

## AGENT INSOLVENCY: SOME REMINDERS

by Andrew Webb

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In the recent UK Supreme Court case of *Bailey and another v Angove's PTY Limited* [2016] UKSC 47, the insolvency risks inherent in the collection of payments by an agent for a principal have been analysed. The decision, which is highly persuasive in the Isle of Man, comes as a useful reminder that agency contracts need to be carefully drafted.

Briefly, an Australian winemaker (**W**) entered into an agreement with a retail supplier (**S**) as agent and distributor for major UK retailers in return for a commission. These activities were governed by an Agency and Distribution Agreement (**ADA**). The ADA was terminable by notice by either side and also on the happening of certain events, including the appointment of an administrator or liquidator. S went into administration and then moved into creditors' voluntary liquidation. S was owed some AU\$875,000, being the price of wine sold by S to two UK retailers. W gave S notice terminating the ADA and with it, S's authority to collect the outstanding invoices. The notice declared that W would collect instead and would account to S for its commission. The liquidators objected to this and claimed the right to collect the outstanding invoices, deduct the commission and leave W to prove in the winding up for the rest of the price. The liquidators argued that the transactions covered by the invoices represented a relationship of buyer and seller so that S's liability to W was a simple debt. W argued that the recovered monies were held in trust for them. Sensibly, escrow arrangements were set up to hold the recovered funds until the dispute was settled.

At first instance, it was held that the relationship was one of principal and agent, with the agency terminated by W on service of the notice. The agency finding was accepted by the Liquidators at the Court of Appeal stage, but they argued that their authority to collect the price survived the termination of the ADA because they

needed it to collect their commission. The Court of Appeal accepted this and allowed the appeal, but S's alternative case that the proceeds of the invoices were held in trust failed for different reasons.

The Supreme Court considered when an agent's authority may be revoked and when it may not. Authority may be revoked even if the contract makes it irrevocable. The main exception is where the agent has a relevant interest of his own in the exercise of his authority. The exception applies if the agreement states that the authority granted is irrevocable where it is given to secure an interest, (either proprietary, for example, to enable a chargee to perfect an equitable interest, or where a liability is owed to the agent personally). This is embodied in section 4(1) of the Powers of Attorney Act 1971 (of Parliament) and section 3(1) of the Powers of Attorney Act 1983 (of Tynwald), both reflecting the common law. In this case, on considering the terms of the ADA, the Supreme Court found that the authority to recover from the retailers was neither irrevocable nor to secure an interest, so W's notice did terminate W's authority to collect on the invoices. In those circumstances, the funds recovered by W and S and subject to escrow were ordered to be paid to W.

Whilst it was not necessary to determine whether there was a constructive trust over any funds paid to S after the commencement of the administration, the Court did so, as if, contrary to the conclusion reached, the notice had not terminated S's authority. Lord Sumption restated the principle that an agent's duty to account to his appointor does not necessarily give rise to a trust over those monies in favour of the principal. He considered that the right to restitution of money paid on a consideration which has wholly failed is simply a process of contractual adjustment not giving rise to any proprietary restitutionary right. Retail clients had paid S in the belief that it was still authorised to collect for W. W's remedy in these circumstances would have been contractual not proprietary, the Court confirming that if proprietary, it would have given W an unfair advantage in the liquidation over other creditors.

When considering agency agreements a party acting as principal should take care to draft so that:

- the agent's power to collect receivables is expressed to be revocable and that the power is not coupled with an interest, eg commission;
- strong termination provisions are embedded such that the agent has no collection rights which might give rise to disputes where a liquidator is appointed over the agent;
- the agent's commission rights should be against the principal, not by way of deduction from collections;
- where the agent collects, this should be an obligation not a right, not least so that it is not seen as giving rise to a right to deduct from recoveries;
- include a mechanism for the principal to be able to instruct the debtor to pay him and not the agent;
- provide for regular collections from the agent to minimise the credit risk; and
- consider drafting an express trust over receivables held by the agent for the principal with segregation of funds from those of the agent.

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