NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF MANAGEMENT SCIENCES

COURSE CODE: BHM 307

COURSE TITLE: BUSINESS LAW

BHM 307: BUSINESS LAW

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Published by
National Open University of Nigeria

Printed 2009

ISBN: 978-058-631-8

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Introduction

Commercial transactions otherwise called Commercial Law are basically concerned with the various aspects of law regulating the relationship between different people involved in a commercial transaction. It is a broadened aspect of Law of contract as it cannot be brought into existence without the presence of all the requirements for a valid contract between persons and/or groups of persons.

Commercial law is a subject that is difficult to define. It however encompasses the law that applies to business and includes but is not limited to contract, company law, agency, sale of goods, banking, intellectual property, competition law, taxation law, insurance law and Hire purchase law.

Generally, the practice of commercial law is influenced by the general legal context that prevails in England subject to our local interpretations and applications. There is no particular statute that regulates and guides the commercial law practices in Nigeria save for the different statutes that regulate each of the component aspects of law that make up commercial law and particular reference in this respect shall be made to the Sale of Goods Act and Hire Purchase Act being the major components of the law that shall be discussed hereunder while others such as the Banking and other Financial Institutions Act companies and Allied Matters Act, and Insurance Act compliment it.

This course deals with twenty seven basic units typically relevant and found in Commonwealth Jurisdiction most of which gained independence from Britain. These topics, generally treat issues on commercial transactions in Nigeria and other factors that influence their form and content. They most importantly, touch upon the underlying values and feature which chart the way be commercial transactions follow.

Course Aim

The primary aim of this course is to familiarize the student with the subject matter which is dealt with herein and which the student is expected to know much about at the end of reading through.

Course Objectives

The major objectives of this course, as designed are to enable the student:

1) describe what makes up commercial transactions.

2) understand what an agency is.
3) identify an agency relationship is created.
4) understand the capacity of an agent.
5) Determine the scope of the authority of the principal in carrying out some duties.
6) discern the rights, duties and obligation of an agent.
7) understand when an agency relationship is created.
8) identify the different modes of termination of an agency contract.
9) explain the relationship of principal and third parties.
10) Understand the idea of irrevocable authority.

Working through this Course

To complete this course, you are advised to read the study units, recommended books and other materials provided by NOUN. Each unit contains Self Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 17 weeks to complete. You will find all the components of the course listed below. You need to make out time for each unit in order to complete the course successfully and on time.

Course Materials

The major components of the course are:

a) Course guide.
b) Study Units.
c) Textbooks
d) Assignment file
e) Presentation schedule.

Study Units

We deal with this course in 21 study units divided into four modules as follows:

Module 1

Unit 1 Formation of a Contract – Offer
Unit 2 Acceptance
Unit 3 Consideration
Unit 4 Intention to Create Legal Relations
Unit 5 Terms of a Contract
Unit 6 Exclusion Clauses & Limitation Terms

Module 2

Unit 1 History and Sources of Nigeria Commercial Law
Unit 2 What is an Agency?
Unit 3 The Nature and Character of Agency Relationship
Unit 4 Classification of Agents

Module 3

Unit 1 Competence of the Principal
Unit 2 Competence of the Agent
Unit 3 Authority of an Agent
Unit 4 Formalities to Creation of Agency
Unit 5 Agency by Ratification
Unit 6 Agency by Necessity

Module 4

Unit 1 Relationship with Third Party Disclosed Principal
Unit 2 Relationship with Third Party; Undisclosed principal
Unit 3 Relationship between Principal and Agent

Module 5

Unit 1 Duties of the Principal to the Agent
Unit 2 Duties of the Agent to the Principal
Unit 3 Remedies available to the Parties
Unit 4 Torts Committed by Agents
Unit 5 Crimes Committed by Agents

Module 6

Unit 1 Termination of Agency by Acts of the Parties
Unit 2 Termination of Agency by Operation of Law
Unit 3 Incidence of Termination of Agency

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each.

We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will gain more from them if you have first carried out work on the scope of Commercial Law generally. You will then have a clearer picture into which to paint these topics. Subsequent courses are written on the assumption that you have completed these Units.

Each study unit consists of one week's work and includes specific objectives, directions for study, reading materials and Self Assessment Exercises *(SAE).* Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the course.

Textbooks and References

Certain books have been recommended in the curse. You should read them where so directed before attempting the exercise.

Assessment

There are two aspects of the assessment of this course, the Tutor Marked Assignments and a written examination. In doing these assignments you are expected to apply knowledge acquired during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. The work that you submit to your tutor for assessment will count for 30% of your total score.

Tutor-Marked Assignment

There is a Tutor-Marked Assignment at the end for every unit. You are required to attempt all the assignments. You will be assessed on all of them but the best three performances will be used for assessment. The assignments carry 10% each.

When you have completed each assignment, send it together with a *(Tutor Marked Assignment)* form, to your tutor. Make sure that each assignment reaches your tutor on or before the deadline. If for any reason you cannot complete your work on time, contact your tutor before the assignment is due to discuss the possibility of an extension.

Extensions will not be granted after the due date unless under exceptional circumstances.

Final Examination and Grading

The duration of the final examination for this course is three hours and will carry 70% of the total course grad e. The examination will consist of questions, which reflect the kinds of self-assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit, and taking the examination to revise the entire

course. You may find it useful to review your self assessment exercises and tutor marked assignments before the examination.

Course Marking Scheme

The following table lays out how the actual course marking is broken down.

Assessment	**Marks**
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments. Best three marks of the four count at 30% of course marks.
Final examination	70% of overall course score
Total	**100% of course score.**

Course Overview and Presentation Schedule

Unit	**Title of Work**	**Weeks Activity**	**Assessment (End of Unit)**
	Course Guide	1	
	Module 1		
1	Formation of a Contract – Offer	1	Assignment 1
2	Acceptance	1	Assignment 2
3	Consideration	1	Assignment 3
4	Intention to Create Legal Relations	1	Assignment 4
5	Terms of a Contract	1	Assignment 5
6	Exclusion Clauses & Limitation Terms	1	Assignment 6
	Module 2		
1	History and Sources of Nigeria Commercial Law	1	Assignment 7
2	What is an Agency?	1	Assignment 8
3	The Nature and Character of Agency Relationship	1	Assignment 9
	Module 3		
1	Competence of the Principal	1	Assignment 10
2	Competence of the Agent	1	Assignment 11
3	Authority of an Agent	1	Assignment 12
4	Formalities to Creation of Agency	1	Assignment 13
5	Agency by Ratification	1	Assignment 14

6	Agency by Necessity	1	Assignment 15
	Module 4		
1	Relationship with the Third Party Disclosed Principal	1	Assignment 16
2	Relationship with Third Party; Undisclosed Principal	1	Assignment 17
3	Relationship between Principal and Agent	1	Assignment 18
	Module 5		
1	Duties of the Principal to the Agent	1	Assignment 19
2	Duties of the Agent to the Principal	1	Assignment 20
3	Remedies available to the Parties	1	Assignment 21
4	Torts Committed by Agents	1	Assignment 22
5	Crimes Committed by Agents	1	Assignment 23
	Module 6		
1	Termination of Agency by Acts of the Parties	1	Assignment 24
2	Termination of Agency by Operation of Law	1	Assignment 25
3	Incidence of Termination of Agency	1	Assignment 26
	Revision	1	
	Examination	1	
	Total	**27**	

How to Get the Most from this Course

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lectu rer. Just as a lecturer might give you in-class exercise, you study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the

objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

Facilitators/Tutors and Tutorials

There are 15 hours of tutorials provide in support of this course. You will be notified of the dates, times and location of the tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments. Keep a close watch on your progress and on any difficulties you might encounter. Your tutor may help and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor by telephone or e-mail if you need help. Contact your tutor if:

- You do not understand any part of the study units or the assigned readings;
- You have difficulty with the self assessment exercises;
- You have a question or a problem with an assignment, with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

Summary

This course deals with 15 basic points typically relevant and found in Commonwealth Jurisdictions most of which gained independence from Britain, our colonial master. These topics, broken down into units

generally are on employee/employers relationship in Nigeria and they may influence its form and content.

We wish you success with the course and hope that you will find it both interesting and useful.

MAIN COURSE

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Published by
National Open University of Nigeria

Printed 2009

ISBN: 978-058-631-8

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MODULE 1

UNIT 1 FORMATION OF A CONT4RACT – OFFER

CONTENTS

1.0 INTRODUCTION

The basic ingredients required under the law for the formation of a contract are offer, Acceptance, Consideration, Intention to create legal relations, terms of the contract and in most cases, the inclusion of exclusion clauses and limitation terms in the body of the contract. This unit is meant to deal principally with the law relating to offer in the establishment of commercial transactions.

2.0 OBJECTIVES

The main objectives of this unit is to bring to the knowledge of the learner what is meant by an offer, its basic ingredients, its distinctive feature as compared with invitation to treat, how it is communicated and its termination. At the end of this unit, learners are expected to understand the rudiments of an offer.

3.0 MAIN CONTENT

3.1 Definition of an Offer

As been noted, for a contract to exist, there has to be an offer by one party to another and an acceptance by the person to whom the offer is addressed.

An offer may be defined as a definite undertaking or promise, made by one party with the intention that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed. The person making the offer is known as the offeror, and the person to whom it is addressed, the offeree. Thus all comm ercial transactions must involve an offer and an acceptance.

By its very nature, there is no limit to the number of people to whom an offer can be made. It is however noteworthy that a contact comes into existence only between the parties, that is, the offeror and the offeree. This principle was first declared in the case of ***CARLILL V CARBOLIC SMOKE LALL CO. (1893)1 Q.B.253*** The principle in that case is now that an offer can be made not only to an individual or to a group of persons, but also to the whole world.

An offer can be made expressly or by conduct (impliedly). For example, a bus stopping at a bus stop implies that the owner of the bus is making an offer to a person waiting of the bus stop. If that person enters the bus, he accepts the offer by his conduct.

However, for a proposition to amount to an offer capable of acceptance, it must satisfy three conditions.

1. It must be definite, certain and unequivocal. In other words, it must amount to a definite promise to be bound, provided that certain specified terms are accepted.
2. the proposition must emanate from the person liable to be bound if the terms are accepted. i.e. from the offeror or his authorized agent. A proposition made by a person having no authority to do so purporting it to be an offer, cannot create a contract if accepted.
3. the offer must be communicated to the offeree.

An offer may be made in many ways and forms.

1. It may be made verbally i.e by word of mouth either in the presence of each other or by telephone, as well as by telex or telegraphic message or by writing.

2. an offer may be either specific or general. It is specific if made to a definite or particular person, and he alone may accept it.
3. an offer is general if addressed to the public or world at large or to a class of persons and it can only be accepted by any person coming within the scope of the offer who had notice of it.

SELF ASSESSMENT EXERCISE 1

1. Define an offer.
2. Highlight the various ways by which an offer can be made.
3. State the conditions for a valid offer.

3.2 Offer Distinguished from Invitation to Treat

It is necessary to distinguish a true offer from what is called an *"Invitation to treat"*, because very often an invitation to make an offer (i.e an invitation to treat) is confused with an offer. In other words, some problems arise in distinguishing between certain expressions used by the parties which are intended to lead to contractual relationship between then, on the one had, and certain other statements made by the parties which are not intended to lead to any legal consequence.

The importance of the distinction between an offer and an invitation to treat is that if an offer is made and is th en accepted, the offerer is bound, whereas if what the offeror said or did is not a true offer but an invitation to treat, the other party cannot by saying *"I accept"* bind b y the offeror to a contract.

The major distinctive feature between an offer and an invitation to treat is that for a offer to be a true offer, the offeror must have completed his part in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal.

An invitation to treat, on the other hand, is a preliminary to an offer such expressions or acts of a person to which no legal consequence are intended to attach but may only be regarded as preliminaries to the making of a contract are generally referred to as *"invitation to treat"*.

The essence of an invitation to treat is that by it the supposed offerer is merely initiating negotiations from which an agreement might or might not in time result. The negotiation crystallizes into a true offer when one of the parties, the offeror, finally resumes a definite and unshifting position of preparedness to be bound if the other party accepts.

The following situations usually involve invitation to treat.

1. Display of goods in shelves in a shop supermarket, self-service shops, e.t.c.
3. An advertisement of goods in a catalogue.
4. Invitations of tender.

SELF ASSESSMENT EXERCISE 2

Distinguish between an offer and an invitation to treat.

3.3 Communication of an Offer

An offer becomes effective only when it has been communicated to the offeree. Consequently, a person cannot accept an offer, the existence of which he has no knowledge. ***In R V CLARKE (1927)40 C.L.R. 227.*** It was held by Higgins, J. that, this ignorance of the offer is the same thing 'whether it is due to never hearing of it or to forgetting it after hearing'.

The American case of ***FITCH V SNEDAKER (1868)38 N.Y. 248*** also approves the principle that a plaintiff cannot accept an offer unless he is aware of it.

SELF ASSESSMENT EXERCISE 3

How is an offer communicated

3.4 Termination of an Offer

The general rule in respect of termination of an offer is that once an offer is made, it remains open for acceptance until an event known to law happens to terminate it. Some of these events are:

1. **REVOCATION:-** An offer can be revoked (i.e. withdrawn) at any time before it is accepted. This principle governing revocation remains operative even if the offeror has expressly stipulated that he would keep the offer open for a given period. In such a situation, the offeror can still exercise his right of revocation even though the time the offer was left open has expired. Thus, in ***ROUTLENDGE V GRANT (1824)4 BING. 653,*** the defendant, offered to buy the plaintiff's house for a certain sum and allowed the plaintiff six weeks within which to give him a definite answer. However, the defendant withdrew his offer before the expiration of six weeks. It was held that the defendant could withdraw the offer of any moment before acceptance, even though the time limited had not expired.

2. REJECTION:- Rejection of an offer terminates the offer, and makes it incapable of acceptance. For example if Olu offers to sell a house to Funsho for ₦5Million and Funsho says, "No, thank you" Funsho's rejection puts Olu's offer to an end. Funsho cannot subsequently accept Olu's offer, even if Olu had left his offer for a fixed period which had not expired.

It follows that where an offer has been rejected, it cannot be accepted subsequently unless a fresh offer is made by the offerer.

Rejection of an offer may occur in two ways namely:

A) By a direct intentional refusal of the offer
B) By a counter offer.

In respect of a counter offer, it happens when the offeree attempts to accept the offer on new terms, not contained in the offer.

However, a counter offer will not occur if what the offeree did was merely to make an inquiry or request for information as to certain aspects of the offer. In other words, a genuine request for further information should not be construed as a counter offer, and would therefore not cause the original offer to lapse.

Secondly, a counter-offer replaces the original offer and becomes a new offer capable of acceptance. Thus the original offeree becomes the offeror and the original offeror becomes the new offeree. If a contract is then to result, the counter-offer must be accepted by the original offeror.

3. LAPSE OF TIME: - If an offer is stated to be open for a fixed time, it clearly cannot be accepted after that time. Therefore, if the time for the acceptance of an offer is limited or fixed, the offer lapses automaticall y, if not accepted within the prescribed time. Where there is no fixed time within which the offer should be accepted, the offer must be accepted within a reasonable time. What amounts to *"reasonable time"* is a question to fact and depends on the subject matter of the contract and the peculiar circumstances of each case.

4. OCCURRENCE OR NON-OCCURRENCE OF CONDITION: - If an offer is expressly or impliedly made to terminate on the occurrence of some condition, it ceases to exist and becomes incapable of acceptance after that condition has occurred. Thus, an offer to insure the life of a person should impliedly terminate if the person cease to exist, and cannot be accepted after the person is dead.

5. **DEATH BEFORE ACCEPTANCE: -** The exact effect of the death of both the offeror and the offeree, or of either of them, has not been conclusively determined. However, the weight of academic and judicial opinions seems to indicate the following positions.

a) Death of both the offeror and the offeree before acceptance terminates the offer.
b) Death of the offeree before acceptance terminates the offer whether death is notified to the offeror or not unless, on its true construction, the offer was made to the offeree and his successes in title.

6. **LOSS OF CONTRACTUAL CAPACITY BY EITHER PARTY: -** If either of the parties loses his contractual capacity, for example through becoming insane, before the offer is accepted, the offer lapses.

SELF ASSESSMENT EXERCISE 4

Discuss the various ways by which an offer may be terminated.

4.0 CONCLUSION

By this time, the objective of this unit must have been achieved in that learners should by have known what an offer is and its related components.

5.0 SUMMARY

Through this unit, learners must have known what an offer is, the distinguishing factors between an offer and an invitation to treat, how an offer is communicated and how it is brought to an end. These are germain to the understating of commercial transactions.

6.0 TUTOR-MARKED ASSIGNMENT

1) What is an offer?
2) Distinguish between an offer and an invitation to treat
3) Enumerate and discuss the various ways by which an offer could be terminated.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

Sir William Holdsworth, *"A History of English Law,"* Vol. IV.

Walker, D.W. (1980). *"The Oxford Companion to Law."* London: Butterworths.

Friedman, G.H.L. (1984). *Law of Agency, 7th Edition*. London: Butterworths.

Powell, (1961). *Law of Agency, 2nd Edition.* London: Sweet and Maxwell.

UNIT 2 ACCEPTANCE

CONTENTS

1.0 INTRODUCTION

The law relating to creation of a commercial transaction cannot be created without the acceptance of offers from prospective business parties. In the earlier unit, an offer was defined as a definite undertaking or promise made by one party with the intention that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed. It is that acceptance by the latter that we shall be discussing in this unit.

2.0 OBJECTIVES

The major objective of this unit is to bring to the fore the major ingredients that constitute a valid acceptance of an o ffer in a commercial transactions. By the end of this unit, learners should be able to marry offer with acceptance and understand the two concepts in relation to commercial transactions.

3.0 MAIN CONTENT

3.1 Meaning and Conditions of Acceptance

Acceptance is defined as the final expression of assent to the terms of an offer. By acceptance, the offeree indicates his intention and willingness to be bound by the terms of the offer. When an offer is accepted, it is transformed to a promise and a breach of it will give rise to an action.

An acceptance like an offer may be made by word of mouth, in writing, or by conduct. It must be made while the offer is still in force, and once accepted it is complete and the offer becomes irrevocable.

CONDITIONS OF ACCEPTANCE

For an acceptance to be valid, it must fulfill the following conditions.

a) The acceptance must be unqualified. It must correspond with the offer. Therefore, any variation or modification of the offer while accepting or any acceptance which is dubiously expressed will be invalid. In other words, a reply to an offer is only effective as an acceptance if it accepts all the terms of the offer without equivocation, qualification or addition. An attempt to accept an offer with qualification or addition operates as a counter-offer and not an acceptance. Thus in ***HART V MILLS (1846)15 L.J.*** Exch 200, the defendant ordered for four dozen of wine. The plaintiff sent eight dozen. The defendant, however, took only thirteen bottles and returned the rest. The plaintiff sued claiming the price of four dozen as originally requested by the defendant. It was held that the defendant was at liberty to reject the entire eight dozen as a counter-offer, but if he retained thirteen bottles he was liable to pay for these only. The retention of thirteen bottles must be seen as the basis for the entirely fresh contract between the parties.

b) An acceptance must not be conditional. Therefore, a conditional assent to the terms of an offer is not an acceptances. In ***ODUFUNDADE V OSOSAMI (1972) U.I.L.R. 101,*** it was held that an acceptance expressed as 'a tentative agreement without engagement' could not result in a contract. Whether an acceptance is conditional or not in certain circumstances may be a strictly in issue, particularly when phrases such as 'subject to advice by our solicitor' or ' subject to a formal contract to be approved by my solicitor', or ' subject to contract' or 'provisional agreement', are employed. This is a matter of construction. The guide from the decided cases is, from the expressions used b y the parties, it is clear that they have only expressed an intention to enter a contract in future, than the phrase will be taken as a condition and not a firm acceptance.

c) An offer can only be accepted by the person to whom it is made or by his agent duly authorized. But where an offer is made to the public at large, any member of the public may accept if (see Carlill V Carbolic Smokeball Co. (supra). Where the offeror prescribes a certain mode of acceptance, an acceptance otherwise then in the manner prescribed by the offeror, is ineffective. However, where the offeror merel y indicates, without insisting on a particular mode of acceptance, any acceptance in some other but more expeditous mode will be good.

d) An acceptance must be made not only with full knowledge of the offer but also in reliance on it. Therefore, a contract cannot result from the mere coincidence of two independent acts. Thus, if a person does some act in ignorance of a standing offer, but subsequently discovers that he has un wittingly done an act for which a reward has been offered, he cannot claim the reward, since his act was not done with the knowledge of or in reliance on the offer. In other words, if, for example, Ngozi advertises an offer of a reward of ₦800 to anyone who finds and returns her lost passport and Chike in ignorance of the offer, finds and returns the passport to her, Chike cannot afterwards, on becoming aware of the offer, claim to be entitled to it.

SELF ASSESSMENT EXERCISE 1

Define an acceptance and discuss the conditions for a valid offer.

3.2 Acceptance must be Communicated

The general rule is that acceptance of an offer is not complete until it has been communicated to the offeror either by the offeree himself or by his duly authorized agent. Therefore, acceptance becomes operative only when it has been communicated to the offeror.

Communication in this sense means actual notification to the offeror or to his agent duly authorized to receive an acceptance. This rule applies not only to the cases where parties are contracting in each others presence but also to cases where the negoti ations are conducted over the telephone or other electronic means. Thus, if the offeree accepts an offer by word of month or by telephone, and the words are inaudible, no contract is formed at that moment. For this reason, the offeree must repeat his acceptance so that the offeror can hear it.

A mere mental resolve on the party of the offeree to accept an offer, i.e an intention to accept but which has not been communicated to the offeror is ineffectual. In other words, silence or a mental acceptance or an unmanifested assent to an offer will not constitute a contract.

The law requires that there must be an external manifestation of assent, some word spoken or act done by the offeree or his authorized agent which the law can regard as the communication of the acceptance to the offeror.

Acceptance may be effected in the following circumstances.

1) If the offeror prescribes or indicates a particular method of acceptances, and the offeree accepts in that way. There will be a contract, even though the offeror does not know of the acceptance.

2) Acceptance communicated to a duly authorized agent of the offeror is effective in law.

3) Where acceptance is governed by the rule in ***ADAMS V LINDSELL (1818)1 B and Ald 681,*** i.e, acceptance made by postal correspondence, e.g, by letter or telegram. Here, although strictly communication is still required as a matter of law, it is no sense by way of actual notification, but is, if anything, only fictional.

4) Where the offeror himself expressly or impliedly states the need for communication.

5) Communication of acceptance is waived impliedly, i.e, is d eemed to be waived where it is to take the form of the performance of an act, as in the case of unilateral contracts.

SELF ASSESSM ENT EXCERSISE 2

In what way or ways can the acceptance of an offer be effected.

3.3 Modes of Communication

The acceptance of an offer can be communicated in any of the following modes.

1) **Where a particular mode is prescribed**. The general rule in respect of this point is that where a special mode of acceptance of an offer has been prescribed by the offeror, the offeree is bound to comply with it. Therefore, if the offer prescribes a particular mode of communication, acceptance communicated in a mode other than that prescribed will generally be nugatory.

In different cases, the question may arise as to whether an acceptance will be vitiated if the offeree communi cates his acceptance by means which is equally or more expeditious than that prescribed by the offeror?. In principle, it appears that a deviation from the prescribed mode may be fatal to the acceptance. However, it is difficult to see why a tradesman should not be free to use an alternative mode to signify his

willingness to contract, particularly where that mode is commercially safer, more convenient and expeditious. Therefore, if the mode of communication used by the offeree though different, is equally or more expeditions than that prescribed, the acceptance will be effective.

But the result will be otherwise where the offeror insists that acceptance should be communicated by a particular mode prescribed and by that mode only. In ***MANCHESTER DIOCESAN COUNCIL FOR EDUCATION V COMMERICAL AND GENERAL INVESTMENT LTD (1969)3 ALL E.R. 1593,*** Buckley, J, approved this view that the offeree could employ an equally or more expeditious mode than that prescribed by the offeror, if it cannot be expressly shown that the offeror had only one mode of acceptance in mind.

2) **Where No Particular Mode is Prescribed: -** The general rule in this respect is that where the offeror does not state the mode of acceptance of the offer, the form of communication will depend upon the nature of the offer and the circumstance in which it is made.

Generally, common sense, commercial efficiency and commercial risk demand that the offeree should, as much as possible, accept the offer in the same mode it was made. If an offer was made in the presence of each other the acceptance would be expected there and then. The same reasoning follows with regard to offers made over the telephone, or by other electronic menas. The reason for this is that since it is the mode prescribed by the offeror, either expressly or impliedly, he runs all the risks that may arise, for example, where the letter of acceptance is lost or stolen. Therefore if the offeree communicates his acceptance promptly, e.g. by a courier, telephone or telex the communication is effective, but not, it seems, if he sends an ordinary letter.

3) **Where Acceptance is By Post: -** Generally, an acceptance is incomplete until notice of it has reached the offeror. But contracts made through the post, e.g. by mere posting or by telegram, are governed by a different rule which was ably stated by ***HERSCHELL, L.J. In HENTHORN V FRASER (1892)2 Ch. 27, at page 33*** thus;

"Where the circumstances are such that it must have been within the contemplation of the parties, that, according to the ordinary usage of mankind, the post might be used as a means of communicating the acceptances of an offer, the acceptance is complete as soon as it is posted".

4.0 CONCLUSION

The role the acceptance of an offer plays in a commercial transaction should have been easily understood. Without an unconditional acceptance communicated to the offeror there cannot be a valid officer.

5.0 SUMMARY

In this unit, learners must have known the effect of an acceptance in the course of a commercial transaction. They should also have understood the various ways of accepting an offer in order to make the acceptance valid.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the conditions for a valid acceptance.
2. Discuss the modes of communication.
3. Under what circumstances may an acceptance be revoked.

7.0 REFERENCES/FURTHER READINGS

Sagay; (1999). *"Nigeria Law of Contract."* Ibadan: Spectrum Books Limited.

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UNIT 3 CONSIDERATION

CONTENTS

1.0 INTRODUCTION

The general rule of law of contract in relation to the concept of consideration is that unless an agreement is under seal, it cannot be enforced.

There must be an exchange, either of promises, or a promise for an act. The basic feature of the doctrine is reciprocity. Thus, it is the law that something of value in the eye of the law must be given for a promise in order to make it enforceable as a contract. For a party to be entitled to bring an action on an agreement he must demonstrate that he contributed to the agreement. It is the contribution that is called consideration. A gratuitous promise, not made under seal cannot constitute a contract. The plaintiff must show that the defendant's promise was part of a bargain to which he himself contributed.

2.0 OBJECTIVES

The main objective of this unit is to bring to the knowledge of the learner the importance of consideration in all commercial transactions. It should be noted from onset that the basis of parties entering into commercial transactions is to make profits and where one of the contracting parties fails to fulfill his own side of the bargain, the other party is entitled to enforce his rights under the law depending on the nature of the breach.

3.0 MAIN CONTENT

Consideration as a topic under in of commercial transactions is very wide. In this regard, efforts shall be made to concentrate on the germaine aspects of it for easy comprehension.

3.1 Definition of Consideration

The most illustrative and applied definition of consideration is that of Lush J., ***in CURIE V MISA (1875) L. R. 10 Exch 153 at 162 where he said:***

> *"A valuable consideration in the eye of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Thus consideration does not only consist of profit by one party but also exist where the other party abandoning some legal rights in the present, or limits his legal freedom of motion in the future as an inducement fo r the promise of the first. So it is irrelevant whether one party benefits but enough that he accepts the consideration that the party giving it does thereby undertake some burden or lose something which is in contemplation of law may be of valve."*

In order to be able to sustain an action, the plaintiff must prove either a benefit conferred by him on the defendant, or on someone else at the instance of the defendant, or a detriment suffered by him (the plaintiff) in the implementation or the fulfillment of the terms of the bargain.

In a simple agreement for the sale of goods the seller's consideration is the promise of transfer or the actual transfer of his title to the goods or possession of them to the buyer or someone nominated by the latter. The buyer's consid eration is the money he pays or promises to pay for the goods the transfer of title to the goods or possession of them to the buyer represents a benefit to him, moving from the seller, conversely, the promise to pay mone y or actual payment represents a benefit to the seller, moving from the buyer.

A moral obligation does not constitute consideration. Thus, the fact that Kofi owes Acquah a moral obligation does not constitute consideration moving from Acquah in order to entitle her to enforce a promise made by Kofi towards discharging the moral obligation. In ***Eastwood V Kenyon (1840)11 A & E 438,*** Eastwood who was guardian to Mrs. Kenyon whilst she was an infant, had spent a consideration amount of

his own money in improving her estate and in bringing her up. When she reached maturity, she promised to reimburse for his expenses. Her husband also promised to do so independently. When they failed to carry out their promise, he sued them. The plaintiff relied on the defendant's moral obligation to him to fulfill their promises. The suit was dismissed and moral obligation was rejected as the basis of an action as such a notion would destroy the requirement for consideration.

SELF ASSESSMENT EXERCISE 1

Define consideration.

3.2 Consideration must Move from the Promise

The general rule in this regard is that only a person who has furnished consideration in a contract can bring an action to enforce a promise given by the defendant in that contract. The absence of consideration on the part of the promise (plaintiff) can take one of various forms.

3.2.1 Where Consideration is furnished by a Third Party and not the Plaintiff

The general rule is that only a party to a contract can of course bring an action to enforce it. This is the whole essence of the doctrine of privity of contract. The law is that a party that has not furnished consideration in a contract cannot be strictly regarded as a party to that contract. Therefore any action based on consideration furnished by another party will necessarily fail.

Where the plaintiff belongs to an organization that furnished the consideration, then he must sue in a representative capacity and not in his own name on his own behalf. See ***Gbadamosi V Mbadiwe (1964)2 All N.L.R. 19.***

3.2.2 Claim in Excess of Benefit Provided For in an Agreement

In most cases, a contract always specifies the benefit or consideration each party is to furnish. What then is the effect of a promise by one of the parties to confer an extra reward or benefit on the other party after the main contract itself has been concluded.

At best, the promise is not actionable because there is no consideration for it. In ***Egware V Shell BP Petrol Development Company of Nigeria*** *(Unreported)* Midwestern High Court, Suit NO. VHC/36/70 delivered on April 30, 1971, the plaintiffs claimed to have agreed to allow the defendants to use their land as drilling location on condition that all minor contract jobs in the location would be given to the plaintiffs only.

The action was brought against the Defendants for committing a breach of this agreement.

It was established in evidence that the plaintiffs had already received full compensation from the defendants for the acquisition of their land. It was held that since the defendants had full legal rights to drill on the land, the plaintiffs furnished no consideration for the defendant's promise. See also ***U.T.C. V Hauri (1940)6 W.A.C.A. 148.***

SELF ASSESSMENT EXERCISE 2

Only a person who has furnished consideration in a contract can enforce it. Discuss.

3.3 Executory and Executed Consideration

Consideration is termed executory, When the offer and acceptance consist of promises – the offeree making a promise in return for the offeror's promise consideration is regarded as executory. This happens very often in commercial transactions, where the delivery and payment are to be made in the future. Both parties became bound in the contract, prior to actual performance. It is the exchange of promise that constitutes the contract. The whole transaction remains in the future.

Executed consideration on the other hand is when an act is performed in return for a promise. The most common examples of this are offers of reward by the owner of a lost article to anyone who finds and returns it to him, or offers of reward by the police or anyone else for information leading to the arrest and conviction of a criminal. The finder of the article is taken to both accept the offer and to furnish consideration for the offerer's promise by the single act of returning it to the offeror.

Where consideration is executed, liability is outstanding on one side only – on that of the offeror. The offeree is never under any obligation whatsoever.

On the other hand, where the consideration is executory, both parties are liable under the contract.

SELF ASSESSMENT EXERICE 3

Distinguish between executory and executed consideration.

3.4 Past Consideration

Consideration is said to be past when it consists of a promise or an act prior to, and independent of, the promise which the plaintiff seeks to enforce. In other words, where a party to a contract makes another promise, which is after and independent of the transaction between him and other party, the subsequent promise is said not to attach to the transaction, nor can it affect the legal position between the parties. The subsequent promise is referred to as ***"Past Consideration".***

A past consideration is therefore a promise given after the act and is independent of it, that is the act is wholly executed and finished before the promise is made. For instance, if Kole builds a house for Akpan at ₦5million and after the completion of the house akpan likes the house and thereafter promises Kole ₦1million, Kole cannot rely on his act as consideration because this is past consideration.. ***Roscoria V Thomas (1842)3 Q.B 234,*** the plaintiff bought a horse from the defendant. Some time after the sale, the defendant promised the plaintiff that the horse was sound and free from vice when in fact the horse was vicious. Whereupon, the plaintiff sued the defendant for breach of warranty on discovering that the horse was vicious. It was held that, since the warranty that the horse was sound was subsequently to the transaction, and independent of the sale, the promise amounted to past consideration which was not capable of supporting an action in contract.

Exceptions

1. Where Service Are Performed

a) At the express or implied request of the defendant but without the plaintiff and the defendant reaching any agreement for payment and the defendant subsequently agreed to pay for the services.

b) In circumstances in which it can reasonably be assumed that the parties throughout their negotiation intended that the services were ultimately to be paid for, the promise is enforceable.

2) Under section 37 of the Limitation Act, 1966 if a debtor, after the debt has been statute barred, acknowledges the creditors claim in writing, the creditor ma y sue on the written acknowledgment. No consideration need be sought. The effect of this is that a written acknowledgment may revive a statute barred debt, so that it will be enforceable, although the consideration is past.

SELF ASSESSMENT EXERCISE 4

The rule that consideration is past is absolute. Do you agree?

3.5 Adequacy of Consideration

The general rule is that in the absence of fraud, duress or misrepresentation the courts will not question the adequacy of consideration.

This means that they do not measure the values of the consideration furnished by the plaintiff and the defendant respectively. This means that a contract will not be declared invalid simply because one party has got a much better bargain than the other.

By this token, no consideration is to small or too much or unfair. Consideration however, need not be adequate or equivalant to the promise, but it must be real or have same value. In other words, the court will not assist a party to a contract if he has made a bad bargain (unless he is an infant or fraud is alleged). Because as long as the consideration has some value, in the eyes of the law, its inadequacy to the promise is irrelevant.

The courts are not normally concerned with the amount of consideration. If, in a contract, a person gives up much more than he stands to gain, the courts will not interfere since "the adequacy of consideration is for the parties to consider at the time of making the agreement, not for the court when if is sought to be enforeced.

In ***Thomas V Thomas (1842)2 Q.B. 851,*** a testator, before his death, expressed the desire that his wife should continue to live in his house for the rest of her life. After he died, his executor wrote to the wife confirming her late husband's wish and stated that the widow could have the use of the house for the rest of her life, on payment of £1 a year. When subsequently the executor tried to rescind his consent, he was held bound by the undertaking not because of the husband's wishes, but because of the widow's own undertaking to pay £1 a year, which was regarded as good consideration.

SELF ASSESSMENT EXERCISE 5

With the aid of decided cases, discuss adequacy of consideration.

3.6 Sufficiency of Consideration

The meaning of the requirement that consideration must be sufficient is embedded in the principle that since consideration is a 'price' it must be something real, something of value. Therefore, if the price of which the plaintiff bought the defendant's promise is worthless or unreal, that price, whether it be in the form of an act, or a promise to do an act, will be sufficient consideration and therefore incapable of supporting a contract. But once it is real and of some value, the act or promise will be sufficient, and it is immaterial that it is not adequate for, or commensurate to, the defendants promise. The most important issue is that consideration must possess some legal value. The courts are not in a position to assess the value or create a contract for the parties.

It is however noteworthy that in the circumstances stated below, consideration will be insufficient and therefore incapable of supporting a contract.

a) Where there is an existing contractual obligation and there is a promise for payment of money if the promise is fulfilled, whether the plaintiff will recover on the promise will depend on whether he can show that he has done something more than he was contractually bound to do.

b) Where a person performs no more than his public duty, he cannot rely on the performance of that duty to constitute enough consideration to sue a promise.

c) Where the sum of money which the defendant pays to the plaintiff at the plaintiff's request is neither more or less than the sum which the defendant is already liable to pay to the plaintiff, such payment cannot serve as consideration, because nothing more than an existing obligation is discharged by the defendant.

Rule in Pinnel's Case

The rule states, that payment of a lesser sum than the amount due does not discharge the larger sum. In other words, in the case of payment of a lesser sum than the amount due, if the plaintiff had promised to forgo the balance, the plaintiff may afterwards break the promise without incurring any contractual liability. The apparent reason is that since there is no consideration for the promise, no contractual obligation exists between him and the defendant in respect of it.

THE PINNEL'S CASE (1602)Co Rep. 1129

The facts are as follows; Pinnel sued Cole in debt for £8.105 due to a beand on November, 11, 1600. Cole pleaded that he had the sum of £5:25:6d on October 1, at Pinnel's request, in satisfaction of the whole debt, and that Pinnel had accepted this. The court, on point of pleading, gave judgment for the plaintiff, i.e for the balance due. The court however emphasized that they would have given judgment in favour of the defendant, but for the flaw in the pleadings, as the payment of a lesser sum of money at an earlier date than the date on which the debt was due, if accepted by the plaintiff, would satisfy the debt owed.

Exceptions to the Rule

1) The rule does not apply where in addition to the lesser amount paid at the creditor's request, a new element is introduced in the payment. The introduction of a new element supplies the consideration which will otherwise be absent. The requirement is satisfied if the debtor pays the lesser amount at an earlier date than, or at a different place from that originally agreed provided it was not made at the debtor's request for his sole benefit.

2) The rule does not app ly where the lesser amount is paid as part of a comprehensive settlement involving a variety of claims on both sides. In other words, the principle does not operate with regard to unliquidated sums of money in which a smaller sum of money may well be given in satisfaction of a larger amount owed.

3) Where a third party pays a lesser sum which is accepted in satisfaction of the greater amount due, the plaintiff cannot subsequently claim the balance from the debtor.

4) Where a person is unable to pay his debt which is owed to several people, and it is agreed between him and the other creditors that the creditors will accept a lesser sum than the amount owed them in full satisfaction of the debt, the agreement is binding. This is called composition of creditors.

SELF ASSESSM ENT EXERCISE 6

Discuss the rule in Pinnel's case in relation to sufficiency of consideration.

4.0 CONCLUSION

The issue of consideration is the mo st important aspect of issues relating to the formation of contract. A plaintiff will easily succed in a claim for the enforcement of a contract where he can successfully plead the existence or otherwise of consideration depending on the nature of the contract. Therefore, learners are expected to know the various roles played by consideration in the formation of a contract particularly in relation to commercial transactions.

5.0 SUMMARY

Consideration has been described as some thing of value in the eyes of the law and this value would be much appreciated when learners fully understand the various sub-heads that make up consideration as follows:

a) Definition of Consideration
b) Consideration must move from the promise.
c) Executory and Executed Consideration.
d) Past Consideration
e) Adequate Consideration.
f) Sufficient Consideration.

6.0 TUTOR-MARKED ASSIGNMENT

1) Attempt a concise definition of consideration.
2) What do you understand by the saying that consideration must move from the promise?
3) Distinguish between Executed and Executory Considerations.
4) When consideration is past, it is unenforceable. Do you agree?
5) Briefly discuss the rule in Pinnel's case.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

Sagay; (1991). *"Nigeria Law of Contract."* Ibadan.

UNIT 4 INTENTION TO CREATE LEGAL RELATION

CONTENTS

1.0 INTRODUCTION

Generally, when parties are contemplating entering into a contract, formal or informal, it is always hoped that problems will not arise there from. But when this come out as the case, the parties begin to look into the terms of the contract to see if the breach by the other party is actionable in law. It is at this point that it would be discovered whether the parties actually intended or expected that legal relationship was actually contemplated by them at the formative stage of the contract.

2.0 OBJECTIVES

The main objective of this unit therefore is to bring to the fore those situations, circumstances and cases where the parties to a contract had actually intended that their relationship be legally bound right from the offer and acceptance stages of the contract.

3.0 MAIN CONTENT

Some authors are of the view that the intention between the parties does not form the bedrock of the formation of a contract. Perhaps the most popular view in this regard came from Professor Williston. He said:

> *"The common law does not require any positive intention to create a legal obligation as an element of contract …… a deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability."*

This quotation shall be discussed along with the position of the law on this important topic. Indeed, we shall look at domestic and social engagements as well as commercial transactions.

3.1 Domestic and Social Engagements

In order to consider the presence or otherwise of the contractual intention in agreements which are domestic and/or social in nature, there is a resumption in law that the contractual intention is absent and the parties to such an agreement cannot sue each other on it.

Agreements are made every day in domestic and social life where the parties do not intend to invoke the assistance of the courts, should the engagements not be honoured. A promise to offer a trim a friend's garden should not result in litigation.

It is therefore obvious that in addition to the phenomena of agreement and the presence of consideration, a third contractual element – the intention to create legal relations exists.

In ***Balfour V Balfour (1919)2 K.B 571*** a Briton was employed by the Government of Ceylon. He returned home on leave with his wife, but the wife was unable to go back to Ceylon with him because of ill-health. He then promised to make her an allowance of £30 a month until she joined him. When he failed to make this payment, she sued him to enforce the promise. The court of Appeal held that there was no contract between the parties. As a natural consequence of their relationships, spouses make numerous agreements involving payment of mone y and its applications to the household themselves and their children.

In contradistinction to ***Balfour V Balfour*** is ***MCGregor V Mc Gregor (1888)21 Q.B.D. 424***, in that case it was held that when spouses are not living in amity, particularly when their relationship has degenerated to the level of mutual hostility and distrust, an agreement between them would be binding.

However, where the performance of a domestic or social engagement involves great sacrifice on the part of one or both parties, the presumption against the presence of contractual intention may be rebutted, particularly were the plaintiff has performed his own part of the agreement. In ***Parker V Clark (1960)1 W.L.R. 286,*** on the invitation of the defendant, who was the plaintiff's uncle, the plaintiff and his wife sold their house and moved into the defendants house, it was also agreed that the Parkers would share the living expenses with the Clarkes and that Clarke would leave the house to Parker in his will. After quarrels between the couples, the Clarkes attempted to evict the Parker on the

ground that the agreement was not a binding one. It was held to be binding.

SELF ASSESSMENT EXERCISE 1

The rule that domestic and social engagements are not enforceable is absolute. Discuss.

3.2 Commercial Agreements

Generally, the law presumes the presence of the contractual intention in commercial agreements. It is therefore not surprising that there is hardly a case in which the validity of a commercial agreement has been challenged for absence of the contractual intentions.

In this class of cases, the courts presume that an intention to create legal relations exists, unless and until the contrary is proved. Thus, in ***Carlill V Carbolic Smoke Ball's Case (SUPRA***) The defendants advertised their anti-influenza capsules by offering to pay £100 to any purchaser who bought and used it and yet caught influenza within a given period, and by declaring that they had deposited £1, 000 with their bankers to show their security. The plaintiff bought the capsule, used it and caught influenza. The defendant, amon g others, raised the defence that they had no legal relations with the plaintiff. This defence was rejected and they were held to be contractually bound.

However, the defendant may escape liability where the agreement itself contains a clause expressly excludin g the intention to enter into legal relations like agreements on betting.

SELF ASSESSMENT EXERCISE 2

Not all commercial agreements are readily enforceable. Do you agree.

SELF ASSESSMENT EXERCISE 3

Examine the known intermediate situations in which the existence of legal relations has been rejected by the courts.

4.0 CONCLUSION

The learners, are by now, expected to know the significance of the concept that an agreement will not constitute a binding contract, unless it is intended by the parties to it that it should give rise to legal relations. therefore, in addition to the need to show the existence of an agreement between the parties, and consideration which clothes the agreement with

the notion of enforceability, there is a further requirement of ensuring that the parties to the agreement had the intention of creating legal relations.

5.0 SUMMARY

The intention of parties to create legal relations in commercial transactions that have connotations of domestic and social engagements, commercial transactions and other intermediate situations is only visible in minute cases.

6.0 TUTOR-MARKED ASSIGNMENT

1) Are domestic and social engagements enforceable?
2) Discuss the exceptions to the rule that commercial transactions are legally binding on the parties.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

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UNIT 5 TERMS OF A CONTRACT

CONTENTS

1.0 INTRODUCTION

In the process of formation of a contract there are terms and conditions usually inserted into the body of the contract documents b y the parties to the contract. In most cases, these terms and conditions form the basis of the contract. Some of these terms are usually express while others are implied from a variety of situation s and circumstances depending on the whole contract.

2.0 OBJECTIVE

In this unit we shall discuss all the terms and conditions which usually bind or regulate the conduct of the parties under the contractual arrangement. By the end of this unit, learners are expected to be able to decipher between express and implied terms which. Learners are also expected to know the major difference between a term of the contract and a mere representation.

3.0 MAIN CONTENT

It is usually expected that after the parties have satisfied all the essential requirements of a valid contract, it will still be necessary to determine the extent of the obligations which the contract creates. To do this, three things must be done.

Firstly, it is necessary to determine what the terms are and which the party has expressly included in the contract. It is important to note that the rights and obligations of the parties under a contract are determined by reference to the content of the contract. In other words, the terms of the contract control the operation of the contract.

Secondly, the relative importance of those terms must be evaluated.

Thirdly, it may be necessary to ascertain some additional terms which a statute, the courts and custom may imply into the contract.

3.1 A Term of the Contract and Mere Representati0n Distinguished

The importance of the distinction between a term of the contract and a mere representation lies in the type of remed y available to an aggrieved party when a breach of a contract is alleged. If the breach is of a term of the contract, then the aggrieved party can sue for a breach of that term and obtain a remedy in damages or in both damages and repudiation, depending on the importance of the term breached.

If however, the term breached is not a term of the contract, but a mere representation, not only is the remedy available to the plaintiff less valuable, th ere may in fact, be no real remedies at all. He can on ly claim damages for misrepresentation if the term breached is a representation.

However, for the purpose of distinguishing a term of the contract and a mere representation three independent tests have been designed as follows:

1) At what stage of the transaction was the crucial statement made? Statements made at the preliminary stages of the negotiations are usually not be regarded as terms of the contract, but mere representations. It is assumed that the longer the time lay between the time the statement was made, and the time the contract was concluded, the more likely would it be regarded as a mere representation and vice versa.

2) Reduction of the terms to writing. The issue here is that where there was an oral agreement, which was subsequently reduced into writing, any term contained in the oral agreement, not contained in the later document, will be treated as a mere representation.

3) One party's superior knowledge. If the person who made the statement had special knowledge or skill as compared to the other party, then the statement is taken to be a term of the contract. If, however the statement is made by the person who is less knowledgeable about the subject matter of the contract. It is regarded as a mere representation.

SELF ASSESSMENT EXERCISE 1

Distinguish between a term of contract and a mere representation

3.2 Express Terms

If the contract is wholly or partly oral, the task of discovering the terms which the parties expressly stipulate is a matter of evidence. But where the contract is wholly in written, the discovery of the express terms normally presents no problem, because the written terms are the terms of the contract. In such a case, the court always insist that the parties must be confined within the four corners' of the written words in which they have chosen to express their agreement.

In determining the content of the contract, there is a cardinal rule of construction that no one is allowed 'to add to vary or contradict a written document by a parol evidence'. The word 'parol' in this context meaning any extrinsic evidence. This rule is subject to the following exceptions:

1) Parol evidence may be adduced to prove a custom or trade usage whose implications the parties have, or may reasonably be deemed to have, tacitly assumed.

2) Parol evidence is adduced to show that the operation of the written contract was subject to an agreed antecedent condition - a condition precedent which had not occurred.

3) Parol evidence is adduced to prove that the written agreement was not the whole contract.

4) Parol evidence may be given to prove some invalidating cause outside the written contract itself, e.g. fraud, illegality, misrepresentation, mistake, incapacity or absence of consideration.

CONDITIONS

The word condition is used in two senses. In the first sense it means a term or a stipulation in a contract which is absolutely essential to its existence, the breach of which entitles the injure party to repudiate the contract and to treat it as discharged. In other words, a condition is a term of major importance which forms the main basis of the contract, the breach of which normally gives the aggrieved party a right, at his option, to repudiate the contract and treat it as at an end.

In the second sense, a condition is a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain future event; such conditions are either precedent or subsequent.

A condition precedent is one which must occur or be fulfilled before an obligation or right created by the contract can be enforced. In ***PYM V Campbell (1910) K.B. 1012*** where under a written contract, the defendant's promise to buy a share in the plaintiff's invention was, by an unwritten understanding made subject to the approval of a third party. It was held that, until the approval was given, he defendant was under no obligation to buy. In other words, the contract was unenforceable in the absence of the desired approval which was the condition precedent. A condition subsequent on the other hand is a statement of the circumstances in which the obligations under a contract may be prematurely terminated after the transaction has been embarked upon. In ***Head V Tattersall (1971)L.R. 7 Exh. 7,*** the plaintiff bought a horse o f a particular description from the defendant, with the understanding that the plaintiff could return it, up to the following Wednesday, if it did not answer the description. The description failed and the plaintiff returned the horse within time. It was held that although a contract had come into existence, the option to return operated as a condition subsequent and the plaintiff was therefore entitled to cancel the contract and return the horse.

WARRANTIES

Warranty ordinarily denotes a binding promise, but when it is used in a narrower and technical sense, it means a subsidiary term in a contract *(i.e a term of minor impotence*) a breach of which gives no right to repudiate the contract, but only a right to an action for damages for the loss sustained. It is described in the Sale of Goods Act, 1893 assertion 62 as:

> *"An agreement with reference to goods which …… (is) collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods, and treat the contract as repudiated."*

The main difference between a condition and a warranty is that a breach of the former entitles the other party to treat the whole contract as discharged, while a breach of the latter merely entitles the other party to claim damages, but does not absolve in from performing his duties under the contract.

SELF ASSESSMENT EXERCISE 2

1) Define express terms
2) Distinguish between conditions and warranties.

3.3 Implied Terms

Generally, apart from express terms i.e oral or written agreements of parties, contracts entered into by parties may also be governed by implied terms.

Implied terms are terms implied in the contract, and they, like express terms may assume the character of conditions or of warranties. In certain circumstance it may be difficult to ascertain the intention of the parties without resorting to these implied terms. This is particularly so when it is remembered that, it is not in every contractual relationship that the parties will remember to express all the terms which they intended to govern their contractual arrangement. These implied terms may be discussed under three major groups namely:

1) Terms Implied by the Courts

Generally, it is not the duty of the court to make a contract for th parties. However, in very exceptional circumstances, whenever it is desirable to effectuate the intention of the parties as may be gathered from their express terms, the court may imply a term into their contract. But, the circumstances for implying such a term must be established to be necessary. In ***Hutton-Mills V Nkansah II and Ors (1940)6 W.A.C.A. 32,*** the court was called upon to imply a term in the written agreement, that the express powers conferred on the respondents under a power of attorney to determine certain concessions and dispose of them also empowered them to collect arrears of rent. The court declined to do so, as the provisions of the power of attorney were clear, and to imply a term as urged by the respondents could not be said to be necessary for the proper functioning of the contract.

2) Terms Implied by Law or Statute

Contractual terms may also be implied by law or statute. Among outstanding examples are the implied terms contained in section 4 of the Hire Purchase Act, 1965 and in section 12-15 of the Sale of Goods Act, 1893 for Edo State and States in the former Western Region of Nigeria, where the English Act does not apply, provisions corresponding to section 12-15 above are contained in sections 13-16 of the Sale of Goods Law, 1959. These provisions are separately dealt with in the

second semester of this work under the chapters on Hire Purchase and Sale of Goods.

3) Terms Implied by Custom and Usage

As a rule, firmly established local mercantile custom and usages ma y be implied in a contract, although not expressly adverted to by the parties. Thus, in ***Hutton V Warren (1836)1 M and W 466,*** it was proved that, by a local custom, a tenant was bound to farm according to a certain course of husbandry and that, on quitting his tenant, he was entitled to a fair allowance for seed and labour on the arable land.

The court held that, the lease made by the parties must be construed in the light of this custom.

Also, in ***Produce Brokers, Co. Ltd V Olympia Oil and Cook Co. Ltd (1916)1 A.C 314,*** a written agreement for the sale of goods provided that "all disputes arising out of this contract shall be referred to arbitration; a dispute was submitted to arbitrators who in their award insisted on taking into consideration a particular custom of the trade. The House of Lords held that they were right to do so.

It should however be noted that the application of any customary implied terms is subject to the rule that such terms cannot override the terms of a written contract.

SELF ASSESSM ENT EXERCISE 3

Discuss the various heads of implied terms and their importance in contractual agreements.

4.0 CONCLUSION

The concept of Terms of a Contract as shown above usually forms the rock on which a valid contract is built. Apart from the basic requirements of an offer, acceptance, consideration and intention to create legal relations, where the parties are silent on the terms intended to govern the contract at hand, there is likely to be a breach of the contract by either of the parties thereto. Therefore, terms of a contract, particularly in relation to commercial transaction are very important.

5.0 SUMMARY

The pivotal role played by the knowledge of the distinction between a term of a contract and a mere representation; the importance of express terms in the nature of conditions and warranties and the necessity of

implied terms in the absence of specific terms on a variety of subjects makes this unit a vital one in the knowledge of the basic ingredients of contract relating to commercial transactions.

6.0 TUTOR-MARKED ASSIGNMENT

1) Examine the three tests adopted over the years in distinguishing a term of a contract from a mere representation.
2) Define an express term of a contract
3) Distinguish between conditions and warranties.
4) What are implied terms and their significance in commercial transactions.
5) Discuss the various heads under which an implied term could be invoked.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike *"Nigeria Commercial Law: Agency."* (1993) FAB Educational Books, Jos, Nigeria.

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Sagay; (1999). *"Nigeria Law of Contract."* Ibadan.

UNIT 6 EXCLUSION CLAUSES AND LIMITING TERMS

CONTENTS

1.0 INTRODUCTION

Apart from the terms usually inserted into a contract by the parties thereto, parties are also, free to limit or exclude the obligations otherwise attached to such undertaking. It is the importance and the significance of inserting exclusion or exemption clauses and Limiting terms that is our concern in this unit.

2.0 OBJECTIVE

The objective of this unit is to bring out the importance of insertion of exemption clauses and limitation terms in the body of a contract in commercial transaction and how to decipher one by the learner.

3.0 MAIN CONTENT

3.1 Exemption Clauses

An exemption clause or exclusion clause is a term in a contract which seeks to exempt one of the parties from liabilities in certain events. Where the term merely limits (rather than wholly excludes) liab ility, it is called a limiting clause. However, the governing principles are the same in both cases.

The courts have, over the years, made appreciable success in controlling unreasonable exemption clauses, and have fully developed principles which govern their validity. These principles are summarized as follows:

1) The document containing the exemption clause must be an integrant part of the contract between the parties.

In this regard, the courts have always insisted that the contract in which the exemption clause is written must be a contractual document, for it is only when the documents is a contractual document that the exemption clauses therein contained can be a term of the contract and as such, bind the party against whom it is inserted. The document may become a contractual document and so form part of the document in two ways:

a) The document must be signed by both parties to the contract.
b) Notice of the exemption clause is given to the affected party within reasonable time, before or at the time of contracting and the affected party already knows of the clause.

The general rule is that the burden is on the party wishing to rely on the exemption clause to establish that the other party was aware of the exemption clause or ought to have been aware of it having regard to all the circumstances.

It is therefore, obvious that an exemption clause cannot be unilaterally introduced into a contract after its completion. Thus, an attempt to introduce an exemption clause in a receipt, which is generally not regarded as a contractual document, would not make it a term of the contract, and would, therefore, not bind the person who received it.

2) Any ambiquity, or Other Doubt, in an Exemption Clause Must Be Resolved Contra proferentem
The contra proferentem rule states that it is a basic principle of the common law that an exemption clause must be constricted strictly against the party relying on it. Therefore, in considering the validity of an exemption clause, the courts resolve any ambiguity or other doubts in the clause against the person who is seeking to rely on it; that is, against the person who is proffering it.

3) If the plaintiff signed the document containing an exemption clause by reason of fraud or misrepresentation perpetrated by the defendant or his agent, the plaintiff is not bound.

Generally, if a person signs a contractual document, he is bound by its terms, including any exemption clause it may concern, whether he read the document or not. But this rule does not apply where the plaintiff is induced to sign the document by fraud or misrepresentation on the part of the defendant or his agent.

4) Third parties are not protected by the exemption clause.

5) No exemption clause, however wide, can operate if it is contrary To statute.

6) No Exemption Clause can operate if it is inconsistent With a Term of the Contract.

7) If the party seeking to Take Advantage of either the Exemption or the Limitation Clause acts Outside the FourWalls of the Contract.

8) If the Exemption Clause is repugnant to the Main Object and Purpose of the Contract.

9) A party who is guilty of a fundamental Breach of Contract, if the contract can be so construed, be disqualified from Relying on an Exemption Clause.

SELF ASSESSMENT EXERCISE 1

1) What are exemption clauses?
2) Examine the rules that govern the validity of exemption clause.

3.2 Term of the Contract and Mere Representation Distinguished

The importance of the distinction between a term of the contract and a mere representation lies in the type of remedy available to an aggrieved party when a breach of a contract is alleged. If the breach is of a term of the contract, then the aggrieved party can sue for a breach of that term and obtain a remedy in damages or in both damages and repudiation, depending on the importance of the term breached.

If however, the term breached is not a term of the contract, but a mere representation, not only is the remedy available to the plaintiff less valuable, there may in fact, be no real remedies at all. He can only claim damages for misrepresentation if the term breached is a representation.

However, for the purpose of distinguishing a term of the contract and a mere representation three independent tests has been designed. These are:

1) At what stage of the transaction was the crucial statement made? The rule have is that statements made at the preliminary stages of the negotiations would not be regarded as terms of the contract, but mere representations.

2) Was the oral statement later followed by a reduction of the terms to writing? The basic point here is that, if there was an oral agreement, which was subsequently reduced into writing, any term contained in the oral agreement not contained in the later document, will be treated as a mere representation.

3) One party's superior knowledge. If the person who made the statement had special knowledge or skill as compared to the other party, then the statement is taken to be a term of the contract. If, however the statement is made by the person who is less knowledgeable about the subject matter of the contract. It is regarded as a mere representation.

SELF ASSESSMENT EXERCISE 1

Distinguish between a term of contract and a mere representation.

3.3 The Concept of Fundamental Terms

The courts have in recent years developed the concept of "fundamental term" which insists that the operation of an exemption or limiting clause will be subject to the doctrine of fundamental terms.

Under this doctrine, no person is allowed to take shelter under the provisions of an exemption clause, notwithstanding how wide the clause is expressed, if the breach of the contract is substantial and affects the very purpose of the contract. In every contract, there is some central obligation, the non-fulfillment of which renders the contract meaningless.

An exemption clause will not avoid a party who is in breach of such obligation and like a condition, a breach of a fundamental term may entitle the innocent party to an action for damages and repu diation of the contract.

Fundamental terms imply that there is a fundamental obligation of a contract of sale to deliver the goods contracted for In ***Karoles (Harrow) Ltd V Wllis (1956)2 ALL E.R. 866.*** The defendant agreed to buy a Buick Car from the plaintiff under a hire-purchase agreement which provided, inter alia, "*no condition or warranty that the vehicle is road worthy or as to its usage, condition or fitness for any purpose is given by the owner or implied herein"*. The car was left in the defendant's premises one night and on inspection the defendant found that it was badly damaged. The cylinder head was off, all the valves were burnt out, two pistons were broken and it was incapable of propulsion. The defendant refused to accept delivery of it. The court of Appeal held that

the exemption clause could not avail the plaintiffs, for they supplied something entirely different from that contrated for by the defendant. In other words there was a breach of fundamental term of the contract and not a fundamental breach of the contract.

SELF ASSESSMENT EXERCISE 2

Examine the concept of fundamental terms.

3.4 Fundamental Breach

Generally, a fundamental breach should not be confused with fundamental terms because of their similarity. They are two different concepts. Where there is a breach of a fundamental term, the innocent party may sue for damages as well as repudiate the contract, and any exemption clause in the contract cannot avail the party in breach against the innocent party.

A fundamental breach has been described by UpJohn, L.J. in Charter House Credit Co. Ltd. V Toll (Supra) as:

> *"No more than a covenant shorthand expression of saying that a particular breach or breach of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract".*

A fundamental breach does not mean that he fundamental obligation has been broken, but that the breach or breaches which have occurred together strike at the root of the contract. Thus, ***Charter House Credit Co. Ltd. V Tolly (Supra***) although the vehicle delivered was defective, it was still a car within the terms of the agreement. Therefore, there had not been a breach of a fundamental term. However, the principal defect was so serious that it constituted a fundamental breach of the contract.

The new governing principle, of exemption clauses in relation to fundamental term, as laid down by the House of Lords in the cases of ***Suisse Atlantique Case (1967)1 A.C 361*** and ***Photo Productions Ltd V Securicor Transport Ltd (1980)1 ALL E.R. 596*** are as follows;

a) A distinction must be drawn between breach of a *"fundamental terms"* and *"a fundamental breach"*. A fundamental term is the same as a condition, and therefore, breach of a fundamental term is the same as breach of a condition. A fundamental breach amount to the same thing as total non performance of the contract.

b) There is no rule that an exemption clause can never apply where there has been a breach of a fundamental term or a fundamental breach. This is because the parties are free to agree to whatever exclusion or modifications of their obligations they choose.

c) It is a question of construction whether an exemption clause applies or not in the event that have happened.

d) If, after a breach of a fundamental term or a fundamental breach, the innocent party elects to affirm the contract and continue with it, he is bound by all its clauses, including an exemption clauses unless the contract can be otherwise construed. If, on the other hand, the innocent party elects to repudiate the contract, the whole contract, including the exemption clause, is at an end.

SELF ASSESSMENT EXERCISE 3

Discuss the concept of fundamental breach.

4.0 CONCLUSION

Exemption clauses, the concept of fundamental term and fundamental breach are principally interwoven to the extent that there is no way a discussion on one will not necessarily affect the other. This, therefore, is what the learner should look out for.

5.0 SUMMARY

Exclusion clause, limitation terms fundamental terms and fundamental breach are all technical terms used in the creation of a contract in commercial transactions. A proper understanding of this term will be of immense advantage to the learners.

6.0 TUTOR-MARKED ASSIGNMENT

1) What are exemption clauses?
2) Examine the rules that govern the validity of exemption clauses in a contract.
3) Define fundamental terms
4) Fundamental breach is actionable in law subject to rules. Discuss these rules.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

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MODULE 2

UNIT 1 HISTORY AND SOURCES OF NIGERIAN COMMERCIAL LAW

CONTENTS

1.0 INTRODUCTION

Having gone trough the basic requirements of all commercial transactions, the rest of this material shall turn on commercial law. This is the aspect of law that puts into practice all that have been learnt in the earlier units. The unit shall introduce the students to the transaction history and sources of Nigerian Commercial Law. It will also delve into defining commercial law and identifying its characteristics and contents.

Basically, Nigerians and indeed the whole of the African continent are commerce oriented people even prior to the advent of the Europeans unto the continent. Nigerians engaged in various forms of commercial activities ranging from selling of farm produce, poultry products, household accessories and at times engagement of their fellow men in labour activities such as farming, building of houses, roads, market places, and most importantly, service to their communities. By the time the Europeans arrived, they met a viable consistent, and growing commercial norm and what they *(Europeans)* did was only to enlighten the people on their own ways of transacting business and particularly to safeguard their investment because the core reasons for the European incursion into the black race was for commerce.

Originally, commercial law was fashioned to ameliorate the prevalent crisis usually engulfing commercial activities in England as a result of the overbearing influence of merchants who at that time applied only merchant law in settling disputes arising from commercial activities.
The content of commercial law takes a great deal from the law of contract. All commercial transactions are rooted in contract. Nigerian Commercial Law, like all other laws, was developed from mostly what obtained in England. The reason for this was because of the colonial relationship between Nigeria and that country. The sources of the Nigerian Commercial Law will be adequately dealt with in this unit.

2.0 OBJECTIVES

By the end of this unit student should be able to:

- identify the various sources of Nigeria Commercial Law
- know the basic components of Commercial Law
- make out a working definition for commercial law
- understand the universality of commercial law
- discern the importance of commercial law in our every day life.

3.0 MAIN CONTENT

3.1 History and Sources of Nigeria Commercial Law

Nigerian commercial law is traceable to two major sources. These are:

1. The Received English Law
2. Indigenous Commercial System

1. The Received English Law

As noted earlier, the major reasons for the incursion of the Europeans on the African continent were for commerce and commercial purposes. Nigeria is a good example of a situation where Europeans commercial activities succeeded. From the exportation of cash crops such as cocoa, palm oil, kolanut, groundnut, millet, maize, cassava and lately crude-oil, the colonial masters were able to extend their stay on our soil.

As a greater percentage of Nigerians at that time were illiterate who only enjoyed buying and selling without more, the Europeans through various means introduced the English Legal System into our culture and by implication introduced their own commercial system and laws into our local commerce. Prior to that time, what obtained in England was the application of merchant law which was broadly applied by merchants in their own courts. The rules developed in these courts were incorporated

into common law. Attempts to codify the mass case law arising from the judgments of the common law courts in the late nineteenth century produced the Bills of Exchange Act, 1882, the Sale of Goods Act, 1893, the Marine Insurance Act 1906 and the Partnership Act 1890 all of which were in force in England until 1900 when the Statute of General Application was promulgated and this affected only the Marine Insurance Act 1906.

The purport of the Statute of General Application was that as from the 1st day of January, 1900 laws made in England shall not be applicable in Nigeria except those made prior to that date and that is why commercial transactions in Nigeria were broadly governed by statutes in existence in England prior to 1st January, 1900.

2. Indigenous Commercial System

As stated in the introductory aspect of this unit, indigenous Africans, particularly Nigerians were business oriented and prior to the advent of the Europeans had established norms governing business and commercial transactions. These were not documented and they were sustained by means of oral tradition.

SELF ASSESSMENT EXERCISE

Discuss the sources of commercial law into Nigeria.

3.2 What is Commercial Law

Commercial law is a dynamic and exciting area of law. It has been flexible in order to keep pace with the rapid changes in business and with the globalization of markets. At the same time, it has been certain in order to assist in the growth and development required in commerce.

Commercial law is a subject that is difficult to define. In fact, there has never been a universally acceptable definition for this aspect of law. One thing is however clear. This is that it encompasses the laws that apply to business which include most importantly the law of contract and other aspects of law like company law, agency, sale of goods, banking, intellectual property, competition law, taxation law, insurance and hire purchase.

This course material does not cover all of these subjects. Its main objective is to look at certain areas in order to acquire an understanding of the themes, principles and practices of commercial law.

This course is divided into three broad heads. These are:

1) Agency
2) Sale of Goods
3) Hire
4) Purchase

This material shall deal extensively with agency while the second volume shall treat sale of goods and hire purchase extensively.

SELF ASSESSMENT EXERCISE 2

What is commercial law?

3.3 The Scope of Commercial Law

The scope of Commercial law includes local and international regulations.

To understand this course, it is imperative to understand the basic requirements of a contract. These include offer, acceptance, intention between the parties to create a legally binding relationship between themselves, consideration and capacity between the parties. All these have been considerably treated in the previous module. It is hoped that learners would have clearly understood the principles in that module as they will be extensively used in the module and the later ones.

SELF ASSESSMENT EXERCISE 3

Outline the scope of commercial law.

4.0 CONCLUSION

This unit has afforded you the opportunity of knowing the history and sources of commercial law in Nigeria. It has also given you an understanding of the scope and content commercial law.

5.0 SUMMARY

This unit has revealed the following facts.

1) Commercial law and transactions there under developed from English Common Law.
2) The sources of Nigeria Commercial Law also have indigenous content.
3) Agency, sale of goods and hire purchase are the MAIN CONTENT of commercial law.

6.0 TUTOR-MARKED ASSIGNMENT

Briefly trace the historical antecedents of commercial law in Nigeria.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

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UNIT 2 WHAT IS AN AGENCY

CONTENTS

1.0 INTRODUCTION

The law of agency is an essential part of commercial law because companies can only conduct business through agents. The function of the law of agency is to enable agents to bring commercial parties into contractual relations in such a way as to render the parties, not the agents, liable on, and able to enforce, the contract.

The principal, on whose behalf the agent bargains, must be able to place complete confidence in the agent. This has led the law of agency to make the agent a fiduciary. This imposes strict obligations. However, there are interests other than the protection of the principal against misuse of power by the agent, the protection of the third party with whom the agent has dealt, the protection of the agent against any liability incurred on behalf of the principal, and the rights an agent may have against the principal.

2.0 OBJECTIVES

The main objective of this unit is to define the concept of agency as an essential part of commercial law. This volume shall focus on agency which is the aspect of law that enables transactions between parties where it is not compulsory for the principal to be present.

Therefore, the focus will be on the principal, third party and third party/agent relations.

3.0 Main Content

3.1 What is Agency

Every day, in various parts of the world, there are persons act ing for and on behalf of others, in different capacities and under different circumstances. During one's business career or private life, one may be involved in the selling of goods or services to the general public. As a customer, one may have to be involved with persons representing others. The question may therefore arise as to whether all such representatives are necessarily agents of the person they claim to represent. A person may be a representative of another or a dealer in the products manufactured by that other person and may in consequence attach to himself the title of *'agent'*.

The issue is, when can it be said that an agency relationship has come to existence?. These and other problems have made it difficult to arrive at what one might consider as a concise definition of the term *'agent' or 'agency'*.

In the Oxford Companion Law, the term agency is defined as:

> *"The relationship between one person, the agent, having authority to act, and having consented to act on behalf of another, the principal, in contractual relations with a third party. The term is also used more widely as one acting in the interest of another"*.

In the same vein, the American Restatement on Law of Agency describes the term as:

> *"……. a term which in its broadest sense includes every relationship in which one acts for or represents another by his authority but in the law of principal and agent, the term signifies the fiduciary relations which result from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consented by the other so to act"*.

In the English case of ***The Quenn V Kane (1901)1 Q.B 472, Alverstine LCJ*** defined an agent as:

> *"any person who happens to act on behalf of another"*.

In the Nigerian case of ***James V Midmotors (Nig) Ltd. (1978)11-12 SC. 21*** the Supreme Court, considering the phenomenon in relation to the definition of agency observed as follows:

> *"…… it necessary …….. to explain the term agency.. In law the word agency is used to connote the relationship which exists when one person has an authority or capacity to create legal relations between a person occupying the position of principal and third party, an d the relation also arises when one person called the agent has the authority to act on behalf of another called the principal and consents (expressly or by implication) so to act".*

Thus, whether an agency relationship exists or not in a given set of circumstances raises both factual as well as legal problems. This duality of significance was more succinctly brought out by ***Herschell L.J in Kennedy V Annette De Trafford & Ors (1897) A.C. 180.*** That court had the opportunity of dealing with the nature of agency relationship and observed that:

> *"No word is more commonly and constantly abused than the word 'agent'. A person may be spoken of as an 'agent' and no doubt in the popular sense of the word may properly be said to be an 'agent' although when it is attempted to suggest that he is an 'agent' under such circumstan ces as to create the legal obligation attaching to agency that use of the word is only misleading".*

The above dictum stresses the two most important considerations in any attempt at defining the term agent.

In the first place, it distinguishes the legal meaning of the term from its ordinary or popular meaning. There may be many instances in which a person represents or acts for or on behalf of another. But the true law of agency applies only when the act of the presumed agent produces legal consequence. The legal requirement in this respect is that such representation in order to create a true agency relationship must be performed in such a way as to be able to affect the principal's legal position with respect to strangers to the relationship.

Thus, the law of agency does not apply to social or other non-legal situations for example, when a man sends his wife or son to represent him at a wedding, launching, or naming ceremony, the law of agency has no application thereon.

The reason for this is the law regards these relationships as intended purely to serve a social purpose. In other words, there is no intention to create legal relations between the parties.

In contrast, where a house-wife sends a boy or girl to purchase a leaf of bread from the local shop or super-market, she invests the boy or girl with authority to contract in respect thereto.

Thus, in the process of executing this simple instruction of the housewife, some legal rights and obligations could be created in favour of or against her.

Secondly, the dictum stresses that where true agency relationship exists or subsists, it does so irrespective of what the parties concerned choose to refer or label it.

In ***Bamgboye V University Of Ilorin & Ors (1991)8 N.W.L.R 129,*** the Court of Appeal was given the opportunity to examine the characteristics of an agency relationship. It held, inter alia, that agency, in law, is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The court went further to hold that the question whether that relationship exists in an y situation depends not on the terminology used by the parties to describe it, but on the nature of the agreement between the principal and the agents.

The issue is fact that the parties have called their relationship an agency is not conclusive, if the incidence of the relationship as disclosed by evidence does not justify a finding of agency. The existence of an agency can only be deduced from facts.

This dictum stresses the abuse in the use of the word *'agency'* or *'agent'*. Nowhere is such abuse most prevalent than in business transactions. In Nigeria, the terms agent, dealer, representative, sole agent, sole representative, wholesaler, retailer, attaché e.t.c. are frequently employed as synonymous.

The word, '*agency'* can therefore be graphically seen in a situation where P *(the principal)* instructs A *(the agent)* to act in the purchase of goods from T *(the third party)* in the sale of goods. The contract of sale that is made by A is enforceable between P and T. In general, A has no liability to either P or T on that contract.

SELF ASSESSMENT EXERCISE 1

1. Discuss the concept of agency in commercial transactions.
2. Attempt a definition of an agency.

3.2 The Origin of Agency

The origin of the modern law of agency can be traced to the early medieval period where instances of the institution were identified in some rudimentary forms. Some early English writers traced these to the English doctrine of Uses.

Although the rudimentary form of an agency can be isolated and perceived, there was no developed legal institution which could be strictly described as agency. There was therefore very little law on the subject at the time. In fact, the designation 'agent' or 'agency' was not used under the English Common Law before the seventeenth century. The idea of representation or agency was as of that time subsumed with other service functions or auxiliaries, especially the master-servant relationship. With the development of commercial life, in many ways, such as the growth of trading companies, the law of agenc y grew in importance and extent and eventually emerged as a separate concept distinct from the relationship of master and servant.

Its further development was aided and encouraged by the introduction of both equitable and civil rules. The court of chancery dealt with the relationship of principal and agent as if it were a relationship of cestui que trust and trustee. Holt, C.J introduced ideas developed by the Court of Admiralty in respect of the relationship of ship owners, masters and merchants into the law dealing with the relation of principal and agent.

This growth in commercial life, especially with the rise in trading companies showed that both in contract and tort, the issue of agency was vital. As a result of this pivotal position agents occupy in commerce they play a major role in the consummation of commercial transaction in modern times. For example, a sale of good s abroad by an exporter or a purchaser by an importer may be brought into effect through an overseas agent. A newspaper may obtain order for advertisements also through the intervention of an advertising agent.

The origin of the concept of agency is also traceable to the use of people to effect contracts in private transactions. A man may engage the services of a broker to effect an insurance contract or a sale or purchase of shares in a company. He may also sell or purchase a house or real estate through an estate agent.

Generally, an agency relationship may be described as a special kind of contract or fiduciary relationship or simply as a grant of authority. It is relevant in our every modern day transactions.

3.3 Theories of Agency

There are three main theories that seek to define and explain the role of the agent.

These are:

The power-liability theory.
The consent theory.
The qualified consent theory.

a) The Power-Liability Theory

The concept of agency exists when a person *(the agent)* acquires the power to alter the principal's legal relations with a third party in such a way that it is only the principal who can sue, and be sued by that third party. This focuses on the external relationship with the third party and ignores the internal relationship between the principal and the agent.

The power-liability theory excludes many who are commonly called agents. Estate agents introduce buyers to sellers without, usually having any power to bind either party. Nevertheless, they are subject to fiduciary duties in the same way as agents narrowly defined.

b) The Consent Theory

According to the US Restatement *(third)* of Agency (Tentative Draft No. 2) (2003)

> *"Agency is the fiduciary relationship that arises when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act"*

In focusing on the fiduciary that an agent owes a principal there is recognition that agency exists onl y where someone is undertaking more than merely ministerial functions.

In other words, the agent must have been invested with a degree of discretion that shows the principal has placed trust and confidence in th e agent. It is this which gives rise to a fiduciary duty.

The problems associated with the definitions of an agency under this theory are as follows:

It places attention on the internal relationship between principal and agent while ignoring the external relationship with the third party.
It also ignores the fact that agency relationship not only requires the assent of the parties, in all cases but such consent may not be necessary in an agency of necessity situation.
That consent or assent is only required in special cases.

It is noteworthy that whether or not the principal and agent consented to the creation of an agency is determined by an objective standard. The law is not concerned with the principal's or the agent's opinions. It takes cognizance of the objectives of the parties and whether the reasonable person would conclude that an agency existed.

The existence of an agency may be presumed, for instance, where Funmi represents to Bayo by actions or words that Ibrahim has authority to act as an agent and Bayo has acted on that representation.

c) Qualified Consent Theory

This theory combines the consent theory with the protection of 'misplaced reliance' to account for actual and apparent authority. This is more clearly defined in agency by ratification to reflect commercial reality since authorization may not always be neatly contemporaneous with the initial transaction.

SELF ASSESSMENT EXERCISE 3

Discuss briefly the various theories associated with the concept of agency.

4.0 CONCLUSION

A thorough perusal and understanding of this unit would enable the student to thoroughly understand the concept of agency, its origin and the various theories usually employed to determine the existence or otherwise of an agency relationship.

5.0 SUMMARY

This unit thought us:

a) The various definitions of an agency.
b) The origin of agency as a legal concept in commercial transactions.
c) The various theories associated with the concept of agency.

6.0 TUTOR-MARKED ASSESSMENT

1. Attempt a concise definition of an agency as a legal concept.
2. The origin of agency is vague; Discuss
3. Distinguish the various theories of agency as a concept in commercial transactions.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 THE NATURE AND CHARACTER OF AGENCY RELATIONSHIP

CONTENTS

1.0 INTRODUCTION

The concept of agency in commercial transactions is a universal one. With the role played by agents as middlemen in the actualization of existence of contracts, it appears their existence is unavoidable. Agents do not come on board of business transactions without the requisite consent, approval or authority of their principals to so act. Hence, they derive their authorities to act through their principals who in turn fulfill their own obligation under the terms of employment. In this respect, the basic rules for the coming into effect of a valid contract must be observed. For this reason, the agent will not be able to enforce such contracts where there is a perceived breach.

In this unit, we shall deal extensively on the nature and character of an agency relationship with particular emphasis on the consent of the parties, authority of the agent and a vivid comparison of agency with other related situations.

2.0 OBJECTIVES

At the end of this unit, students should be able to know the basic nature and character of an agency relationship. This unit is meant to deal, in concise form, with the issue of consent of the parties to an agency relationship. It will also deal with the authority of the agent to act as such on behalf of his principal and a thorough comparison of agency and other related relationships which are often mistaken to an agency relationship.

3.0 MAIN CONTENT

3.1 The Consent of the Parties

Though there may remain some unresolved minor problems, once the relationship of principal and agent has been shown to exist absolutely, the main consequences are clear. A major problem however remains that at determining whether or not such a relationship exists in any given set of circumstances and if so at what point in time. The concern in this respect is the consensual aspect of the relationship as the major determining factor. This is more apparent when considering the various definitions of agency. An example is the definition preferred by ***Bowstead.*** He defined agency as:

> *"the relationship that exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf and the other whom similarly consents to representing the former or so to act".*

Consent is also manifested in the definition in the American Restatement on Agency. It is no doubt that consent is absolutely necessary in establishing agency relationship. This has received judicial approval in many cases. For instance in ***Ayua V Adasu (1992)2 N.W.L.R. 598,*** the Supreme Court of Nigeria quoted with approval the dictum of ***Lord Pearson in Garnac Grain Co. V H.M.F. Fairclough Ltd (1967)1 Lyds. Rep. 495.*** that;

> *"The relationship of principal and agent can only be established by consent of the principal and the agent"*

The learned jurist however went on to say that:

> *"They will be held to have consented if they have agreed to what amounts in law to such a relationship even if they do not recognize it themselves and if they have professed to disclaim it."*

He further emphasized that:

> *"The consent must however have been given by each of them either expressly or by necessary implication from their words or conduct."*

This dictum of the learned jurist raises two fundamental issues. First is "what amounts to consent in such a case?" and secondly, whether it is

right to say that the relationship of principal and agent exists only where the agent and the principal have so consented."

It is submitted that consent is fundamental in cases where such relationship was established by agreement and contract. It is not uncommon to find that in commercial transactions, most agents are appointed by this method. Under certain circumstances, the law may impose or thrust agency relationship upon the parties irrespective of their consent or indeed knowledge.

SELF ASSESSMENT EXERCISE 1

Consent is fundamental to the creation and existence of an agency Discuss.

3.2 The Authority of the Agent

It is an essential characteristic of agency relationship that the agent is vested with legal authority or power to alter the legal relations of the principal with third parties. This seems to provide the nucleus of a true agency relationship. This underscores its representative character and the ability of the agent to subject the principal to personal responsibility and liability while creating rights in his favour as well as obligations against him.

Thus, in holding the principal bound by an act of the agent, it must be established that such an act was legally authorized. The principal will only be bound to the third party by an act which is within the agent's authority. However, an act which is ultra vires this authority, unless ratified by the principal, will not bind him.

The notion of authority is still very important in agency relationships in that it enables the judge or lawyer to state, even if provisionally what the agent can do and how he can affect his principal beneficially or adversely. In this regard, it becomes pertinent to determine both the source and the scope of the agents claimed or asserted authority.

An agent's authority may be derived from both an agreement between him and his principal, expressed or implied, or from operation of law. The exercise of such authority binds the principal if the agent acted within his actual (real) authority or his apparent *(ostensible)* authority.

The actual or real authority refers to the authority of the agent to do that which the principal has agreed that the agent should do for or on his behalf. It includes the power to carry out whatever the principal has expressly mandated the agent to do or impliedly engaged him to

accomplish. Such authority may emanate from express instructions given by the principal to the agent, or implied from the words or conduct of the principal.

In ***FREEMAN AND LOCKYER V BURKHURST PARK PROPERTIES LTD (1964)1 ALL E.R. 630, DIPLOCK, L.J.*** described the actual or real authority of the agent as the legal relationship which subsists between the principal and the agent created by consensual agreement to which they alone are parties. Its scope, he states, is to be ascertained by applying ordinary principles of construction of contract including any proper implication from the express words used, the usage of the trade, or the course of dealing between the parties such an authority. He went further to state that such authority may be express when it is given by express words or implied when it is inferred from the conduct of the parties or from the surrounding circumstances of the case.

The apparent or ostensible authority refers to authority which in fact does not but merely appears to exist. It is essential that the appearance of such an authority emanated from an independent act of the principal manifested to a third party.

Thus, the basic difference between actual authority and apparent authority is that in the former, the expression of authority is made directly to the agent, whereas in the later, the expression is made to a third party with whom the agent deals.

An agent who has apparent authority may or may not have actual authority, though it may coincide or sometimes exceed it. The apparent or extensible authority extends to doing all acts which a reasonable person or a person of ordinary prudence familiar with the customs and usage of the particular community, trade, business or profession where the agent is employed, would be justified in assuming that the agent has authority to perform.

SELF ASSESSMENT EXERCISE 2

Distinguish between actual and apparent authorities of an agent.

3.3 Agency and Other Relationships Distinguished

The concept of agency in commercial transaction has in most cases been mistaken to be the same with some other relationship of similar nature and character. A preliminary way of understanding the typical features of agency relationship is to compare and contrast an agent with some other functionaries and relationships which appear similar but invariably

are distinct and different. Such functionaries include trustees, servants, bailees, and independent contractors.

3.3.1 Agent and Trustee

For certain purposes, an agent may be treated as a trustee of his principal. An example of this in cases of money had and received on behalf of the principal. Equally, a trustee may for certain purposes be treated as an agent of the beneficiary *(cestui que trust)*, There is also the historical antecedent between them in that at some point in time, the concept of agency looks its root from that of trusteeship. The consequence is that certain principles of law are thereby applicable to both, such as the doctrine of fiduciary relationship with its attendant incidents. Both functionaries are nonetheless distinguishable on the following grounds:

a) the relationship of principal and agent is generally consensual in origin, whereas and except in minor cases, a trust is created without the consent of the beneficiary *(cestui que trust)* or the trustee.

b) when an agent is appointed, this is invariably done by the principal himself, whereas, in a tru st situation, the trustee is never appointed by the beneficiary *(cestui que trust).*

c) the agent is for all purposes, the representative of his principal in dealing with third parties whereas, the trustee is not in anyway the representative of the beneficiary *(cestui que trust).*

d) actions between the principal and the agent may be barred by lapse of time under the limitation Acts whereas, no such limitation is imposed on actions between the beneficiary *(cestui que trust)* and the trustee.

3.3.2 Agent, Servant and Independent Contractor

Basically, an agent is distinguishable from both a servant and an independent contract. The essential feature of the master servant relationship is that the master always has the right to control the diligent performance by the servant of the terms of his employment while a servant merely works for his master, an agent acts for and in place of his principal to effect legal relations of his principal with third parties.

The distinguishing features of an agency relationship are its representative character and derivative authority which give the agent a

degree of discretion in the performance o f the terms of its agency which a servant would not ordinarily have.

An independent contractor on the other hand renders services to his employer in the course of an independent occupation or calling. He contracts with his employer only as to the results to be achieved, but not as to the means whereby the work is done.

Accordingly, he employs his own means and skill and is entirely independent of control and supervision of his employer.

3.3.3 Agent and Bailee

A bailment arises where personal property is delivered or transferred by the owner (bailer) to ano ther person (bailee) under an agreement that the property can be returned to the owner (*bailor)* or transferred to a third party or dealt with in any other way indicated by the owner *(bailor).* The bailee is not an agent of the bailor strictly speaking since he has no authority to deal with the property in any other way except in accordance with the instructions of the bailor. The bailee does not be render any service at all to the bailor which is an essential purpose of agency.

There are some important distinguishing features between an agent and a bailee.

1) The agent is the representative of his principal but the bailee does not thereby become the representative of the bailor.
2) The agent has authority to contract for and on behalf of his principal and can make him liable in tort. A bailee essentially has no authority to bind the bailor in contract except perhaps to preserve the property the subject of the bailment, and can rarely make the bailor liable in tort.

SELF ASSESSM ENT EXERCISE 3

Discuss and state the essential distinguishing features of an agent, trustee, servants, independent contractor and bailee?

4.0 CONCLUSION

This unit h as revealed the basic nature and characteristics of agency vis-à-vis the authority of an agent and the differences between the concept of agency, trusteeship, servant, independent contractor and bailment. All these are basically common law concepts but now more relevant and applicable to issues arising from commercial transactions.

5.0 SUMMARY

This unit has revealed the following facts.

1. The necessity of the consent of the parties to the creation of an agency.
2. The basic differences between the various heads of authority of an agent.
3. The distinguishing factors and elements of an agency relationship with particular reference to trusteeship, servant, independent contractor and a bailment.

6.0 TUTOR-MARKED ASSINGMENT

1. Consent is fundamental to the creation and existence of an agency Discuss.
2. Distinguish between actual and apparent authorities of an agent.
3. Discuss and state the essential distinguishing features of an agent, trustee, servants, independent contractor and bailee?

7.0 REFERENCES/FURTHER READINGS

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Friedman, G.H.L. (1984). *Law of Agency*, 7th Edition. London: Butterworths.

UNIT 4 CLASSIFICATION OF AGENTS

CONTENTS

1.0 INTRODUCTION

In view of modern developments in trade and commerce and changing need for specialization certain types of agents have distinguished themselves by name, character and function. Consequently, they have been invested with varying degrees of authority and power arising from the customs, trade, business or profession in which they belong or operate or simply from their distinct peculiarities.

It has therefore been realized that there is need for such types of agents to be specifically distinguished and examined in some detail here for proper understanding and assimilation.

2.0 OBJECTIVES

The main objective of this unit is to identify and thoroughly examine th e various types of agents that exist and attempt a through comparison of them with the aim of bringing out their peculiar features as th ey relate to modern commercial transactions.

3.0 MAIN CONTENT

3.1 General and Special Agents

Agents are classified as either *"general"* or *"special"* agents. The primary distinction between the two types lies in the nature of the authority given or accorded to each and the extent to which there exercise affects the position of the principal.

A General Agent is one who is authorized to act for and on behalf of his principal in all his affairs in connection with a particular kind of business, trade or profession or who represents him in the ordinary course of his own trade, business or profession, as agent.

An example of a general agent is a director of a limited liability company who acts for the purpose of the company's business. In the same vein, a Solicitor, broker or auctioneer who is engaged to perform in the ordinary course of his own business is a general agent of his employer in relation to that employment.

A special agent on the other hand is one authorized to act for and on behalf of his principal on or for special occasion. Such an agent may also be required to handle a particular transaction or to do a specific act which is not within the ordinary course of his trade, business or profession. An example of this is a dealer in goods taken on hire-purchase for the purpose of executing the necessary hire-purchase documents, paying the initial deposits, taking delivery of the goods and in some cases receiving the periodic payments.

Distinction between General and Special Agents

The distinguishing feature between the two classes of agents lies in the nature and character of the authority given or accorded and its scope in relation to third parties.

In this connection, the court observed in BULLER V MAPLES (1869)9 Wall 766 that:

> *"The purpose of (a special agency) is a single transaction or a transaction with designated persons …. Authority to buy for the principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency. But authority to make purchase from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases is a general agency".*

SELF ASSESSMENT EXERCISE 1

Define and distinguish between general and special agents.

3.2 Commission Agents

A commissioned agent is the one to whom certain goods have been consigned for a foreign principal. This type of agent belongs to a

recognized class of commercial agents whose rights and obligation are superimposed between the ordinary relationship of principal and agent on the one hand, and a buyer and seller on the other.

A commissioned agent is therefore saddled with dual responsibility. The first being an agent to his principal with equal rights and obligation of any other agent. The second is that who does not bind his principal contractually to third parties. Instead, he stands in his own right in the position of principal to such third parties.

The peculiar feature of this category of commercial agents was identified by Lord Blackburn in ***IRELAND V LIVINGSTONE (1872) A.C. 395.*** In that case he stated that a person who supplies goods to a commissioned agent has no authority to pledge the credit of his principal for them.

SELF ASSESSMENT EXERCISE 2

Define a commissioned agent and state its roles in commercial transaction.

3.3 Mercantile Agents

A mercantile agent is an agent having in the course of his business, as such agent, authority to sell or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods. In essence, when one is dealing with a mercantile agent, it becomes pertinent to enquire whether in the "customary course of the agent's business he has authority to sell, consign for sale or to buy or raise money on the security of goods in his possession as such agent.

This is so because there are many kinds of agents who receive or are in possession of goods, yet it is not their duty to sale or consign them for sale or to raise money on them. It is important therefore, that when one is dealing with an agent in possession of goods, one has to consider what sort agent he is and what his customary course of business wound be when he is getting in the capacity of an agent.

In ***OPPENHIEMER V ATTENBOROUGH (1708) 1 K.B 221*** a distinction between *"customary case of business"*and *"ordinary course of business"* by LORD BUCKLEY. According to the learned judge, a customary course of business speaks of the arrangement made between the owner of goods and his agent. It contemplates that the principal has given possession of the goods to the agent in the course of business which the principal knows or believes the agent carries on as a

mercantile agent. It deals with the situation under which the agent gets his authority.

On the other hand, in ordinary course of business, has to do with the stage at which the agent is going to deal with the goods in his possession with reference to some other person.

There are three types of mercantile agents. These are Factors, Brokers and Del Credere Agents.

3.3.1 Factors

The term *"Factor"* has not been defined in any statue book, both foreign and local. However, under the common law it has been defined as referring to a mercantile agent who has been entrusted with the possession of goods for sale only. In ***BARRING V CORRIE (1818)2 B & AID. 137***, **Abott C. J.,** described a factor as a person to whom goods are consigned for sale by a merchant residing abroad or at a distance away from the place of sale and who normally sells in his own name without disclosing that of his principal.

This definition was qualified in ***STEVENS V BILLER (1884)25 CH. D. 31*** where it was held that an agent does not loose his character of factor by reason of his acting under special instruction from his principal to sell the goods at a particular price and to sell in the principal's name.

3.3.2 Brokers

A broker is a mercantile agent who, in the ordinary course of his business is employed to make contact with third parties for the purchase of goods, or property or for the sale of his principal's goods or property of which he is not entrusted with possession or document of title thereto. He has been described under the common law as an agent employed to make bargains and contact between persons in matter of trade, commerce and navigation. He is a mere negotiator between such persons with no possession of the goods. He lacks the power or authority to determine whether the goods belong to the buyer or seller and no legal or power to determine whether the goods should be delivered to the one or be kept by the other.

In essence, a factor is not entrusted with the possession of the goods and has authority to sell them in his own right or name possession or control of the goods of the principal by the factor distinguishes him from a broker and he is personally liable when contracting for a foreign principal, while the broker incures no personal liability if he does not exceed his authority or instruction.

3.3.3 Del Credere Agent

A del credere agent is defined as one who, in consideration of extra remuneration called a del credere commission, guarantees to his principal that third parties with whom he enters into contract for and on behalf of the principal shall duly pay any sums becoming due under those contracts. The element of extra remuneration by way of del credere commission is indispensable to the establishment of a del credere agency and it is this feature that mainly distinguishes it from any other agent.

Therefore, where there are no words in an agenc y contract from which it can be held that a higher reward is being paid to the agent in consideration of his assuming liability for any amounts due from third parties and there is nothing in the course of conduct between te agent and the principal from which such arrangement can be inferred, the agent is not in del credere agent.

SELF ASSESSMENT EXERCISE 3

1. What are the main features of a mercantile agent.
2. Distinguish between the three major types of a mercantile agent.

4.0 CONCLUSION

A thorough understanding of the concept of agency without the knowledge of the different heads or classification of agents will underscore the importance of this topic. By this revelation, it is apparently clear that students can now easily distinguish the different types of agents in commercial transactions.

5.0 SUMMARY

This unit has dealt with the following points:

1. General and Special agents.
2. Commission Agents.
3. Mercantile Agents.
4. Brokers
5. Del Credere Agents.

6.0 TUTOR-MARKED ASSIGNMENT

1. Attempt the definition and distinctions between a general agent and a special agent.
2. What are the main features of a commission agent.

3. Mercantile agent's only deals with merchants; Discuses.
4. differentiate between a Factor, a Broker and a Del Credere Agents.

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MODULE 3

UNIT 1 COMPETENCE OF PRINCIPAL

CONTENTS

1.0 INTRODUCTION

The most important step in determining whether the agent's act or omission will in law bind the principal is to establish whether an agency relationship actually exists between the supposed principal and a given agent. This type of relationship may be created or established in any of the ways to be discussed under this head.

However, some basic factors must be in existence before an agency relationship can be established and these are also to be distilled properly in this unit.

2.0 OBJECTIVES

The objectives of this unit are two fold; to establish and bring to the knowledge of the student steps to be understood before an agency relationship could be created and secondly to examine the various ways by which an agency relationship can be created with the main aim of informing the student of the relevance of those distinctions in commercial transactions.

3.0 MAIN CONTENT

3.1 Competency of the Principal

The general principle of law in this regard is that the competency of a person to entrust to another the performance of a task for and on his behalf is co-existent with the competency of that person to perform the task himself. However, to every rule, there is always an exception. In this instance where delegation of that said power is prohibited by law, the general common law rule that powers could be delegated will be of no effect.

Section 72 of the Companies and Allied Matters Act of 1990 provides thus:

> *"Any contract or other transactions purporting to be entered into by the company or by any person on beha lf of the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence of the date of such contract or other transaction and had been a party thereto".*
>
> *"Prior to its ratification by the company, the person who purported to act in the name of or on behalf of the company shall in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof".*

The principle usually applied is often expressed in the maxim ***"NEMO POTEST FACERE PER ALIUM, QUOD PER SE NON POTEST"*** which means that ***"no one can do through another what he cannot do himself".***

Three categories of persons, due to natural or legal disability are either totally or partially incompetent to be principals. These shall be discussed in eh next segment.

3.2 Infants

Generally, an infant cannot validly appoint another person, whether an adult or an infant to be o r act as his agent except in the circumstances in which he can act personally or for himself. However, under the general law governing contracts, an infant can validly contract only for his legal necessaries. The term necessaries is not restricted to bare essentials of life, but extend to articles and matters which can be considered reasonably necessary to him, having regard to his state of life.

SELF ASSESSMENT EXERCISE 1

Discuss the exceptions to the general rule that an infant cannot validly appoint another person to be or act as his agent.

3.2 Mentally ill Persons

As in the case of an infant, a mentally ill person cannot appoint an agent where the circumstances are such that he would have been bound if he had himself personally acted. To render on appointment by such a person void and of no effect, it must be shown that his infirmity was such as to render him incapable of comprehending the true nature and probable consequences of his act.

SELF ASSESSMENT EXERCISE 2

Appointment made by a mentally ill person of another to act as his agent may sometimes be valid. Do you agree?

3.3 Corporations

The primary legal status of the particular corporation usually determines the competence of that corporation to appoint a person as its agent. This presupposes that if a corporation has legal personality of its own quite distinct from those of its member constituting it, it can contract and do other legal acts on its own behalf and in its own name just like an ordinary person.

However, to be so competent, the corporation must have been duly registered under the Companies and Allied Matters Act of 2004 and must have fulfilled the requirements of the Act. In that regard, section 63, (1) of the CAMA 2004 states that:

> *"A company shall act through its members in general meeting or its board of directors or through officers or agents appointed by or under authority derived from the members in general meeting or the board of directors".*

Section 65 of CAMA states in part:

> *"Any act of the member, in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable thereof to the same extent as if it were a natural person".*

SELF ASSESSMENT EXERCISE 3

Under what conditions would appointments made by a corporation of another to act as its agent be valid in law?

4.0 CONCLUSION

As must have been noted, the appointment of a person to act as an agent of another will be invalid if such person, body of persons or a corporation lacks the legal status to so act. Where the capacity or competency is not ascertained, such appointment will be declared void ab-initio.

5.0 SUMMARY

By now learners are expected to be able to differentiate between the appointments of an infant, a mentally ill person and a corporation to act as a principal for another.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the exceptions to the general rule that an infant cannot validly appoint another person to be or act as his agent.
2. Appointment made by a mentally ill person of another to act as his agent may sometimes be valid. Do you agree?
3. Under what conditions would appointments made by a corporation of another to act as its agent be valid in law?

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UNIT 2 COMPETENCY TO BE AN AGENT

CONTENTS

1.0 INTRODUCTION

The rules governing the competency to be a principal are quite different from that governing the competency to be an agent.

The general rule here is that any person of age and of sound mind may act as an agent of another person. Thus, the law permits th e employment as agents of infants, drunkards, mentally ill persons, aliens and others who may be under natural or legal disabilit y. Therefore, the competence of a person to act as an agent of another is not limited by the competence of that person to act for him in that regard.

2.0 OBJECTIVES

However, in some instances, particularly in business, trades and professions, the law has placed limitations on the right to be or act as an agent. This is primarily to protect the general public from loss or damage at the hands of unscrupulous, unqualified and inexperienced persons who may take advantage of the ignorance of the consuming public. The adequate understanding of this set of professionals as agents is the main objective of this unit.

3.0 MAIN CONTENT

3.1 Legal Practitioners

The general rule and belief is that a barrister or solicitor is an agent of his client in regard to a matter for which he has been briefed. The client for whom he acts as barristers or solicitor is his principal. For a person to be legally entitled to be and to act as such agent, he or she must obtain the requisite qualification as a legal practical, be called to the Nigerian

Bar and have his name enrolled in the register of the Supreme Court of Nigeria.

The competence to be or do this is regulated by the Legal Education (consolidation, e.t.c.) Decree No.13 of 1976, as amended. Under this law, a person is entitled to have a qualifying certificate issued to him by the Council of Legal Education stating that he is qualified to be called to the Nigerian Bar if:

(a) He is a citizen of Nigeria.
(b) He has, except where the Council otherwise directs, successfully completed a course of practical trainings in the Nigeria Law school for a period fixed by the Council.

A person is entitled to be called to the Nigeria Bar if, and only if:

(a) He is a citizen of Nigeria
(b) He produces a qualifying certificate to the Body of Benchers and
(c) Satisfies the Body of Benchers that he is of good character.

Once these conditions are qualified, the Body of Benchers is obliged to call him to the Nigeria Bar and issue him with a certificate of call to the Bar. Upon being called to the Nigeria Bar, such person becomes entitled to practice as a barrister and solicitor in Nigeria, if and only if, his name appears in the roll.

SELF ASSESSMENT EXERCISE 1

A person is entitled to be an agent of another if he is a barrister or solicitor. State the conditions for qualification to practice as a barrister or solicitor in Nigeria.

3.2 Insurance Agents and Brokers

Like the legal profession, insurance business is also regulated by a law. Section 28 of the Insurance Decree No.58 of 1991 provides in part as follows:

(1) No person shall transact business as an insurance agent unless he is licensed in that behalf under this Decree.
(2) An application for a license as an insurance agent shall be made to the Director in the prescribed form and be accompanied by the prescribed fee and such other documents as may be prescribed, from time to time.

(3) If the Director is satisfied that the applicant has satisfied the requirements as may be prescribed, he shall license the applicant as an insurance agent.

The following sets of people are not eligible to apply and my have his license cancelled if he has already obtained one.

(a) A minor.
(b) A person of unsound mind.
(c) An ex-convict by a court or tribunal in the nature of a criminal appropriation of found or breach of trust.

However, the applicant may also be appointed as an insurance broker if the director is satisfied, inter alia, that the applicant has the prescribed qualifications.

Cancelation of License or Refusal of Renewal

Where the director is desirous of canceling a certificate of insurance or intends to refuse its renewal, the registered insurance broker must have,

(a) Knowingl y or recklessly contravened the provisions of this part of the said Decree; or
(b) For the purpose of obtaining a license, made a statement which is false in a material particular; or
(c) Been found guilty by a court of competent jurisdiction of fraudulent or dishonest practices including misappropriation of clients' money
(d) Materially misrepresented the terms and conditions of any policy or contract of insurance which he has sold to the clients or seeks to sell to prospective clients.

SELF ASSESSM ENT EXERCISE 2

1. To be registered as an Insurance Broker, no particular form of registration is required. Do you agree?
2. State the condition for cancellation of an insurance broker's certificate.

3.3 Auctioneers

Generally, an auctioneer is a person who conducts a sale b y auction for a client both before and of the position of an agent for the vendor i.e. the owner of the goods to be auctioned.

Apart from the requirement of application and obtaining a license from the appropriate licensing authority, on the payment of any prescribed fee or such other fee as may be prescribed, no special qualification is required by statute of one who wishes to carry on the business of or act as an auctioneer.

Such an application is made to the licensing authority for the area in which the principal office or place of business of the applicant is situate.

A license may be granted to a firm or corporation.

It is however an offence punishable by a fine for any person to carry on the business of or act as an auctioneer without such a license.

SELF ASSESSMENT EXERCISE 3

To practice as an auctioneer, no particular qualification is required. Discuss.

4.0 CONCLUSION

Generally, legal practitioners as professionals are expected to act on behalf of clients who are their principals. On the other hand, Insurance Brokers and Auctioneers, through not professionals are also expected to act on behalf of their clients who trust them with their years of experience and the failure of these set of groups to act as trustworthy agent is followed with necessary sanctions from their respective regulatory bodies.

5.0 SUMMARY

By now, the learner must have been able to distinguish between these sets to agents who are professionals in their own rights.

6.0 TUTOR-MARKED ASSIGNMENT

Differentiate the following types of agents

1. Legal practitioners
2. Insurance Brokers
3. Auctioneers

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 AUTHORITY OF AN AGENT

CONTENTS

1.0 INTRODUCTION

Authority of an agent simply means the power or right reposed in that agent by the principal. But in the context of an agency relationship, this issue has a broader and wider connotation. This is because the issue of authority has been engulfed in serious debates as to its relevance to the concept and its effects on the parties to an agreement on the one hand and a third parties on the other hand.

2.0 OBJECTIVES

The major objectives of this unit is to state the importance of authority of an agent in with emphasis on the known distinctions between the actual authority of an agent and his usual authority. It will also involve the effects of this authorit y on contracts carried out by the agent on behalf of the principal with a third party believes in the existence of the authority of the agent to so act.

3.0 MAIN CONTENT

The word, “Authority” is used in this unit to mean the ability of the agent to bind the principal. This authority is entangled with the creation of agency by the principal and agent agreeing to the creation of the agency. That agreement will embody the authority of the agency.

Generally, the principal is bound only by those acts of the agent that are within the scope of that agent authority and every action carried outside that authority will be that of the agent unless the principal ratifies it.

3.1 Actual Authority of an Agent

The scope of an agent's actual authority is important. Generally, it is only if an agent cuts within actual authority that h is able to claim an indemnity from the principal for any expenses incurred or remuneration under the agency contract with the principal.

In the same vein, an agent who acts outside this actual authority may be liable to the third party for breach of the implied authority.

The actual authority of an agent is determined be the agreement between the principal and the agent. It is a matter of content construction. Two types of actual authority exist.

1. Express Actual Authority

This is the authority, which the principal expressly gives to the agent. An example is where the agent is instructed to sell a particular properly for the principal.

See: ELECTRONICS LTD V AKHTER COMPUTER LTD (2001) 1/BCLC/433

2. Implied (or Incidential) Actual Authority

In addition to express actual authority, the agent may have implied actual authority. However, implied authority cannot contradict express actual authority because it is only a way of filling the gaps in the agency agreement. It is not a means of altering that agreement.

An agent may have implied authority of his principal in the following ways.

(a) To do things that are necessarily incidental to the execution of the express actual authority.

(b) To undertake that which is implied from the particular circumstance of the relationship between him and the principal such as where there has been a previous course of dealings.

(c) Such authority as is customarily enjoyed by dealings in the particular market. A custom must be uniform certain, notorious (generally known), recognized as binding and reasonable.

SELF ASSESSMENT EXERCISE 1

Discuss the two heads of actual authority of an agent.

Usual Authority of an Agent

The usual authority of an agent first came up for consideration in the case of WATTEAN V FENWICK (1893) IQ.B.346. In that case F owned a hotel where he appointed a manager. It was expressly forbidden from buying goods other than mineral water and bottle of beer. It had previously owned the hotel and his name remained above the door as the licenses it ordered cigars from W, who believed he was the owner of the hotel. F was had liable for the price of the cigars.

It might be argued that W did not think H was an agent, he believed H to be the principal, so if W had not been allowed to enforce the contract against F, W would have lost nothing because he was unaware of F's existence . against this it might be said that F's action in allowing his agent, H, to represent himself as the principal placed W in a weakened position W had every reason to suppose that H was the original principal and this misconception was facilitated by F.

The case does not fall within the normal understanding of the doctrine of apparent authority because F made no representation to W that it was acting as F's agent.

Also, the decision does not appear to be the same with those case where someone is appointed to a particular position and the principal is bound by actions that fall within the usual authority of an agent in that position.

As will be seen later, the doctrine of undisclosed principal will not assist because for that to operate the agent must enter the transaction within the actual authority of the principal.

In the same vein, the principal cannot ratify the transaction because this would have required H to have told W that he was an agent and this he did not do.

Usual authority can therefore be likened to implied authority which an agent has in respect of his dealings with innocent third parties who are not aware that he lacks the authority to enter into such transaction on behalf of the supposed principal.
This is however subject to whether the principal was disclosed at the time of entering into the agreement with the third party and whether such action rectifiable.

SELF ASSESSMENT EXERCISE 2

Discuss the decision in WATTEAU V FENWICK.

4.0 CONCLUSION

The authority of an agent to enter into control on behalf of the supposed principal is very fundamental in the study of Law of Agency in relation to commercial transactions. Care must be taken so that the occurrences of these authorities will not be confused with one another.

5.0 SUMMARY

Actual authority of an agent refers to those express authorities contained in the agency agreement while the implied authorities includes those authorities the agent would reasonably be expected to exhibit in relation to demanding situations. Usual authority, as confusing as it may appear, is the direct and unequivocal direction of the principal provided no vitiating element is detected.

6.0 TUTOR-MARKED ASSIGNMENT

Distinguish between the Express Actual Authority and Implied (or incidental) Actual Authority of an agent.

The decision in WATTEAN V FENWICK is confusing and does not relate to the usual Authority of an agent. Discuss

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UNIT 4 FORMALITIES TO CREATION OF AN AGENCY

CONTENTS

1.0 INTRODUCTION

One of the several ways an agency situation comes to life is estoppel and this occurs intentionally or by necessary implication. When this situation arises, the supposed principal will be estopped from denying the fact that a third party acted on the belief that the agent was actually that of the principal. The principal will therefore be bound by an act or omission of the agent.

2.0 OBJECTIVES

The main objective of this unit is to bring to discuss the requirements for an agency created by estoppel. This is done by delving into the basic elements that qualify such acts of the supposed agent as that of the supposed principal.

3.0 MAIN CONTENT

Generally, no particular formalities are required for the creation of agency relationship. Consequently, the principal-agent relationship may be established by words of month, by mere conduct or by writing and may also be inferred from the circumstances of a particular case.

Some appointments are required by law to be in writing or evidenced in writing or in any other particular manner. Thus, a power of attorney or the instrument of appointment of an agent who is required to execute a deed must be in the form of a deed.

Agents, such as solicitors, are sometimes, desirable to be appointed in writing so that the effect of agency and the extent of the authority conferred may easily be ascertainable. Apart from such appointments,

the law does not require formal evidence of the existence of an agency relationship.

In ***HEARD V PILLAY (1869) 4 Ch. App 548,*** it was held that a contract of purchase of land made by an agent will be enforced although the agent was appointed by parole.

In ***DAVIS V SWEET (1962)2 Q.B. 300, DANCKWERT, L. J,*** delivering the judgement of the Court of Appeal (English) observed on the same point that:

> *"….. But such an authority may be conferred upon an estate agent expressly or may be informed from the circumstan ce of the case. It seems to me that authority to enter into a contract on behalf of the defendant should be inferred from the circumstances of this case".*

In the Nigeria case of ***ROSENJE V BAKARE (1973)5 S. C. 131,*** the question arose as to whether a contract made by an agent in order to satisfy the provision of section 5(2) of the Law Reform (contracts) Act 1961, the agent's appointment need necessarily be in writing. The section which is the same as section 4 of the English Statute of Frauds of 1677 provides that:

> *"No contract to which this section applies shall be enforceable by action unless the contract or some memorandum or note in respect thereof is in writing and signed by the party to be charged therewith or by some other person lawfully authorized by him".*

The Supreme Court held that the section does not prescribe any form of authorization of an agent, although it is tidier and certainly desirable to expect a formal authorization.

3.1 Agency by Agreement or Contract

On of the basis of a contract, agreement is the consensus of the contracting parties to the terms and conditions of the proposed contract. The same principle applies to the formation of an agency agreement by express agreement or contract of the terms thereof. In commercial transactions, an agreement is the revelation of the intention of both the agent and the principal unequivocally to constitute such a relationship.

In ***AYUA V ADASU & ORS (1992)3 N.W.L.R. 598 Akanbi, JCA,*** restated the law in the following statement of page 611 thus;

> *"In the ordinary law of Agency, the paradigm is that in which the agent and the principal agree that one should act for the other. And the term "agency" is assigned to this basic principle which involves consent of both parties. It is therefore trite law that agency arises mainly from a contract or agreement between the parties express or implied".*

The basic element in this situation is a manifestation by the principal that the agent shall act for and on his behalf and an evidence of the agent's acceptance of that undertaking.
On the part of the principal, there must be either an actual intention to appoint the agent or an intention inferable from his words or conduct.

Where an agency relationship was set up through an agreement, such agreement must nonetheless possess all the essential pre-requisites or elements of a valid contract to be sustainable. To establish the existence of a valid contract therefore, the general rules of law of contract are applicable. These rules have been comprehensively treated in Module One.

It is to be that the mere fact that a person was described as a "*agent* or his relationship with another person described as "agent" in an agreement is not conclusive in law of such facts. Where such an agreement is by parole, proof would necessarily be essential for mere spoken words could easily be misunderstood or misinterpreted. The burden of proving the existence of such a relationship rests on the party who asserts it.

Where however, such an agreement is inferred, from conduct, the law demands that there must b e some positive act from which such inference can be drawn.

SELF ASSESSM ENT EXERCISE 1

An agency relationship can only be created by oral agreement. Discuss.

3.2 Agency by Estoppel

The general position of the law in this area is to the effect that where a supposed principal intentionally or otherwise causes a third party to believe that another person is his agent and the third party so relies in dealing with the supposed agent, the principal will be estopped from denying the existence of an agency relationship between him and e supposed agent. In such a situation, the supposed principal will be

bound by an act or omission of the supposed agent to the same extent as if an agency relationship had existed between them.

In ***LUKAN V OGUNNUSI (1972)5 S.C. 40,*** the Supreme Court of Nigeria affirmed this when it stated that:

> *"When a person behaves in such a way as to lead another person to believe that he has authorized a third person to act on his behalf and that other person in such belief, enters into transaction with the third person within the scope of such ostensible authority, the first mentioned person would be estopped from denying the fact of the first person's agency. It would be immaterial whether the ostensible agent had no authority whatever in fact. It would also not matter whether the ostensible agent acted in excess of his usual authority".*

Agency by estoppel is based on the principle of *"holding out"* by the principal to the third person or upon the *"apparent"* or *"ostensible"* authority of the agent.

Thus, in ***DIDIGUN V.R.T. BRISCOE LTD (SUPRA) OMOTESHO, J.*** emphasizing this element of estoppel stated that:

> *"In law ostensible authority gives rise to agency by estoppel. Ostensible authority is based on the doctrine of "holding out""…. The holding out may be by acts of the principal. For example, by allowing the agent to hold himself out as having authority. An important factor however, is that there must be a holding out by the principal, some acts of the principal which are capable of leading another to believe that the ostensible agent has authority".*

The classical, judicial statement of the doctrine of agency by estoppel was made in ***SAUL RACCAH V STANDARD COMPANY OF NIGERIA LTD (1938) 4 W.A.C.A 162.*** The court observed as follows:

> *"…. where any person by word or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the faith of such representation, to the same extent as if such other person had the authority, he was so represented to have".*

It is therefore possible, from the above illustrating and judicial authorities, to proffer a broader definition of the term "estoppel" which would eliminate the need for the secondary category of agency liability based on apparent authority. In some ways, the two categories, *(ostensible and apparent authorities)* seem to cover the same area. That is, that the principal has done something or has failed to do something on which a reasonable third party relies upon as granting authority on the agent to contract on b ehalf of the principal. In those circumstances it is right to hold the principal bound and responsible for any resulting contract with the third party. Nevertheless, there is still reason for considering them distinctly. Some courts have distinguished them and secondly apparent authority as opposed to ostensible authority generally describes the situation in which the principal has been more active in causing his own liability.

ESSENTIAL ELEMENTS OF AGENCY BY ESTOPPEL

a. Representation

For a successful plea of agency by estopp el, a party must show some statement or conduct by the principal amounting to a representation that the supposed agent has the authority he has been represented to have.

In ***ADENIJI V JADESIMI (1976) 3 Pt. 1 OYO SHC. 142 at page 145, Agbaje J.,*** In this respect pointed out that:

> *"Where, as in this case, the appellant did not have contract with the respondent in so far as the transaction, the subject matter for this action are concerned before the transaction was concluded between her and the first defendant it is difficult for one to say that the appellant had by words or conduct represented or permitted to be represent to the respondent that the first defendant had authority to act on his behalf in those transaction."*

In ***PRESIDENT CLOTHING & CO. LTD V JOSEPH ANYANWU (1975) 1 CCHCJ 1,*** a Lagos High Court held that a representation in order to amount to ostensible authority must

i) be made by word or conduct or acts of a general nature;
ii) be made by the principal or by sources authorized to act for him;
iii) representation of fact.

In ***COLONIAL BANK AND ANOR.V JOHN CANDY AND ANOR(1890) 15 A.C .267 ,*** the English court of appeal held that for a statement or conduct to amount to a representation. It must be clear and unambiguous.

b. Reliance on Representation

The party who raise the issue of estoppel must show not only that a representation was made to him but in actual fact he acted upon it. If however he did not act at all on the faith of the representation, no agency of estoppel has been created.

In ***FARGUHARSON BROTHERS & Co. V KING &Co.(1902) A.C.325, Lindley L.J.*** said that:

> *"The holding out must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it."*

c. Alteration of Position

For a successful plea of estoppel by representation, the claimant must show that he altered his position consequent upon the representation and to his detriment.

Therefore, if he has not altered his position at all, or has done so but has not suffered any loss or detriment thereb y, or has done so but not on the faith of the representation, there is no valid agency by estoppel.

The position of the law on this issue is that for a representation to operate as an estoppel, it must be "the proximate cause of the loss" suffered by the third party.

Generally, a party seeking the aid of estoppel must himself have acted honesty and without knowledge that the supposed agent had no authority or that he had exceeded hit authority, if that b e the case. This is based on the fact that estoppel is an equit able remedy and he who comes to equ ity must do so with clean hands and must have acted without blemish.

SELF ASSESSM ENT EXERCISE 2

1. Agency by estoppel entails only the ostensible and apparent authority of act as an agency. Discuss.
2. Discuss the major element of an agency created by estoppel.

4.0 CONCLUSION

The formalities for the creation of an agency are quite straight forward. Where the principal agent holds himself out in some way with the knowledge and understanding of the principal, the principal shall be estopped from indemnifying himself from liability.

5.0 SUMMARY

With the understanding of the Doctrine of Agency by Estoppel, particularly its essential elements, learners should have less difficulty in identifying one where the situation arises.

6.0 TUTOR-MARKED ASSIGNMENT

1. An agency relationship can only be created by oral agreement. Discuss.
2. Agency by estoppel entails only the ostensible and apparent authority of act as an agency. Discuss.
3. Discuss the major element of an agency created by estoppel.

7.0 REFERENCES/FURTHER READINGS

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UNIT 5 AGENCY BY RATIFICATION

CONTENTS

1.0 INTRODUCTION

Agency by ratification exists where one person, the agent acts on behalf of another, the principal who at the relevant time was not aware of the action of the agent but later acknowledges the action by ratifying same. By this action, he is bound to be liable to the principal as well as to take all the advantages that comes with it.

2.0 OBJECTIVES

The objective of this unit is to know what is meant by agenc y by ratification its validity and the consequential effects, if an y. This will also involve understanding the position of all interested parties i.e. the agent and the third party.

3.0 MAIN CONTENT

Ratification has been described as equivalent to antecedent aut hority and has been defined as the affirmation by a person of a prior act which was done or done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

The doctrine of ratification was explained in ***WILSON V TUNMAN (1843)6 MAN & G 236*** as follows:

> *" That an act done, for another, by a person not assuming to act for himself, but for such other person, though without any antecedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established principle of law."*

The doctrine of agency by ratification can be simply illustrated thus:

If Ayo, unauthorized by Bola, with Charles, which Bola afterwards recognizes and adopts, there should be no difficulty in dealing wit it as having been originally entered into with Bola's authority. Charles undoubtedly entered into the contract on the understanding that he was dealing with Bola, and when therefore Bola subsequently agrees to admit that such was the case, Charles was precisely put in the situation in which he was understood to be.

This doctrine must not be confused with and must therefore be distinguished from the doctrine of undisclosed principal. This is because the law permits an undisclosed principal, on whose behalf a contract has been entered into, to be liable on the contract. The effect of ratification is equivalent to previous mandate and a person who ratifies a contract entered into on his behalf is essentiall y in the same position as an undisclosed principal.

3.1 Validity of Ratification

For ratification to be successfully raised, it is required that the purported act of ratification must be valid, effective and binding on the alleged principal.

To acquire these qualities, the purported ratification must fulfill or meet certain criteria. These include:

Act Must be on Behalf of the Principal: For a successful establishment of act of ratification, the act of ratification can only be validly executed by the alleged principal for and on whose behalf the act was originally performed.

In ***FOLASHADE V ALHAJI DUROSHOLA (1961)1 ALL N.L.R. 87.*** It was held, per curiam, that there could be no ratification unless a person purported to act as an agent and to act for a particular person.

However, in respect of contracts, the law is very different. In ***KEIGHLEY MAXSTEAD & CO. V DURRANT (1901) A.C. 240***. the House of Lords unanimously held that a contract made by a person intending to con tract on behalf of a third party, but without his authority, cannot be ratified by the third party, so as to render him self liable to sue or be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

Existence of a Competent Principal: For an act to be rectifiable, the supposed principal must be in existence at the time the act was

supposedly performed for and on his behalf. It follows that the supposed principal must be a person in law. That means he must be living or be a subsisting juristic person. In ***CALIGHARA V GIOVANNI & CO. LTD (1961)3 ALL N.L.R. 534;*** it was held that a company cannot ratify a contract purported to have been entered into on its behalf by the promoters prior to its incorporation.

In the same vein, in ***KELNER V BAXTER (1866) L.R.2C.P.174, Erle, C.J*** pointed out in this respect that:

> *"The cases referred to in the course of the arguments fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent", but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby and a stranger cannot by a subsequent ratification relieve him from that responsibility".*

This general common law position as stated in the two foregoing cases, though previously applicable to Nigeria, have been overruled by section 72 (1) of the Companies and Allied Matters Act of 1990. The effect of this provision is that the alleged principal must be in existence at the time the act was supposedly performed on his behalf. He needed not be named as identified provided it could be ascertained. This position was earlier stated in the English case of ***WATSON V SWANN (1862)11 C.B. (N.S) 756*** where Wiles, J., suggested as follows:

> *"The law obviously requires that a person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such description of him as shall amount to a reasonable designation of the person intended to be bound by the contract."*

The implication of this law is that infants and mentally incompetent persons would not be able to ratify acts purported to have been performed on their behalf in much the same way as they would not be able to appoint agents to perform those acts on their behalf.

The principal is expected to maintain his competence up to the time of the purported ratification. This is to the effect that there can be no ratification of an act which is ultra vires the principal or which although competent to perform it, at the time it was done on his behalf; he could no longer do the same at the time of the purported ratification. This was

the position in ***ASHBURY RAILWAY CARRIAGE & IRON CO. V RICHIE (1875) L.R. 7 H.L. 653***.

The Legal Quality of the Act: The general rule here is that the principal may ratify any act which he could have authorized at the time the act was performed for and on his behalf. There are, however, certain facts which are not capable of ratification so that any purported ratification would not be binding even on the principal.
Therefore, an act which the principal could not authorize in the first place because it is illegal, ultra vires or contrary to public policy cannot be made to become valid and effective by ratification.

In ***EMMANUEL URHOBO V CHIEF J.S. TARKA (1976)11 CC HCJ 262,*** a Lagos High Court held that if a pre-incorporation contract be entered into by the company which did not exist at the time, the contract is a nullity and neither the company when formed nor the promoter whose signature was appended could sue or be sued on the contract and the company could not take any benefit under it.

Note however, that this common law position has now been repealed by section 72(1) of the Companies and Allied Matters Act of 1990. the section provides, inter alia, as follows:

> *"Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of such contract or other transaction and had been a party thereto."*

However, the general rule still remains valid and effective as regards other situations other than company pre-incorporation contracts and other transactions.

Time or Period of Ratification: For amount of ratification to be valid and effective it must be performed within the time limit, if any, prescribed by the parties or by the nature and circumstances of the particular case or within a reasonable time. In ***FOLASHADE V ALHAJI DUROSHOLA (SUPRA)*** it was held, per curiam that a proper case of ratification is subject to the important qualification that ratification must be within a reasonable time after which an act cannot be ratified to the prejudice of a third party.

In some situations, the agent and the third party stipulate time for ratification. In such cases the principal can validly ratify only if he acted

within the period so prescribed. In ***METROPOLITAN ASYLUM BOARD MANAGERS V KINGHAM & SONS (1890)6 T.L.R. 217,*** it was held that a contract must be ratified within a reasonable time after acceptance by an authorized person, and that such contract cannot be ratified after the date fixed for performance to commence.

Also the act constituting the ratification must have taken place when the act to be ratified could still, lawfully and effectively be performed. This issue came up in ***BIRD V BROWN (1850)4 Exch. 786*** *where* an agent of the seller of goods purported to exercise the right of *stoppage in transitu* over the goods sent to the buyer. This was subsequently ratified by the seller but that was after the buyer's assignee had taken steps to interrupt and end the transit by the demand for possession and payment of the freight. It was held that the ratification came too late to divest the buyer's assignee of their right to obtain possession of the goods. The transit could not be artificially extended by the doctrine of ratification.

Partial or Conditional Ratification: Opinion seems to be divided on this criterion for validity of ratification of an act done on behalf of a principal by the agent. The main issue here is the question of whether the principal could validly ratify some acts of his agent while rejecting others.

A school of thought is of the opinion that the adoption or acceptance by the principal of part of what the agent has done on his behalf amounts to ratification of all that had been done.

The others are of the opinion that there could be ratification of one or more of a series of acts by the agent without the principal being obliged to accept all of them.

The majority view is that for ratification to be valid and effective, it must be absolute and unconditional. This view is premised on the fact that an act of ratification must profess to adopt the transaction sought to be ratified in its entirety and absolutely without qualification. Therefore, a principal cannot ratify only the beneficial aspects of his agents' act while declining those that are prejudicial to him. If he elects to ratify at all, he must do so for the entire transaction, otherwise his action will not amount to an effective ratification.

In ***UNION BANK OF AUSTRALIA LTD. V MCLINTOCK (1922) A. C. 1*** It was held that the respondents could not ratify the act of their managers in obtaining the drafts, so as to have a title to sue without also ratifying his subsequent dealing with the drafts, the form of which m ade collection through a bank necessary.

Awareness of the Material Facts: Before a principal could validly ratify an act or series of acts done or performed on his behalf by an agent it is essential that there must be some objective evidence that the principal is aware or ought to be aware of the material facts constituting the act before electing to affirm it and to be bound thereby. Thus, in ***PHOSPHATE OF LIME V GREEN (1871)L.R. 7 C.P 43, Wiles, J.*** expressed this as follows:

> *"……. ratification to be binding must be either with full knowledge of the character of the act to be adopted or with intention to adopt it at all events and under whatever circumstances."*

In the same vein, in ***MARSH V JOSEPH (1897)1 CH.D. 213,*** the Court of Appeal (English) held that to constitute a binding adoption or ratification of acts done without previous authority, full knowledge of them and unequivocal adoption after knowledge must be proved or else the circumstances must warrant the clear inference that the principal was adopting the acts of his supposed agent.

SELF ASSESSMENT EXERCISE 1

Enumerate and explain the conditions that must be satisfied before ratification can be valid.

3.2 Mode of Ratification

Generally, ratification requires the manifestation by the principal in some way, of his intention to be bound by a prior unauthorized act of an agent. This, in most cases may be supplied by a clear and unequivocal adoptive act or by conduct amounting to acquiescence. Usually, an express approval of the transaction is the clearest evidence of ratification but sometimes, it may be supplied wherever the alleged principal accepts the benefit of the unauthorized transaction or otherwise obtains an advantage therefrom with the knowledge of the transaction.

In ***MUTUAL AIDS SOCIETY LTD V AKERELE (1965)1 ALL A.L.R. 336,*** the Supreme Court held interalia that even if were to be assumed that the auctioneer was exceeding his authority in publishing the notice of sale of the respondent's house, the silence of the appellant's manager on the placing of the action notice on a wrong property over the notice of sale implied ratification of it on their behalf.

Positive acts provide the clearest and most satisfactory evidence of ratification. Accordingly, a voluntary acceptance or retention by the principal of the benefits of a transaction purportedly entered into by the

agent for and on his behalf but without authority will generally establish ratification.

On the other hand, where the principal institutes an action or sets up a defense to an action against him, in reliance upon some prior unauthorized act of his agent, he will be deemed to have affirmed it.

In general, no formality is required in order to effectively delegate authority to another person. Therefore, ratification need not be in any special form or made in a form or manner proper for an original authorization.

SELF ASSESSMENT EXERCISE 2

How is ratification effected?

3.3 Effect of Ratification

Generally, ratification is retrospective in nature. It is treated as though it had been authorized from the onset. All rights and liabilities attaching thereto are in consequence said to relate back to the date of the original act. This doctrine of relation back was aptly explained by Lord Standale, in ***M.R. KOENICABLATT V SWEET (1923)2 Ch. D 314*** as follows:

> *"I think, it is settled law now that when once you get ratification it relates back. It is equivalent to an antecedent authority mandates priori acquiparator – and when there had been ratification the act that is done is put in the same position as if it had been antecedently authorized."*

The only exception to this principle of relation back is that ratification would not have this effect where to do so will prejudice an innocent third party who has, in the interim acquired a right or benefit under the transaction.

Ratification strictly speaking is not a method of appointing an agent but a means whereby an agency relationship may arise. It therefore relates only to past acts and does not thereby become a license or further authorization to perform similar or even the same act in the future.

It does not thereby constitute the agent into a general agent of the principal. Consequently, no formal termination of such agency relationship is called for, required or necessary.

SELF ASSESSMENT EXERCISE 3

Discuss the effects of ratification

4.0 CONCLUSION

As noted above, agency by ratification is created when the act of a supposed agent is subsequently acknowledge and when this is done, the principal will be deemed to have initially authorized the action in the first place. This is the concept of ratification and learners are expected to identify this.

5.0 SUMMARY

Learners must know that there cannot be ratification without a prior action done on behalf of the principal who later comes forwards to acknowledge the action of the agent with third partied.

6.0 TUTOR-MARKED ASSIGNMENT

1. Examine, with the aid of judicial authorities, agency by ratification.
2. What are the essential ingredients for the validity of ratification?

7.0 REFERENCES/FURTHER READINGS

Pollock and Maitland. ***"The History of English Law,"*** Vol. 11.

Walker, D.W. (1980). *"The Oxford Companion to Law."* London: Butterworths.

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UNIT 6 AGENCY OF NECESSITY

CONTENTS

1.0 INTRODUCTION

In a restricted range of instances, an agency may arise as a matter of law so the agent is authorized to bind the principal to the extent required by that instance without prior authority from them, or ratification by, the principal. This usually occurs in emergency situations.

2.0 OBJECTIVES

The significance of an agency created as a result of emergency is that it can bind a principal to a third party or allow an agent to claim reimbursement for expenses incurred, or provide a defence to a claim in the tort of conversion. This will be the focus of this unit.

3.0 Main Content

3.1 What is Agency by Necessity?

Generally, the courts are reluctant to find that an agency of necessity exists because it imposes obligations on someone who has not given consent to the supposed agent to so act.

The agency of necessity may arise where certain condition are fulfilled.

1. Peluola's property must be in Ade's possession as the result of an existing legal relationship, such as a contract of bailment. This will also include claims by strangers such as someone who finds the goods.
2. Ade is unable to obtain instructions from the owner.

3. An emergency threatens the property. It is not sufficient for Ade show that Peluola's property is causing Ade hardship or inconvenience.
4. Ade takes action in good faith and that action is commercially reasonable, proportionate and in the interest of Peluola.

See further ***SACHS V MIKLOS (1948)2 K.B.23 PRAGER V BLASTPIEL, STAMP AND HSACOCK LTD (1924)1 K.B 566.*** It is therefore pertinent to state that since it is a characteristic of an agent that they can affect the legal relations of the principal, it might be argued that those agents who only have the right to claim expenses or to defend an action are not true agents of necessity and that the only true agency of necessity is the master of a ship who acts to save the ship or its cargo in an emergency.

SELF ASSESSMENT EXERCISE 1

Explain in detail the concept of agency of Necessity.

3.2 Doctrine of Deserted Wife's Agency of Necessity

Another classical example of agency of necessity arising out of an existing or subsisting legal duty concerns a deserted wife. A deserted wife is an agent of necessity endowed by law with authority to pledge her husband's credit for necessaries.

The locus classicus in respect of this point of law is the case of ***PHILLIPSON V HAYTER (1870) L.R.6 C.P.38*** where Wiles, J, while explaining the rule stated as follows:

> *"What the law infers is this, that his wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fell fairly within the domestic department which is ordinarily confined to the management of the wife."*

This principle was applied and approved by the Court of Appeal *(North Central State)* Kaduna, in the Nigerian case of ***HUTCHINSON V MADAM OLAIDE (1970) N.N.L.R. 31*** where it was held that a wife whose husband's cruelty forced her to leave him was entitled to pledge his credit for necessaries. It was further held that this is subject to the wife's own means and earning power and that it was limited to pledging the husband's credit for goods supplied or services rendered but not extended to borrowing money.

However, there are certain conditions that are required by law to be fulfilled before a deserted wife can successfully set up an agency of necessity. These conditions are:

a) That the husband *(Principal)* and the wife *(agent)* were legally married and cohabiting as husband and wife at the material time.
b) That there was an actual or constructive desertion of the wife by the husband.
c) That the credit pledged by the wife was for chattels other than money and for the domestic requirements.
d) That such expenditure was suitable for her style or situation in life or for what she was used to while she was living with her husband.
e) That there was no other credit available to her for her maintenance either through her own earning power or under a court order.

SELF ASSESSMENT EXERCISE 2

A wife is at liberty to bind her husband for cost of necessaries incurred by her. Discuss.

3.3 Conditions for Necessity of Agency

The existence or otherwise of an agency of authority is dependant on the fulfillment of the following conditions by the supposed agent. These are:

a) That there is an emergency situation necessitating instantaneous action.
b) That it was impossible for the claimed agent to communicate with the presumed principal at the material time.
c) That the action taken was reasonably necessary having regard to the circumstances in the case.
d) That the claimed agent acted bona fide and in the interest of the presumed principal.

A claimed agent must prove the existence of all these conditions cumulatively before reliefs sought in respect of expenses or damages accruing to him as a result of the agency situation can be sustained.

SELF ASSESSMENT EXERCISE 3

Reliefs sought by an agent of necessity are granted as of right. Do you agree?

4.0 CONCLUSSION

From the foregoing it is believed that learners would have been able to know the variou s ways by which a contract of agency is created. A valid agency will be held to subsist where any of the foregoing situations is proved to exist.

5.0 SUMMARY

This unit has taught learners:

1. What is meant by competence of parties to be an agent?
2. The various ways by which an agency is created.
3. The distinctive features in the various ways by which an agency contract is created.

6.0 TUTOR-MARKED ASSIGNMENT

1. Examine in brief what you understand by competency of parties in an agency relationship.
2. Creation of agency follows a particular form. Do you agree?.
3. What are the distinguishing factors of the various modes of creation of agency?

7.0 REFERENCES/FURTHER READINGS

Sir William Holdsworth, *"A History of English Law,"* Vol. IV.

Walker, D.W. (1980). *"The Oxford Companion to Law"* London: Butterworths.

American Restatements, Second, Agency, Article.

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MODULE 4

Unit 1 Relationship with Third Party; Disclosed Principal
Unit 2 Relationship with Third Party; Undisclosed Principal
Unit 3 Relationship between Principal and Agent

UNIT 1 RELATIONSHIP WITH THIRD PARTIES; DISCLOSED PRINCIPAL

CONTENTS

1.0 INTRODUCTION

Under the law of agency, the principal is generally responsible to third parties for any decision, act or omission of his agent which was performed or taken while executing the terms of the agency. This is the hallmark of the law of agency on a disclosed principal.

2.0 OBJECTIVE

The main objective of this unit is to expose the learner to the peculiar relationship between a principal and an agent and its effects on a contract executed by the third party in favour of the principal with a third party where the principal is disclosed by the agent to the third party at the time of the contract.

3.0 MAIN CONTENT

The main content of this unit on the nature of contracts executed by the agent in favour of the prin cipal with a third party who, at the time of the contract was aware to the existence of the said principal.

3.1 Contracts by Agents

Generally, issues in contracts by agents raise the fundamental problem of who can sue and who can be sued. between the principal or the agent. In either case, the rights and liabilities attaching to each depend on the following factors:

1) Whether the agent acted within the scope of his authority; express or implied.
2) Whether the principal is disclosed or undisclosed.
3) Whether the principal is a national as opposed to a foreign principal.

Where the agent acted within the scope of his authority, or if without authority, it has been subsequently ratified by the principal, and the identity of the principal disclosed, the latter alone is generally the true party to the contract and bound thereby. The agent incurs neither right nor liability under such a contract unless otherwise expressly made a party thereto.

Lord Erskin stated the position of the law clearly in ***EX PARTE HARTROP (1806)12 Ves 349*** when he said:

> *"No rule of law is better ascertained or stands upon a stronger foundation than this; that, where an agent names his principal, the principal is responsible, not the agent; but for the application of that rule, the agent must name his principal as the person to be responsible."*

It is however, not necessary that the agent must specifically have stated that he was acting for and on behalf of his principal in order for the latter to be disclosed. It is sufficient if the third party knows or ought to have known that the person he was dealing with was acting for another specific person.

However, where the principal is undisclosed, that is, where the fact of agency as well as the identity of the principal are not known to the third party, the contract may, as a general rule, be enforced by or against the principal if and when disclosed provided that the agent's act was authorized.
See ***WATTEAU V FENWICK (1893)1 Q.B.D 346*.**

SELF ASSESSMENT EXERCISE 1

Briefly examine the nature of contracts entered into on behalf of a disclosed principal, with a third party.

3.2 Principal and Third Party

The general rule is that where a person contracts as agent for a principal the contract is the contract of the principal and not that of the agent, and prima-facie, at common law the only person who may sue is the principal, and the only person who can be sued is the principal.

In other words, every one is liable for his contract even where he acts for another unless it can be shown that this liability is removed by the operation of that contract.

The relationship between the disclosed principal and the third party will be brought to life and the principal could take advantage therefrom only under the following situations:

1) The agent discloses, names or unnames the existence of a principal on whose behalf the contract was negotiated.
2) The agent acts within actual authority.
3) The agent acts without authority but the principal subsequently ratifies same.

Generally, the principal may be sued on the contract if the agent acts within apparent authority but the third party cannot be sued without firstly ratifying the act of the agent.

In response to a claim by the disclosed principal, the third party has the defences.

1) He can set up and use any defense or claim arising from the contract.
2) He may also use any defense available against the principal.

It is however to be noted that a defense or claim available against the agent and unconnected with the contract cannot be used against the principal.

SELF ASSESSMENT EXERCISE 2

What rights are available to both the principal and third party in an agency situation where the principal is disclosed?

3.3 Effects of Agency on Disclosed Principal

In ***BARWICK V ENGLISH JOINT STOCK BANK (1967) L.R, 2 Exch. 259. Wiles. J.*** stated the rationale behind this issue thus:

> *"The principal put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."*

The principal is only liable for those decisions, acts or commissions which fall within the scope of the real *(actual)* or apparent *(ostensible)* authority of the agent.

The crucial test is therefore whether a particular decision, act or omission falls within the scope of the agent's authority and done or taken in the course of that agent's employment.

Therefore, in as much as the third party dealt with the agent in good faith, the principal does not cease to be liable by reason only of the fact that the agent was acting fraudulently or otherwise to the detriment of the principal.

Generally, the effect of an agency relationship created by an agent on behalf of a disclosed principal with a third party is that the disclosed principal is bound on all fours in respect of the contract so created.

SELF ASSESSMENT EXERCISE 3

A disclosed principal is bound by contracts entered to on his behalf. Do you agree?

4.0 CONCLUSION

This unit has exposed the learner to the understanding of the nature of relationship that exists between an agent and a third party in a disclosed principal situation.

5.0 SUMMARY

By the end of this unit you should be able to understand:

1. The nature of contracts entered into by agents with a third party on behalf of a disclosed principal.
2. The extent of the liabilities or otherwise of the principal in a disclosed principal's contract entered into by an agent on the principal's behalf with a third party.
3. The effect of such contract on all the parties concerned.

6.0 TUTOR-MARKED ASSIGNMENT

1. Who is a disclosed principal?
2. State the rights available to both the principal and a third party in a disclosed principal's agency situation.
3. Contracts entered into on behalf of a disclosed principal are enforceable against the principal. Do you agree?

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike, (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

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UNIT 2 RELATIONSHIP WITH THIRD PARTY; UNDISCLOSED PRINCIPAL

CONTENTS

1.0 INTRODUCTION

This unit is meant to deal with the agency situation where the principal is not disclosed by the agent while dealing with a third party albeit on behalf of the principal. This is also known as Undisclosed Agency. Up to this point, the law of agency in respect of third parties seems relatively consistent in that it involves representations made by the principal to the third party. The consistency vanishes at the realm of undisclosed principal. In this instance, the existence of an agency is not disclosed.

2.0 OBJECTIVES

The main objective of this unit is to bring to the knowledge of the student the consequences of agreement entered on behalf of an undisclosed principal by an agent with a third party. It is also meant to look into the rights, obligations, liabilities and duties of all the parties concerned in this type of contract.

3.0 MAIN CONTENT

The following illustration explains this nature of agency. Ayo believes the contract is with Chime and is unaware that Chime is acting for Olu. Olu is entitled to intervene and enforce the contract. This is the subject that will be dealt with in this unit.

3.1 The Doctrine of Undisclosed Principal

An undisclosed principal is one whose existence and identity are unknown to the third party at the time of entering into a contract with an agent.

Under the doctrine of undisclosed principal, it is permissible, in appropriate circumstances for such principal on whose behalf a contract has been entered into by an agent to sue and be sued on the contract. Although it is a well settled principle of law, the doctrine has been described as an anomaly in the sense that it offends the doctrine of privity of contract and it is in this respect that it is often regarded as an exception to the doctrine of privity of contract rule.

EXCEPTIONS

The rights and liabilities of the principal on contracts negotiated by the agent on his behalf are subject to certain general exceptions. These are:

1. No principal can validly sue or be sued in respect of any contract purported to have been entered into on his behalf by the agent unless with his consent or authority.

2. At common law, no principal may sue or be sued on any deed, even if it was expressed to have been executed on his behalf unless he was described as a party thereto and it was executed in his name.

3. Where the contract in question is a negotiable instrument, for example a bill of exchange, cheque or promissory note, the principal is not liable unless his signature appears on it. He needs to sign by himself to be liable.

4. Where the principal is a foreign principal, there is a presumption that the intention was to bind the agent and not the foreign principal. This may, however, be contradicted by clear terms of the contract itself or circumstantial evidence from the surrounding circumstances of the case.

5. The rights and liabilities of the principal may be expressly excluded by a term of the contract itself or impliedly by a custom, or usage of the particular trade, business or profession to which the agent belongs or in which he operates. This is subject to the provision that these are not inconsistent with the express term of the contract and not reasonable or unlawful.

SELF ASSESSMENT EXERCISE 1

The Doctrine of undisclosed principal is absolute. Discuss.

3.2 Personal Liability of the Agent

In situations where the principal cannot be sued on a contract entered into on his behalf by the agent, the question may arise as to whether the third party can sue the agent who negotiated the contract.

The common law rule is expressed in the maxim *"QUI PER ALIUM FACIT PER SEIPSAM FACERE VIDETUR"* which means "he who does an act through another is deemed in law to do it himself. That is why a person cannot escape liability merely because he has done what he did through an agent. However, an agent may also personally liable in some circumstances. These circumstances are:

a. Where the Agent Contracts Personally

In this situation, the agent will be held liable if he enters into the contract in his name instead of in the name of his principal, with or without disclosing the fact of his agency or the identity of his principal. It is generally presumed that he intended to contract personally.

In ***Calder V Dobell (1871) L.R 6 C.P. 486*** a broker contracted in his own name to purchase goods from the plaintiff, having previously disclosed to him that he was an agent of the defendant. In an action for the price of the goods, it was argued for the defendant that there is a distinction between the case where one party was not aware when entering into the contract that the other was acting as an agent and the case where he was aware of that fact but nevertheless the contract was entered into by the agent in his own way. It was submitted that the principal could be sued in the former case but not in the latter. This argument was rejected by the Court of Common Pleas which unanimously held that the plaintiff was entitled to sue the defendant on the contract.

See; ***West African Shipping Agency (Nig.) Ltd & Anor V Kalla (1978)3 S.C. 21. Jammal engineering (Nig.) Ltd. V Nigeria Ports Authority & Ors CCHCJ/1/731.***

b. Where the Principal is Foreign

The general rule is that where an agent contracts on behalf of a foreign principal, there is a presumption that the intention was to bind the agent and not the principal. The practical consideration concerns the necessity

to avoid the difficulties arising from the foreign element present in such circumstances. However, there would be no presumption where the intention to bind the principal was clear form the contract itself or from the surrounding circumstances of the particular case.

c. Where the Principal is Fictitious or Non-Existent

In cases where an agent professes to contract on behalf of a fictitious or non-existent principal, he ma y sometimes be presumed to have intended to be bound by the terms of such contract.

The leading judicial authority on this point is ***Kelner V Baxter & Ors (Supra)*** where an agent purported to enter into a written contract on behalf of a company not yet incorporated. It was held that the agent was personally liable on the contract, even if he expressed himself as contracting for the future company.

d. Where the Principal is Unavowed

Where a person professes to contract as an agent and it subsequently established or revealed that he is in fact the real principal and that he was merely acting for himself, he is personally liable on the contract.

This situation is however, not an instance of undisclosed prin cipal in the sense that the fact of agency and the existence of the principal are acknowledged but what was not known or apparent is the fact that the principal and the purported agent are one and the same person.

It is important to state here that there is no general principle of law prohibiting a person from acting as both as an agent and the principal in one and the same transaction. The only proviso is that where the identity of the principal is immaterial to the other contracting party, the agent would be entitled to sue and be sued on the contract.

e. Where the Contract is in Writing

The question whether an agent, who on behalf of his principal, purportedly enters into a written contract other than a deed or negotiable instrument is personally liable thereon depends on a number of factors. He will be personally liable if he signs his name absolutely and without qualification.

For such an agent to escape liability, the document so signed must unequivocall y show that he contracted as agent and did not undertake any personal responsibility.

In ***Gadd V Houghton (1876)1 Exq. D. 357, Mellish, L.J ,*** had this to say on the matter:

> *"When a man signs a document in his own name, he is prima facie a contracting party and liable and there must be something very strong on the face of the instrument to show that liability does not attach to him."*

For this rule to be applicable, it will not be sufficient that the person should have described himself in the relevant document as an agent, director, secretary, accountant, broker, or words of similar nature. If it is stated in the document that he signs the same "*as agent for*" or "*on behalf of*" a simply "*for*" a principal or words of that kind, he escapes liability unless it was clearly evident from the body of the document that he intended to bind himself.

See ***West African Shipping Agency (Nig.) Ltd & Anor V Alhaji Kala (Supra)***

f. Where the Contract is a Deed

In cases where an agent appends his signature to a deed or document under seal and executes it in his own name, he is personally liable even if he is described in the document or deed as an agent acting for and on behalf of a named principal.

This rule is strict and operates even if that agent subsequently executes the document or deed on behalf of his principal. In ***Schalfk V Anthony (1813)1 M.B. & S 573,*** a shipmaster, executed by deed, a charter party in his own name describing himself as the agent of the ship-owner. It was held that notwithstanding that description, the shipowner, as principal, was not entitled to sue for the freight but only the ship-master because the owner was not a party to the deed.

This principle is premised on the rule that no one can add to or contradict the terms of a deed. To escape liability, however, the agent must have executed the deed as the principle's deed. In such instance, the agent will not incur personal liability.

g. Where the Contract is a Negotiable Instrument

Where an agent signs his own name on an ordinary bill of exchange, a cheque or promissory note, or endorses or accepts such an instrument by signing his own name, he is personally liable on the instrument notwithstanding that he added to his signature words describing himself as an agent or as filing a representative character.

Where he signs as drawer, endorser or acceptor, adding to his signature words indicating that he signs not only as agent for a principal but also as agent for a specified principal, he will incur no personal liability.

Where the agent signs per pro *(per procuration)* he can only bind his principal for acts within his limited authority or capacity. He will however be personally liable for any excess.

He will equally be liable if he signs in a trade name if he signs in his own name.

h. Where There is Implied Warranty of Authority

Where an agent purports to act on behalf of a principal, and it turns out that he was acting without authority or in excess of his authority, the principal cannot be held responsible in the absence of ratification by him. The agent alone is responsible irrespective of whether he knew, or ought to have known, or inadvertently thought that he had the authority he was supposed to have professed. For responsibility to be placed on the agent, the law requires that the third party should have relied on the warranty of the agent in entering into the contract. Therefore, the agent will not be liable if the third party knows or was aware of the fact that the agent was mistaken as to his own authority.

It has been duly acknowledged that this principle is a well established exception to the general rule that an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another see: ***Starkey V Bank of England (1903) A.C.114: Mcneal V Hawes (1923)2 K.B.539.***

It is however pertinent to point out that in most cases, the basic understanding of the agent's warranty is that the agent has his principal's authority to enter into the transaction in question. He is not however understood thereb y, to warrant that his principal is solvent or will perform the transaction entered into. On the other hand the law would not allow implied warranty in some instances. These are:

a) Where the assertion of representation is one of law as distinct from one of fact;
b) Where the principal subsequently and effectively ratifies the said transaction; and
c) Where the third party knows or ought to know that the agent had no authority.

SELF ASSESSMENT EXERCISE 2

State and discuss the various situations under which an agent will personally incur liability for contracts entered into on behalf of a principal with a third party.

3.3 Torts Committed by Agents

Under this doctrine, a principal is held answerable for torts committed by his agent in the course of executing the terms of his agency. The matter does not only affect the vicarious responsibility of the principal for such acts and omission but also the personal responsibility of the agent himself. Thus, a third party injured by the wrongful act or omission of an agent may proceed against the principal vicariously, and or the agent directly, as the perpetrator of the wrongful act.

The liability of the principal for a wrongful act of his agent is under the common law founded on the doctrine of *"RESPONDENT SUPERIOR"* which means *"Let the Principal Be Answerable."*

Under the law, several rationale of vicarious liability have been suggested in tort cases. Some of these have been imported into the principal-agency relationship. Some of these are:

a) that the master *(principal)* has a fictitious control over the behaviour or is servant *(agent);*
b) that the master (principal) has selected his servant *(agent)* and trusted him and should therefore suffer for his wrongs, rather than an innocent stranger or third party.
c) that it is a privilege granted by law for a person *(principal)* to be allowed to employ another *(agent)* and that for that privilege there should be a corresponding responsibility;
d) those tort losses are placed upon the employer *(principal)* because he is better able to prevent them through careful hiring and better able to bear them.

3.3.1 Liability of the Principal

The liability of the principal under the doctrine of respondent superior is strict and the principal is so responsible notwithstanding his exercise of due care and diligence in selecting the agent or supervising him or probing the act or omission concerned. The principal is only liable in contract for things done or actions taken within the actual (real) or ostensible *(apparent)* authority of the agent.

In tort, he is liable for all wrongs committed by the agent whether within his actual or ostensible authority or not. In ***Construction Industry Co. Ltd V Bank of North (1968) N.C.L.R. 194,*** a driver waiting to be served at a petrol station, struck a match on his cigarette. This action set a petrol station ablaze. It was held that his employer *(principal)* was liable for the damage caused thereby.

However, to make the principal liable, the act of the agent must have been committed in the course of the agent's employment. Thus, where it was established that the agent was on a frolic of his own, it was held that the agent was not in the course of his employment and therefore the principal was not liable.

See: ***Navarro V Moregrand Ltd. & Anor (1951)2 T.L.R. 674.***

The principal will also be held liable in the following circumstances.

a) where he authorized the wrongful acts.

See: Pan Brothers Ltd. V Landed Property Ltd & Anor (1982)2 All N.L.R. 22 Adesuloye V Martin & Anor (1978)10-12 CCHCJ 345.

b) where the principal ratified the wrongful acts.

See: Inoma Russel V Niger Construcion Coy (1987)3 N.W.L.R. 298.

c) where there is a misrepresentation by agent.

See: Imersel Chemical Co. Ltd. V National Bank of Nigeria (1974)4 E.C.S.L.R. 355.

3.3.2 Liability of the Agent

In situations where a third party suffers a loss, damage or injury as a result of the wrongful act or omission of the agent, the latter remains liable to him personally. The agent is liable directly as the perpetrator of the wrongful act or omission and jointly with his principal. His liability exists notwithstanding that he was acting with the express authority or instruction or order of the principal or for the benefits of the principal.

In ***Baschet V London Illustrated Standard Co. (1900)1 Ch. D. 73.*** It was held that an author whose copyright has been infringed was entitled to recover separate damages against every infringer, whether principal, agent or servant.

Unless the action of the agent is ratified by the principal, the agent will be personally liable. The same applies to a situation where the agent departs from the scope of his employment.

EXCEPTIONS

a) If the wrongful act or omission complained of will not be tortuous as regard his principal who has ratified it.
b) If the wrongful act or omission complained of requires a specific state of mind at the time of its commission, and he did not have that state of mind at the time, e.g. innocent misrepresentation.
c) If the agent is personally immuned from suit on the wrongful act or omission complained of even though the principal may remain liable.

Who May Be Sued

The third party m y sue either the agent or the principal separately or both jointly since they are both generally jointly and severally liable. Any judgment obtained against either of them bars any further action against the other.

However, section 8(1)(a) of the Civil Liability *(Miscellaneous Provisions Act)* of 1961 has overruled this common law position as it forbids judgments obtained against a party from standing as bar to an action against any other person who is liable as a joint tort-feasor in respect of the same damage.

SELF ASSESSM ENT EXERCISE 3

Distinguish between the liability of an agent and a principal to a third party in tort.

3.4 Crimes Committed by Agents

It is pertinent to state from the onset that crimes committed by agents in the course of executing the terms of their agency have a dual aspect. In the first place, it refers to the personal responsibility of the agents and the principal respectively. Secondly, it refers to the vicarious responsibility of the principal for the crimes committed by the agents.

1. Personal Responsibility of Principal and Agent

The general rule relating to crimes committed by an agent is that as the perpetrator of any act or omission constituting a crime, he is personall y responsible whether such crime was committed in the course of his employed or not. Therefore, to be criminally responsible for such an act or omission, the prosecution must prove as against the agent, all the essential elements or ingredients of criminality. The agent must be proved to have:

a) attained the age of criminal responsibility.
b) been in possession of the relevant *mens rea* (i.e. the criminal intent) of the particular crime or offence at the time of its commission or omission and
c) performed the *actus reus* i.e perpetrated the act or omission constituting the particular offence or crime.

In ***Mandillas and Caraberis & Anor V Inspector General of Police (1958)3 F.S.C. 20,*** the second defendant was the Area Manager of the first defendant company, from whose workshop two lorries, the subject-matter of the prosecution were allegedly stolen. The prosecution submitted that the second defendant, being the Area Manager for the shop, were in personal possession of the lorries. He must therefore, be held criminally responsible for any offence committed in relation to the lorries. Ademola F.C.J., delivering the judgement of the Supreme Court held that, whatever the position of a manager may be in cases of absolute liability, he could not be convicted of an offence involving mens rea except in respect of his own act or omission.

2. Vicarious Responsibility of Principal

The general rule in common law is that the principal is not ordinaril y vicariously responsible for a crime committed by his agent in the course of his employment. This principle of law has raised the issue of when a statute should be considered as having created a strict liability offence.

The general test that has been applied is whether the duty or offence created is or has been rendered absolute thereby. If it has or is, the principal is in the same vein made responsible, whether he has expressly delegated his duty under the statute to his agent or not and regardless of any intent, knowledge or mens rea. In ***Gammon Hong Kong Ltd & Ors. V Att. General of Hong Kong (1984)3 W.L.R. 437*** the Judicial committee of the privy council set out the law relating to vicarious responsibility of a principal where crime is committed as follows:

1) that there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence.
2) that the presumption is particularly strong where the offence is truly criminal in character.
3) that the presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute.
4) that the only situation in which the presumption can be displaced is where the statute is concerned with social concern and public safety is such an issue.
5) that even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability is effective to promote the object of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

SELF ASSESSMENT EXERCISE 4

Under what conditions will a principal be held liable for crimes committed by his agent while contracting with a third party?

4.0 CONCLUSSION

This unit deals with the doctrine of undisclosed principal in an agency relationship and its recognized exceptions. Learners have been exposed to rudiments of this doctrine as applicable both under the common law and statute.

5.0 SUMMARY

At this point of this unit you should be able to know the basic concepts of agency as they relate to the doctrine of undisclosed principal in general.

6.0 TUTOR-MARKED ASSIGNMENT

1. The doctrine of undisclosed principal in an agency relationship is without exceptions. Discuss.
2. In what instance would an agent be personally liable for contracts entered on behalf of a principal with a third party.
3. The distinction between the liability of an agent and that of his principal to a third party in tort is very remote Discuss?
4. Discuss the basic factors to be considered before a principal could be held liable for crimes committed by his agent.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 RELATIONSHIP BETWEEN PRINCIPAL AND AGENT

CONTENTS

1.0 INTRODUCTION

In modern commerce, the relationship of principal and agent is primarily consensual. Consequently, the rights and duties arising from such relationship are discernible from the express or implied agreement between the parties. The relationship is often described as fiduciary in the sense that it arises out of the trust or confidence reposed upon the agent by the principal. Hence, there exist rights and obligations with attendant duties on both parties to one another.

2.0 OBJECTIVES

The major objective of this unit is to bring to the fore and discuss the major duties of an agent to his principal when such relationship is established to exist. The continuation of the agency relationship is dependant on the agent carrying out his duties as such diligently to the principal.

3.0 MAIN CONTENT

In commercial transaction it is apparent that a principal may sometimes engage or appoint an agent who belongs to a particular trade, business or profession or may be required or instructed to operate at a particular place or locality. In some of the cases, the principal is not always with the agent and this requires the agent to perform some basic duties to the satisfaction of the said principal. These duties are the basis of this unit.

3.1 Duty to Perform

The primary duty of an agent particularly where he was appointed under an agreement with the principal is to execute his agency in accordance with the terms of such agreement. In ***Otto Hamman V Senbanjo & Anor (1962)2 All N.L.R. B9 Adefarasin. Ag. J.,*** aptly stated the position thus:

> *"It is the duty of an agent to carry out the business he had undertaken. This was his obligation unless he had in his contract expressly excluded responsibility."*

However, where the agent fails to perform his duties or to do so in accordance with the terms of his contract, he is generally liable only for the breach of his agency agreement. If he performs such duties carelessly or in an imperfect manner and thereby causes loss to his principal, he may in addition become liable in negligence. Such liability may take the form of an action for damages for the loss suffered by the principal, or an indemnity or contribution from the agent in favour of the principal.

However, his duty to perform is not absolute. If he was unable to perform his duty, he must promptly inform his principal or any other person having authority to receive such information.

Also, if the duties are illegal, he is not bound to perform then. If he is also a gratuitous agent, he will not be liable for breach of duty to perform.

SELF ASSESSMENT EXERCISE 1

The duty of an agent to perform his duties based on the terms of the contract is absolute. Discuss.

3.2 Duty of Obedience or Loyalty

When an agent is executing the terms of his agency, he is obliged to carry out such instructions as may be given to him by the principal relating thereto. In ***Eso West African INC. V Ali (1968) N.M.L.R 414*** an Ibadan High Court held, inter alia, that it is the duty of an agent to carry out any instructions that may be given to him by the principal and cannot depart from such instructions even though he reasonably believed that in doing so he was promoting the interest of the principal.

Exceptions

1. Where no definite instructions has been given to the agent, or where such has been given, but this leaves the agent a measure of discretion, he would only be expected to be guided by the reasonable and honest exercise of his own judgement and the interest of the principal. If he is therefore so guided, he incurs no liability even if the principal suffers a loss by their exercise.

2. If the principal's instruction is ambiguous, the agent is put to election and provided he acted fairly and honestly, he would not be in breach of his duty of obedience and honesty even if the course chosen by him is less favorable to his principal.

3. If the agent is a professional agent the principal's instructions may be subject to any custom or usage of the particular trade, business or profession to which the agent belongs or within which he operates.

SELF ASSESSMENT EXERCISE 2

What is the extent of obedience or loyalty required of an agent to his principal.

3.3 Duty of Care and Skill

In the course of executing the terms of his agency, an agent is bound to exhibit such care, skill and judgment as are required under the circumstances of the particular situations. In ***Spiropolous Co. Ltd. V Nigeria Rubber & Co. Ltd (1970) N.C.L.R. 94,*** a High Court in Benin held that the prudence which an agent is expected to show in the affairs of his principal requires that he should not involve the principal in a heavier financial burden where there is available means of involving him in a higher financial burden. Accordingly, it was held that an agent who undertook to effect a policy of insurance on behalf of his principal is under a duty to do so at the most economical rate.

The degree of care, skill or diligence required of an agent may sometimes depend on whether he is a gratuitous agent or acting for reward. If he was acting for reward, a higher standard of care, skill or diligence is required of him. If he were a professional, agent or holds himself out as possessing a professional qualification, he must exhibit such car, skill or diligence as is usual or necessary or for the proper conduct of the trade, business or profession in which he is employed.

However, if he holds himself out to the principal as possessing a special skill or knowledge, then he is obliged to exhibit such care, skill or diligence as would normally be shown by one possessing such skill or knowledge.

SELF ASSESSMENT EXERCISE 3

What is duty of care and skill?

3.4 Duty of Personal Performance

The basic principle of law in this regard is covered by the maxim *"Delegatus Non Potest Delegare"* which means a delegated power cannot be further delegated. Agency relationship is one of confidentiality of principal and the agent, and the agent is generally expected to perform his duties as an agent, personally.

In the realm of agency, an agent cannot entrust to another person or a sub-agent the exercise of an authority or duty entrusted to him by his principal without the latter's express or implied authority to do so. In ***Bamgboye V University of Ilorin & Ors (1991)8 N.W.L.R. 1,*** the Court of Appeal affirmed that an agent to whom power is delegated cannot further delegate it without the express authority of the principal or authority derived from statute.

Exceptions

The recognized exceptions to this general rule include:

1) Where the transaction is required by statute to be evidenced by the signature of the principal himself.
2) Where the competency to do the act arises by virtue of holding some public office or by virtue of some power, authority, or duty of a personal nature and requiring skill or discretion for its existence.
3) Where a statute imposes on a person a duty which he is not free to delegate to another.
4) Where the agent has the express or implied authority of the principal to do so.
5) Where no personal confidence is reposed on the agent by the principal or by the terms of his agency.
6) Where the function or duty of the agent does not require any particular skill or discretion or is purely ministerial.
7) Where a custom or usage of the trade, business or profession of the agent or within which he operates allows.

8) Where an emergency has arisen requiring immediate or instantaneous action in order to preserve or protect the interest of the principal or the agency itself.
9) Where the nature of the agency itself necessitates a partial or total delegation, without which it would be superflous or unreliable.
10) Where the principal ratifies the act of the agent in appointing a sub-agent or an act or omission of the supposed sub-agent either directly or otherwise.
11) Where the authority to delegate is derived from a statutory or legislative provision or enactment.

SELF ASSESSMENT EXERCISE 4

Discuss the various exceptions to the general rule contained in the maxim, *Delegatus Non Potest Delegare"*

3. 5 Duty to Act in Good Faith

This duty of an agent arises principall y from the fiduciary nature or character of the principal-agent relationship. Agency relationship, as a whole, is based essentially on the trust reposed on the agent by the principal. The principal employs an agent normally because he requires that agent's personal service or expertise. He will usually depend on the agent for the due performance of those services. The law imposes on the agent the duty to show good faith in his dealings on behalf the principal.

The duty of good faith has many corollaries. These are:

1) The agent must avoid class of personal interest with that of his principal.
2) The agent should not make any secret profit or other benefit from his position as agent in excess of his agreed commission or remuneration.
3) The agent is under an obligation not to take a bribe while executing his agency.

In cases where the giving or receiving of bribe is established against the agent, the principal could exercise the following options:

a) dismiss the agent immediately and without notice.
b) refuse to pay the agent any salary or commission payable or accruing.
c) recover any salary or commission already paid on the particular transaction.
d) recover the amount of the bribe paid to the agent.
e) claim damages from the agent or the third party for any loss occasioned by the bribe.

SELF ASSESSMENT EXERCISE 5

The duty of an agent to act in good faith is qualified. Discuss.

3.6 Duty to Account

It is a fundamental obligation of every agent to keep and to render appropriate account of his stewardship to his principal whenever he is called upon to do so. Thus he must be willing and ready at all times to render an account of all transactions undertaken by him for and on behalf of his principal. This duty is more particularly important where money or property has been received for and on behalf of the principal. In ***Majekodunmi V Joseph Daboul Ltd. (1975)2 C.C.H.C.J. 161*** a Lagos High Court held, inter alia, that once the relationship of principal and agent is established, and the agent fails to keep proper account or fails to account to the principal for monies or properties received b y him in the cause of his agency, he is accountable to such a principal and can be compelled to render such account by an action in a court for an account.

However, some individual obligations of the agent his principal relating to the duty to account flow from the general duty to account. These are:

1) duty to keep proper account.
2) duty to make books and documents in his possession relating to the execution of the agency assessable to his principal.
3) duty to keep his personal monies separate from his principal's money.
4) he is under a duty, if he holds money or property on behalf of his principal, to pay over or account for such money or restore such property to his principal notwithstanding claims made by third parties provided that the money or property was not received in respect of a void or illegal transaction or that the agency itself is not void or illegal.

SELF ASSESSMENT EXERCISE 6

The basic duty of an agent is to render account to his principal. Do you agree?

4.0 CONCLUSION

The basis of the needs for duties which an agent is bound to perform in respect of his principal is premised basically on the fact that most agency situations are fiduciary in nature. It is only when provisions are made as to their duties that effective agency could be effected.

5.0 SUMMARY

This unit has dealt with the different duties which an agent owes his principal and these include:

1) duty to perform.
2) duty of obedience or loyalty.
3) duty of care and skill.
4) duty of personal performs.
5) duty to act in good faith.
6) duty to account.

6.0 TUTOR-MARKED ASSIGNMENT

The various duties which an agent owes his principal are absolute. Discuss.

7.0 REFERENCES/FURTHER READINGS

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MODULE 5

Unit 1 Duties of the Principal to the Agent
Unit 2 Remedies Available to the Parties

UNIT 1 DUTIES OF THE PRINCIPAL TO THE AGENT

CONTENTS

1.0 INTRODUCTION

As discussed in the preceeding unit, parties to an agency relationship have corresponding duties which they owe one another failure of which either of them could make valid claims in the law court for breach of contract. The failure to perform any of these duties of or performing some negligently which resu lt into one of the other parties incurring loss is a ground for an action in damages.

2.0 OBJECTIVES

The major objective of this unit is to bring to the knowledge of the learner those duties a principal owes his agent which are either express or implied.

3.0 MAIN CONTENT

The major duty a principal owes his agent is premised on the issue of money and pecuniary advantages accruable to the agent in the event of an effective discharge of his own duties under the contract. This also includes carrying out the principal's instructions under the terms of the agency in respect of his dealings with third parties on behalf of the principal.

3.1 Duty to Remunerate

The primary duty of a principal to his agent is to remunerate him for the services rendered. Such duties arise whenever the agent is employed under such circumstances as would reasonably justify the expectations that he should be paid.

The remuneration may take the form of an agreed commission or wages or other benefit agreed between the parties such as some share of the benefits accruing to the principal from the agency.

However, the duty to remunerate is not absolute for the agent's right to receive it accrues only if he is entitled to it in accordance with the agency agreement which will also include the amount payable, the conditions under which it becomes payable and the time of payment.

The right to reasonable remuneration may sometimes be implied from the express terms of an agreement, the custom and usage of the particular trade, business or profession of the agent. Where the parties operate and the surrounding circumstance including any dealings between the parties may also determine remuneration.

However, even when the duty to remunerate has arisen expressly or by implication the agent's right to it is further subject to certain conditions. These include:

a) the agent must have earned the remuneration. That is, when the agent has done all or substantially all he was obliged to do under the circumstances.
b) the agent must be the effective cause of the transaction from which the remuneration accrues.
c) the agent must fulfill the conditions, if any, upon which the remuneration accrues.
d) the agent must fulfill the conditions, if any, upon which the remuneration accrues.

SELF ASSESSMENT EXERCISE 1

It is an absolute right that an agent is entitled to his remunerations. Discuss.

3.2 Estate Agent's Commission

Estate agents are a peculiar type of agents whose rights, duties and obligations are often spelt out in an agreement, mostly Power of Attorney. They present a peculiar problem with regard to payment of

commission or entitlement from their principals. This is primarily because there is normally no obligation on the estate agent to do anything for the principal. The contract with the latter is merely a promise binding on the principal to pay a sum of money upon the rendering of specified service by the estate agent.

In some cases, an instruction or agreement as to when any commission becomes payable may be given or concluded in one of various ways:

a) on the estate agent introducing a buyer.
b) on finding a buyer or someone to buy.
c) on introduction of a person who signs or enters into a legally binding contract to purchase.

SELF ASSESSMENT EXERCISE 2

Estate agent's commission are payable as of right. Discuss.

3.3 Duty of Re-Imbursement and Indemnity

In every agency relationship, there is by implication, a duty on the principal to indemnify the agent of all loses, damages or liabilities sustained by the agent in the course of discharging his authorized duties. This implied duty is subject to any subsisting agreement or declared intention of the parties. All reasonable expenses incurred by the agent and any incurred by him when he engages the services of a sub-agent or substitute with the approval of the principal are payable.

Exceptions

1) where the parties provide in their agency relationship for the payment of some kind of remuneration the right to indemnity or re-imbursement may be superseded.
2) where the right of the agent to indemnity or re-imbursement is expressly provided for by the parties in their agency agreement.

The agent will not be entitled to this right in any of the following conditions:

a) where the agent acted without express or implied authority, unless the transaction is subsequently ratified by the principal or any other person authorized by him to do so.
b) where the agent incurred the expenses, loss or liability in consequence of his own negligence, default or insolvency.
c) where the agent has acted in breach of his duty, including violation of any principal's lawful or reasonable instructions.

d) where the agent acted in respect of a transaction that is to his knowledge unlawful or contrary to public policy.
e) where the agent acted in respect of any transaction rendered null and void by any statute.

SELF ASSESSMENT EXERCISE 3

An agent is entitled to re-imbursement of his incurred expenses and indemnity in all situations. Do you agree?

4.0 CONCLUSION

As noted earlier, the basis of any agency is for the principal and the agent to perform their respective duties both expressly and impliedly. The duty of a principal is to pay the various monies accruable to the agent on the fulfillment of the agency conditions provided his action does not fall under any of the known exceptions.

5.0 SUMMARY

This unit has revealed to the learner the duties a principal is obliged to perform to his agent which are as follows:

a) to Remunerate.
b) Estate Agent's Commission
c) Re-imbursement and Indemnity.

6.0 TUTOR-MARKED ASSIGNMENT

The major duty of a principal to an agent under an agency relationship is premised on the monies accruable to the agent under the contract of Agency. Discuss

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 REMEDIES AVAILABLE TO PARTIES

CONTENTS

1.0 INTRODUCTION

In every contractual situation there are bound to be infringement of the right of the parties by themselves. This comes in the form of breach of the terms of the agreement between the contracting parties. It is usually followed by claims for damages in the law court.

2.0 OBJECTIVES

The main corpus of this unit is to bring to the knowledge of the learner the available remedies to the parties under an agency relationship where there is a breach of any of the terms of the agreement by any of the parties.

3.0 MAIN CONTENT

Breach of an agency relationship may give rise to a claim for damages or other remedies available to the innocent party which may either be the principal or the agent. The remedies available to either party ma y depend on the terms of any relevant agreement, the type or nature of the breach and the surrounding circumstances.

3.1 Remedies Available to the Principal

In situations where the agent by some misconduct or otherwise commits a breach of a term of his agency relationship with the principal, the latter may avail himself of one or more of a number of remedies stated below.

1. **Dismissal:** The principal may determine or bring the agency relationship to an end or otherwise dismiss the agent from his employment without notice.

2. **Rescission and Damages:** The principal may also rescind any contract made on his behalf by the agent without authority or in breach of his duty and this may include claims for damages.

3. **Action for Account:** The principal may take an action to compel the agent to render an account for all his dealings on his behalf, in respect of their agency relationship. This may also include an account for all money or property of the principal in his possession.

4. **Action in Tort:** The principal may in addition sue the agent for conversion where the latter has received property on his behalf and has misappropriated or misused it. He may also institute an action for negligence where such is in contravention of the agency agreement.

5. **Private Prosecution:** The principal may be entitled to and may take out private summons against the agent where the latter's conduct, act or omission is criminal.

SELF ASSESSMENT EXERCISE 1

Enumerate and explain the various remedies available to a principal in an agency relationship.

3.2 Remedies Available to the Agent

Where the agency relationship is established by contract and the principal commits a breach of a term of his agency contract, the agent has most of the remedies ordinarily available to a contracting party under the general law of contract.

The law may imply certain remedies from the facts and circumstances of a particular agency case in some cases. Generally, in a case of a breach of an agency contract or a term thereof. Both the principal and the agent are entitled to and may claim one or more of the following remedies:

1. **Damages:** The agent may sue the principal to recover any loss or injury he may have suffered as a result of the principal's failure to perform any of his duties under the agency arrangement. This may include his right to indemnity or re-imbursement and damages unless the parties agreed otherwise or the agent has waived or otherwise lost his right to sue.

2. **Right of Set-Off:** Whenever the principal institutes an action in a court of law against the agent, the latter may claim a right of set-

off or counter-claim of engagement due to him from the principal by way of remuneration, indemnity or re-imbursement. This he must specifically do in his defense to the claims by the principal.

3. **Right of Lien:** The agent also has a right of lien on the property, goods or chattels of his principal in his lawful possession or custody in respect of and up to the amount of his claim for remuneration, losses, liabilities and expanses incurred lawfully and for advances made in favour of the principal. This is however subject to any agreement between the parties. The law recognizes only two types of lien; the general and particular lien.

4. **General Lien:** This enables the agent of retain his principal's property, chattel, or goods until any sum due to him from the principal is paid.

5. **Particular Lien:** This only enables the agent to retain such property, chattel or goods pending payment of any sums due in respect of that property, chattel or goods.

6. **Right of Stoppage in Transitu:** Where the agent stands towards his principal in the position of an unpaid seller of goods, he may exercise this right against the goods of his principal.

This will arise where he bought the goods for his principal with his own money or otherwise incurs a personal liability to the seller for the price.

7. Other Remedies

a) The agent may demand an accounting by the principal where there is reciprocal indebtedness by the parties to each other.

b) The agent may be entitled to withhold further performance of the terms of his agency where there has been a continuing breach by the principal.

c) Where the agent becomes possessed of property, goods or chattels or money to which conflicting claims have been made by the principal and a third party, he may claim relief by way of inter-pleader summons.

SELF ASSESSMENT EXERCISE 2

Discuss the various remedies available to an agent against his principal where there is a breach of agency agreement by the principal.

4.0 CONCLUSION

Where there are rights, remedies usually follow. Therefore, it is right to state here that a remedy follows a breach. The available remedies, to both parties under an agency situation have been well explained in this unit. It is expected that learners would have comprehended the available remedies in cases of breach.

5.0 SUMMARY

The remedies available to both the principal and an agent under an agency agreement, as stated, are easy to understand and learners are expected to engage in further readings for judicial authorities on these issues.

6.0 TUTOR-MARKED ASSIGNMENT

The general rule that Remedies follow breach is applicable in an agency agreement. Do you agree?

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). "*Nigeria Commercial Law: Agency.*" Jos, Nigeria: FAB Educational Books.

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MODULE 6

UNIT 1 TERMINATION OF AGENCY BY ACTS OF THE PARTIES

CONTENTS

1.0 INTRODUCTION

Generally, under the law of contract which by extension applies to commercial transactions, parties to an agreement usually state the modes by which their contractual relationship may come to an end. Failure of any of the parties to adopt any of the modes stated under the contract may actuate the other contracting party to sue for damages. This rule is also applicable to agency contract.

2.0 OBJECTIVES

The ob jectives of this unit is to highlight and state the general modes by which an agency agreement is terminated by the parties as provided in their agreement, provided there is one and also in the event of absence of such express agreement. This is to enable the learners to know that an action for breach of contract will lie at the suit of the perceived innocent party.

3.0 MAIN CONTENT

Subject to the operation of the principle of irrevocable authority, an agency relationship may be terminated by an act of the principal or and the agent. Such an act may be an agreement between the two parties or a

unilateral act of either of them. A unilateral act of the principal terminating his relationship with his agent is referred to as revocation and that of the agent with the same effect is a remuneration. These three aspects of termination require further elucidation for better assimilation of their nature, effect and significance.

3.1 Agreement between Principal and Agent

The general nature of relationship of principal and agent is primarily consensual. It is generally considered as good sense to allow the parties the freedom to be able to terminate their relationship when it is no longer beneficial to them or fulfilling their purpose.

This freedom to terminate an agency relationship accruing to the two principal parties exists irrespective of the previous or original agreement by which the agency relationship was established or in any subsequent constituted agreement.

In ***Esso West African INC. V Alli (Supra)*** an agency agreement provided for termination of the relationship at the end of six months or thereafter by one month's notice. An Ibadan High Court held that the agency relationship constituted by that agreement could be terminated by either party at the end of six months without notice.

SELF ASSESSMENT EXERCISE 1

The agreement by parties to terminate their agency relationship collectively at the happening of a particular event is unchallengeable. Do you agree?

3.2 Revocation by Principal

An agency relationship is generally presumed to have been created, formed or established for the benefit of the principal. It therefore follows that he is generally also free at any time to revoke the agency or any authority granted to the agent when he considers that the object or purpose is no longer attainable or when that benefit is no longer accruing to him.

Such revocation may constitute a breach for which an action may lie. While a revocation may be valid and effective and the authority granted to an agent terminated, the principal may also be liable in damages to the agent or a third party who has dealt with the agent for any loss, injury or damage sustained as a result of such revocation.

Inspite of this general rule, a revocation is subject to the principle of irrevocable authority and the giving of reasonable notice.

See ***Alexander Logios V Att. General of Nigeria (1938)4 W.A.C.A. 163.***

Generally, no formality is required in respect of mode of revocation of an agency relationship. It is effective if the principal informs the agent or the third party who may be affected as a result, personally or if the y independently learn of the event which revokes the agent's authority.

It may also be effected orally or simply by the principal intervening during the course of any negotiation by the agent and inferring the parties concerned.

Where the agent is appointed via a written authority or a deed, any revocation by the principal is required to be recorded in like manner to be valid and effectual.

Revocation may be implied or inferred where the principal has withdrawn all necessary facilities originally provided to the agent for the proper execution of his agency or such facilities as will render the effectual operation of the agency untenable.

SELF ASSESSM ENT EXERCISE 3

The right of revocation of agency by the principal is exercisable without regard to the rights of the agent and third parties. Do you agree?

3.3 Renunciation by Agent

Renunciation occurs where the agent unilaterally terminates his relationship with his principal. This right is implied in every agenc y relationship if the agent so wishes except in cases of irrevocable authority. The agent is contractually bound to perform his agency and any renun ciation by him may continue a breach of contract which may expose him to liabilities in damages. This would however not prevent the renunciation from being valid and effective to terminate his authority and duties as an agent.

Renunciation by the agent is also subject to the giving of notice by the agent to the principal. However, the agent may renounce his authority without notice where the principal is equally guilty of misconduct or breach of duty to the agent.

Modes of Renunciation

1) by a written instrument
2) by words of mouth.
3) by simply refusing to act.
4) by an unequivocal abandonment of the object of the agency.

Where the renunciation is wrongful, the agent may be liable to the principal in damages for injury sustained by the principal consequent upon the renunciation.

Consequences of Renunciation

The agent may forfeit his right to receive commission or renunciation or compensation for services rendered but not for those due prior to the renunciation. In other words, he may be entitled to a reasonable value of such services or a reasonable proportion of any agreed commission or remuneration after taking into consideration any damage or injury sustained by the principal as a result of the agent's action.

SELF ASSESSMENT EXERCISE 3

This right to renunciate an agency contract by an agent is exercisable without any consequences – Discuss.

4.0 CONCLUSION

Termination of agency by acts of the parties has been discussed under the foregoing heads. The consequential effect of failure to comply with the laid down procedures as contained in the agency agreement by either of the parties has also been discussed the contractual procedure is followed.

5.0 SUMMARY

The right of the parties to put an end to their relationship may be express or implied as shown above and learners are expected to have learnt and be able to distinguish between the various options available under this head.

6.0 TUTOR-MARKED ASSIGNMENT

Differentiate the following.

a) Termination by Agreement of the parties
b) revocation by the principal
c) renunciation by the Agent

7.0 REFERENCES/FURTHER REASINGS

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UNIT 2 TERMINATION BY OPERATION OF LAW

CONTENTS

1.0 INTRODUCTION

Termination of Agency by operation of law occurs where any of the points to be discussed under the main content of this unit occurs. When such is the case the agency relationship automatically comes to an end. This is the focus of this unit.

2.0 OBJECTIVES

The main objective of this unit is to expose the learners to the situation that arises where, in exceptional cases, the parties to an agency relationship will be relieved of their obligations under the agency agreement. Usually, this situation puts an end to their relationship except where prior claims are yet to be made.

3.0 MAIN CONTENT

The main content of this unit is six in number each with its peculiarities in relation to termination of agency by operation of law.

3.1 By Performance

In cases where an agent is given an authority to accomplish or achieve a specific result reason demands that the authority terminates upon the object of the power being accomplished.

Generally, there are some or difficulties that can be identified with regard to the practical operation of this method of agency determination.

Firstly, there may be some initially difficulty of ascertaining the point in time when an agent's authority ceased or has been executed. An example is the authority of an estate agent.

Secondly, it may be possible for the express or implied authority of an agent to have ceased while his apparent or ostensible authority continues. In this situation, an agent may validly assert his apparent or ostensible authority when his express or implied authority has been fully executed. In such circumstances, the agency under which he was exercising express or implied authority might have terminated. In its place, an agency of estoppel might have been created or subsisting. Such apparent or ostensible authority or agency by estoppel would cease or terminate, as the case may be, whether by performance, revocation or renunciation in the ordinary way.

SELF ASSESSMENT EXERCISE 1

Termination of agency by performance becomes effective when the purpose of the agency has been achieved. Do you agree?

3.2 By Effluxtion of Time

It is also generally expected that the authority of an agent which was conferred on him for a specific period of time terminates or ceases automatically upon the expiration of that period of time. The agency relationship terminates at the expiration of such period of time irrespective of whether the task or object contemplated by its creation or formation has been accomplished or not.

Where no time is specified or agreed upon by the parties in their agency arrangement, a reasonable time is implied by the parties and the authority terminates at the expiration of such reasonable time or period.

What constitutes a reasonable time or period depends upon the facts and the surrounding circumstances of the particular case.

The period of time may also be fixed or agreed to by the parties to the agency arrangement or implied into their relationship by custom or usage of the particular trade, business or profession to which the agent belongs or profession to which the agent belongs or in which he or she operates. It can also be presumed from the nature and circumstances of the agency itself or the authority given or granted to the agent.

SELF ASSESSMENT EXERCISE 2

Explain the term "effluxion of time".

3.3 By Frustration

Where an agency agreement exists between the principal and the agent, it may be terminated by the operation of the doctrine of frustration. This doctrine operates in situations when two people enter into a contract of agency which is dependent for the possibility of its performance on the continued existence or availability of a specific thing or matter. When the subject matter comes to an end by reason of circumstances beyond the control of the parties, that contract of agency is regarded as prima facie dissolved.

An agency relationship will automatically terminate if its object or subject matter or the authority of the agent;

a) becomes unlawful or illegal.
b) ceases to exist by reason of government expropriation or compulsory acquisition or requisition.
c) the principal or agent becomes an alien enemy.
d) impossible to be executed or to be executed strictly in accordance with the arrangement between the principal and the agent.

SELF ASSESSMENT EXERCISE 3

The operation of the doctrine of frustration in relation to agency relationship is absolute. Do you agree?

3.4 By Death of Principal or Agent

Death is inevitable to every living being ordinarily. Save in cases of irrevocable authority, the death of a principal or agent terminates the agency relationship unless there is an express or implied stipulation to the contrary in their arrangement. In ***Phillips V Jones (1888)4 T.L.R. 401,*** It was held that the authority of a broker, express or implied, terminated on the death of the principal.

The effect of the death of the principal is that it deprives the agent of that person for whom or on behalf of whom he should act while the death of the agent deprives the principal of the person through whom h e should act.

Where the principal or agent is a limited liability company, an agency relationship to which they are parties terminates upon the dissolution of the company. In ***Nzom & Anor V Jinadu (1987)1 N.W.L.R. 533,*** the Supreme Court held that a dead person ceases to have legal personality from the date of his death and as such can neither sue nor be sued either personally or in representative capacity.

In essence, termination of agency relationship by death of the principal or agent is automatic. It does not depend on the principal or agent and indeed on any other party involved, acquiring knowledge or receiving notices of such death of the deceased party.

Where the death takes the form of a dissolution of a limited liability company, the principal or agent's knowledge of the fact is necessary to effect the termination. Any transaction by the agent after the termination by the death of the principal is not binding on the latter, his personal representation or his estate.

SELF ASSESSMENT EXERCISE 4

Termination of agency agreement by the death of either the principal or agent is absolute. Discuss.

3.5 By Insanity of Principal or Agent

One of the basic ingredients of a valid contract is that the parties to such an agreement must be of sound mind. In an agency situation, this rule is also applicable and where the insanity or mental incapacity of the principal or the agent occurs, the relationship is terminated except in cases of irrevocable authority.

In ***Drew V Nunn (1879)4 A.B. 661,*** the defendant had given his wife authority to deal with the plaintiff, who was a trades man, and had held her out as his agent and as entitled to pledge his credit. The defendant became insane shortly afterwards and while his insanity lasted, his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods, the plaintiff was not aware that the defendant had become insane. The defendant afterwards recovered and then refused to pay for the goods supplied to his wife by the plaintiff. It was held that the defendant was liable for the price of the goods supplied to his wife during the period of his insanity.

This decision would have been otherwise but for the fact that there appears to be in existence the wife's agency of necessity which apparently was not determined by the supervising insanity of the husband.

The incidence of knowledge or notice of insanity or mental incapacity of a party appears to be apparent in various judicial decisions. In Drew V Nunn (Supra) Brett, L. J. opined as follows:

> *"…It seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right*

> *to enter into a contract with him, and the principal, though a lunatic is bound so that he cannot repudiate the contract assumed to be made upon himself."*

An authority may be given to an agent which has been determined without his knowledge by insanity of the principal. If the agent in the principal, and subsequently, the agent in the belief that he was acting in pursuance thereof made a contract or transacted some business with another representing that in so doing, he was acting on behalf of the principal; the agent is liable as having impliedly warranted the existence of the authority which he assumed to exercise to that other person, in respect of damages occasioned to him by reason of the non-existence of that authority. In **Younge V Tonybee** (1910)1 K.B. 215 it was held that a solicitor was liable for breach of warranty of authority when without knowledge he continued with the litigation for a client, who had in the meantime become insane.

SELF ASSESSMENT EXERCISE 5

Knowledge of insanity is an essential ingredient to determine the existence or otherwise of agency. Discuss.

3.6 By Bankruptcy of Principal or Agent

The agency relationship of principal and agent ordinarily terminates at the bankruptcy of either the principal or agent. Where the principal becomes bankrupt his estate by law falls to be administered by his trustee in bankruptcy.

The effect of this is that the authority of an agent appointed by him automatically terminates for a different principal is created in the trustee in bankruptcy. The new principal may however re-appoint the agent but until he does so the authority of the agent in respect of the original principal is assumed to have lapse.

Where the new principal re-appoints the agent, a new agency relationship is thereby constituted in which the parties are the trustees in bankruptcy and the original agent.

4.0 CONCLUSION

Generally, termination of agency by operation of law depends on the various circumstances of each or any given agency relationship. In the absence of notable exceptions, the happening of any of the above noted situations automatically puts an end to the agency relationship between

the principal and the agent. This is one of the basic facts the learners must bear and always advert his mind to while treating this issue.

5.0 SUMMARY

Learners are expected to be able to differentiate the various differences inherent in the foregoing factors and situations that put an abrupt end to a subsisting agency relationship.

6.0 TUTOR-MARKED ASSIGNMENT

Contract of agency is determined by operation of law. Discuss.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

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UNIT 3 INCIDENCE OF TERMINATION OF AGENCY

CONTENTS

1.0 INTRODUCTION

Apart from the generally recognized situation by which an agency relationship could be brought to an end, there exists a particular situation, in the doctrine of irrevocable authority which either party to the agency relationsh ip must strictly observe where it exists in the agency agreement. Notice of termination and effect of termination are the other incidents of termination of an agency agreement.

2.0 OBJECTIVES

The contents of this unit shall include the doctrine of irrevocable authority, notice of termination and the effect of termination.

3.0 MAIN CONTENT

The three major incidents of termination of agency to be discussed under this unit have so well be discussed sparingly in the body of this work. Hence, minimal reference shall be made to irrelevant facts.

3.1 Doctrine of Irrevocable Authority

The general rule that an agency agreement could be brought to an abrupt end by an agreement of the parties, by a unilateral action of any of the parties or by operation of the law is not absolute even with the identified exceptions.

There exists certain situations in which the authority of the agent cannot effectively be revoked or renounced at will by the principal or the agent, as the case may be, nor can the relationship be terminated by death, insanity or bankruptcy of either the principal or the agent. These involve

cases in which the agency relationship was created for the benefits of either the agent or a third party rather than for the principal. In such situations, the authority of the agent is considered irrevocable.

To be irrevocable, however, the power or authority must:

a) be created by deed and for a valuable consideration
b) be granted in order to effect a security or protect the title or interest of the agent or some third party.

In the same vein, a power of attorney expressed to be irrevocable and either given for a valuable consideration or for a period not exceeding one year in favour of or purchase for value is irrevocable.

The most common form of irrevocable authority is one coupled with an interest in the subject matter. The mere existence of a right to earn a commission is not an interest. In First V Firth (1906) A.C. 254, It was held that the ordinary case of an agent emp loyed for pecuniary reward in the share of a fixed salary without more, though confers upon him a benefit is not irrevocable.

The reason given was that the appointment of a salary contained no reference to any special interest in the subject matter of the agency and was not intended to be subservient or dependent on the continuance of such interest.

The fact that the agent subsequently acquires an interest in the subject matter of the agency also does not thereby render his authority irrevocable. To be irrevocable, the authority of an agent must have been conferred as a protection or security for the agent's interest.

Where an agent has incurred personal loss or liability such that the principal is obliged to indemnify him in respect of such loss or liability, his authority cannot be revoked by the principal solely to avoid his obligation to indemnity the agent.

SELF ASSESSM ENT EXERCISE 1

Discuss the Doctrine of Irrevocable Authority in relation to termination of agency agreement.

3.2 Notice of Termination

This is another incidence of termination of agency and in fact a pre-requisite in some cases.

The general rule as to notice of termination of agency relationship is that an agent's authority continues until any purported termination is communicated to him.

For a notice under this rule to be valid and effective in law, it must be reasonable notice which to all intent and purposes depends on the facts of the particular case and the surrounding circumstances.

In **ALEXANDER LOGIOS V ATT. GENERAL OF NIGERIA (SUPRA)** a Solicitor was appointed by the appellant to represent him in certain negotiations with the Government of Nigeria. The West African Court of Appeal held that the respondent was entitled to assume that the solicitor was still the agent of the appellant in as much as no step was taken to inform the government that the solicitor had exceeded his authority or that his agency had been revoked and warning them not to deal with him any longer.

In general, no form of notice is required. Therefore, notice is equall y effective if the principal informs the agent or the third party directly or if they independently learn of the event which terminates the agent's authority.

Notice may be given orally or in writing or by an overt act or omission, except that if the authority of the agent was ordinarily given in writing notice of termination should invariably be given in writing.

On the other hand, where the written authorization indicates specific conditions upon which the agent's authority will terminate and the agent or third party learns that such conditions have occurred no further notice is required.

If the principal gives the required notice or if the agent or third party independently learns of the termination, the principal incurs no further liability if the agent continues to act for him.

SELF ASSESSM ENT EXERCISE 2

Termination of agency agreement with notice is required to follow a particular form oral or written. Do you agree?

3.3 Effect of Termination

The third incident of termination of an agency agreement is the consequential effect of that termination.

Where the agency is revoked by the principal, the agent's act for the principal does not terminate until notice of revocation is given or received by the agent.

Upon the receipt of the notice, the agent ceases to have authority to bind the principal but without prejudice to any rights and liabilities subsisting or accruing prior to the giving or receipt of the notice.

The same applies in other instances where notice of termination might be required as in cases of insanity, bankruptcy or dissolution of a limited liability company.

In instances where notice of termination is not required, e.g. where the act of termination is involuntary, as in the case of death of a party, or frustration or where termination is effected by performance, effluxtion of time of the authority of the agent ceases automaticall y. The rights and liabilities of the principal, the agent and any affected third party are discharged forthwith except as they stood at the time of such termination.

In case of death or bankruptcy of the principal, his legal representative or trustee in bankruptcy, as the case may be, could elect to continue the agency or to ratify particular transactions effected by the agent. Where if the agent dies or becomes bankrupt, the principal cannot compel the agent's legal representative or trustee in bankruptcy, as the case may be, to perform the services rendered by the agent instead.

SELF ASSESSM ENT EXERCISE 3

Examine the various effects of termination of an agency agreement.

4.0 CONCLUSION

Doctrine of Irrevocable Authority, Notice of Termination and Effect of Termination are the three incidents of termination of agency which the learner must have in mind. Even at the time of entering into an agency agreement, parties do have these factors at the back of their minds so that rights and liabilities could be easily ascertained.

5.0 SUMMARY

Doctrine of Irrevocable Authority, Notice of termination and Effect of Termination are fundamental in any agency relationship. It must always be borne in mind that as in all other relationships, agency agreements also come to an end.

6.0 TUTOR-MARKED ASSIGNMENT

Doctrine of irrevocable authority, notice of termination and effect of termination are detachable and independent from the concept of termination of agency as a whole. Discuss.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

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