Neutral Citation Number: [2025] EWHC 815 (Comm)

Claim No: CL-2024-000250

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2025

Before :

MR JUSTICE FOXTON

- -

Between :

MSH Ltd	**Claimant / Arbitral Respondent**
- and -	
HCS Ltd	**Defendant / Arbitral Claimant**

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- -

Duncan Matthews KC and **Matthew Chan** (instructed by **BDM LAW LLP**) for **the Claimant**
David Lewis KC and **Alex Carless** (instructed by **Stephenson Harwood LLP**) for **the Defendant**

Hearing date: 27 March 2025
Draft judgment to parties: 01 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 07 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FOXTON

Mr Justice Foxton :

1. This is an application by the Claimant ("**MSH Ltd**") under s.67 of the Arbitration Act 1996 challenging the majority arbitration award dated 5 April 2024 ("**the Award**") for lack of substantive jurisdiction. The short point which arises is whether the Defendant ("**HCS Ltd**") was party, as an undisclosed principal, to a contract for the sale and purchase of Colombian nut coke dated 28 September 2020 ("**the Contract**"), the named parties to which were MSH Ltd as seller and CTW Ltd Limited ("**CTW Ltd**") as buyer.

2. The case was very well argued by both legal teams, both orally and in writing, and I am very grateful for the considerable assistance they provided to the court.

The applicable legal principles

3. In *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 545, 552 Lord Denning MR observed:

> "It is a well-established rule of English law that an undisclosed principal can sue and be sued upon a contract, even though his name and even his existence is undisclosed, save in those cases when the terms of the contract expressly or impliedly confine it to the parties to it."

4. Diplock LJ stated at p. 555:

> "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 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 contract. In the case of an ordinary commercial contract such willingness by 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."

5. In *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207, Lord Lloyd of Berwick summarised the law in the following terms:

> "For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."

6. I was also referred to the following summary of the law in *Kaefer v AMS Drilling* [2019] 1 WLR 3514, [53]:

> "for a party to be an undisclosed principal it must hence be established that: (1) the agent contracted with and within the scope of the actual authority of the undisclosed principal; (2) at the time of the relevant contract, the agent intended to contract on the principal's behalf; and (3), there is nothing in the contract or surrounding circumstances showing that the agent is the true principal and which excludes the making of a contract with an undisclosed principal."

7. There was some debate before me as to whether the burden of showing that an undisclosed principal was entitled to enforce a contract was a "heavy" one. It is a description which features in some of the authorities cited to me. In *Filatona Trading Limited v Navigator Equities Limited* [2019] EWHC 173 (Comm), [156], Teare J used that expression to describe the burden faced by a non-signatory party seeking to show an entitlement to enforce a joint venture agreement and a beneficial interest in joint venture property, to the exclusion of one of the signatories who was said to be acting only as a nominee. That might be thought to involve a more challenging forensic enquiry than a conventional undisclosed principal case, in which the issue is whether the putative undisclosed principal has rights and liabilities under the contract in addition to those of the signatory, and the beneficial ownership of assets as between the undisclosed principal and the signatory is not in issue. In the Court of Appeal, the expression "heavy burden" is used in a different context: when considering whether a known and identified principal is precluded by the terms of the contract from enforcing it (*Filatona Trading Ltd v Navigator Equities Ltd* [2020] EWCA Civ 109, [100], [126]). The expression was used in the same context in *Bell v Ivy Technology Limited* [2020] EWCA Civ 1563, [28].

8. I am not concerned with the issue of whether the right of a disclosed principal to enforce a contract has been excluded by its terms, but (at this stage) whether HCS Ltd can show that CTW Ltd intended to enter into the Contract on HCS Ltd's behalf and had authority at the relevant time to do so. While there is certainly a burden on HCS Ltd to show that these requirements are satisfied, I am not persuaded that there is any utility in describing that burden as a heavy one, or that authority requires that it be so characterised. The difficulty of discharging the burden which rests on a litigating party in the position of HCS Ltd will vary from case to case and as between different types of contract.

9. In *Siu*, Lord Lloyd's fifth proposition addressed the issue of whether the operation of the undisclosed principal doctrine was precluded as a matter of contract. That would seem to be a binary enquiry: either the contract does or does not, on its proper construction, exclude the doctrine. However, the terms of the contract to be entered into may be relevant in considering the factual position of whether the signatory intended to act as agent for the putative undisclosed principal (e.g. the signatory might be cross-examined on the basis that, if that was his intention, he would not have been willing to sign a contract containing particular terms). Reliance on the contractual terms in this context would simply be one aspect of a broader evidential "mix".

10. *Kaefer* appears to have been concerned with both of these questions, which are addressed compendiously by Green LJ at [113]-[114]:

> "On appeal in *Aspen* the Court endorsed the findings of Teare J and held that the terms of the agreement "… tell, at the least very strongly, against the Bank being a party thereto" (per Gross LJ ([2018] EWCA Civ 2590 paragraph [51]). In other words, the express identification of the parties in the relevant agreement was (a powerful) part of the evidential mix but was not dispositive. It is evidence going

> to, *inter alia* , whether a party (here the Claimant) was willing to contract with persons other than the counterparty signatory. Where there is an entire agreement clause this is evidence which tends to negative any suggestion that a party intended to sue or be sued by a person other than the counterparty in respect of disputes under the agreement.
>
> … For my part I do not think that the entire agreement clause in the terms and conditions necessarily serve to exclude *altogether* the possibility that there might be undisclosed principals. The language used is not wholly unequivocal and the parties could, had they wished, have expressly stated that the parties thereto were the *only* parties that could sue and/or be sued. But they did not. On the other hand, I do consider that it is a cogent indication that the alleged agents (the First and Second Defendants) did not intend to act on behalf of an undisclosed third-party principal and that this was also the view of the Claimant."

My understanding is that the *evidential* significance of the contractual clauses is likely to concern the putative agent's intention to act on behalf of the putative principal, with the position of the counterparty depending on the application of the *legal* rule as to the effect of the contractually manifest intention.

11. Finally, the doctrine of ratification does not apply to undisclosed principals (*Bowstead & Reynolds on Agency* (23rd), [8-070]). That principle is understandable where the first of Lord Lloyd's two ingredients is absent (viz the signatory was not intending to act as agent for the undisclosed principal at the time of the contracting). However, as *Bowstead & Reynolds* notes, it appears less compelling where there was such an intention, but the agent had failed to obtain the specific authority necessary by the point of contracting but only afterwards. However, that distinction is foreclosed by the decision of the House of Lords in *Keighley, Maxsted & Co v Durant* [1901] AC 240.

The evidence before the court

12. As with all s.67 applications, this is a re-hearing. However, the parties have agreed to proceed on the basis of the evidence adduced in the arbitration including witness statements from Mr CT (who works in MSH Ltd's Colombian office), Mr OD (at the relevant time Global Head of Trading Solid Fuels at CTW Ltd) and Ms PP (HCS Ltd's Chief Financial Officer), and transcripts of their evidence before the arbitral tribunal.

13. Different parts of that evidence offer something for each side, and I was inevitably treated to two contrasting Cook's Tours of the same destination. While it is right to say that the written witness statements of these two individuals do not cohere in every respect with the case which HCS Ltd now put, I am unable to accept Mr Matthews KC's submission that, at least for HCS Ltd's purposes, the evidence which emerged in cross-examination has less forensic worth.

14. In these circumstances, I am not particularly surprised that this issue generated a divergence of views within the tribunal. I have had regard to the whole of the evidence, which is not always clear or consistent, nor, with benefit of hindsight, comprehensive, and which left rather more scope for argument as to its overall ultimate effect than might have been expected in a dispute of this kind. For that reason, I have attached particular importance to the inherent probabilities.

15. I have not sought specifically to address each passage of evidence to which I was referred, but set out my factual findings having regard to the evidence and inherent probabilities as a whole.

The issues in the case

16. There are, in effect, four issues in the case:

    i) Whether, and if so in what circumstances, CTW Ltd was able to transact on HCS Ltd's behalf?

    ii) When was the Contract concluded (which embraces within it the sub-issue of whether it is now open to HCS Ltd to contend for a different date to the date which formed the basis of its argument at the hearing)?

    iii) Did CTW Ltd have authority to enter into the Contract on HCS Ltd's behalf when the Contract was concluded?

    iv) Do the terms of the Contract preclude HCS Ltd enforcing the contract as undisclosed principal?

Whether, and if so in what circumstances, CTW Ltd was able to transact on HCS Ltd's behalf?

17. So far as the relationship between CTW Ltd and HCS Ltd is concerned, I am satisfied that the evidence establishes the following.

18. At the time of the Contract, HCS Ltd was an established customer of CTW Ltd, and the only customer whose business Mr OD handled. Dealings went back to at least the end of 2018/early 2019.

19. CTW Ltd was usually remunerated by an agreed percentage of profits for transactions it arranged for its customers, although sometimes it accepted an agreed fee. Example invoices in respect of prior transactions in which CTW Ltd and HCS Ltd were involved described the services provided as "facilitation of sale/purchase" or "share of proceeds". I accept that remuneration was not always agreed in advance, albeit this was the general practice, not least because important data inputs into determining the profit were very frequently not available until some later point (e.g. after product purchased had been on-sold and certain costs of performance such as demurrage were ascertained).

20. There was no written agency agreement, with contact between Ms PP and Mr OD being largely by phone, text, WhatsApp and the occasional email. There was regular and essentially informal communication by these methods between these individuals.

21. CTW Ltd had no standing authority to contract on HCS Ltd's behalf when not doing "package" or "back-to-back" deals (an issue which did not emerge quite as clearly from HCS Ltd's witness statements as one might have expected, but was clear by the end of cross-examination). Deals which were "front to back" had to be approved by Ms PP on a "deal-by-deal" basis. This was consistent with documents before the court in which Mr OD sought but was refused approval for a particular transaction (e.g. the email of 5 July 2019 relating to a transaction for which Ms PP withheld approval) or sought confirmation from Ms PP that the required financing would be available (email of 6 December 2020).

It follows that CTW Ltd's actual authority to commit HCS Ltd to the Contract depends on showing specific authority was granted before the Contract was concluded.

22. I accept that CTW Ltd's general business model, and in particular its dealings with HCS Ltd, was concerned to avoid principal risk, because it did not have standing credit lines available to open and fund the letters of credit necessary to purchase goods. It is accepted that this was not invariably the position, the debate being whether there was a single exception in a non-HCS Ltd transaction in which the funding came from an Australian finance group, or more than that.

23. It is not necessary to resolve that dispute. I am satisfied that CTW Ltd's business strategy when HCS Ltd was its client was to contract as agent, with HCS Ltd providing the finance. That conclusion, which finds support in the evidence of both Mr OD and Ms PP, is supported by:

    i) documents showing occasions when Mr OD sought HCS Ltd's approval before contracts were concluded;

    ii) the absence of any sale contracts between CTW Ltd and HCS Ltd;

    iii) the terms of invoices provided by CTW Ltd to HCS Ltd, which are never for the price of goods being bought from or sold to HCS Ltd, but for "share of proceeds resulting from the purchase and sale" or "facilitation of sale/purchase"; and

    iv) the fact that the funding came from HCS Ltd, which was a trading house rather than a finance house, and therefore more likely to be funding acquisitions for itself rather than someone else.

24. MSH Ltd's reliance on the IWY LTD Metallurgical Resources Contract does not undermine this conclusion – CTW Ltd was named as seller (i.e. it had no financing requirement), and in any event, even before the addendum was drawn up, the contract provided for the buyer to open the letter of credit in favour of HCS Ltd: i.e. it looks like CTW Ltd was selling on HCS Ltd's behalf. The other transaction relied upon does not seem to involve CTW Ltd at all.

25. I am also satisfied that CTW Ltd intended to enter into the Contract on HCS Ltd's behalf rather than as principal. That was consistent with CTW Ltd's business model, particularly in relation to HCS Ltd; the fact that CTW Ltd was dependent on HCS Ltd providing the financing which the Contract required; and is supported by the general interactions between CTW Ltd and HCS Ltd in relation to the Contract and the onsale of the product sold under the Contract. These are summarised in the following section.

When was the Contract concluded?

The chronology on the material before the court

26. On 16 September 2020, CTW Ltd sent MSH Ltd a "firm bid", "subject to management approval and final contract". Mr CT and Mr OD then spoke, and the following day Mr OD told Mr CT that "we would like to make a decision today as we cannot wait till next week in this volatile market". He concluded "look forward to your confirmation of our bid and rest of your terms".

27. MSH Ltd finally reverted with its "commercial proposal" on 21 September 2020. Mr OD replied that day saying, "we are pleased to confirm the business as per your offer and as per the following conditions". The proposed counterparty was "CTW Ltd Limited … or CTW Ltd nominated subsidiary", and the email provided "rest of terms as per final contract." MSH Ltd reverted with revised terms the follow day, to which CTW Ltd responded with a counter, stating "look forward to your one line confirmation and send us your draft contract". That evening, Mr CT stated "business confirmed. Reverting with revised contract".

28. The next event after 22 September was Mr CT sending through the revised contract on 28 September 2020, and stating he was looking forward to seeing CTW Ltd's comments. That involved a gap of three working days, and a further six working days passed before Mr OD reverted on 6 October 2020 with what he described as "logical changes", asking MSH Ltd to countersign and return. Mr CT provided his comments that day, asking for CTW Ltd's signature. Mr OD reverted with two further changes on 8 October, on both of which Mr CT held his ground.

29. At 19.45 on 12 October 2020, Mr OD sent Ms PP a WhatsApp message referring to "MSH Ltd trading deal lc to be opened mid-November and we will get incoming lc by mid December … will share the contract". The contract was sent through at 22.35. The version sent through was signed by Mr OG of CTW Ltd but had yet to be signed by MSH Ltd. Very shortly thereafter, Mr OD said "Hi, closed this with MSH Ltd … Need your OK on payment which we have discussed". Ms PP replied, "of course but need buyers contract if not LC". There was then some discussion about whether insurance was required, and Ms PP then replied, "perfect th[e]n please send as soon as available" to which Mr OD replied "yes".

30. At 15.49 on 13 October 2020, Mr OD returned the signed and executed contract to MSH Ltd, and asked for MSH Ltd's signed version which was sent through at 08.37 on 14 October 2020.

31. The evidence is relatively sparse as to what was happening in relation to any onsale of the product being acquired from MSH Ltd. However, it is clear that at some point a contract was entered into in HCS Ltd's name to sell the product to MMM LTD Resources PTE ("**MMM LTD**"). That contract is dated 10 December 2020, but on the evidence was signed later. That deal was clearly discussed between Ms PP and Mr OD at some point before 11 December 2020, but no record of this conversation or reference to it survives. However, on 11 December 2020, Ms PP asked Mr OD "do you have MMM LTD contract for MSH Ltd cargo already?" On 13 December 2020, Mr OD asked Ms PP, "MMM LTD contract is OK to sign with CTW Ltd or need direct signing with HCS Ltd?" The following day, Ms PP said that the contract should be signed in HCS Ltd's name, and Mr OD sent it through for signature. Mr OD asked for the signed contract, which appears not to have reached him yet, later that day, and Ms PP said she would re-send it. On 16 December 2020, CTW Ltd sent the signed contract through to MMM LTD.

Is it open to HCS Ltd to argue that the Contract was concluded later than 28 September 2020?

32. It is fair to observe that the point at which the parties first entered into a contract came into sharper focus in the s.67 challenge than it had before the arbitral tribunal. HCS Ltd's pleaded case referred to "a written contract dated 28 September 20202 and executed on 14 October 2020", and stated that "authority was confirmed orally by Ms PP around 10-

15 days prior to the execution of the Contract" (which would have been around 29 September to 4 October).

33. There was no suggestion in the course of oral submissions or cross-examination that the contractual Rubicon was first crossed on 13/14 October 2020, and indeed MSH Ltd's cross-examination was premised on a contract having been concluded at the latest on 28 September 2020 (see e.g. the point referred to at paragraph 94 of the Award). The Award refers to the Contract having been concluded on 28 September 2020 (paragraphs 1 and 36).

34. Subject to one point to which I return below, I am satisfied that MSH Ltd would be prejudiced if, at this late stage, HCS Ltd was permitted to argue that the Contract was not concluded until 13/14 October 2020. That argument was first raised in HCS Ltd's skeleton argument served on 24 March 2025, after the parties had agreed to forego the right to call any further evidence at the s.67 hearing beyond the documents, witness statements and transcripts of evidence which were before the arbitral tribunal. I accept that there is a real risk that, had HCS Ltd sought to advance such a case at an earlier stage in the s.67 process, MSH Ltd would have wanted to adduce further evidence or ask further questions of HCS Ltd's witnesses in response to it.

35. However, it seems to me that there is no scope for factual dispute that the parties' written contract with its entire agreement clause came into existence through the execution and exchange on 13/14 October 2020, and that gave legal effect to certain additional terms which the parties continued to negotiate after 28 September 2020. That is so, even if I proceed on the basis (as I am satisfied that I should) that the parties had already reached a binding agreement on the terms which had been agreed by 28 September 2020 (i.e. a contract of the type referred to in *Pagnan v Feed Products* [1987] 2 Lloyd's Rep 601, 619 at (4) of Lloyd LJ's judgment).

36. Finally, I should note that my acceptance of Mr Matthews KC's submissions on the manner in which the case was conducted in the arbitration has one potentially significant consequence. The arbitration having been conducted on the basis that the point of legal commitment was reached by 28 September 2020, and it not having been suggested at any point in the arbitration that Mr OD and Ms PP had not understood that and wrongly thought that authority granted at a later point in time was sufficient, there can be no scope at this hearing for the suggestion that any failure by CTW Ltd to secure the necessary authority can be explained in this way.

Did CTW Ltd have authority to enter into the Contract on HCS Ltd's behalf on 28 September 2020?

37. I have come to the conclusion that it is more likely than not that Ms PP authorised Mr OD to commit to the Contract before he did so, on 28 September 2020:

    i) That was clearly how the business models of CTW Ltd and HCS Ltd were intended to work, authority being required for "front-to-back" deals, in contracts depending upon HCS Ltd's financing. It would, in effect, have required Mr OD to have "dropped the ball" if he had committed CTW Ltd to the Contract without obtaining HCS Ltd's consent and commitment to provide the necessary financial support first.

ii) There were regular telephone calls between Mr OD and Ms PP, not all of which are referred to in the WhatsApp exchanges, in the course of which the necessary approval could have been sought and obtained.

iii) In addition to "means, motive and opportunity", the later exchanges between Ms PP and Mr OD are, in my view, informative as to what had transpired before. Mr OD's first written contact about the MSH Ltd deal at 19.45 on 12 October 2020 refers to a letter of credit which HCS Ltd needed to open, and make it clear that this is not a "back to back" transaction. He then sent Ms PP a contract which CTW Ltd had already signed and which provided that HCS Ltd would provide the letter of credit.

iv) If there had been no approval of this deal, as both parties accepted was required for "front-to-back" deals, in my view it is highly unlikely that Mr OD would have introduced the conclusion of the Contract and the letter of credit requirement to Ms PP in so casual a manner, nor that Ms PP would not have replied asking why CTW Ltd had entered a contract providing for HCS Ltd to provide the letter of credit without her authority.

v) The messages on 12 October 2020 also make it clear that there had been undocumented prior discussion ("Need your OK on payment which we have discussed").

vi) HCS Ltd later contracted to sell the nut coke being supplied under the Contract without ever, on MSH Ltd's case, contracting to buy it. That curiosity does not arise if HCS Ltd was party to the Contract, having authorised CTW Ltd to enter into it.

38. To my mind, the inherent probabilities arising from the facts I have set out have greater explanatory power than the issues relied upon by MSH Ltd:

i) While CTW Ltd's remuneration had not been agreed by 28 September 2020, I accept that this was not an invariable "remuneration before authority" practice when CTW Ltd was authorised to contract for HCS Ltd. Significantly, no remuneration had been agreed by the stage when CTW Ltd had arranged the onsale of the product in HCS Ltd's name, by which point HCS Ltd was clearly treating the Colombian nut coke sale as "its deal".

ii) The absence of any written record of oral approval at the relevant time is not particularly surprising given what I accept was the regularity and informality of communication, and in any event, the communications on 12 October do evidence the fact of prior discussion of some kind.

iii) To the extent that MSH Ltd relies on the fact that the contract terms in circulation by 28 September 2020, but not yet agreed, included (as I shall assume they did) an entire agreement clause, a confidentiality clause and a limitation on the right of assignment, this has very little weight. As at 28 September 2020, because all that had happened is that MSH Ltd had sent Mr OD a draft contract containing those provisions, to which there had yet to be any response. There is absolutely nothing which emerges on the CTW Ltd/HCS Ltd side of the divide in relation to these clauses before the assumed date of contract, nor was HCS Ltd itself even aware of

> the terms proposed at that point. If these clauses are to assist MSH Ltd in this case, it must be because their presence in the final signed contract is said to preclude the operation of the undisclosed principal doctrine. That issue is addressed below.

39. On this basis, I am satisfied that CTW Ltd both intended to act as HCS Ltd's agent in entering into the Contract, and was specifically authorised by HCS Ltd to do so, and that these requirements were satisfied by 28 September 2020.

Did CTW Ltd have authority to enter into the Contract on HCS Ltd's behalf on 13/14 October 2020?

40. Given my conclusion on the preceding issue, it is not necessary to address this point, and I shall do so only briefly. The parties' final signed contract, executed on 13/14 October 2020, contained the following term:

> "This agreement contains the entire agreement and understanding between the parties hereto in respect of the subject mater of the agreement and supersedes all prior agreements, commitments, representations and understandings and discussions between the parties".

41. I accept Mr Lewis KC's submission that the effect of this clause was that the signed contract superseded any *Pagnan* category (4) contract previously concluded. As Lightman J noted in *Inntrepeneur Pub Co v East Crown* [2000] 2 Lloyd's Rep 611, 614, "such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere."

42. In circumstances in which (as I have found), CTW Ltd was intending to act at all times as agent for HCS Ltd, the issue then arises of whether the obtaining of authority from HCS Ltd prior to the final and complete expression of the parties' bargain in their signed contract would suffice, or whether this would fall foul of the rule that the doctrine of ratification does not operate in favour of an undisclosed principal (cf [11] above).

43. This is an interesting question, on which there does not appear to be any authority. Working from first principles, I am persuaded that the doctrine of undisclosed principal can apply in this scenario. The parties' decision to reduce their contract into a signed document, and to agree that the written instrument should be the exclusive statement of their contractual rights, makes the date when the written instrument and the entire agreement clause took effect a point in time of contractual significance for the purposes of the original bargain. If, by that point in time, the conditions for the operation of the undisclosed principal doctrine are satisfied, I do not see why the operation of the doctrine should be excluded simply because those conditions had yet to be satisfied when an earlier, less complete and now superseded, agreement between the signatories took effect. The rule in *Keighley Maxsted*, at least in cases where there is an intention to contract as agent, is an anomalous rule, and it is one which should not be extended beyond its current scope.

44. Had I not been persuaded that HCS Ltd had authorised CTW Ltd's decision to enter into the Contract by 28 September 2020, I would nonetheless have accepted Mr Lewis KC's alternative case that HCS Ltd did so in the course of the WhatsApp exchanges on 12 and 13 October 2020. In particular, I am not persuaded that the words "needs buyers contract

if not LC" qualified Ms PP's response "OK on payment" when Mr OD asked for approval, as opposed to being an instruction that Mr OD should set about seeking to conclude the necessary onsale to turn a "front-to-back" arrangement into a "back-to-back" arrangement. Mr OD clearly did not understand there to be such a condition, because he sent the signed contract out to MSH Ltd the next day even though no onsale had been concluded. There is no evidence that Ms PP ever chased for news on the status of any onsale. The exchanges between Ms PP and Mr OD in December when the MMM LTD contract is executed are not in terms which suggest that the Contract had been in abeyance for the intervening two months pending satisfaction of some outstanding condition to HCS Ltd's approval.

Do the terms of the Contract preclude HCS Ltd enforcing the contract as undisclosed principal?

45. As the editors of *Bowstead & Reynolds on Agency* note at [8-069], the circumstances in which the terms of a commercial contract will impliedly exclude the operation of the undisclosed principal doctrine are likely to be infrequent (and see also *Filatona Trading Ltd v Navigator Equities Ltd*, [2020] EWCA Civ 109, [46]).

46. In this case, the contract was for the sale and purchase of a commodity and:

    i) The obligations of both parties are tightly defined:

    ii) From MSH Ltd's perspective, this is the case for the quality of the product to be supplied by MSH Ltd, the quantity (any optionality being MSH Ltd's), the place of loading (with any optionality being MSH Ltd's), the timing of the shipment obligation (a narrow laycan, with MSH Ltd having the right to declare the precise period) and the place of delivery.

    iii) On CTW Ltd's part, there is the obligation to guarantee the arrival draft and discharge rate at the named delivery ports, and obligations of payment (demurrage and discharge costs at the named ports, and opening a letter of credit for the price). Further, the Contract expressly provided (in a bespoke term) for "LC to be established on and behalf of CTW Ltd by its Nominee HCS Ltd …"

    iv) "Vicarious performance" is inherent in a contract for the sale of a commodity of this kind. A seller may source the cargo from somewhere else, or buy a qualifying cargo afloat. The buyer may on-sell it, and be passing liabilities up and down the line.

    This is not promising territory for an argument that the parties have impliedly excluded the undisclosed principal doctrine (without using one of the many widely used express clauses intended to achieve this outcome).

47. The four clauses cumulatively relied upon by MSH Ltd are:

    i) Clause 11, on the basis that it identifies HCS Ltd as the party providing the letter of credit, and not as the buyer.

ii) Clause 19, which precludes assignment without the other party's prior written consent (in the case of an affiliate of a putative assignor, such consent not to be unreasonably withheld).

iii) Clause 22, an agreement to keep the fixture confidential.

iv) Clause 23, an "entire agreement" clause.

48. I am not persuaded that the reference to HCS Ltd in clause 11 provides an indication of an intention contractually to preclude HCS Ltd from being an undisclosed principal. That argument would seem to leave HCS Ltd in a worse position so far any rights as undisclosed principal are concerned than any other person (i.e. it would involve a party-specific exclusion of the undisclosed principal doctrine). However, the fact that it was HCS Ltd who was identified as providing the means of discharging the buyer's key obligation under the Contract if anything makes HCS Ltd a more likely candidate for an undisclosed principal. It certainly does not move the needle from the neutral position in MSH Ltd's favour.

49. As to the limitation on assignment, in *Siu Yin Kwan v Eastern Assurance Co Ltd* [1994] 2 AC 199, the Privy Council considered whether the operation of the undisclosed principal doctrine was precluded by the terms of an employer's liability insurance policy. The Board was referred to an article by AL Goodhart and CJ Hamson ("Undisclosed Principals in Contract" (1932) CLJ 320) which drew an analogy between the undisclosed principal doctrine and the assignment of contractual rights, which the insurer relied upon to support the argument that if a contract could not be assigned, the undisclosed principal doctrine was similarly inapplicable. That argument was rejected at p.210. The Board noted that where the contract was one of those classes of personal contract which could not be performed vicariously (such as the painting of a portrait), the contract could not be enforced by an undisclosed principal, but that this was not the case for mercantile contracts generally. Echoing an observation later made by Sir Stanley Burnton, and oft cited in certain quarters of the Temple, the Board continued:

> "The argument based on assignment illustrates the dangers of proceeding by analogy. There are indeed certain similarities between these two branches of the law. But there are also many differences."

50. In discussing the argument advanced and rejected in *Siu Yin Kwan*, *Bowstead & Reynolds on Agency* at [8-079] noted that even on the basis of the rejected argument:

> "Intervention on a sale would under this rule rarely be disallowed, for both in the case of assignment and in the case of undisclosed principal, the liability of the original contracting party to the third party remains."

To similar effect, the editors note that "in most cases where the undisclosed principals doctrine has been successfully invoked the nature and scope of the third party's obligation would not have varied much whoever is the principal". That is the position here. Given the nature and terms of this contract, I am not persuaded that a clause limiting (but not excluding) the right of assignment has much weight when determining whether there is an implied exclusion of the undisclosed principal doctrine.

51. The confidentiality clause is of even less assistance, particularly when the putative undisclosed principal is someone clearly within the "confidentiality club" as CTW Ltd's "Nominee" and the entity which is to open the letter of credit in MSH Ltd's favour. The obligation of confidentiality binds the parties to the Contract, but does not exclude a long-established legal principal arising under the law chosen to govern that contract in deciding who is entitled to enforce and is liable under the Contract.

52. That leaves the entire agreement clause. *Bowstead & Reynolds* suggest that these "perhaps carry less weight" than clauses limiting the right of assignment ([8-079]). In *Filatona*, the Court of Appeal addressed an argument by the appellants that the entire agreement clause in that case told against the ability of an unnamed principal to enforce the contract, an argument buttressed, like MSH Ltd's, by reference to Green LJ's judgment in *Kaefer*. The Court of Appeal recorded Teare J's conclusion at first instance that such a clause "can tend to negative a suggestion that a party was willing to contract with a person not named as a party. But it may not do so unequivocally where it does not state that only the named parties may sue or be sued on a contract." The Court of Appeal noted at [90] the "boilerplate" nature of such clauses, and the availability of other types of boilerplate clause which more directly engaged with the undisclosed principal doctrine. The Court appeared to attach significance to the fact that, when reaching for standardised clauses for their contract, the parties had not seen fit to incorporate something rather more directly aimed at this target.

53. Ultimately, the force which an "entire agreement clause" has when it goes "into the mix" (in Green LJ's words) will depend on the nature and circumstances of the contract in issue and, to some extent at least, the wording of the clause. *Kaefer* involved the refurbishment of a specialist oil rig, and the clause in question addressed at least to some extent the issue of who was bound outside the immediate signatory ("Atlantic Marine Servies BV and its various affiliates and subsidiaries (hereafter collectively referred to as the company"). In such circumstances, the entire agreement clause was held to constitute a significant ingredient in the mix. In *Filatona*, there were strong commercial reasons for concluding that Mr Chernukhin was party to the contract in issue, and these were sufficient to outweigh the effect of a relatively strongly worded "entire agreement" clause ("complete and exhaustive agreement between the Parties").

54. In this case, the Contract is a bargain which is very much at the "non-relational" end of the scale of contracts, it contemplates someone other than a named signatory providing the mechanism to perform CTW Ltd's characteristic obligation of payment, and the entire agreement clause is of the most vanilla kind. Even taken together, the four clauses relied upon by MSH Ltd bring little to the mix, and are not sufficient to prevent the operation of this established doctrine of English commercial law.

Conclusion

55. For these reasons, MSH Ltd's s.67 challenge fails.