decision to a merchant jury meant decisions were

175 Scrutton, above n 116, at 9.

176 At 9.

177 William Searle Holdsworth "The Development of the Law Merchant and Its Courts" in Association of American Law Schools (ed) *Select Essays in Anglo-American Legal History* (Cambridge University Press, Cambridge, 1909) vol 1, 289 at 303.

178 Scrutton, above n 116, at 8.

179 At 13.

180 At 13.

181 At 13.

182 It is during this period that Fegan's theory based on his proposed earliest examples of the doctrine begins. See *Gonzales v Sladen*, above n 122, at 128; and *Garratt v Cullum*, above n 123, at 42.

183 Scrutton, above n 116, at 13.

highly particular to their facts and therefore established no general principles.¹⁸⁴ Lord Mansfield sought to change this. By extracting legal principles out of mercantile treatises, combined with a special merchant jury to inform him of the relevant customs and usages, Lord Mansfield assimilated into the common law a coherent body of mercantile law,¹⁸⁵ thereby gaining the sobriquet "Founder of the Commercial Law of [England]".¹⁸⁶ Thus, it is not surprising that it is by Lord Mansfield's pen that the undisclosed principal doctrine is given its first legal recognition in the law reports in *Rabone v Williams*.¹⁸⁷ As one 19th century select committee report on the law of factors states:¹⁸⁸

[T]he laws have been made to bend to the convenience of trade, in giving validity to contracts of sale by factors in certain cases, where the strict application of the old rules of law would not have supported them.

So perhaps it is on this basis that the undisclosed principal doctrine was incorporated into the common law from the law merchant, whether by Lord Mansfield or judges before him.

V FAIRNESS AND COHERENCE OF THE DOCTRINE

The undisclosed principal doctrine sits uncomfortably in the law of agency, having been divorced from its mercantile roots.¹⁸⁹ While the doctrine is still frequently applied in the context of international commerce,¹⁹⁰ it is now also applied to a much wider range of contracts, including for the sale and purchase of land,¹⁹¹ theatre tickets,¹⁹² employee insurance,¹⁹³ and a Jaguar sports car.¹⁹⁴ It has become an established agency doctrine with general application.

184 At 13.

185 At 13.

186 *Lickbarrow v Mason* (1787) 2 TR 63 at 73, 100 ER 35 (KB) at 40 per Buller J. See also RST Chorley, above n 116, at 51.

187 Many commentators give *Scrimshire v Alderton*, above n 124, as the first case concerning the undisclosed principal doctrine. See for example Lang, above n 5, at 114; and Goodhart and Hamson, above n 34, at 320. However, a close reading of the case does not show any evidence that the principal was in fact undisclosed. Further, some commentators suggest the case was decided on the basis of fraud: see Fegan, above n 119, at 861. See also n 127.

188 United Kingdom House of Commons Select Committee, above n 170, at 11.

189 Macgregor, above n 167, at 291.

190 See for example *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd*, above n 39.

191 Richard A Mann and Barry S Roberts *Business Law and the Regulation of Business* (11th ed, South-Western Publishing Co, Mason (Ohio), 2014) at 607.

192 *Said v Butt* [1920] 3 KB 498 (KB).

193 *Siu Yin Kwan v Eastern Insurance Co Ltd*, above n 8.

194 *Lloyds & Scottish Finance Ltd v Williamson* [1965] 1 WLR 404 (CA).

A Fairness of the Doctrine

One might suggest the undisclosed principal doctrine can be wielded by scheming principals to subject unwary third parties to considerable unfairness. Parties treating with one another ought to be able to assess the wants, needs and funds of the other party in determining what the terms of the contract will be. By using an agent masquerading as a principal, the undisclosed principal misleads the third party into thinking the wants, needs and funds of the party with whom he is bargaining are *x*, whereas they are actually *y*. Thus, when Walt Disney Productions as an undisclosed principal used agents to purchase 27,400 acres of Florida land at a total cost of USD 5 million to build a theme park, the landowners undoubtedly missed an opportunity to negotiate much higher prices for the land sales.¹⁹⁵

However, two considerations undermine the strength of this argument. Firstly, the doctrine only precludes the third party from getting a *better* bargain; it does not hold the third party to terms to which he did not consent.¹⁹⁶ Second, the same effect that the doctrine provides could be achieved through a contractual relationship rather than an agency relationship. The "principal" could contract with the "agent" to purchase the desired property,¹⁹⁷ stipulating that the "agent" must then onsell to the "principal".¹⁹⁸ While it is true that a seller always takes the risk of the purchaser onselling goods (potentially for a better price), when this occurs the seller is no longer legally interested in the goods. Whereas, so long as a seller has a legal interest in the goods, she ought to be able to dispose of it to whomever and on whatever terms she likes. This argument, however, is more accurately characterised as a normative argument concerning the correct relationship between the laws of contract and agency, rather than a criticism that highlights the perceived unfairness of the doctrine. This argument is now considered.

B Purpose of Agency Law and its Compatibility with the Doctrine

Contract formation is a legal procedure. A contract forms when two parties objectively agree to sufficiently clear terms,¹⁹⁹ each bear mutual objective intentions to contract,²⁰⁰ and each provide

195 Mann and Roberts, above n 191, at 607.

196 Peter Watts "Agency" in William Day and Sarah Worthington (eds) *Challenging Private Law Lord Sumption on the Supreme Court* (Hart Publishing, Oxford, 2020) 257 at 267.

197 The converse situation where the third party wishes to buy goods, and principal/agent wish to sell goods, equally applies.

198 "Principal" and "agent" are in quotation marks to indicate that in such a situation the parties would not be in a principal-agent relationship at all, but in a contractual relationship.

199 *Smith v Hughes*, above n 25, at 607.

200 Jeremy Finn "Historical introduction" in Burrows, Finn and Todd, above n 15, at [1.5].

consideration.²⁰¹ The content of the contract consists of reciprocal contractual duties owed by each party to follow the terms to which they have agreed.²⁰² Contract formation is a personal procedure, meaning the parties who take part in the procedure are the parties who assume the contractual duties.²⁰³ Thus, person T cannot impose contractual liabilities on person X by performing the contract formation procedure with person P. This procedural concept can be expressed as a diagram.

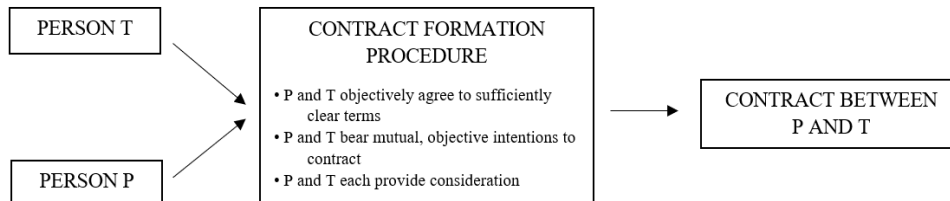


Figure 1: Standard contract formation procedure

P and A may agree to empower A to affect P's legal relations with third parties, such as his contractual rights and obligations.²⁰⁴ Thus, when A and T perform the contract formation procedure a contract generally forms solely between P and T.²⁰⁵ This contract between P and T arises without altering any rules of contract formation. P and T both objectively manifest reciprocal mutual intentions to contract with one another. Only in this case P's intention will be manifested through A, and T's knowledge of P means T may manifest an intention to contract with P rather than A (the person with whom he treats). P and T both provide consideration for the contract by reciprocally assuming contractual obligations intending to be legally binding, albeit P's assumption will be manifested through A. Even an unnamed principal (with which many courts confuse undisclosed principals)²⁰⁶ may contract with a third party through an agent without altering the rules of contract formation. T can still intend to contract with P despite not knowing P's identity; contracting with a person whose

201 *Tweddle v Atkinson*, above n 66, at 399; and *Salmond and Williams*, above n 24, at 18.

202 *Salmond and Williams*, above n 24, at 33.

203 At 382.

204 *Bowstead and Reynolds on Agency*, above n 2, at [1-001].

205 At [9-001]; and *Montomerie v United Kingdom Mutual Steamship Association*, above n 52, at 371. The word "generally" is here used because an agent is able to contract in such a way as to bind herself and her principal, if she so chooses: see *International Railway Co v Niagara Parks Commission* [1941] AC 328 (PC) at 342.

206 See for example *Benton v Campbell, Parker & Co* [1925] 2 KB 410 (DC); *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd*, above n 39; and *Hersom v Bernett* [1955] 1 QB 98 (QB).

identity is unknown is a common everyday occurrence.²⁰⁷ Likewise, A can manifest P's intention to contract with T without revealing P's identity. A is simply a medium through which P may act in the law, per the legal maxim *qui facit per alium facit per se*,²⁰⁸ and thus a P-T contract forms by the ordinary rules of contract formation. This concept can also be expressed as a diagram.

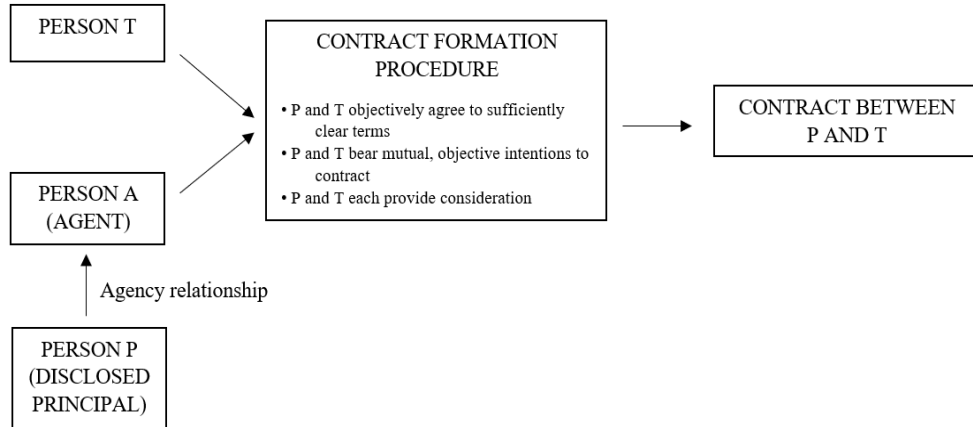


Figure 2: Contract formation procedure by standard, disclosed agency relationship

P may be undisclosed, meaning his existence rather than his identity is unknown to T. By operation of the undisclosed principal doctrine, the law nevertheless holds that if A and T perform the contract formation procedure a "contract" forms between P and T.²⁰⁹ Here, P and T's reciprocal contractual obligations arise by operation of a *different* procedure. There is no requirement for P and T to objectively agree to the contractual terms. Further, there is no requirement for T to intend objectively to contract with P, nor for P to intend objectively to contract with T.²¹⁰ Finally, P is not required to provide consideration to support the contract.²¹¹ In fact, the contract formation procedure

207 For example, a sole trader has no knowledge of the identity of customers who purchase goods from their store operated by agent employees, and vice versa, but valid contracts for sale and purchase nevertheless form between the sole trader and the purchaser customer.

208 "One who does an act through another is deemed in law to do it oneself": see Herbert Broom *A Selection of Legal Maxims, Classified and Illustrated* (7th ed, Sweet and Maxwell, London, 1900) at 623.

209 Here "contract" is used as a simplified means of saying person A and B have reciprocal contractual duties enforceable against one another. It is not an endorsement of the theory that an ordinary contract is formed between the undisclosed principal and third party.

210 See section above titled "Third party's implied intention" for a discussion of why the undisclosed principal doctrine operates to hold the third party contractually liable without requiring such objective agreements and intentions to contract.

211 See section above titled "Consideration" for a discussion of why P provides no consideration for the contract.

that operates to create the contractual obligations between P and T is exactly the same as the procedure that gives rise to an A-T contract,²¹² except that A must have actual authority to contract on P's behalf.²¹³ The conceptual diagram for the undisclosed principal doctrine is therefore as follows.

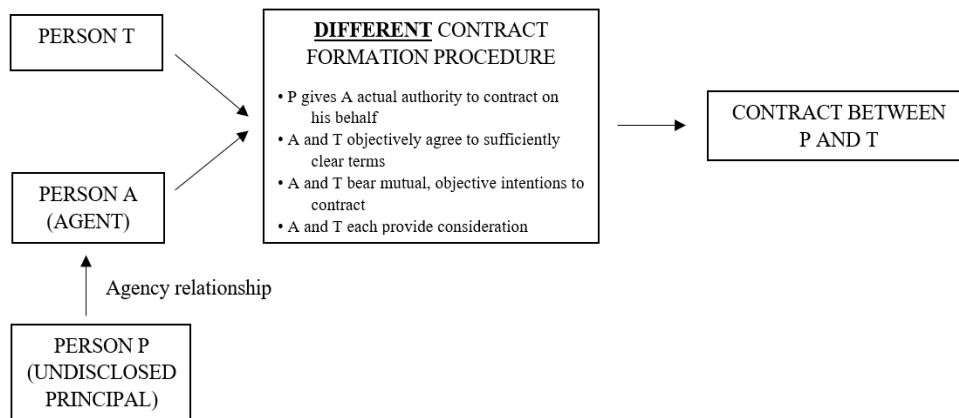


Figure 3: Contract formation procedure by undisclosed agency relationship

It is evident that the agency law doctrine concerning undisclosed principals overrides the common law rules of contract formation. This ought not to be the case. Agency law is a means through which one person may act through another in the law.²¹⁴ This means it affects *who* is empowered to follow certain rules giving rise to certain legal results, such as who may perform the contract formation procedure resulting in contractual obligations on P. Normally only P may do this,²¹⁵ but agency law provides that anyone whom P has authorised may do this.²¹⁶ The undisclosed principal doctrine frustrates agency law's general purpose by altering both *who* may perform the contract procedure giving rise to contractual obligations on P, and *what form* this contract formation procedure takes.

VI CONCLUSION

During the Middle Ages, the merchant class must have considered the undisclosed principal doctrine just and logical, if not necessary for efficient commerce, in adopting it as custom. But its subsequent adoption into the common law divorced it from its mercantile roots and has seen it

212 The undisclosed principal doctrine does act to so create such a contract, as T may elect to sue either A or P: see section above titled "Legal Nature of the Doctrine".

213 See the sentence preceding n 23 above.

214 Salmond and Williams, above n 24, at 391.

215 This is because of the personal nature of contract formation: see Figure 1 above and the preceding discussion.

216 Salmond and Williams, above n 24, at 391.

transform into a general agency doctrine with limitless application.²¹⁷ Nevertheless, if 150 years ago Lord Blackburn considered the doctrine too firmly entrenched in the common law for the courts to give it a second thought, it is certainly too late now.²¹⁸ However, the diverse range of proposed underpinning theories, and their inconsistent judicial adoption, have only acted to further confuse the doctrine's rules, thereby making it ever-increasingly difficult to maintain any semblance of internal coherence. As such, save legislative intervention, the doctrine ought simply to be recognised as anomalous and exceptional to the law of contract formation, rather than justified and rationalised on grounds that do not withstand analysis.

²¹⁷ See for example *A v Attorney-General* [2018] NZHC 986, [2018] 3 NZLR 439. In this case, the police had conducted an investigation into a motorcycle club believed to be involved in illicit activity. As part of the planned infiltration of the club, Constable Wilson, an undercover police officer, had rented a storage unit at a storage facility run by a company, H Ltd. Mr A was the director of H Ltd, and was affiliated with the motorcycle club. The renting of the unit was used to build a fictitious back story that Constable Wilson was involved in criminal activity, with the aim of becoming close to members of the club. Various paraphernalia were stored in the rental unit, including equipment for growing cannabis, laptop computers and resealable plastic bags of the type used by drug dealers. To bolster Constable Wilson's credibility as a criminal, the police decided to execute a "search warrant" of the storage unit in the presence of Mr A. Two police staff were involved in the search. It was later found that the search warrant used was fake, and thus amounted to serious police misconduct. H Ltd sued the police in trespass (amongst other claims). Nevertheless, the Court held that the police had permission to enter the unit by reason of the Commissioner of Police being an undisclosed principal of Constable Wilson when he signed the licence agreement with H Ltd. Thus, the police had a valid licence to enter the storage unit despite the invalidity of the search warrant. One might question whether there ought to be a material distinction made in the application of the doctrine from situations involving the sale and purchase of goods in a commercial setting (where the doctrine arose) and contracts granting interests in land. It can be safely assumed that Mr A (as director of H Ltd) would not have been willing to grant to the police a licence to his property. It is one thing for the law to impose obligations on a third party for the sale and purchase of goods, as the identity of the counterparty is likely less important to the third party than the nature of the goods or price being negotiated. However, it seems quite another thing for the law to impose on a third party an obligation to grant a licence in favour of person X when the third party thought the licence was in favour of person Y. The identity of a person is a much more relevant consideration in the granting of a licence (or another interest in relation to the third party's land) than it is in the sale and purchase of goods. This case illustrates the awkward legal results that follow from the expansion of the doctrine into one of general application in the law.

²¹⁸ *Armstrong v Stokes*, above n 144, at 604.