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Introduction
Contractual negotiations between companies frequently operate on the understanding that the negotiators have the necessary capacity to bind the parties, and a testing clause usually makes that capacity clear. A contracting party can come unstuck if the negotiator turns out not to be the decision taker, for example where decisions have to be made by committees. The Court of Appeal’s decision in Hawksford illustrates this problem in the context of a commercial contract with a trust where the trust is seeking rectification of that contract.

Background
The claimant, H, was a professional corporate trustee based in Jersey; it acted as the sole trustee of a discretionary trust set up for the benefit of B, a high wealth individual and the founder of a substantial travel agency business, G Ltd, and his family. B was not a director but acted as a consultant and advisor to the board under a written consultancy agreement which in 2007 had earned him over £700,000. 97.99 per cent of the shares in G Ltd were owned by H, with the remainder held by AB, G Ltd's CEO. In 2007 H entered into a share purchase agreement under which it and AB agreed to sell their shares in G Ltd to the defendant, S Ltd. The negotiations had been principally carried out by B on behalf of H, which was to be the controversial aspect of the deal. As frequently occurs in shared purchase agreements (“SPAs”), the consideration was to be paid in stages; an initial payment out of which H would pay off a bank loan owed by G; a structured deferred payment which partly depended on a cash surplus within G; and “earn out consideration” which was a multiple of earnings before interest, taxation, depreciation and amortisation (“EBITDA”). The SPA had failed to exclude the costs of B’s consultancy agreement, which would result in a substantially reduced ”earn out consideration” for B and by contrast a much reduced consideration payable by S Ltd.

H applied for rectification of the SPA, arguing that although it did not refer to the payments made in 2007, it had been the parties’ common expressed intention that all consultancy payments made to B should be disregarded for purposes of calculating EBITDA under the agreement. The judge at first instance had found clear and compelling proof that when H had entered into the SPA, B, as the relevant decision maker, was, considered objectively, operating under a mistaken belief that the contract as executed accorded with his outwardly expressed continuing intention that his 2007 consultancy payments should be excluded. His conclusion that B was the relevant decision-maker was based on H Ltd’s passive role throughout the contractual negotiations and the fact that B had been authorised to negotiate on behalf of H Ltd. He found that the omission was due to the pressures of drafting and completing the transaction in a short space of time. He also made similar findings in respect of AB and S Ltd. S Ltd did not challenge the judge’s attribution of that common intention to itself but appealed against the order for rectification on the ground that there was no identifiable legal relationship between H Ltd and B.

The law
Companies can only act through a human agency and company law has identified the degree of control and responsibility that is required for the actions of the individual to be treated as those of the company. In Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 A.C. 500, a decision of the Privy Council, Lord Hoffmann said at 506 that:
“The company’s primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as ‘for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company’ or ‘the decisions of the board in managing the company’s business shall be the decisions of the company’. There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as ‘the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company’.

In practice few decisions are the subject of a resolution of the board or a unanimous decision of the shareholders; most decisions are taken using “general rules of attribution”, namely principles of agency. A company appoints servants and agents whose acts, by a combination of the general principles of agency and the company’s primary rules of attribution, count as the acts of the company. In cases involving rectification, the court’s approach is to identify the person who is the decision-taker in the corporate body which entered the contract, as opposed to the negotiator, and to see whether he was making a mistake. The fact that the contract had been negotiated by a person who was not the decision-taker and had made an error was insufficient unless it could be shown that the decision-taker shared the intention of the negotiator (George Wimpey UK Ltd v VI Construction Ltd [2005] EWCA Civ 77).

The appeal decision

S Ltd’s persuasive argument was that, as the judge had accepted that the only person authorised to enter into the contract on the terms agreed was the trustee, he had been wrong to find that B was the decision-maker. As a matter of fact, H had sold the shares on the terms negotiated by B and its officers had not applied any independent judgment. However, because the decision to sell had to be taken by H, it did not matter that H was rubber-stamping B’s decision; it was, as a matter of law, a decision of the trustee, not B, since he was not an employee of H, he had no delegated authority to sell the shares or bind H to the contract and his only authority had been to negotiate the terms. The relevant decision for rectification rested with the trustee.

This argument was rejected by the Court of Appeal (Rix, Etherton and Patten L.JJ.). Patten L.J. (with whom the other judges agreed), having set out the objective test for whether a written agreement reflected prior consensus, said at [31] that if companies (or other non-human entities with a legal persona) were to take advantage of the equitable jurisdiction then

“it becomes necessary to ascertain the individual or individuals whose expressed intentions qualify as those of the contracting party. Problems of attribution populate large areas of the law”.

He noted that it had been common ground before the judge that in order for H to be entitled to rectification, B had to treated as the decision-maker, which had an obvious connection with the “directing mind and will” test used to identify the person whose actions or knowledge is regarded as that of the company itself. Ordinarily this would be a director of the company but it might include an agent who was invested with the necessary authority to manage or control the particular aspect of the company’s business to which the issue of liability related.

“Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company ‘as such’ cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course the meaning is usually perfectly clear. But a reference to a company ‘as such’ might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.”

At [41] Patten L.J. accepted H’s argument that the decision-maker ought in principle to be the person who had the authority to bind the company to the contract.
“The expressed intentions of a mere negotiator will therefore be immaterial unless he is also the decision-maker or shares in a relevant way those intentions with the person who is the decision-maker on behalf of the company.”

While accepting that H alone by its officers had power to contract, he rather surprisingly used the particular circumstances of H to find that B was the decision maker; since H’s decision was largely a formality provided that the terms of the sale were acceptable to B, his role as a negotiator was

“therefore critical both to his own willingness to see the shares sold on the terms he had agreed and to the trustee’s decision to sell them on that basis”.

In essence, B’s decision was attributed to H even though none of the usual agency rules applied. The appeal was dismissed on that basis.

Conclusion
The Court of Appeal abandoned any real distinction between negotiator and decision maker because it was apparent that no human agent other than B had had any role in negotiating the terms of the SPA. The alternative would have been a “black hole” scenario where the absence of any formal authorisation of B to make the contract would have prevented rectification, even if both parties had been in agreement as to the relevant mistake, or where rectification had been sought by S Ltd rather than H.