Should the Doctrine of Undisclosed Principal be retained?

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The article investigates whether or not the doctrine of undisclosed agency - one of the most criticized doctrines of agency law should be retained by English Law.
INTRODUCTION

One of the principles of the law of agency is that, where an agent acts for a **disclosed principal** (whose existence is known by the third party), who expressly authorized the agent to act on his behalf in relation to a third party the **principal can sue and be sued by the third party**. Literally put, the agent is considered as an intermediary or an instrument through whom the principal and the third party transact with each other.¹

On the other hand, where the agent acts for an **undisclosed principal** (whose existence is not known by the third party), it would appear, ordinarily and logically, that the legal position should not have been the same as in the case of disclosed principal. However, this is not the case. The law is that, where an agent acts for an undisclosed principal the position is “in much the same way as one who is disclosed”.² That is to say, although the third party deals only with the agent and the agent only, and does not know the existence of the undisclosed principal, the latter can sue and be sued in his own name in so far as he authorized the agent to act on his behalf - and the agent acts within the scope of that authority. It is trite law that both the undisclosed principal and the third party can sue each other on the contract made by the agent on behalf of the undisclosed principal.³ And where the third party discovers the existence of the undisclosed principal, he may sue either the agent or the undisclosed principal, even though the contract is still considered that of the undisclosed principal.

This doctrine, although accepted and recognised in English law, has been attracting many criticisms as being anomalous, uncertain, “unknown to every other legal system”⁴ and something “to be reckoned with”⁵. On the other hand, some scholars consider these

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⁴ F. Pollock, (1887) 3 LQR 358, p. 359.

⁵ J.B. Ames, ‘Undisclosed Principal : His Rights and Liabilities’ (1909) XVII YLJ, 7, 443 is rich on this argument
criticisms as “unfair”\textsuperscript{6}, and to them the “doctrine is not as black or as peculiar as it is painted and that the case against it is overstated”.\textsuperscript{7}

All the academic writings, criticisms and comments on the doctrine, and all the theories propounded to rationalise or justify the anomaly of undisclosed principal, are expressed in an attempt to answer one question: why does the English law permit an undisclosed principal to sue and be sued by the third party?

This article analyses some of the arguments for and against the doctrine of undisclosed principal. Different views and opinions have been expressed over years. Some of these theories propounded attempted to answer the first limb of the anomaly i.e. why could the undisclosed principal sue the third party? Some of the arguments concentrate on the entire anomaly that is on both the rights and liabilities of undisclosed principal against the third party.\textsuperscript{8} Reasons for each theory have been given, some of which have to do with what we practically observe in our daily life. For instance, a strong case was recently made for undisclosed principal by Tan Chen – Han\textsuperscript{9} justifying the anomaly of the doctrine among other things in its commercial convenience. There are some of the theories that attempted (unsuccessfully) to extend the application of other branches of law and principles of equity to undisclosed agency - to rationalize and justify the anomaly.\textsuperscript{10} Some theories still invoked ‘home-made principles’ of agency law without going out borrowing principles of tort, trust or equity in order to explain or rationalise the anomaly of undisclosed principal.\textsuperscript{11}

\textsuperscript{6} Tan Chen-Han, ‘Undisclosed Principals and Contract’ (2004) 120 LQR 481.


\textsuperscript{8} Professor A. Rochvarg, discussed in detail these theories on the rights and liabilities of undisclosed principal, although the theme of his article gives emphasis on whether or not the undisclosed principal should be permitted to ratify the unauthorized contract of his agent. See A. Rochvarg, n. 7 above.

\textsuperscript{9} Tan Chen-Han, n. 6 above, pp. 481- 486. See also the case of Sui Yin Kwan v Eastern Insurance Co. Ltd, n. 1 above.

\textsuperscript{10} For instance the arguments canvassed by J. B. Ames, n. 5 above, and P.F.P. Higgins, n. 7 above.

\textsuperscript{11} See W.A.Seavey, n. 7 above.
However, it is clear that none of these arguments has so far succeeded in changing the position of English law on the rights and liabilities of undisclosed principal. Having observed these arguments, this article concludes that the doctrine of undisclosed principal should be retained for its commercial relevance and convenience. While this submission may be regurgitating the position of law as at now, it is also indisputably acknowledged by critics of the doctrine. That is to say, every writer (and critic) is convinced about the undisclosed principal’s over-whelming commercial relevance as accepted by the society and recognised by the courts. Which acceptance indicates how the doctrine “conforms readily to the needs of society”, and is another “indicator of its inherent value and correctness.”

It will be submitted therefore, being the doctrine a creation of society it should not be buried by fictions of identity, reciprocity and unsuccessful extensions of principles of tort, trust and equity. Nor should it be ‘disturbed’ by less powerful and seemingly less relevant rigid rules of privity of contract.

A. THE DOCTRINE OF UNDISCLOSED PRINCIPAL IN THE CASE LAW

An undisclosed principal is “a principal who is not known by the third party to be connected with the particular transaction”, i.e. a principal “whose existence the third party is unaware”. Undisclosed principal is not the same as unidentified principal whose existence the third party knows but not his name. It will soon be found out that the criticisms and objections against the doctrine of undisclosed principal have come too late as the doctrine is too well settled as part of English law of agency. The English courts have not been bothered or “unduly troubled” by the criticisms and comments being made against the doctrine. This is because the doctrine seems to have an unshakable origin “of reasonable antiquity, substantial solidarity and eminent judicial

12 Tan Chen-Han, n.6 above, p 485.
13 Ibid;
16 Armstrong v Strokes (1872) QB 598. See also F.R. Mechem, n. 7 above, p. 515.
respectability”\textsuperscript{18}. This position was re-affirmed in \textit{Siu Yin Kwan v Eastern Insurance Co. Ltd.}\textsuperscript{19} where the Privy Council stated that:

“The origin of, and theoretical justification for, the doctrine of undisclosed principal has been the subject of much discussion by academic writers...It seems to be generally accepted that, while the development of this branch of law may have been anomalous, since it runs counter to fundamental principles of privity of contract, it is justified on grounds of commercial convenience.”\textsuperscript{20}

In \textit{Schrimshire v Alderton}\textsuperscript{21}, the undisclosed principal who was the plaintiff, authorised his agent to sell some oats to the defendant. When the undisclosed principal requested the defendant to pay directly to him not his agent, the defendant refused and paid the agent from whom he bought the oats. The undisclosed principal sued the defendant when the agent failed to pay him the price of his oats. The members of jury were reluctant to make a finding for the plaintiff as directed by the court.\textsuperscript{22} Three times they were directed and three times they found for the defendant. The main reason given by the jury after a new trial was directed was that, to them there was no credit given by the owner to the buyer and the buyer was answerable to the agent only and the agent to the owner.

This case clearly demonstrated the tension between law and logic. Higgins said that the case “entailed a conflict between legal and mercantile thinking.”\textsuperscript{23} Another writer said that, although the case is being cited as the first one in which the doctrine of undisclosed principal was discussed, on the contrary it forms “a most characteristic illustration of the laymen to accept the new doctrine.”\textsuperscript{24} While the English law was identifying the undisclosed principal with the contract entered by his agent, reverse was the case as logically perceived by the jury. Although this is a remarkable decision which sets out the position of law in respect of undisclosed agency, yet this is said to have “embarked the

\textsuperscript{18} G.H.L. Friedman, n. 2 above, p. 253.

\textsuperscript{19} N. 1 above.

\textsuperscript{20} \textit{Per} Lord Lloyds of Birwick, delivering the advice of the Privy Council, at 207.

\textsuperscript{21} (1743) 2 STRA, 1182.

\textsuperscript{22} See J.B. Ames, n. 5 above, p. 446.

\textsuperscript{23} P.F.P. Higgins n. 7 above p. 168.

\textsuperscript{24} See W. Muller-Freienfels ‘The Undisclosed Principal’ n. 7 above p. 302.
courts upon an uncharted sea without any clear guiding light to steer by in future cases”.

A. L Good Hart said that this early hesitation was evidence which could be corroborated by subsequent events that there is a good deal of complexity in the theory of undisclosed principal. However, whether this legal reasoning can be sustained without contradicting other fundamental principles of law is another thing on which the critics said a lot and may be analysed in the other part of this article.

Other cases in which undisclosed agency was involved and also attracted attention and comments include for instance, *Edmunds v Bushell & Jones* and *Watteau v Fenwick* which cases were regarded as undesirable extension of the anomaly of the doctrine of undisclosed principal. However, the justification of the anomaly of the doctrine could best be explained in the judicial pronouncement in the case of *Keighley Maxstead & Co. v Durant* that:

“...the contract is in truth, although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made; and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although that truth may not be known to him...”

What matters to third party in undisclosed agency is not whether or not he knows in fact that the agent is acting for a particular principal. It does not matter to the third party whether the agent informs him that he is acting for an “identified” principal. As far as the third party “is concerned, the agent is really a principal, dealing in his own behalf”. What matters in law is whether or not the agent, while contracting with the third party,

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25 See Austin Tappan Wright, n. 7 above, p. 184.

26 A.L. GoodHart and C.J. Hamson, n. 7 above p. 322.

27 (1865) Q.B. 97.

28 (1893) 1 Q.B 346.

29 See P.F.P. Higgins n. 7 above, who analysed some of the controversial decisions on undisclosed agency, he submitted that the doctrine is in accord with principles of equity; pp. 167-179.

30 (1901) AC 240.

31 At p. 261.

32 G.H.L. Friedman, n. 2 above, p. 253
contracted in his name or in the name of the undisclosed principal. An agent could be personally liable to the third party if it can be established that he contracted as a principal. An agent may also be personally liable where, although he disclosed to the third party that he was acting for a principal, but in truth there was no such a principal. It is generally undisputable in undisclosed agency that, what is legally material is the undisclosed principal’s authority to the agent and the agent’s intention as at the time of contracting with the third party. This position has been made clear by Diplock LJ. in the case of Tehran-Europe Co. Ltd. v S.T. Bolton (Tractors) Ltd. when his Lordship stated that:

“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 discloses to the other party the identity of the principal, or even that he is contracting with on behalf of a principal at all, If the other party is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. 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 the agent to realise that the other party was not so willing.”

The undisclosed principal’s authority to the agent is what makes the contract as belonging to the principal and not to the agent. In ordinary commercial transactions, the fact that the agent does not make mention to the third party the fact of him representing a principal, is usually immaterial to the third party- who is usually willing to transact with the agent without knowing who his principal is. And where the principal’s identity matters to the third party, it is apparent that the third party would refuse to transact with the agent without knowing who his principal is. An argument could therefore be maintained that, the criticisms being made against the doctrine of the undisclosed principal do not reflect

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33 Jenkins v Hutchinson (1849) 13 Q.B 744

34 But this is not undisclosed agency, is cited only as example. See Halsbury’s Laws of England, n. 1 above


36 At p. 555.

protection of the interest of the third party. This is because, in commercial transactions involving undisclosed agency, the third party does not worry about whom the agent’s principal is. Thus, as far as the interest of the third party is concerned in commercial transactions, the objections seem valueless because, the circumstances as well as the principles of the law of agency do not prevent him from fighting the case himself when he finds out that the disclosure of the agent’s principal is material to him.\textsuperscript{38} Thus, it could be submitted that, a contract between the third party and the undisclosed principal could be implied by the third party’s willingness to treat as also party to the contract, any person from whom the agent gets authority. Of course it could be argued that in fact the third party contracts with the agent and the agent only – moreover, he does not even know that the agent is representing a principal. However, in commercial transactions involving an agent, practically, it matters not to the third party whether or not the agent discloses his principal.\textsuperscript{39}

A. SOME ARGUMENTS FOR AND AGAINST RETAINING THE DOCTRINE OF UNDISCLOSED PRINCIPAL

J.B. Ames condemned the doctrine of undisclosed principals for three reasons. The first is for “violating fundamental principles of contract”\textsuperscript{40}. Secondly, for giving no relief to the third party and thirdly, for operating unjustly between undisclosed principal and the third party. He therefore came up with three theories i.e. theory of equating the agent with a trustee and the undisclosed principal with beneficiary; the theory of indemnification and the theory of exoneration.\textsuperscript{41} According to him the agent is a trustee of undisclosed principal holding title not for himself (the agent), but for the benefit of undisclosed principal. The undisclosed principal as a beneficiary “would realise indirectly through the trustee all that under actual law he now obtains from him by direct action against him.”\textsuperscript{42} To Ames, the undisclosed principal is liable to the third party on authorised contract entered into by his agent with the third party because, as the undisclosed

\textsuperscript{38} See in particular the dictum of Diplock LJ, n. 36 above.

\textsuperscript{39} Tan Chen-Han, n.6 above, pp. 501-505, strongly supports and analyses this argument in detail.

\textsuperscript{40} J.B. Ames, n. 5 above p. 453.

\textsuperscript{41} See generally A. Rochvareg, n. 7 above. pp. 298, 301 and 312.

\textsuperscript{42} J. B. Ames, supra, p. 448.
principal received the benefit so also he would bear the burden of what his agent undertakes for him in the contract with the third party.\textsuperscript{43} Ames came up with “a mode of legal procedure”\textsuperscript{44} by which the third party can indirectly “compel the undisclosed principal to make good the contract of his agent.”\textsuperscript{45} He opined that, two duties usually exist in the relationship between the agent and the undisclosed principal i.e. the duty of reimbursement and the duty of exoneration. By these duties, the undisclosed principal undertakes not only to provide the funds to the agent to make payments for what the agent transacts with third party, but also undertakes to cover the agent “harmless”\textsuperscript{46} for the authorised contracts between the agent and the third party. This right of exoneration belonging to the agent can be enforced against the undisclosed principal at the suit of third party who transacts with the agent.

Nevertheless, one of the important aspects of law that Ames’ theory did not consider before equating agent with trustee is the independence of trustee. An agent is acting under the authority of his principal while trustee is not under the authority or control of the beneficiary. Thus, “the principal is a master which the beneficiary is not.”\textsuperscript{47} The theory did not also consider the existence and essence of consent in the relationship between the agent and the principal to the extent that, as between the agent and principal no legal relationship can “be created, nor can it continue to exist without the consent of the parties.”\textsuperscript{48} This element is lacking in the relationship between trustee and the beneficiary.

Another contradiction is that, while the third party can directly sue the undisclosed principal for the contract between the third party and the agent of the undisclosed principal, the beneficiary of a trust cannot be sued by the third party on contract between him (the third party) and the trustee. To sum it up, the Privy Council in \textit{Allen and Others v F.O’Hearn & Co.}\textsuperscript{49} giving advice on the decision of the Court of Appeal of Ontario,

\begin{itemize}
\item \textsuperscript{43} \textit{Ibid; p. 447.}
\item \textsuperscript{44} \textit{Ibid; p. 449.}
\item \textsuperscript{45} \textit{Ibid.}
\item \textsuperscript{46} \textit{Ibid.}
\item \textsuperscript{47} Ten Chen-Han, n. 6 above, p. 499.
\item \textsuperscript{48} See W.A. Seavey, n. 7 above, p. 863.
\item \textsuperscript{49} (1937) AC 213.
\end{itemize}
held that, although there are instances where the agent of undisclosed principal can sue in his name “there appears to be no precedent for such an agent suing as trustee for his principal.”\textsuperscript{50} Executory contracts may not also be covered by Ames’ benefit-burden theory where a contract exists even though the benefit is yet to be conferred. Although this theory attempts to certain extent to rationalise the anomaly of the undisclosed principal applying the principles of the doctrine of equity, it contradicts both the principles of agency law and the doctrine of equity and therefore “provides little assistance”\textsuperscript{51} in the search for a rationalised theory. But it may not be discarded altogether.

The theory propounded by GoodHart and Hamson\textsuperscript{52} was referred to as influential by the Privy Council in \textit{Sui Yin Kwan v Eastern Insurance Co.}\textsuperscript{53} although its explanation was unfortunately rejected by the Council in the same case.\textsuperscript{54} Their explanation to the anomaly is that, the contract made by the agent is not between the undisclosed principal and the third party, but is between the agent and the third party. The undisclosed principal intervenes as a stranger to the contract and that is why even in the law of agency it is always being said the undisclosed principal ‘intervenes’. Supporting their argument they asked the question that

\begin{quote}
If the principal is the contracting party, how can he be said to be intervening in a contract which is declared to be ‘really’ his own?\textsuperscript{55}
\end{quote}

To them the anomaly of the doctrine of undisclosed principal should be “best considered as a primitive and legally restrictive form of assignment”.\textsuperscript{56} Because there is no contract between the third party and the undisclosed principal the third party may not have direct action against undisclosed principal. The third party derives his right to sue undisclosed principal from the agent’s right against the principal. The principal also derives his right

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\textit{Ibid}; 218.
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\textsuperscript{51} See Ten Chen-Han, n. 6 above, p. 449. See also W. Muller-Freienfels, n. 7 above p. 308. See also A. Rochvarg, n. 7 above, p. 299.
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\textsuperscript{52} A.L. GoodHart and C.J. Hamson, n. 7 above, pp. 320-356.
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\textsuperscript{53} (1994) 2 A.C 199.
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\textsuperscript{54} Ten Chen-Han, n. 6 above p. 496.
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\textsuperscript{55} GoodHart and Hamson, n. 7 above, p. 347.
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\textsuperscript{56} \textit{Ibid} p. 352
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to sue the third party from the agent’s assignment to the principal of his right to sue the third party.  

However, if GoodHart’s theory is to be accepted, for instance, what then could an infant agent assign to his principal as he (the infant) could not enforce the contract himself? In this sense therefore the theory of assignment contradicts the established rule in agency that allows an infant to enter into a contract on behalf of his principal. This implies that the contract is not between the principal and the agent (who could be an infant and who could not enforce the contract), but between the principal and the third party through the agent, as an instrument used to effect a transaction. Because the contract is in law that of the principal, he can intervene even if there is provision in the contract that it shall not be assigned. It is therefore submitted that the idea of assignment should be rejected because it “does not represent the English approach”. It resembles the continental indirect agency which is unknown to English law.  

One of the most repeated objections being raised against the doctrine of undisclosed principal is that, it contradicts the rules of privity of contract by permitting a person who is not a party to a contract to enforce it. By rules of privity of contract, no person other than parties to a contract can enforce it. Accordingly, a contract confers rights and obligations only to parties to it. So the objection is that an undisclosed principal is not a party to agent’s contract with third party. Neither right nor liability is to be conferred on the undisclosed principal. However, an argument could be maintained that the undisclosed principal is a party to the contract made with third party by his agent, because he (the undisclosed principal) furnishes consideration which is a fundamental element of contract with force of making a person a party to a contract. Although the contract was made by the agent, “[it] is the undisclosed principal who gets the advantages

57 See a. Rochvarg, n. 7 above, p. 302.

58 See Danziger v Thompson (1944) K.B. 654.

59 Tan Chen-Han, n. 6 above p. 496.

60 W. Muller-Freienfels, n. 7 above p. 314.

61 Ibid.

62 Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd. [1915] AC 847.
and disadvantages of the contract in the end\textsuperscript{63}(i.e. the benefit and the detriment), and the agent is just a “mere conduit pipe”.\textsuperscript{64} In addition, the fact that an undisclosed principal is said to be vicariously liable in tort for the acts of his agent presupposes that undisclosed principal furnished consideration and the contract belongs to him.\textsuperscript{65}

The most acceptable justification of the doctrine of undisclosed principal is the undisputable fact that, it enhances and facilitates distribution of goods and services, which in turn assists in the growth of economy.\textsuperscript{66} And this makes the doctrine relevant in the development of the society, which fact has been judicially acknowledged in many cases.\textsuperscript{67} It would appear that even the critics of the doctrine of undisclosed principal have accepted its commercial relevance, because none of them seemed to have pointed out at its commercial inconvenience, if any. However, it may not be hastily accepted that the doctrine has commercial relevance without reconsidering the role it plays in commercial transactions that may facilitate the sacrifice of one of the fundamental principles of law of contract in its favour. It is generally accepted that there is an old practice, which still continues, whereby commission agents get possession of goods belonging to other people for sale. They are entrusted with these goods so much that they could give out credits upon certain terms on behalf of the real owners i.e. the undisclosed principals. Whatever proceeds generated from the sale belongs to the owner of the goods upon commission being paid to the agents. The owners of the goods hold the commission agents accountable for the proceeds of sale and more particularly, intervene where the agent withholds paying directly to them or where he becomes bankrupt. Practically, as far as the purchaser is concerned, the agent is the principal. The purchaser, while buying from the agent “undertakes a risk”\textsuperscript{68} (to which he willingly submits) that the agent has authority to sell. In a modern day business as pointed out by Ten Chen- Han, this practice is common in a more sophisticated way. Manufacturers and producers of goods and

\textsuperscript{63} W.Muller-Freienfels ‘The Undisclosed Principal’ n. 7 above p. 300.

\textsuperscript{64} Ibid; p. 306.

\textsuperscript{65} Ibid; p. 309.

\textsuperscript{66} Ten Chen- Han n. 6 above pp. 480-509 discussed the historical development of the doctrine of undisclosed principal, its commercial convenience and its consistency with rules of agency. Generally he is in support of the retention of the doctrine.

\textsuperscript{67} For instance in Keighley Maxstead & Co. v Durant, n. 30 above, and the case of Siu Yiu kwan v Eastern Insurance Co. Ltd. n. 1 above

\textsuperscript{68} G.H.L. Friedman, n. 2 above, p. 253.
products do not generally transact with the buyers directly. For economic reasons, they employ the services of some persons who stand as intermediaries between them and the buyers. On this arrangement it may be found that the producers, who are undisclosed take care of the production and the provision of the goods to their respective agents, who in turn sell them on their behalf to different purchasers.

This arrangement based on undisclosed agency is accepted by society because it among other things enhances efficient economic growth and easy distribution of goods and service. Undisclosed principals are undisclosed for reasons not only for their own benefit, but also for the benefit of the purchaser, the agent and the society generally. Non-disclosure of the producer means concentration on production and less expenses in market survey and advertisement – less cost of production. The producer may also wish to remain undisclosed in order to “prevent potentially extortionate behaviour”. For instance, a person selling a property, on discovering that the purchaser (the ‘undisclosed’ principal) attaches importance to it may “[hold] out in a bid to extract superior terms”. This is where the vendor would prepare more to sell the property to the undisclosed principal on an exorbitant price than selling it to the agent; as he realises the importance of the property to the undisclosed principal. In addition to the fact that this could become an obstacle to acquisition of properties, it would also generate high inflation of goods to the detriment of society. As to the agent, the arrangement should better remain undisclosed so that he would have more confidence in dealing with his clients than if they know that he is acting as another person’s agent. It is also likely that if the purchasers (the client’s agents) know of the agent’s source they could “bypass him” and deal directly with his principal.

CONCLUSION

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69 Tan Chen-Han, n. 6 above p. 482.

70 Ibid; p. 483.

71 Ibid.

72 Ibid; p. 482.
An attempt is made in this article to reconsider some of the arguments for and against the retention of the doctrine of undisclosed principal. The central objection against the doctrine of undisclosed principal is that, it contradicts the rules of privity of contract, by allowing the undisclosed principal, who is not a party to the contract to enforce it. It has been demonstrated that many theories and justifications were given in order to rationalise or explain the anomaly of this doctrine. Principles from other branches of law were also borrowed unsuccessfully, and extended to the law of agency in order to come out with an explanation to the anomaly of the doctrine of undisclosed principal. All these views seemed to be “artificial stratagems” to explain why the undisclosed principal should or should not sue and be sued by the third party. These arguments centrally pointed out to the acknowledged tension between the doctrine of undisclosed principal and rules of privity of contract.

However, it may be pointed out at this juncture that, the central objection that the doctrine of undisclosed principal contradicts the rules of privity of contract could not in the modern day be acceptable. Of course an argument in this direction could be maintained successfully in the eighteenth century when “the tempo of trade” was not growing faster. At that time the contradiction of the doctrine of undisclosed principal with the rules of privity of contract could be practically understandable. This is because contractual relations were more or less built upon individual agreements. For these reasons therefore, it could be submitted in the words of Markesinis and Munday

“…that the doctrine of undisclosed principal…has since developed beyond confined needs of eighteenth and nineteenth century factors and brokers…”

Furthermore, because the rules of privity of contract have proved inadequate in meeting the challenges of modern day commercial transactions, undisclosed agency should be

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74 W. Muller-Freienfels, ‘The Undisclosed Principal’, n. 7 above p. 300.

75 B.S. Markesinis and R.J.C Munday, n. 3 above p. 155.

76 Ibid; p. 156
allowed to “stand upon its two feet” and should not be tested against the complicated and rigid rules of privity of contract. W. Muller-Freienfels has pointed out this when he said:

“The social function of contract at the present day requires the extension of the contractual “vinculum juris.” The individual two-party relationship must be transformed into a multi-party relationship, and here, undisclosed agency makes a highly valuable contribution.”

Furthermore, it may be submitted that, the doctrine of privity of contract does not fit into the modern complex commercial life whereby it is a common practice to find different categories of people, ('parties' to the contract) - ranging from architects, surveyors, building engineers and insurance companies – all in one complex contract and all claiming being parties to the contract. It may be pointed out that “the wide spread criticism” of the strict rules of privity of contract indicate their irrelevance to the modern day commercial transaction and that it “is strong indication that the privity doctrine is flawed”.

The doctrine of undisclosed principal should be taken as an exception to the rules of privity of contract. This is because, as observed by Tan Chen-Hen, “[t]he two co-exist and each recognises the validity of the other.” The same conclusion was made by another prominent writer that:

“… [t]he better view seems to be that the undisclosed principal’s right is not based on the theory that he has somehow acquired the agent’s right. His right is an independent right, established by way of exception to the


78 W. Muller-Freienfels, ‘The Undisclosed Principal’ n. 7 above p.300.

79 Report of the Law Commission, n. 73 above, para. 3.7

80 ibid;

81 Tan Chen-Hen, n. 6 above p. 485.
common law doctrine of privity, in the interest of commercial convenience.”  

**BIBLIOGRAPHY**

**Books**


---

82 G.H. Treitel, n. 15 above p. 728.


Sealy, L.S. and Hooley, R.J.A. *Commercial Law Text Cases and Materials* (UK: Butterworths, 1999)


**Articles**


Higgins, P.F.P., ‘The Equity of the Undisclosed Principal’ (1965) 28 MLR 167

Mechem, F.R., ‘The Liability of an Undisclosed Principal’ (1923) 23 HLR 513

Muller-Freienfels, W., ‘The Undisclosed Principal’ (1953) 16 MLR 299

Muller-Freienfels, W., ‘Comparative Aspects of Undisclosed Agency’ (1955) 18 MLR 33


Seavey, A.W. ‘The Rational of Agency’ (1920) 29 YLJ 859


Wright, A.T., ‘Undisclosed Principal in California’ (1917) 3 CLR 184

**Report**

NB: I am still reviewing the article for possible Nigerian flavor.

A big thank you!