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The Importance of Law of Agency in Commercial Sector

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Abstract:
With the effects of globalisation and the speed at which modern day business is done, it is almost impossible for individuals and corporations to be physically present for all business decisions taken, which may affect their interests. In such situations where they are unavailable, businesses are carried on with the use of agents, who proceed to act with authority, on their behalf. Therefore, basic knowledge of the principle of agency, manner of creating and establishing a relationship of agency and the effects of such a relationship is vital for those involved in the commercial sector, these are the discussions in this paper.

Keywords: *Agency, Agent, Commercial Sector, Principal*

1. Introduction

Agency is 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 who consents to represent the former or so to act. The one who is to be represented or on whose behalf the act is to be done is called the principal and the one who is to represent or act is called the agent.[1] 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.

The role of agents in today's business world cannot be over emphasized. This is due to several reasons as enumerated below:

1.1. Physical Necessity

A business world without agent is hard to imagine. By using agents, a principal can conduct multiple business operations simultaneously in various locations.

1.2. It allows Use of Experts

Certain agents are required for their expert knowledge which the principal may not have to assist in business operations.

1.3. Emergency Situation

In certain emergency situation such as where transportation is delayed and perishable goods begin to go bad, or where goods are left uncollected, for a long period either due to illness or death of proprietor or break out of war the person in possession of the goods, may if necessary, and if unable to reach out to the principal sell or dispose of the goods as an agent of necessity. In Prager v. Blatspiel[2] where it was held that "a ship master who finds it practically difficult to contact the owners of perishable goods that cannot be delivered at the destination in good condition is entitled to sell the goods for what they can fetch.

1.4. Need for Secrecy

In certain situations, the need arise to keep the name of the principal secret. In such a case, an agent may be employed who either will not disclose that he is acting as agent or disclose his principal's name.

[1] Mikano International Limited v. Ehumadu (2013) All FWLR (Pt. 667) 658, held 1. Global Soap and Detergent Ind. & 3 Ors v. Bello & Anor (2013) All FWLR (Pt. 671) 1594, held 2.
[2] (1922) 38 TLR. 562

2. Classification of Agents

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.

2.1. 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.

2.2. 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[3]**.** 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.

2.3. 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 would be when he is getting in the capacity of an agent.

In Oppenhiemer v. Attenborough[4] a distinction was drawn 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.

2.4. 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,*[5] 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* [6] 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.

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[3] (1872) AC 395
[4] (1708) 1 KB 221
[5] (1818)2 B& AID 137
[6] (1884)25 CH D 31

2.5. 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.

2.6. 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 agency 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 the agent and the principal from which such arrangement can be inferred, the agent is not in del credere agent.

3. Capacity of the Principal

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 as shall be discussed under this head.

However, some basic factors must be in existence before an agency relationship can be established. The general principle of law in this regard is that the capacity 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[7] provides thus:

Any contract or other transactions purporting to be entered into by the company or by any person on behalf 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.

3.1. Infants

Generally, an infant cannot validly appoint another person, whether an adult or an infant to be or act as his agent except in the circumstances in which he can act personally or for himself. In Shepherd v. Cartwright,[8] it was held that an infant cannot be a principal to appoint an agent because that appointment is void as he was more likely to appoint a wrong person. 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.

In *G. v. G*,[9] the court held that a minor could appoint an agent to pay maintenance to support his legitimate child since the payment was lawful and it was something he could be compelled to do.

3.2. Persons of unsound mind

As in the case of an infant, a person of unsound mind 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.

[7] Cap C 20, Laws of the Federation of Nigeria 2010
[8] (1953) 2 All ER 608
[9] (1970) 3 All ER 456

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 2010 and must have fulfilled the requirements of the Act. In that regard, section 63, (1) of CAMA 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.

4. Capacity of an Agent

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 the employment as agents of infants, drunkards, mentally ill persons, aliens and others who may be under natural or legal disability. 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.

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. This set of professionals as agents are discussed below.

4.1. 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) 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.

4.2. 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 may 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.

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

(a) Knowingly 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.

4.3. Auctioneers
Generally, an auctioneer is a person who conducts a sale by 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 situated. 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.

5. Creation of an Agency
Generally, no particular formalities are required for the creation of agency relationship. Consequently, the principal-agent relationship may be established by words of mouth, 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. Thus in Abina & Ors v. Farhat,[10] the court declared a deed invalid because it was signed by an agent who was appointed on mere oral authority.[11]
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 the case of Rosenje v. Bakare,[12] 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,[13] the agent's appointment need necessarily be in writing. The section which is the same as section 4 of the English Statute of Frauds[14] 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.

5.1. 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.[15] 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[16] 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.
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 be some positive act from which such inference can be drawn.

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[10] (1988) 14 NLR 17
[11] Adeagbo Ode v. The Registered Trustees of Ibadan (1966) 1 WLR 287
[12] (1973) 5 SC 131
[13] of 1961
[14] of 1677
[15] Bayero v. Mainasara & Sons Ltd. (2006) 5 NWLR (Pt. 982) 391, 8.
[16] (1992) 3 NWLR 598

5.2. 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.[17] 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,[18] 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,[19] 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[20]**.** 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 behalf 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.

5.3. Agency by Ratification

Ratification means a confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done.[21]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. Ratification has been described as equivalent to antecedent authority 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[22] 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 essentially in the same position as an undisclosed principal.

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[17] BFI Group Corp. v. Bureau of Public Enterprises (2013) All FWLR (Pt. 676) 444, held 14

[18] (1972) 5 SC 40

[19] Supra

[20] (1938) 4 WACA 162

[21] Mikano International Limited v. Ehumadu (2013) All FWLR (Pt. 667) 658, held 4.

[22] (1843) 6 MAN & G 236

5.4. Agency of Necessity

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. 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.

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. Emmanuel's property must be in Victor'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. Victor is unable to obtain instructions from the owner.
3. An emergency threatens the property. It is not sufficient for Victor show that Emmanuel's property is causing Victor hardship or inconvenience.
4. Victor takes action in good faith and that action is commercially reasonable, proportionate and in the interest of Emmanuel.[23]

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.

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[24] 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[25] 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.

6. Relationship with Third Parties

6.1. Disclosed Principal

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.

6.1.1. Contracts by Agents

A contract entered by an agent acting in the scope of his authority for a disclosed principal is, in law, the contract of the principal. The principal but not the agent, is the proper person to sue or be sued upon such contract.[26]

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.

[23] Sachs v. Miklos (1948) 2 KB 23; Prager v. Blastpiel, Stamp and Hsacock Ltd (1924) 1 KB 566.
[24] (1870) LR 6 CP.38
[25] (1970) NNLR. 31
[26] Global Soap and Detergent Ind. & 3 Ors v. Bello & Anor (2013) All FWLR (Pt. 671) 1594, held 1. Bayero v. Mainasa and Sons (2006) 8 NWLR (Pt. 982) 391

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.[27]

6.1.2. 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.

6.1.3. Liability of an Agent where his Principal is Disclosed

An agent acting on behalf of a known and disclosed principal bears no liability.[28] In such cases he negatives any personal responsibility by a proper execution of the contract. Only if the agent carelessly executes a written agreement may he find himself bound by the contract. An agent who signs a negotiable instrument for his principal, but fails to indicate clearly the principal's existence and his relation to the instrument, is personally liable.
In recent times, two major landmark cases have considered the liability of an agent where his principal is disclosed under Nigerian commercial law.[29]
In Samuel Osigwe v. Privatization Share Purchase Loan Scheme Management Consortium Ltd & Ors[30] Osigwe had filed a class action before the Investment and Securities Tribunal[31] claiming damages from the fact that the Privatization Share Purchase Loan Scheme Management Consortium Ltd[32] did not file appropriate statements with the Securities and Exchange Commission[33] and that, as a result, the Consortium's share acquisition scheme did not proceed as was promised with the investors, including Osigwe suffering damages. The Consortium filed a Notice of Preliminary Objection to the suit, claiming that the Consortium was an agent of a disclosed principal, i.e., that the Consortium represented the Nigerian Bureau of Public Enterprises[34]. In other words, the sole proper defendant—the BPE, was not a party to the suit, making the suit incompetent.
The IST sustained the objection, and Osigwe appealed all the way to the Supreme Court which considered a plethora of common law decisions of the non-liability, and reiterated that the agent of a disclosed principal can not be liable in so far as the principal was disclosed. According to Nigerian Supreme Court Judge, Musdapher, JSC who gave the lead judgment:
Again, it is clear from the appellant's pleading that each of the respondents herein are merely agents of the BPE solely appointed for the registration of would be purchasers of the shares of the public companies to be privatized. The respondents also by the pleading of the appellant, are unmistakably agents of a revealed principal and as agents, they cannot be liable under all the circumstance of this case. See Okafor v. Ezenwa[35]... An agent acting on behalf of a known and disclosed principal incurs no personal liability. See Niger Progress case[36]".

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[27] Watteau v. Fenwick (1893)1 QBD 346
[28] Olaghere v. P.P. & P. (Nig) Ltd (2013)All FWLR (Pt. 661) 1593, held 2.
[29] Samuel Osigwe v. Privatization Share Purchase Loan Scheme Management Consortium Ltd & Ors (2009) 3 NWLR (Pt. 1128) 378 and Ukpanah v. Ayaya, (2011) 1 NWLR (Pt 1227) 61
[30] Supra
[31] Herein after referred to as "the IST"
[32] Herein after referred to as "the Consortium"
[33] Herein after referred to as "SEC"
[34] Herein after referred to as "BPE"
[35] Supra
[36] Supra

Next came the Nigerian Court of Appeal Decision in *Ukpanah v. Ayaya* [37]. In Ukpanah, the facts are straight forward, Ukpanah took a long lease on a piece of land from Ndidem Edim Imona, the Ntoe of Big Qua who was a prominent traditional ruler in Calabar, in Cross River State. After lease agreement was executed, Ukpanah took possession. 30 years later, the Big Qua Community attempted to terminate the lease. 2 years later, i.e., in 2005, acting furtherance to the lease termination, the Big Qua Community engaged Mr. Ayaya, a licensed surveyor, to carry out a survey of the land. Ayaya was later paid off for his services by the Big Qua community. For some reasons unknown, Ukpanah proceeded against Ayaya for damages for trespass, when it is clear that Ayaya never claimed to be an owner of the land. The suit was also dismissed as lacking merit because Ayaya was an agent of a disclosed principal.

6.1.4. When Agent is Bound on Sealed Instruments by the Form of His Execution

Finally, it is a long established rule that only those who are named or described in and sign a sealed instrument are bound thereon. If the agent signs his own name only, though he describe himself as agent, he will be bound and the principal will not be bound. By the law of sealed instruments, only those can be sued thereon who are parties thereto. An agent may, by careless execution of a sealed instrument, bind himself when he intended only to bind his principal.

6.2. 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.

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.

7. Personal Liability of the Agent

If the agent acts within his authority in relation to his duties as agent, he will be free from any liability arising from the contract. The third party can neither enforce the rights nor impose liabilities under the transaction on the agent nor can the agent exercise either of those powers vi-a-vis the third party.

Where a party asserts that another has no authority to act as an agent, the burden rests on him to prove it. Where the agent holds himself out that he possesses authority when in fact he has none, the third party who deals with him on the basis of the assumed authority, may sue him for the implied breach of authority if the third party suffers any damage acting in reliance upon the purported authority.

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:

7.1. 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*[38] 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

[37] (2011) 1 NWLR (Pt. 1227) 61
[38] (1871) LR 6 CP 486

argument was rejected by the Court of Common Pleas which unanimously held that the plaintiff was entitled to sue the defendant on the contract.[39]

7.2. 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.

7.3. 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 may 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[40] 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.

7.4. Where the Principal is Unavowed

Where a person professes to contract as an agent and it is 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 principal 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.

7.5. 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 unequivocally show that he contracted as agent and did not undertake any personal responsibility.

In Gadd v. Houghton[41], 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 the intended to bind himself.[42]

7.6. 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,[43] 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.

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[39] West African Shipping Agency (Nig.) Ltd & Anor v. Kalla (1978) 3 SC 21. Jammal engineering (Nig.) Ltd. v. Nigeria Ports Authority & Ors CCHCJ/1/731.

[40] Supra

[41] (1876)1 Exq D 357

[42] West African Shipping Agency (Nig.) Ltd & Anor v. Alhaji Kala, Supra

[43] (1813)1 MB & S 573

7.7. 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*[44] 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 and/or if he signs in his own name.

7.8. 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.[45]

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 thereby, 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.

8. Torts Committed by Agents

Generally, 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.

9. 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[46] 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.[47]

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. [48]

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[44] I.e. per procuration
[45] Starkey v. Bank of England (1903) AC 114; Mcneal v. Hawes (1923) 2 KB 539.
[46] (1968) NCLR 194
[47] Osigwe v. PS PLS Management Consortium Ltd. & Ors (2009) 37 (Pt. 2) NSCQR 841
[48] Navarro v. Moregrand Ltd. & Anor (1951)2 T.L.R. 674 ; R. O. Iyere v. Bendel Feed and Floor Mill Ltd (2009) 37 NSCQR 290.

The principal will also be held liable in the following circumstances:
a) Where he authorized the wrongful acts.[49]
b) Where the principal ratified the wrongful acts.[50]
c) Where there is a misrepresentation by agent.[51]

10. 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.[52] 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.

10.1. 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.[53]
c) If the agent is personally immuned from suit on the wrongful act or omission complained of even though the principal may remain liable.

10.2. Who May Be Sued

The third party may 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[54] 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.

11. 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.

11.1. 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 personally 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[55] of the particular crime or offence at the time of its commission or omission and
c) Performed the actus reus.[56]
In Mandillas and Caraberis & Anor v. Inspector General of Police[57] 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.

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[49] Pan Brothers Ltd. v. Landed Property Ltd & Anor (1982)2 All NLR. 22; Adesuloye v. Martin & Anor (1978)10-12 CCHCJ 345.
[50] Inoma Russel v. Niger Construcion Coy (1987)3 NWLR 298.
[51] Imersel Chemical Co. Ltd. v. National Bank of Nigeria (1974) 4 ECSLR. 355.
[52] (1900)1 ChD 73
[53] E.g. innocent misrepresentation.
[54] of 1961
[55] i.e. the criminal intent
[56] i.e. perpetrated the act or omission constituting the particular offence or crime.
[57] (1958)3 FSC 20

11.2. Vicarious Responsibility of Principal

The general rule in common law is that the principal is not ordinarily 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 [58] 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.

12. Conclusion

Agency is an essential part of commercial law because most businesses are conducted 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. The law of Agency is very necessary because every day, in various parts of the world, there are persons acting for and on behalf of others, in different capacities and under different circumstances.

13. References

i. F.M.B. Reynolds (1985) Bowstead on Agency, 15th Edn., London: Sweet and Maxwell, 1985
ii. Kingsley Igweike (1993). “Nigeria Commercial Law: Agency.” Jos, Nigeria: FAB Educational Books.
iii. Walker, D.W. (1980). “The Oxford Companion to Law.” London: Butterworths.
iv. Friedman, G.H.L. (1984). Law of Agency, 7th Edition. London: Butterworths.
v. Powell, (1961). Law of Agency, 2nd Edition. London: Sweet and Maxwell.

[58] (1984) 3 WLR 437