

THE LAW

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Without the Law of Agency, modern commercial life may have been hampered. This is so because you need to require the services of other persons in order to enter into different trades with different parties at different places and probably at the same time.

Corporate bodies are artificial persons that can only act through natural persons i.e. human beings as agents.

In this paper we will briefly discuss Agency as a concept, its elements, types, rights and duties of an agent, termination of agency and the effects of such termination among others.

DEFINITION

Agency does not have an all embracing definition or description. Fridman describes it as "a relationship that exist between two persons when one called the agent is considered in law to represent the other called the principal in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by making of contracts or the disposition of property."

The law of agency is the legal effects of the acts of a person for another. The contract of agency is that of the principal but not that of the agent. The latin maxim that represent this situation as "Qui facit per alium facit per se" (He who acts by another acts by himself). Stalin J. in *Bevan v. Webb* (1901) 2CH. 59 at 78 said that "Whatever a man who is sui juris (i.e. of full age) may do by himself, he may do by another."

ELEMENTS OF AGENCY

The elements of agency is the legal consequences resulting from the contract of agency. Some of the elements include the following:

1. The agent must have the authority of the principal to act as an agent.
2. Agent must not only stand in place

of and for the principal but must also act for him.

3. The result of such act is to create legal relation between the principal and the third party. The agent brings about a contract binding between the principal and the third party. Immediately after making the contract with the third party, his person disappears from the relationship. The benefits accruing from such contracts otherwise go to either the principal or the third party.

Therefore, the agency is void if the agent acts in his own name. Also if the relationship is that between a wholesaler and a retailer, agency is not created. This is so because there is no principal and agent relationship between a wholesaler and a retailer. Both of them are independent of each other. The relationship between a wholesaler and a retailer is not that of agency but contractual simpliciter.

TYPES OF AGENTS

Agency can be manifested in different ways and forms. Types of agency are mostly discernible by their functions. They are as follows:

1. Attorney: This simply means an agent or a representative. When he is appointed in writing, usually under seal, he is said to have Power of Attorney. If the attorney is a lawyer, he is referred to as attorney at law.

Once an attorney at law is briefed by his client, he takes over the control of the matter or cause. This means that an attorney at law cannot commence a suit without instruction to

act on behalf of his client. Once he is seized of the suit, he can compromise an action unless expressly forbidden. An attorney at law is simply an agent of his client who is the principal.

2. Auctioneer: An auctioneer is an agent appointed by a principal or authorised by law to sell goods or property at public (see Sheriff and Civil Process Law of 1973, Laws of Lagos). The auctioneer is the agent of both the seller and the buyer for signing the memorandum of sale. He has the duty to sell publicly and not by private agreement or treaty even if the public sale proved abortive. An auctioneer has the duty to obey the instructions of the seller (see S.24 sale by Auction Law, Lagos State).

3. Broker: This is an agent whose duty it is to bring parties together by negotiation. His remuneration is by commission called brokerage. A broker has no possession of any property or service. He cannot act or sue in his own name but in the name of his principal e.g. insurance broker, real estate agent.

4. Factor: As defined by statute, a factor is mercantile agent who in the

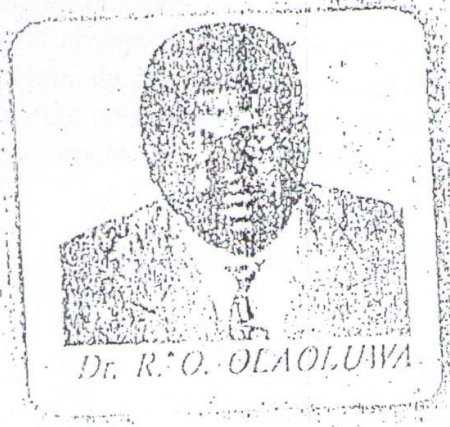
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Under the law of master and servant in En-

customary course of his business has authority to sell or buy goods or raise money on the security of goods. See S.2 (1) Mercantile Agents Law 1973, Laws of Lagos State. Unlike the broker, a factor is entrusted with the goods he buys and sells in his own name for a



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commission called factorage. A person may be a factor though he acts for one customer only once his position is established, he is regarded as a factor. In *Barring V Come*, Abbot C. J. described a factor as a person to whom goods are consigned for sale by a merchant residing abroad or at a distance a way from the principal.

5. *Del-Credere* Agent: This is a factor who for a higher commission promise that persons with whom he enters into contract on behalf of his principal shall duly pay any sum becoming due under the contract.

In *Ijebor V Epokhai*, Epokhai who was a transporter and member of Aluze Farmer's Club undertook to transport 18 bags of maize from Aluze to Ibadan to dispose off the baggage at a prevailing price. He came to report of a fall in price but was instructed to sell. The person with who he felt the maize sold it on credit and the club now sued the defendant for the original price prevailing at Ibadan. It was held that the defendant was not a *del credere* agent as he only acted in good faith. He has not contracted as an agent per se and not remunerated for his services. And he never promised to sell at a particular price.

6. *Special, General and Universal Agent*: The above classification carry no legal implications at all. They have no expression in statutes. The user of such expression is only trying to describe the functions of such agents.

The scope of authority of an agent is the most important factor to look for in any purported agency.

Having considered types of agents we can see that an agent is a person who has undertaken to act for and on behalf of another person - the principal with authority to create legal relation between the principal and a third person.

The concept of agency can be distinguished from other concepts such as trusteeship and master and servant relationship.

Agency is analogous to trust in that the trustee acts on behalf of the beneficiaries of the trust. But an agent differs from a trustee in that while the trustee is the legal owner of the trust property, the agent is not. The act of the agent is that of the principal but the trustee acts in his own name.

While the court has the inherent power to remove the trustee, it is only the principal who can remove the agent. The trustee has no power to end the trust on his own without the permission of the court.

Conversely, the agent can revoke the agency agreement with the principal without the intervention of the court. See *Olabode Renal & Ors V Babatunde Renal*

land, before the law of agency, the servant acted on behalf of his master with power to subject his master to liability if the act is authorised by the master. With the development of the law of agency, the law of servant and master was merged into it. The master and the servant originally relates to domestic service but nowadays it has grown beyond domestic service but gone into employee and employer's relationship.

The employee has authority to create a contractual bond on behalf of his master. In the case of *A G. Western Nigeria V Adedoyin*, the Western State Court of Appeal held that a permanent secretary could execute a contract on behalf of the government.

The law of employment seems to look like the law of agency. Despite academic jibes in this respect, it is evident that a servant cannot serve two masters i.e. he cannot be a servant and at the same time be an agent while agency can be revoked summarily the master and servant relationship is regulated by legislation. In agency, the principal is not concerned with how the agent performs his duties but concerned with carrying out his orders. But in master and servant's relationship, a servant is under the direct control of his master. He is supervised and must conform to reasonable instructions of his master. In *Schenkle V A O, Nigeria Ltd & Ors*, it was said that a servant may work under shifting roster of duty. His time and movement may be restricted.

CREATION OF PRINCIPAL AND AGENT RELATIONSHIP

Before agency can be validly created, the parties to the agreement must

have capacity in law. Agency exists on the principle that whatever a man can do, he can do through another. The principal cannot appoint an agent to do what he himself cannot do in law.

However, there are certain acts which by law of agency, the agent cannot do for and on behalf of the principal. These are acts of experts in a particular field, for example, doctor-surgeons, artists including musicians among others.

The problem of capacity arises in cases of corporate bodies and infants. Being a person in law, a corporation must appoint or act through

an agent (Salomon V Salomon). But it lacks capacity to do so where the capacity to be performed by the corporation is ultra vires (S. 39 Companies and Allied Matters Decree 1990). What ultra vires the principal ultra vires the agent.

Since the act when performed is that of the principal, an infant can appoint an agent where he can validly enter into a contract.

The law of agency is about agent's authority to act on behalf of the principal. The agent's authority is his power to bring the principal into contractual relationship with third parties.

There are about four ways by which an agent may have power.

1. By actual, implied and usual authority
2. By estoppel
3. By ratification
4. By necessity.

It is only an "agent" coming within the first category that fits into previous definition of an agent. But in respect of the remaining three categories, the previous definition is inadequate because

the agent has no prior authority. The law, however, confers power on the "agent" in such cases in the interest of commerce to affect the principal's legal relation with a third person.

1(a) Actual Authority: An agent is said to have actual or express authority when he is appointed in a special form. This form can be written or oral. The burden of proving an oral agency is on the person alleging it. Further prove is however not necessary when the agency agreement is in writing, under seal or in the form of a deed.

The death of the principal or agent terminates the agency. The dissolution of an incorporated company constitutes its death. The bankruptcy or insanity of either principal or the agent terminates the agency

1(b) Implied authority: An agent is said to have an implied authority if he carries out an act in the course of carrying out an act actually authorised. Implied authority amplifies actual authority and it is limited to acts which are incidental and necessary for the exercise of the actual authority. For example, an agent appointed to operate a bank account without restrictions has power to issue an overdraft and draw on the account according. This was the position of Sowemimo J. In ACB Ltd V Balogun & Ors. Conversely, an estate agent authorised to sell a property has no implied authority to enter into a contract of sale. He can only enter into open contract, (see Ayandike V. Akindete).

1(c) Usual authority: Usual authority is a variety of implied authority because it forms part of the agent's actual authority. If custom requires that certain things must be done in a particular trade or profession, usual and actual authority are implied even if an express authority is not given, whatever action he takes in the trade or profession binds the principal. It should however be noted that such custom must be reasonable and lawful. For example, a wife has usual authority to bind her husband if she incurs any debt in the cause of her legitimate business required for her domestic life. This was the principle in Ryan V Sams. To render the husband liable the third party must prove that the wife's pledge is for necessities. Whether they are necessities would depend on the wife's needs based on the husband's standard of life.

Also every partner is the agent of the firm and other partners. By so doing, such a partner has usual, actual and implied authority provided he acts within scope of the partnership and the

acts are lawful. The partnership Act of 1890 being a statute of general application is applied to Nigeria except in the States of the former Western Nigeria. Partnership laws in these states and that of Lagos in Laws of Lagos 1994 are in pari material with the Partnership Act of 1890.

2. Agency by Estoppel: This is a rule of law which precludes a person from denying a representation he made, when in reliance upon such representation, another person's position is materially altered. Applying this rule of law, agency by estoppel will render the principal liable where he represented to another as having authority to deal with third party or holds him out as his agent.

Agency by estoppel is sometimes described as agency by apparent or ostensible authority. It arises only where there is:

- A. A representation.
- B. A reliance upon the representation by a third party.
- C. Material alteration of the position of the third party arising from the representation. The representation need not be intentional, it can be mistaken as was the position in Hedley Byrne & Co Ltd V. Heller & Partners Ltd where a duty of care was said to have arisen.

3. Agency by ratification: This is a situation where an act is done without authority or in excess of authority by an agent is adopted as binding by the principal. Ratification may be implied from the conduct of the principal or his acquiescence. In Mutual Aid Society V. Aserole the Supreme Court per idigbe J.S.C. declared that "the law is that the ratification by or on behalf of the principal of the action of an agent may be expressed or implied and in the case of an agent exceeding his authority, ratification may be implied from mere silence over or acquiescence in the action of the agent by the principal."

Certain conditions must be satisfied before ratification can take place:

a. The principal must not be fictitious or non-existent. It is not enough that the principal will come at a future time.

The principal must be ascertainable. There will be no ratification unless the agent purports to act on behalf of the principal.

The principal must have capacity and competence to ratify.

The act must be ratifiable. Contracts that are void cannot be ratified. Thus a forgery cannot be ratified.

The principal must be aware of the fact of the agent's acts before he can ratify.

Where time is fixed, ratification must take place at such time, otherwise it must

take place within a reasonable time if time is not fixed.

4. Agency by necessity: This agency arises where owing to emergency, a person enters into a transaction on behalf of another without authority so as to protect the interest of that other person from ruin, loss or damage, he may be regarded as an agent of necessity.

The requirements for the agency by necessity are:

1. There must be an emergency making the agent's act commercially necessary.
2. It must be impossible to communicate with the principal in time.
3. The act must be of bonafide benefit in the interest of the principal and not merely for the benefit or convenience of the agent.

RIGHTS AND DUTIES OF AGENT

The Duties of Agent:

The duties of the agent include the following:-

1. To perform the agency undertakings. An agent who refuses to perform his duties is liable in damages for accepting to perform. In Frazer V Furman Ltd the agent failed to effect the employer's liability insurance. He was found guilty. He is however not liable for not performing void or illegal acts.

2. He has the duty to obey his principal's instructions.

3. He has the duty to exercise due care and skill. Due care is required in law where a person gratuitously does an act which calls for special skill and competence. (See Omotayo V Ojikutu 1961 ALL NLR 901).

4. He has the duty not to delegate his power of authority because he has to act personally.

5. He has a duty to act in good faith. This means that he must be honest. He must not make secret profits. He must

not take bribe and he must serve only the interest of his principal.

6. An agent must be ready to render account when they are demanded by the principal. He must keep account of property and money on behalf of his principal. The account must be kept different from the agent's own accounts.

Rights of an Agent

Every duty has a correlative right and vice-versa. On due performance of his duties, the agent is entitled to his rights which includes the following:

1. Right to indemnity: An agent has a right to indemnity unless excluded by contract. Indemnity includes refund of expenses or liabilities involving pecuniary loss incurred in the agent's authority.

However, indemnity cannot be claimed for illegal act unless the agent was unaware of it or the principal misled him.

2. Right to lien: This is a right to detain the principal's goods as security for a debt owed him. The right to lien is only possessory until the debt is liquidated. Any further action or rights over lien goods can be exercised through the instrumentality of the law.

3. Right to remuneration: It is the right of an agent to receive remuneration for his services. It may be by agreement or quantum meruit basis.

All these rights depend on a whole lot of other factors including the question whether a principal is disclosed or not disclosed, whether law or custom of the trade applies among others.

TERMINATION OF AGENCY

Agency can be terminated by various ways. These ways may broadly be divided into two categories viz: act of the parties and by operation of law.

1. Termination of agency by act of the parties can either be bilateral or unilateral act. Bilateral termination of agency occurs where both parties to the agreement agree to put an end to it. Uni-

lateral termination occurs where either of the parties goes to the other to terminate the agency. It is a right which need no formality. As such, an agency created by deed can be revoked orally. It should be noted that revocation will amount to a breach and the party will be liable to damages if he breached the requirement for the revocation. For instance, if notice is not given where it is required otherwise, it has to be reasonable.

There are some restrictions on this mode of termination. They include:

operation of the law. The law automatically operate, in the following situations:

i. where the time fixed has elapsed or where the agent has completed his assignment. At this stage the agent becomes *functus officio*.

ii. Where the contract becomes frustrated or impossible to perform.

iii. Death, bankruptcy or insanity of the parties. The death of the principal or agent terminates the agency. The dissolution of an incorporated company constitutes its death. The bankruptcy or

insanity of either principal or the agent terminates the agency.

However, death, bankruptcy and insanity cannot

terminate an agency "coupled with interest."

iv. If the subject-matter of the agency no longer exist, the law of frustration will apply. For example, if the agent is conscripted into the army, the agency will definitely come to an end by operation of law.

THE EFFECTS OF TERMINATION OF AGENCY

The termination of agency relationship from whatever cause, does not affect rights and obligations that have already arisen between the principal and the agent.

Accordingly, the agent or his per-

sonal representative or trustee in bankruptcy will still be able to sue for the things as commission, indemnity and exercise the right of lien on matters arising before the termination of the agency.

Conversely, the principal or his successor in title will still be able to sue in relation to negligence or breaches of duty committed by the agent before the terminating event.

CONCLUSION

After a cursory exposition of the law of agency as it is currently applicable in Nigeria, it has shown that this branch of our law is not only interesting but serves an important and useful engine of socio-economic and even political development. Without the law of agency by which one person can validly act through another, life will not only be difficult but will be unbearable in our present structure of economic development. Agency is based on the principle of delegation of power of authority. This does not only apply to commercial and economic transactions. It equally applies to other areas of our national development including politics and governance of our nation at different tiers of government.

Although the law of agency is based on the principles of the law of contract, it has developed its frontiers beyond the reach of the law of contract itself.

Despite its distinct identity as a separate branch of law, it will continue to drink from the water of the law of contract. Given the importance of the law of agency, especially to economic development, it is hoped that this area of the law will be codified in the near future. This will make the impact of agency more felt by many members of our society who are not of the legal profession.

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An agent is said to have actual or express authority when he is appointed in a special form. This form can be written or oral.

i. Where the principal appoints the agent for a fixed period, if the principal discontinue business within this period, he will be liable to the agent.

ii. Where the agency is irrevocable. This is an authority coupled with interest. Where the agent has vested interest in the execution of his authority such as where the agent is owed by the principal and in order to secure the payment of the debt, the principal appoints the agent as his agent. His authority will be irrevocable until the interest or debt has been satisfied. This is the position at common law and now forms part of Nigerian law.

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