# THE STRANGE CASE OF AN AGENT ACTING FOR AN UNIDENTIFIED PRINCIPAL

*Nadia Napieraj**

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## A. INTRODUCTION

The strange case of the unidentified principal has so far attracted limited academic attention.[1] The standard case from the external perspective of agency involves a disclosed and identified principal who reveals both his status as an agent and the principal's identity, binding the principal and the third party to an agreement.[2] On the other side of the spectrum lies the "anomalous" concept of undisclosed agency where the third party does not know of the principal's involvement.[3] The orthodox view is that, in undisclosed agency, a contract exists between the agent and the third party, with the principal being able to intervene.[4] The two concepts are to be distinguished from disclosed but unidentified agency which arises where the third party is given notice of the agent's status, but not of the principal's name.[5] The exact contractual relations arising from unidentified agency are unclear,[6] arguably due to limited case law,[7] as well as authorities which confuse unidentified with undisclosed agency.[8]

It will be submitted that in unidentified agency, Scots law should develop the general rule proposed by Professor Macgregor and consistent with the outcome of the nineteenth-century Inner House decision of *Ferrier v Dods*:[9] the agent should be liable 'unless and until the principal is disclosed'.[10] This solution contrasts with other, more

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* Final year LLB Law student at the University of Edinburgh.
[1] Albeit see F M B Reynolds, 'Unidentified Principals in Common Law' in D Busch, L Macgregor, and P Watts (eds), *Agency Law in Commercial Practice* (OUP 2016).
[2] L Macgregor, *Agency Law in Scotland* (1st edn, W Green 2013) para 12.04, relying on Bell, *Commentaries*, I, 536 and I, 539-540; *Miller v Mitchell* (1860) 22 D 833 (IH); *Mackenzie v Cormack*, 1950 SC 183, 187 (IH).
[3] A L Goodhart and C J Hamson, 'Undisclosed Principals in Contract' (1932) 4 Cambridge LJ 320, 346.
[4] Reynolds, 'Unidentified Principals in Common Law' (n 1), para 4.05.
[5] ibid, para 4.01.
[6] Macgregor (n 2), para 12.19.
[7] Macgregor (n 2), para 12.17; Reynolds (n 4), para 4.03.
[8] For example, *Meier v Küchenmeister* (1881) 8 R 642 (IH); *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 All ER 199 (HKPC).
[9] *Ferrier v Dods* (1865) 3 M 561 (IH).
[10] Macgregor (n 2), para 12.21.

modern, Inner House cases, propounding a "credit" approach:[11] *Lamont, Nisbet & Co v Hamilton*,[12] and *Ruddy v Monte Marco & ors*.[13] This essay will firstly analyse these three cases to demonstrate that there is no established approach to unidentified agency in Scots law (Part B). Then, three different approaches will be evaluated: the absence of a general rule of liability (*Lamont*) (Part C), the general rule of liability against (1) the agent (*Ruddy*), or (2) the principal (cf *Ruddy*) (Part D), and finally, the general rule that the agent is liable, but only unless and until he names the principal (*Ferrier*) (Part E). It will be concluded that the *Ferrier* approach should be developed because it best reflects the third party's expression of consent as being bound to the principal, while adequately addressing the practical difficulty of identifying the latter. Although such intervention is inconsistent with the doctrine of privity, it may be explained by mere practical necessity, or, more persuasively, by the emerging doctrine of good faith in Scots law. It also reflects the approach adopted by the leading civil law instruments including the Principles of European Contract Law ('PECL'),[14] and the Draft Common Frame of Reference ('DCFR').[15]

## B. THE SCOTTISH POSITION

### (1) The "Election" Approach in *Ferrier*

The facts of *Ferrier v Dods*[16] were simple. F had bought a horse from an auctioneer, D, who had guaranteed that the horse was a 'good worker'. Because the horse did not meet this description, F returned it to D who instructed F to deliver the horse to B, the principal. Both D, and subsequently, B, accepted the horse's return. Yet, F had not been refunded, and thus raised an action against both D and B.[17]

Lord Justice Clerk Inglis held that F could elect to sue either D, 'because the principal [B] had not been originally disclosed' or B, 'now disclosed'.[18] Because F had returned the horse to B, he was held to had elected B, thus could only pursue the action against him.[19] With respect to the analysis in Macgregor's leading textbook,[20] it is not completely apparent from Lord Inglis's judgement that the agent should not be liable once the principal is identified, considering the emphasis placed by Lord Inglis on D electing B by returning the horse to him, as accepted in Macgregor's earlier work.[21] However, the case may be so interpreted considering Lord Cowan's unopposed assertion that the 'statement explanatory of Dods's connection with the transaction', in other words, his position as agent in the transaction, absolved him of liability.[22] The case can thus be interpreted as suggesting that the agent should be

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[11] Macgregor (n 2), para 12.17-12.19.
[12] *Lamont, Nisbet & Co v Hamilton* 1907 SC 628 (IH).
[13] *Ruddy v Monte Marco & ors* [2008] CSIH 47, 2008 SC 667.
[14] Principles of European Contract Law (PECL) (2000).
[15] Draft Common Frame of Reference (DCFR) (2009).
[16] *Ferrier* (n 9).
[17] ibid 564.
[18] ibid
[19] ibid
[20] Macgregor (n 2), para 12.17.
[21] L Macgregor, 'Agency and Mandate' in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Butterworths; Law Society of Scotland 2001), Reissue 1, paras 139-141.
[22] *Ferrier* (n 9) 564.

liable only unless and until he names the principal. Such a solution finds its support in Lord McLaren's note in Bell's *Commentaries*. [23]

## (2) The "Credit" Approach in *Lamont* and *Ruddy*

*Lamont*
In *Lamont*, managing owners (M) of a ship named Gordon Castle (GC), and other ships belonging to various owners, contracted with insurance brokers (L), to insure these ships. When M failed to pay the premiums, L raised an action for payment against the GC's owners, Hamilton (H), as principals.[24]

The Inner House upheld the decision of the Lord Ordinary that M, the agent, was solely liable under the contract. The key factor in determining the party to the contract was 'to whom … the credit [had been] originally given'.[25] Because of certain contractual terms, such as M's right to cancel the policies, it was held that the contract existed exclusively between L and M.[26]

*Lamont* may be a simple application of the general interpretative rule that even an agent for an identified principal may be liable if the contract or the circumstances show that he intended to bind himself personally.[27] In fact, the case echoes the 19th-century "credit" approach to general contractual interpretation in agency upheld in *Millar v Mitchell*.[28] However, as Macgregor suggests, *Lamont* may suggest that there is no general principle in unidentified agency cases: that the contract is entered into with the party on whose "credit" the third party relied.[29]

*Ruddy*
In *Ruddy*, a 21st-century case, the Inner House identified the parties to an employment contract in an action of reparation for personal injuries suffered by Ruddy (R), a handyman engaged by Marco (M), a director of, and thus agent for, the second defenders, M&H Enterprises Ltd (M&H).[30]

To distil the relevant rules, Lord Eassie relied on two conflicting authorities. Firstly, Professor Walker's textbook on *The Law of Contract and Related Obligations in Scotland* suggested that, as a general rule, the agent should be liable, as the third party usually does not rely on the credit of an unidentified principal.[31] Secondly, *Bowstead and Reynolds*, a leading English authority, suggested that as a general rule, the principal is liable, unless the agent fails to negative his personal liability.[32] Ultimately, a hybrid, "credit" approach was upheld: the agent acting for an unidentified principal will, as a general rule, be liable, unless he can show that he 'negatived

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[23] See also the position preferred in Bell, *Commentaries* I, 540, Lord McLaren's note.
[24] *Lamont* (n 12) 628.
[25] *Lamont* (n 12) 635.
[26] *Lamont* (n 12) 636.
[27] Macgregor (n 2) 12.01.
[28] *Millar v Mitchell* (1860) 22 D 833, 850 (IH). See also Bell, *Commentaries* I, 541, note.
[29] Macgregor (n 2), para 12.18.
[30] *Ruddy* (n 13) 667.
[31] D M Walker, *The Law of Contract and Related Obligations in Scotland* (3rd edn, T&T Clark 1995) para 29.7, in *Ruddy* (n 13) [21].
[32] F M B Reynolds (ed), *Bowstead and Reynolds on Agency* (18th edn, Sweet and Maxwell 2006), paras 9.001–9.003, referred to in *Ruddy* (n 13) [14], [22].

personal liability'.[33] This was seen as reflective of the outcome of *Dores v Horne and Rose,*[34] referred to by Gloag as a 'special case' where law agents were held liable under their client's undertaking.[35]

Although the case may be classified as a "credit" approach case,[36] it suggests very limited circumstances in which the principal will be held liable. The fact that the third party had notice from the surrounding circumstances that the agent acted for a principal was insufficient to negative the agent's liability. This approach thus holds the agent liable, as a general rule, subject to the latter proving otherwise. It also received some support from Lord McLaren in Bell's *Commentaries*.[37]

### (3) An Established Position?

The law in this area is uncertain.[38] *Ruddy* does not refer to, or explicitly overturn *Lamont* or *Ferrier*, but it may do so implicitly. However, the Inner House in *Ruddy* failed to deliver a 'full legal analysis' of unidentified agency.[39] Furthermore, it was a case involving an employment contract, a type of personal contract,[40] in which the standard showing that the agent purported to represent a principal in the contract may be higher. It will thus be considered which, if any, of these three approaches is preferable, assuming that the door to the development of the law by the courts in this area is not closed.

## C. NO GENERAL RULE OF LIABILITY

The approach in *Lamont*, by suggesting a "credit" approach in which neither the agent nor the principal is presumed to be liable, may be admired as it reflects the spirit of contract law by necessitating the finding of the intended contractual party in each case.[41] It is also reflected by some common law authorities. In *The Santa Carina*,[42] the Court of Appeal disapproved of an earlier judgement,[43] which supported the general rule that the agent is liable. Instead, the right question was to whom the "credit" was given in the particular case,[44] or, in a more modern vein, what the intentions of the parties, ascertained objectively, were.[45] The latter approach was approved in a modern decision of the Supreme Court of Canada.[46]

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[33] *Ruddy* (n 13) [23].
[34] (1842) 4 D 673 (IH).
[35] W M Gloag, *Gloag on Contract* (2nd edn, W Green 1929) 138.
[36] Macgregor (n 1) para 12.19.
[37] Bell, *Commentaries* I, 542, Lord McLaren's note.
[38] Macgregor (n 2), paras 12.19, 12.23.
[39] Macgregor (n 2), para 12.19.
[40] D Cabrelli, *Employment Law in Context* (4th edn, OUP 2020) 144.
[41] W McBryde, *The Law of Contract in Scotland* (3rd edn, W Green 2007), para 5.01.
[42] *N & J Vlassopulos Ltd v Ney Shipping Co (The Santa Carina)* [1977] 1 Lloyd's Rep 478 (CA).
[43] *Benton v Campbell, Parker & Co Ltd* [1925] 2 KB 410, 414.
[44] *The Santa Carina* (n 41) 481, per Lord Denning MR.
[45] ibid 483, per LJ Roskill.
[46] *Chartwell Shipping Ltd v Q.N.S. Paper Co Ltd* [1989] 2 SCR 683, 745.

However, the leading English,[47] and Canadian,[48] textbooks now uphold a general rule of the principal's liability in unidentified agency, focusing on the parties' intention only to overturn the general presumption.[49] In the international context, as will be shown below,[50] general rules of liability reign supreme. Similarly, even in cases of undisclosed agency, where the setting of a general rule proved difficult, the now "orthodox" approach that the contract arises between the agent and the third party, with the principal having a right to intervene,[51] has been reached. This may reflect the pursuit of legal certainty, traditionally emphasised as crucial for parties to commercial transactions by Lord Mansfield.[52] It thus seems that a more satisfactory rule could be developed.

## D. GENERAL RULES OF LIABILITY

The approach in *Ruddy* suggests that, as a general rule, the agent is liable, unless he negatives his liability by doing something more than naming the principal. This section will thus consider whether a general rule of liability of the agent, or, by contrast with *Ruddy*, the principal, is satisfactory.

### (1) Agent

The third party may be seen as consenting to the agent being bound, in line with the approach of Diplock LJ in *Teheran-Europe Co Ltd v S.T. Belton (Tractors) Ltd*.[53] The dicta suggest that the identity of the principal is irrelevant if the third party:[54]

> '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.'

Such willingness is presumed in ordinary commercial contracts,[55] as affirmed by a leading Privy Council case.[56] It may thus be argued that, because the identity of the principal is, in general, irrelevant to the third party, the latter implicitly consents to the agent being bound.[57] This approach is reflected by the *Restatement (Third) of the Law of Agency*, which holds that the agent is, as a general rule, a party to the contract, alongside the principal.[58] As Holmes and Symeonides put it, 'few people would put their complete trust in the creditworthiness of an unidentified person', from which it follows that the agent is 'at least a co-obligor on the contract.'[59] Where the third party

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[47] P Watts and F M B Reynolds (eds), *Bowstead and Reynolds on Agency* (22nd edn, Sweet & Maxwell 2022), paras 8-001, 9-001.
[48] G H L Fridman, *Canadian Agency Law* (2nd edn, LexisNexis Canada 2012), para. 6.2.
[49] Watts and Reynolds (n 46), para 9-002; Fridman (n 47), para 6.2.
[50] See in particular Parts D(b), and E.
[51] Reynolds (n 4), para 4.05; Watts and Reynolds (n 46) 8-069; *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148 (CA); cf W Muller-Freienfels, 'The Undisclosed Principal' (1953) 16 MLR 299, 306; C-H Tan, 'Undisclosed Principals and Contract' (2004) 120 LQR 480, 486.
[52] *Vallejo v Wheeler* (1774) 1 Cowp 143, 153.
[53] *Teheran-Europe Co Ltd v ST Belton (Tractors) Co Ltd* [1969] 2 QB 545 (CA).
[54] ibid 555.
[55] ibid 555.
[56] *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207-208 (HKPC).
[57] *Schmalz v Avery* (1851) 16 QB 655.
[58] Restatement (Third) of the Law of Agency, §6.02.
[59] W H Holmes and S C Symeonides, 'Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law' (1999) 73 Tul L Rev 1087, 1143.

expresses or implies his unwillingness to contract with the agent, there would be no contract between the two, due to a lack of consent.[60]

However, this general rule is highly unsatisfactory. As Quinn notes, 'willingness to treat' is not the same as 'willingness to contract' with a party.[61] In other words, just because the third party may not be unwilling to bind the agent does not mean that she consents to contract with him, or even further, as suggested by *Ruddy*, to contract exclusively with him.[62] In construing contracts, the court's task is to 'decide what each [party] was reasonably entitled to conclude from the attitude of the other',[63] and the agent arguably cannot conclude that the third-party consents to contracting with him. Quinn argues, in the undisclosed agency context, that Diplock LJ's dicta in *Teheran-Europe* only apply to merit the intervention of the principal 'by operation of law', rather than enabling a contract to be formed between the principal and the third party.[64] Similarly, in the unidentified agency context, there can be no contract with the agent.

Furthermore, as discussed below,[65] the approach of holding the agent solely liable seems unrepresented internationally. As argued by Lord Hodge, in the context of commercial law, legal particularism should be minimised.[66]

**(2) Principal**

Having demonstrated that the approach in *Ruddy* is unsatisfactory, the contrary position will be assessed, namely, whether the unidentified principal should be held liable as a general rule. Although unrepresented in Scots law, this is the position in English law,[67] which could be used to develop our law, as it has often been done in the agency context.[68] Although the Inner House in *Ruddy* relied directly on *Bowstead and Reynolds* to influence its position, the English authors note that the Scottish approach is 'apparently different' as a result of Ruddy,[69] perhaps suggesting a misinterpretation by the court.

This general rule is more aligned with the requirement of consent: the third party is objectively seen as being willing to take the risk to contract with anyone whom the

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[60] *Hill SS Co Ltd v Hugo Stinnes Ltd* 1941 SC 324, 337, endorsed by Watts and Reynolds (n 46), para 9-095.
[61] K Quinn, 'Undisclosed Principals' in K Quinn and P Watts (eds), *Contracting with Companies, Trusts, Partnerships and Nominees* (2010) 91, paraphrased in A Lang, 'Unexpected Contracts versus Unexpected Remedies: The Conceptual Basis of the Undisclosed Principal Doctrine' (2012) 18 Auckland U L Rev 114, 125.
[62] Reynolds (n 4), para 4.26.
[63] Gloag (n 34) 7.
[64] Quinn (n 60) 91, as referred to in Lang (n 60) 125.
[65] See in particular Parts D(b), and E.
[66] P S Hodge, 'Does Scotland need its own Commercial Law?' (2015) 19(3) The Edinburgh Law Review 299, 310.
[67] Watts and Reynolds (n 46), paras 8-001, and 9-001 referring to *Montgomerie v UK Mutual SS Assn Ltd* [1891] 1 QB 370, 371.
[68] L Macgregor, 'Empire, Trade, and the Use of Agents in the 19th Century: The Reception of the Undisclosed Principal Rule in Louisiana Law and Scots Law' (2019) 79 La L Rev 985, 1034.
[69] Watts and Reynolds (n 46), para 9-001, footnote 2.

agent might represent,[70] consistently with the *Teheran-Europe* dicta by Diplock LJ.[71] The situation can be analysed under the Krebs' 'offer and acceptance model', with the principal and the third party being seen as exchanging consent, and the agent acting as a 'mere messenger'.[72] The third party, if unwilling to take such risk, can simply refuse to enter into the contract.[73] This approach has been adopted in Canada,[74] South Africa,[75] as well as recognised by the UNIDROIT Principles of International Commercial Contracts ('PICC').[76]

The adoption of such a position in Scotland would also be consistent with case law which suggests that in unidentified agency the third party cannot claim compensation against the principal of debt incurred by the agent.[77] The decision may reflect the court's intuition that it is the principal who should be held be liable. Dalley, writing in the context of the *Restatement (Third) of the Law of Agency*, claims that agency law is explained by the 'cost-benefit internalisation theory', which presupposes that, from a moral and economic perspective, it is the principal, the party primarily benefiting from using agency, who should carry the foreseeable risks of transactions entered on his behalf.[78]

Despite the apparent persuasiveness of this rule, two main challenges may be posed. Firstly, any rule making the principal primarily liable may invite unscrupulous behaviour by the agent, who, acting for multiple principals under the same instructions, may enter into the contract without having any particular principal in mind, enabling him to subsequently allocate contracts depending on their success, to the detriment of the third party.[79] The requirement of proof that the agent had actual authority, and subjectively intended to act for a particular principal in English law,[80] could help alleviate this, however, the requirement of proof itself is difficult to overcome.[81] These difficulties may, however, be countered: the third party who has notice of the principal's existence willingly takes the risk of contracting with him and should prepare himself for the risks entailed in that choice.

However, there is no 'proper formal mechanism' for finding the principal's identity,[82] apart from asking the agent, who may be unwilling to reveal the principal's name or has been instructed by the principal not to reveal it.[83] Leaving the third party

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[70] Watts and Reynolds (n 46), para 8-002.
[71] *Teheran-Europe Co Ltd v ST Belton (Tractors) Co Ltd* [1969] 2 QB 545, 555 (CA).
[72] T Krebs, 'Agency Law for Muggles: Why There is no Magic in Agency' A Burrows and E Peel (eds), *Contract Formation and Parties* (OUP 2010) 210.
[73] Working Group for the Preparation of Principles of International Commercial Contracts, 'Summary records of the meeting held in Bolzano/Bozen from 22 to 26 February 1999' (June 1999), para [99]. <https://www.unidroit.org/english/documents/1999/study50/s-50-misc21-e.pdf> accessed 29 April 2023.
[74] Fridman (n 47) para. 6.2.
[75] A J Kerr, *The Law of Agency* (4th edn, LexisNexis South Africa 2006) 209.
[76] The UNIDROIT Principles of International Commercial Contracts (2016), Article 2.2.3.
[77] *Matthews v Auld and Guild* (1873) 1 R 1224; Macgregor (n 2) 12.24.
[78] P J Dalley, 'A Theory of Agency Law' (2011) 72 U Pitt L Rev 495, 498-499.
[79] Holmes and Symeonides (n 58) 1144; Macgregor (n 66) 1028.
[80] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, 597 (Com Ct); Reynolds (n 4), paras 4.07-4.09; Watts and Reynolds (n 46), para 8.072.
[81] Reynolds (n 4), para 4.38.
[82] Watts and Reynolds (n 46), para 9.017.
[83] Watts and Reynolds (n 46), para 8.071.

without any means of finding out whom to sue may be an inequitable result which discourages transactions with agents acting for unidentified principals.

## E. AGENT LIABLE UNLESS AND UNTIL THE PRINCIPAL IS DISCLOSED

The approach proposed by Macgregor, inspired by *Ferrier v Dods*, may provide an answer to the issue of there being no formal framework for finding the principal's name. Macgregor interprets *Ferrier* as suggesting that an agent binds the principal, as well as being 'treated as a party' to the contract, with the agent being absolved once he identifies the principal.[84] Thus, the agent may not be a party to the contract: as argued above, the third party does not give true consent to contract with the agent. Rather, the agent should be so "treated", in other words, seen as intervening in his principal's contract *ab initio*, only being absolved once he reveals the latter's name. In parallel with what has been argued by Quinn in the context of undisclosed agency,[85] the agent could intervene 'by operation of law', in the absence of a better alternative for discovering the principal's name.

Such an approach infringes privity of contract: a doctrine which suggests that third parties can have no rights or obligations under a contract, subject to exceptions.[86] In the context of intervention by principal in undisclosed agency,[87] multiple exceptions to privity of contract have been proposed as theoretical justifications, none of them fully successful.[88] The same assessment can fruitlessly be undertaken as respects unidentified agency. For example, the theory of assignation,[89] proves unpersuasive in this context, as even though the third party can, by contrast with undisclosed agency,[90] be seen as consenting to the assignation, burdens still cannot be assigned.[91] Similarly, the agent cannot be seen as a third party who benefits from the contract:[92] rather they are burdened by it. By defying privity of contract, the doctrine may be seen as another challenge to Krebs' argument that there is 'no magic in agency'.[93]

However, just as 'commercial utility and convenience' is seen as a sufficient justification for the intervention by the undisclosed principal,[94] so too the practical difficulties of identifying the principal may justify the agent's intervention. However, a

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[84] Macgregor (n 2), para 12.19.
[85] Quinn (n 60) 91, as referred to in Lang (n 60) 125.
[86] H MacQueen, Lord Eassie, and others (eds), *Gloag and Henderson: The Law of Scotland* (15th edn, W Green 2022), para 8.01.
[87] Reynolds (n 4), para 4.05; Watts and Reynolds (n 46) 8-069; *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148; cf W Muller-Freienfels, 'The Undisclosed Principal' (1953) 16 MLR 299, 306; C-H Tan, 'Undisclosed Principals and Contract' (2004) 120 LQR 480, 486.
[88] Lang (n 60) 120; Krebs (n 71) 212.
[89] Goodhart and Hamson (n 3) 352, cf *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 (HKPC).
[90] Macgregor (n 2), para 12.29.
[91] MacQueen, Lord Eassie, and others (n 85), para 8.16.
[92] See Contract (Third Party Rights) (Scotland) Act 2017, section 1. See further on the, now rebranded, *jus quaesitum tertio* doctrine in Scots law: H L MacQueen, 'Third Party Rights in Contract: Jus Quaesitum Tertio' in K Reid and R Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations* (OUP 2000).
[93] Krebs (n 71) 210.
[94] *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, 552 (CA); *Siu Yin Kwan v Eastern Insurance Company Ltd* [1994] 2 AC 199, 207 (HKPC).

more persuasive explanation may be made by reference to the 'explanatory and legitimating' doctrine of good faith in Scots law,[95] as, if not for the intervention, the third party would have been left without any remedies. Yet, as recognised in the agency context, 'the reasonable expectations of honest men must be protected'.[96] Furthermore, the approach analogous to *Ferrier* has received approval in the PECL,[97] and the DCFR,[98] which both recognise good faith as a general principle.[99] Drawing from instruments with a civil law pedigree would be consistent with the history of Scots agency law, which has developed out of the Roman concept of mandate.[100]

## F. CONCLUSION

The analysis of *Ferrier*, *Lamont*, and *Ruddy*, has demonstrated that the position of the unidentified principal in Scots law is unsettled. The solution preferred by Professor Macgregor, based on *Ferrier*, that the agent should be liable unless and until the principal is disclosed, should be developed. Not only does it recognise where the true consent of the third party lies: it resolves the issue of there being no formal mechanism for identifying the principal by enabling the agent to intervene in the contract between the principal and the third party. Such departure from privity of contract may be explained by mere practical necessity, or, more persuasively, by the emerging doctrine of good faith in Scots law. Finally, the approach has been endorsed by leading European instruments which share a common legal history with Scotland.

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[95] *R v Immigration Officer at Prague Airport Ex p. European Roma Rights Centre* [2005] 2 AC 1 (HL) [60]. See also *Smith v Bank of Scotland* 1997 SC (HL) 111, 121.
[96] *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCC 533, 533. See also J Steyn, 'Contract law: fulfilling the reasonable expectations of honest men' (1997) 113(7) LQR 433, 433.
[97] PECL Article 3:203.
[98] DCFR (2009) II 6:108.
[99] PECL Article 1:201; DCFR (2009) III 1:103.
[100] L Macgregor, 'Defining Agency and Its Scope (I)' in L DiMatteo and M Hogg (eds), *Comparative Contract Law: British and American Perspectives* (OUP 2015) 382–383.