

Termination of agency - Termination of authority

Introduction

The agency relationship plays an important role in facilitating trade across borders, giving foreign entities a presence and representative in its customer market. The relationship necessarily involves the agent having authority to act on behalf of the principal and this authority constitutes a power to affect the principal's legal relations with third parties such as customers. It might be assumed that when the agency is terminated, so too is the authority. Indeed, the general rule is that the authority of an agent may be revoked by the principal, even if it is agreed by their contract to be irrevocable. The main exception to the general rule is where there is an agreement that the authority shall be irrevocable and the authority is given to confer a security or proprietary interest on the agent. The Supreme Court has recently considered the question of termination of authority in an agency relationship in an insolvency context, in *Bailey and another v Angove's PTY Limited* [2016] UKSC 47.

The facts

Angove's PTY Limited ("Angove's"), an Australian winemaker, employed an English company called D&D Wines International Limited ("D&D") as its agent and distributor in the UK. Their relationship was governed by an Agency and Distributorship Agreement ("ADA"), under which D&D acted as Angove's agents for sale.

The ADA was terminable by either side on six months' notice or by notice with immediate effect in the event of the appointment of an administrator or liquidator. On 21 April 2012 D&D went into administration and on 10 July 2012 moved into

creditors' voluntary liquidation. On 23 April 2012 Angove's gave written notice to D&D terminating the ADA and any authority of D&D to collect sums due from customers as at the date of administration. Angove's made clear its intention to collect the sums due from customers and to account to D&D separately for any commission due.

Under the ADA the parties to the contracts of sale were Angove's and the customer, and commission was payable to D&D in respect of such sales. It was common ground that the ADA required D&D to account to Angove's for the price of the goods sold to customers on Angove's behalf, less the amount payable to D&D in respect of commission whether or not the customers had paid. Under the ADA, D&D had responsibility for collecting payment from the relevant customer.

The liquidators of D&D claimed to be entitled to collect the sums due from customers and deduct the commission owed to D&D and argued that the balance should be available for distribution to the general body of creditors. They argued that Angove's should be required to prove in the liquidation for the sums due to it. This was premised on the relationship between D&D and Angove's being that of buyer and seller, not agent and principal. The liquidators referred this question to the High Court under section 112 of the Insolvency Act 1986. His Honour Judge Pelling QC held that the relationship between Angove's and D&D was that of principal and agent only. The liquidators did not challenge this finding.

The ADA did not express whether the agent's authority was revocable upon the termination of the ADA or irrevocable. It did, however, provide

that upon termination of the ADA, “each party must pay to the other all money owing up to and including the date of termination...” and that “termination of [the ADA] does not affect the accrued rights or remedies of either party”. The liquidators argued that D&D’s authority to collect the price of goods sold on Angove’s behalf survived termination of the ADA because that authority was necessary for D&D to recover its commission. The Court of Appeal accepted this argument. Angove’s appealed to the Supreme Court.

The Supreme Court question

The question for the Supreme Court was in what circumstances will the law treat the authority of an agent as irrevocable?

As stated above, the general rule is that the authority of an agent may be revoked by the principal, even if it is agreed by their contract to be irrevocable. The revocation is effective to terminate the agent’s authority, but gives rise to a claim for damages. It will be recalled that by its notice of termination of the ADA on 23 April 2012 Angove’s also gave notice terminating any authority of D&D to collect sums due from customers as at the date of administration. D&D argued that its authority to collect sums due from customers was essential to enable it to recover its commission and that it therefore survived termination of the ADA and fell within an exception to the general rule – namely where the agent has a relevant interest of his own in the exercise of his authority.

The Supreme Court explained that the exception applies if two conditions are satisfied. First, there must be an agreement that the agent’s authority shall be irrevocable and the authority must be given to secure an interest of the agent, being either a proprietary interest or a liability owed to him personally. Lord Sumption, giving the judgment of the Supreme Court, said:

“Although the agent’s commercial interest in continuing to act in order to earn commission is not enough to make his authority irrevocable, his interest in recovering a debt in respect of commission already earned may well be. There is no reason to distinguish a debt arising in this way from any other debt, provided that it is

sufficiently clear that the parties intended that the agent’s authority should secure it”.

The Supreme Court examined the two conditions: (i) that it is agreed that the authority is irrevocable; and (ii) that the authority is intended to secure the financial interest of the agent, by reference to the relevant clauses of the ADA.

In relation to the first condition, the relevant clause expressly authorising D&D to collect the sums due from customers could have been, but was not, expressed to be irrevocable or to survive the termination of the ADA. The Court did not accept that collection of the sums due constituted a right; rather it was an obligation. Further, although the right to commission survives termination of the ADA, the right to deduct it from sums received from the customer is procedural, rather than a security, so that the irrevocability of D&D’s authority cannot be inferred.

Finally, the court found that it was inherently improbable that D&D and Angove’s should have intended the authority to be irrevocable. They had expressly envisaged the possibility of insolvency and had provided for a right to terminate the ADA in such circumstances.

The Supreme Court therefore, in the particular circumstances of this case, found that there was no agreement that the authority of D&D should be irrevocable, there is no implication to that effect and Angove’s notice of termination of D&D’s authority was effective.

The supplemental question

By reason of the finding above, it was not necessary for the Supreme Court to rule on the question whether the receipt of money by D&D at a time when it knew that imminent insolvency would prevent it from performing a corresponding obligation (to pay it to Angove’s) could give rise to a liability to account as a constructive trustee. However, in obiter dicta, the Supreme Court considered that there was no constructive trust in favour of Angove’s over the sums received by D&D from customers of Angove’s, agreeing with the Court of Appeal on this question. The sums were paid by customers in discharge of their contractual liability. D&D had a contractual right to collect the sums due under the invoices and to deduct its commission therefrom. The mere fact

that D&D's liability to account to Angove's for the sums received would not be performed could make no difference to the basis on which it held the money. It did not become unconscionable for D&D to retain the sums received simply because the statutory insolvency regime intervened to require it to be shared *pari passu* with other creditors.

Conclusion

The judgment is an important reminder of the controversial rule of commercial law that the authority of an agent may be revoked by the principal, even if the agency agreement provides that it is irrevocable. To be able to avail of an exception may require consideration before the agency agreement is entered into. Upon the termination of an agency for reasons of insolvency of the agent, as here, or for other reasons, it is necessary to look beyond the agreement to answer the question whether the law will treat the authority of the agent as continuing.

For further information, please contact:



Marie-Louise King | Partner

T: 020 7593 5192

E: mlking@wslaw.co.uk