“IT IS UNJUST TO FORCE A RELATIONSHIP OF AGENCY ON PARTIES WHO DO NOT WISH FOR SUCH A RELATIONSHIP TO ARISE. ACCORDINGLY, IN ORDER FOR A RELATIONSHIP OF AGENCY TO ARISE, THE CONSENT OF BOTH PARTIES SHOULD ALWAYS BE PRESENT.” AN EVALUATION OF THAT ASSERTION.

BY

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1.0: Introduction:

An Agency relationship is formed where one person is vested with the authority to enter into a legal relationship on behalf of the other. The two parties involved in this mutual relationship is the Principal and the Agent. The Principal is bound by the acts of the Agent and also takes the rights and obligations arising out of the relationship. The two basic ingredients of an Agency relationship is Authority and Consent. An Agent cannot act outside its authority or he would be personally liable. Also, it is unjust to force a relationship of Agency on the parties who do not wish for such a relationship to arise.

The paper seeks to examine the relationship of Agency in Commercial Law, the Origin of Agency law, as well as consent of Agency relationship between the parties and what can be done to establish a relationship between the parties involved, which automatically leads to the classification of Agents, types of Agency and the creation of Agency relationship. We will also look at Agency Relationship in Nigeria and the law governing Agency in United States.

2.0: Definition of Agency

Agency is a relationship arising out of the use of one person by another for the performance of certain tasks on his behalf. It is a situation where one person called the agent has an authority or capacity to create legal relations between a person called the principal and third parties. The relationship exists between the two persons because one of them has expressly or impliedly consented that the other should represent him or act on his behalf, and the other has similarly consented to represent the former as directed.[1]

In **Cotecna International Ltd vs. Churchgate Nigeria Ltd and Anor,**[2] the court stated that an agent is one who is authorized to act for or in place of another as a representative, and includes persons acting in the capacity of deputy, steward, rent collector or trustee. The court, however, cautioned that the status of a party under an agency contract depends on the intention of the parties.

The American restatement of Law[3] defines agency as "a fiduciary relation which result from the manifestation of consent by one person to another that shall act on his behalf and subject to his control and consent by the other so to act. The one for whom action is taken is the principal. The one who is to act is the agent".

The Black Law Dictionary[4] also defines "agency" as "a relation, created either by express or implied contractor or by law, whereby one party (called the principal or constituent) delegates the transaction

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[1]Publication of Association of Accountancy Bodies in West Africa (ABWA), Accounting Technicians Scheme West Africa (ATSWA), *Study Text for Business Law, Chapter 5 – Agency,* Third Edn, p. 64-65.
[2](2010) 44 NSCQR 641.
[3](jentatius Draft No. 2) (2003), ss1. 01.
[4]St. Henbal Minn West Publishing Co. (1910), 2nd edition.

of some lawful business or the authority to do certain acts for him or in relation to his rights or property, with more or less discretionary power, to another person (called the agent, attorney proxy or delegate) who undertakes to manage the affairs and render him an account thereof.

3.0: Origin of English Agency Law

One apparent forerunner of our law appears in the "Statute of the Staple" of 1353,[5] which limited a master's liability for a servant's torts to acts within the scope of employment. The statute deals primarily with commercial law, but the provision limiting liability does not apply only to merchants. Non-commercial agency relationships also existed. Estate management from medieval times, if not earlier, was performed by stewards, bailiffs, and reeves, who were responsible for holding the manor court in the lord's absence, for taking accounts from underlings, for managing and accounting for farm activity, and for overseeing laborers. The bailiff could bind the lord to a lease or alienation in fee of the lord's land, and the sheriff could attach the bailiff if he could not attach the lord. Although the authority of the bailiff and other feudal agents had fairly clear limits, their powers illustrate that the law recognized, even in medieval times, that a man could be bound by and therefore liable for, the acts of another man.[6]

The relationship between bailiff and lord appears to have been connected to the bailiff's custody of the lord's property. Borough customs from the twelfth century describe a rule that a principal's goods in the hands of an agent are not subject to seizure for the agent's wrong.[7] This rule might be read to indicate a rejection of vicarious liability. Alternatively, it may reflect the property-based nature of the relationship. Factors, for example, held title to the goods they held by virtue of their status as factors.[8] Basically, the treatment of the history of Agency in English Common Law has not been fully explored due to its complexity.

4.0: The Nature of Agency Relationship

The principal sources of agency law today are the Second and Third Restatements of Agency. The American Law Institute—an association of lawyers, academics, and judges— authored the Restatements of Agency and, like all Restatements, their text and comments represent an effort to capture the law as developed by the courts. The Second Restatement of Agency was published in 1958, and the Third Restatement of Agency was published in 2006. Although the Restatements are not binding authorities, they are very influential and persuasive to many courts.

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[5]Statute of Staple, 1353, 27 Edw. 3, c. 19 (Eng.).

[6]Paula J. Dalley, *A Theory of Agency Law,* Professor of Law, Oklahoma City University, University of Pittsburgh Law Review, Vol. 72, p 521.

[7]See 1 Borough Customs 221–22, (Mary Bateson ed., Selden Society 18, 1904).

[8]*ibid* at footnote 6 - this legal rule was not changed until 1733, and the modern law of agency only began to develop thereafter.

Because of the relatively recent publication of the Third Restatement, most of the existing case law deals with the Second Restatement. Nevertheless, the basic principles of the Second and Third Restatements are largely the same.

The maxim, "Qui facit per alum, facit per se" which means, "he who acts by another acts by himself", states the bases of the law of agency. Therefore, where a person contracts as agent for a principal, the contract is that of the principal, and not that of the agent; and prima facie, at common law the only person who can be sued is the principal.[9] This was the decision of the court which was delivered by Wright J.[10] Agency exists where one person (the principal) consents that another (the agent) shall act on P's behalf and subject to P's control; and A consents so to act.

5.0: Characteristics of Agency

Agency relationship possesses six essential characters:[11]

1. Agency creates two types of relationships; a bipartite relationship – between the Principal and the Agent, and a tripartite relationship – between the Principal, the Agent and the Third party. In other words, the relationships are: the relationship between the Principal and Agent, the relationship between the Agent and Third Party, and the relationship between the Principal and Third Party.

2. The law of Agency applies in situations when the agent's action on behalf of the principal affects the Principal's legal position only. The law of Agency has no relevance to social or other non-legal obligations.

3. Agency relationship arises in circumstances where it is considered in law to arise. It is the effect the law attaches to it that matters.

4. Consent of both the principal and the agent is necessary to form an agency relationship. More specifically, both the principal and the agent must consent to the agent acting on the principal's behalf and subject to the principal's control. Thus, agency is a consensual relationship in which one person agrees to act for the benefit of, and subject to the control of, another person. Agency relationship is not always consensual. Usually, there is an express or implied agreement or consent on the part of the Principal and Agent, but it is not always needed or necessary. Agency of necessity and Agency by estoppel are examples.

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[9]Miriam Elisha Karu, *An Appraisal of the Concept and Scope of Agency Relationship Under the Nigerian Commercial Law,* Department of Commercial Law, Ahmadu Bello University, Zaria, April, 2015, p 17.

[10]Montgomerie vs. United Kingdom Mutual Steamship Association (1891) 1 Q.B 370.

[11]Martin Chukwuka Okany, Nigerian Commercial Law – Law of Agency, Africana First Publishers PLC, First Published 1992, Revised 2009, p 450-451.

5. The agent represents the principal in an Agency relationship. Provided the agent acts lawfully and within his authority, the actions of the agent in relation to third parties are ascribed to the Principal.

6. Agency creates fiduciary relationship; a relationship of trust and confidence.

6.0: Agency Distinguished from other Relationships

6.1: Agency Distinguished from a Servant

Although both are similar, a Servant is a person employed to render services under the instructions of his master; the master is not liable for the contract of his servant. An Agent on the other hand, is generally employed to arrange contracts between the principal and the third parties. An agent may act in a dual capacity; he may act as an agent as well as a servant.[12]

6.2: Agent Distinguished from a Trustee

In law, the office of an agent is different from that of a trustee, in that each performs a function distinctly peculiar to his office, those two offices are in fact similar by reason of the fact that some varying degree of confidentiality is imposed on the agent and a trustee.[13]

7.0: Creation of Agency

An agency may subtly come into being when the conduct of the principal implies to a third party that a relationship is in effect, although neither the principal nor the agent may be aware of its existence. The authorizing party in an agency relationship is the principal. Some action or conduct by a principal is necessary to create the relationship. The requirements of an agency contract are the same as for any other contract. The parties must be legally competent, that is, they must have the legal capacity or power to enter into such a contract and commit themselves to the performance of its terms. Individuals must be of age and must be mentally competent. If an incompetent enters into an agency agreement, technically the agreement does not exist. A person who has an interest adverse to a principal cannot serve as an agent without knowledge and consent of that party.

Corporations and partnerships can be agents for principals as they are legal entities which have the authority and capacity to act and contract. While unincorporated associations are not recognized as entities having legal capacity, members of the group may contract and be held legally responsible for actions of the association. 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".*** The reasoning behind this principle is that by use of a subterfuge, undue or

[12]Martin Chukwuka Okany, op.cit at footnote 11, p. 452.
[13]*ibid.*

unfair advantage may be gained by one party in dealing with another. In discussing capacity of minors to engage in agency relationships, note that while a minor may sometimes be the agent of an adult principal, a minor may not acquire the capacity to contract with others by engaging an adult agent to handle business transactions.[14]

Agency relationship can be created by either of the following ways:

7.1: Express Agreement: A principal may appoint an agent expressly either orally or in writing. The expectation is that both the principal and the agent must be competent to act. Agency may be created through a power of attorney. The power of attorney, then, is the instrument which confers the agency and the production of a copy of it would be conclusive evidence of the existence of such agency.[15] In White v. Lucas,[16] a firm of estate agents acted contrary to an express statement of the owner of a property prohibiting them from acting as his agents, the court decided that the estate agents could not claim remuneration for acting as agents of the property. In the case of **Ayua vs. Adaru and others**,[17] Akanbi, J.S.C restated the law in the following statement; "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 principal which involves consent of both parties. It is therefore a title law that agency arises mainly from a contract or agreement between the parties express or implied."

7.2: Implied Agreement: There is no evidence that the agent has been appointed by any writing or verbally, but there are facts and circumstances that can show that an agency has been created. In other words, agency is implied from the special circumstances of the case. Parties are taken as having agreed or consented to an agency relationship due to the way they have conducted themselves towards each other. Implied agency may arise through usual, customary and apparent or ostensible authority. See the Ghanaian case of **Buama v Oppong**.[18]

7.3: Agency of Necessity: This agency may arise in emergency situations where a person is obliged to act to prevent irreparable loss to another.[19] Such an agency may be implied where the following conditions exist as stated by Smith, L.J. I in **Williams vs. Twist**:[20]

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[14]Dale Baze, Common Law of Agency – A Supplemental Chapter for Oklahoma Real Estate Principles, Published by B & B Publishing, 2009, p. 2-3.
[15]Publication of Association of Accountancy Bodies in West Africa (ABWA), op.cit at footnote 1, p. 65.
[16](1887) 3 TLR 516.
[17](1992) 3 NWLR 589.
[18][1992] 2 GLR 213.
[19]*ibid* at footnote 13.
[20](1895) 2 Q.B.D. 84.

i. It must be impossible or impracticable to communicate with owner of the goods so as to get his instructions.

ii. There must be real or imminent commercial necessity; and

iii. The agent must have acted in the best interest of the principal.

In case of emergency or necessity, the law may compel a person to act in a particular way or if he has already acted to justify his action. An instance where agency of necessity may arise is where a ship master (captain) acts reasonably as he thinks fit so that the safe of the voyage is guaranteed. In circumstances where he is faced with such emergency, he may need not obtain the consent or authority of the ship owner.[21] In the case of **Langan vs. the Great West Railway Co**.,[22] where a train belonging to the defendant was involved in an accident and their employer took some of the injured passengers to the plaintiff's in where he ordered some Brandy for them. In an action for the price of the Brandy, it was held that the defendant was liable, for the employer had authority to pledge the credit of the defendant for reasonable necessaries to people in the condition of injured passenger.

7.4: Agency by Ratification: This is a situation whereby a person acts without authorization but the person on whose behalf the act was purported to have been carried out subsequently adopts the act. It is a retrospective constitution of agency. The contract is not binding on the principal until ratification. An action which is void ab initio cannot be ratified. In **Brook v. Hook**,[23] where Jones forged the signature of Hook on a Promissory Note, the court decided that the purported ratification by Hook was ineffective as this amounted to a nullity. A contract can be ratified only under certain circumstances.[24] These include the following:

i. The agent must expressly have been contracted as an agent. The contract can only be ratified by the principal who was named or can be ascertained when the contract was made. An undisclosed principal cannot ratify a contract. See Keighley Maxsted& Co. v. Durrant;[25]

ii. The principal must have been in existence at the time the agent entered into the contract. See **Kelner v. Baxter & Others**.[26]

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[21]Miriam Elisha Karu, op.cit at footnote 9, p. 30.
[22](1874) 3 OL.T.R. 173.
[23] (1870) LR 6 Ex 89.
[24]Publication of Association of Accountancy Bodies in West Africa (ABWA), op.cit at footnote 1, p. 67.
[25](1901) AC 240.
[26](1866-67) LR 2 GP 174.

iii. The principal must have had legal capacity to enter into the contract at the time when it was made and at the date of ratification. See **Boston Deep Sea Fishing & Ice co Ltd v Farnham (Inspector of Taxes)**.[27]

iv. The principal must at the time of ratification have full knowledge of all the material facts. See **Suncorp Insurance & Finance v Milano Assicurazioni SpA**.[28]

v. The principal must adopt the whole contract.

vi. The principal must ratify within the time set or within a reasonable time. See **Metropolitan Asylums Board v Kingham & Sons**.[29]

7.5: Agency by Estoppel: It is a general principle of law that a person is not bound by the actions of another person who acts without his written or oral authority. However, when the natural consequence of the party's conduct it to portray someone as his agent, and as a result of the portrayal, an innocent third party enters into a contract with the agent, the principal would be prevented or stopped from denying the existence of the agency.

Agency by estoppel also known as Apparent Authority is based on the principal of "holding out". This means that where a person has acted in such a way as to make other people believe that a certain state of affair exists, the person holding out another will be prevented from turning or asserting that the state of affair really does not exist. This is because by his conduct, he may have concentrated liability in respect of third party who obviously will suffer innocently, if such a person is allowed to get away by claiming that the state of affairs does not in fact exist; and agency relationship would be imputed on him and the other party so as to make them principal and agent.[30] In the case of **Rama Corporation v Proved Tin and General Investments Ltd**,[31] the English Court of Appeal emphasized three main requirements for agency by estoppel;

i. A representation by a principal.

ii. A reliance by a third party on that representation.

iii. An alteration of the third party's position resulting from such representation.

7.6: Agency arising from Cohabitation: Cohabitation means living together as husband and wife whether married or not.[32] A wife or de facto spouse is presumed to have authority to pledge the

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[27](1957)1 WLR 1051.
[28](1993) 2 Lloyds Rep 225 (QB).
[29](1890) 6 TLR 217 (QB).
[30]Miriam Elisha Karu, op.cit at footnote 9, p. 24.
[31](1952) 2 QB 147.
[32]*ibid* at footnote 30.

husband's credit for necessaries in keeping with their social status. Necessaries are items such as food, clothing and medical attention for the spouse and the children in keeping with the family's social standing. Necessaries for which a wife can pledge the husband's credit as his agent do not include luxury items or items such as jewelry. Where she is entitled to pledge the husband's credit Wiles J. in **Philipson vs. Hayter**[33] said:

"What the law does refer is that the wife has authority to contract for things that are really necessary and in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife."

8.0: Classification of Agency

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 their exercise affects the position of the principal.

8.1: General Agents: A general agent is an agent with authority to perform a series of transactions in the ordinary course of business, trade or profession usually of continuous nature. Where the appointment of a general agent is unrestricted, such an agent is a universal agent.[34]

8.2: Special Agents: An agent that is appointed for a special purpose or a specific occasion is called a special agent. Those agents include:

i. **Factor:** A factor is a mercantile agent who, in the course of his business, has the authority to sell goods or to consign goods or raise money on security for goods. In **Baring vs. Corrie**,[35] Abbot C.J described a factor as a person to whom goods and 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.

ii. **Broker:** A broker has no possession of goods but is only involved in the negotiation of contracts on behalf of another for a commission known as brokerage. A broker is an agent that negotiates or serves as a link between a buyer and a seller without having possession of the goods or the document of title. As such, he can neither sue nor act in his own name. Examples are stockbrokers in share dealings, insurance and general buying and selling.[36]

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[33]5 (1870) L.R. 6c p. 38.
[34]Publication of Association of Accountancy Bodies in West Africa (ABWA), op.cit at footnote 1, p. 68.
[35]Kayajo vs. Olabode (1968) NCLR 414.
[36]Miriam Elisha Karu, op.cit at footnote 9, p. 32.

iii. **Auctioneer:** An auctioneer is a person licensed by law and authorized to sell the goods or property of another person at a public sale. He may or may not have possession of the goods to be sold. An auctioneer is a double agent because he acts for both the seller and the agent.[37]

iv. **Del Credere Agent:** This is an agent who guarantees his principal that a thirty party dealing with him shall duly make payment due under a contract in consideration of extra-remuneration which is known as delcredere commission. He guarantees the solvency of the third party, in other words, he is like a surety for the due performance, by the third party of contract entered into with the third part on behalf of his principal.

v. **Commission Agent:** Commission agent (or commission merchant) buys or sells good on behalf of the owner or principal, but not establish a contractual relationship between the owner and the third party. The commission agent acts as principal in the contract with the third party. Nevertheless, this agent acts owe the owner all duties of an agent to a principal.[38]

9.0: Types of Authority of Agents

Agency relationships are dependent on the nature of authority invested on the agent. The scope of the agent's authority is very important in determining the types of agency which exists between the principal and agent. The types of Authority are briefly discussed below:

9.1: Actual Authority: Actual authority or real authority arises from the manifestation of a principal to an agent that the agent has power to deal with others as a representative of the principal. An agent who agrees to act in accordance with that manifestation has actual authority to so act, and his actions without more bind the principal.[39] In **Freeman Tockyer vs. Buckhurst Park Properties (Manga) Ltd**,[40] Lord Dipock defined actual authority as "a legal relationship between principal and agent created by a consensual agreement in which they alone are parties. Its scope is to be ascertained by applying ordinary principles of constructions from the express words use, the usage of the trade or the course of between the parties.

Actual authority may be express; oral or written statements, including provisions in the company's organizational documents or implied; inferred from words used, from custom, or from the relations between the parties.[41] Express Authority is invested on the agent in writing and sometimes by deed under seal. Implied Authority is usually inferred from the conduct of the parties especially the

[37]Ibid at footnote 34.
[38]Miriam Elisha Karu, op.cit at footnote 9, p. 32-33.
[39]Restatement (Second) of Agency §§ 7, 26, 32-34, 144, 186 (1958); Restatement (Third) of Agency §§ 2.01-2.02, 3.01, 6.01-6.03 (2006).
[40](1964) 1 ALL ER 630 at 644.
[41]Restatement (Third) of Agency § 2.02(1) (2006).

principal. An agent may also have the implied authority to acts that are incidental to the acts for which he has actual authority.[42]

9.2: Apparent Authority: Apparent authority, also known as "ostensible authority," is conferred on an agent by force of law to protect innocent third parties who rely on the impression created by the principal that appropriate authority has been conferred on a would-be agent.[43] This was earmarked by **Lord Denning in Hely Hutchinsoin vs. Brayhead Ltd**,[44] this authority has not actually been given, it only appeared to be the law regards the agent as possessing since the principal by his conduct has allowed the agent to appear to have authority.[45] Apparent authority arises from the manifestation of a principal to a third party that another person is authorized to act as an agent for the principal. That other person has apparent authority and an act by him within the scope of that apparent authority binds the principal.[46]

The major difference between apparent authority and actual authority is that actual authority flows from the principal to the agent, while apparent authority flows from the principal to the third party. If the principal's words or conduct would lead a reasonable person in the agent's position to believe that the agent has authority to act on the principal's behalf, the agent has actual authority, but if the principal's words or conduct would lead a reasonable person in the third party's position to believe that the agent (or other person) has authority to act on the principal's behalf, the agent (or other person) has apparent authority.

10.0: Law of Agency in Nigeria

It is important to note that the law governing Agency relationship in Nigeria is the received English Law especially Common Law and equity.[47] Agency relations have garnered a lot of attention now especially in the business world due to increasing demand for agency services. Their services come in very handy seeing as they are used as frontiers of international trade and it makes it easier for businessmen and corporate institutions from across the globe to deal and relate with each other through agents.[48]

Agency relationship in Nigeria has certain qualities that relates to the issues of the extent and limits of the authority of an Agent; the legal consequences of an action taken by an agent who has or has

[42]Publication of Association of Accountancy Bodies in West Africa (ABWA), op.cit at footnote 1, p. 70.
[43]Dale Baze, Common Law of Agency, op.cit at footnote 14, p. 4.
[44](1968) 1 QB 549.
[45]Miriam Elisha Karu, op.cit at footnote 9, p. 21.
[46]Restatement (Second) of Agency §§ 8, 27, 49, 159 (1958); Restatement (Third) of Agency §§ 2.03, 3.03, 6.01-6.02 (2006).
[47]*ibid* at footnote 45, p 2.
[48]Matthew Enya Nwocha, *Fundamental Elements of Agency Relations Under Nigerian Commercial Law,* Head of Department, Jurisprudence and International Law, Faculty of Law, Ebonyi State University, Abakaliki, Nigeria, Judicial Tribune, Volume 8, Special Issue, October 2018, p 192.

not disclosed his principal; the legal position of a principal where the agent has committed tort or crime in the exercise of his power as such; and the recovery of compensation or remuneration by the agent from his principal.[49]

Section 72 of the Companies and Allied Matters Act[50] 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".

In the first issue regarding the scope of the Agent's authority and power, the case of **Incar Nigeria Plc & Anor vs. Bolex Enterprises Nigerian Ltd,**[51] which is a case involving the sale of landed property through an agent, the Court of Appeal stated the scope of the authority of an agent thus: "Every agent who is authorized to do any act in the course of his trade or profession or business as an agent has implied authority to do whatever is usually incidental to the execution of his express authority in the ordinary course of such trade or profession or business." Also, in **Vinz International Nigeria Ltd vs. Morohundiya,**[52] the court held that acts of an agent and managerial status with ostensible authority to act binds – the principal, whether such acts are for the benefit of the principal or not, provided the agent is shown to have acted within the scope of his authority. Basically, the Agent must at all times act within the scope of his express authority, in the instant that he steps outside his actual or ostensible authority, he is legally bound to bear the liability and any negative outcome arising from his actions is his responsibility to bear.

An agent must not allow his own interest to conflict with his own obligation to his principal. In **Odudu vs. Onyibe,**[53] the Supreme Court held that where such a situation occurs to the knowledge of the third party, any contract entered into between the agent and the third party would be voidable at the option of the principal. This case involved an estate agent who sought to represent both the buyer and the seller and the court struck it down as indicative of a conflict of interest and held the contract

[49]Matthew Enya Nwocha, op.cit at footnote 48.
[50]Section 72 of Companies and Allied Matters Act, 1990, amended 2004.
[51](2003) 6 NWLR 288.
[52](2009) 11 NWLR 563.
[53](2001) 13 NWLR (pt, 729) at 140.

of agency as illegal and unenforceable. Also, a situation where the agent is above or superior to his principal, takes no direction or instruction from the principal and acts independently of the principal is untenable.[54]

The second issue is the legal position of an agent who has disclosed or neglected to disclose his principal in his contract or transactions with third parties. A contract made by an agent acting within the scope of authority for a disclosed principal is in law the contract of the principal and it is the principal and not the agent that is entitled to sue or be sued upon such contract. The Court of Appeal in **Federal Government vs. Shobu Nigeria Ltd & Anor,**[55] stated the position precisely when it held that "an agent acting on behalf of a known and disclosed principal incurs no liability. This is because the act of the agent is the act of the principal. It was the principal who did or omitted to do…. an action against an agent in its private capacity for acts done on behalf of a known and disclosed principal is incompetent."

The court went further to state that a person cannot escape legal liability merely because he has done what he did through an agent. This is in line with the common law principle of Q**ui facit per aluim facit per se, a sum facere indepur,** meaning he who does an act through another is deemed in law to do it himself. The Supreme Court in 2005 took the opportunity in the case of **Ataguba & Co. vs. Gura Nigeria Ltd**,[56] to state the only exception to the general rule that an agent is neither to sue nor liable to be sued on a contract made by him in a representative capacity is to be found where an unauthorized agent makes the contract in his name without disclosing the fact that he was acting on behalf of another, and that under such contracts he can sue and be sued in his name since he is, to all appearances, the real contracting party. In **Osigwe vs. P.S.P.L Management Consortium Ltd & 13** ors,[57] the Supreme Court expanded the frontiers of the liability of the disclosed principal to include the fact that even if the disclosed principal was a foreigner or a foreign company in a domestic contract, that foreign person would still be liable upon the contract executed by his agent, but the position of the law changes where the principal is not disclosed as evidenced in the case of **Ogida vs. Oliha**.[58]

Furthermore, there often arise cases where the disclosed principal turns out to be non-existent or a non-juristic person. In such instances the courts have held in a long line of cases that where a person professes to contract on behalf of a principal, and the principal is a fictitious or non-existent person,

[54]Matthew Enya Nwocha, op.cit at footnote 48 at p. 195.
[55](2014) 4 NWLR 45.
[56](2005) 8 NWLR 429.
[57](2009) 3 NWLR 378.
[58](1986) 1 NWLR 786.

the person so professing to contract may sometimes be presumed to have intended to contract personally.[59] In such a situation, both parties can sue and be sued directly.

The third issue concerns the liability or otherwise of the principal for the tortuous or criminal conduct of the agent in the course of his duties as such. Agents by law owe a number of duties to their principals. The duties may arise variously from statutes, common law and equity, but most importantly from the express or implied terms of the contract of agency.[60]

Regarding the duty of care and skill, a principal who appoints an agent must have had full knowledge of his skills and capacity and is therefore not entitled to expect from that agent a higher level of skill or knowledge than that which the Agent possesses. In the case of **Omotayo vs. Ojikutu**,[61] it was held that "An agent does not guarantee the successful outcome of transactions undertaken by him on behalf of his principal; and provided he acts honestly, no more can be demanded of him than that he should show the measure of skill and diligence which could be expected of one of his position and experience."

Regarding the agent's duty of personal performance, the rule of common law which is adopted and applied by the courts, has long been established that a delegated authority cannot be further delegated by the initial one. This has often been expressed by the Latin maxim of **delegatus non potest delegare**, meaning that a person to whom an authority has been delegated cannot sub-delegate that authority to another person. In law, the only possible way for a delegated authority to be further delegated by an agent is if the authority to delegate has been expressly or by necessary implication conferred on him.

The duty to account is the most valuable and fundamental of all duties an agent owes to his principal. As such, an agent is bound in law to make full disclosure to his principal of the details and outcome of his service of agency and deliver up to his principal all proceeds, financial or otherwise, arising therefrom. In the decision of the Supreme Court in **Messrs MIZP (Nigeria) Ltd vs. Ibrahim**,[62] and in **First Bank Nigerian Ltd vs. African Petroleum Ltd**,[63] the Nigerian Court of Appeal put it succinctly that when an agent is employed to carry out any transaction which involves a payment to him on his principal's behalf, all moneys received on the principal's behalf must be paid over and accounted for to the principal upon request, unless the agent has for some lawful reason repaid them to the person from whom he received them. Failure to pay renders the agent liable to an action for money had and received. The court further pointed out that the relational basis of an action for money had and received is unjust enrichment. As such, where the agent has not unlawfully or unjustly

[59]Nigerian National Supply Co. Ltd vs. Agricor Inc. (1994)3 NWLR 329. 22 (1996) 4 SCNJ 40.
[60]Matthew Enya Nwocha, op.cit at footnote 48 at p. 197.
[61](1961) ANLR 931.
[62](1974) 5 SC 55.
[63](1996) 4 NWLR 439.

enriched himself, there can no liability on his part. It is obvious from the foregoing analysis that agents owe fiduciary and other duties to their principals which they must discharge with integrity and transparency.[64]

The fourth issue is of tort or crime involving an agent. The Supreme Court of Nigeria has in the case of I**yere vs. BFFM**,[65] clarified the role of an agent in situations where an employee or servant becomes an agent for the employer.[66] The Court held that "the general disposition of the law is that an employer is liable for the wrongful acts of his employee authorized by him or for wrongful modes of doing authorized acts if the act is one which, if lawful, would have fallen within the scope of the employee's employment, as being reasonably necessary for the discharge of his duties or the preservation of the employer's interests or property, or otherwise incidental to the purposes of his employment, the employer must accept responsibility in as much as he has authorized the employee to do that particular class of act and is therefore precluded from denying the employee's authority to do the act complained of. If, on the other hand, the act is one which, even if lawful, would not have fallen within the scope of the employee's employment, the employer is not bound unless the act is capable of being ratified and is in fact ratified by him."

With regard to commission of crime such as fraud by an agent, the law is that a principal, whether disclosed or not is liable for the fraud of his agent where such fraud is perpetrated while the agent is acting within his actual or apparent scope of authority. This was the decision of the Court of Appeal in the case of **African Continental Bank Plc & Anor vs. Ndoma-Egba**.[67]

The fifth fundamental issue in agency relations concerns the remuneration or compensation of agents by the principal. It is an accepted law that the principal's duty to the agent include the duty to remunerate, reimburse, and indemnity him. However, as the Court of Appeal stated in **Odudu vs. Onyibe**,[68] agency fee is not payable in respect of a consideration that is yet to pass. This is apparently understandable in that while an agent deserves to be paid, reimbursed of expenses incurred for the principal, and indemnified under the contract of agency; this has to wait until he has offered his services. But once he has offered his services, the principal is under obligation to remunerate or compensate him failing which he becomes liable at the suit of the agent.

11.0: Rights and Duties of both parties in the Agency Relationship

11.1: Agent's Duty to the Principal:

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[64]Matthew Enya Nwocha, op.cit at footnote 48 at p. 198.
[65](2009)37 NSCQR 290.
[66]Martin Chukwuka Okany, op.cit at footnote 11, p. 452.
[67](2000) 10 NWLR 229. Note that under Nigerian Law, fraud is a crime as it is in almost all criminal jurisdictions.
[68](2001) 13 NWLR (pt, 729) at 140.

i. An agency relationship has the important characteristic of being a fiduciary relationship— i.e., an agent is a fiduciary with respect to matters within the scope of his agency.[69] Some examples of this loyalty and obligation include the following: (1) an agent is accountable to the principal for any profits arising out of the transactions he is to conduct on the principal's behalf,[70] (2) an agent must act solely for the benefit of the principal and not to benefit himself or a third party,[71] (3) an agent must refrain from dealing with his principal as an adverse party or from acting on behalf of an adverse party,[72] (4) an agent may not compete with his principal concerning the subject matter of the agency,[73] and (5) an agent may not use the principal's property (including confidential information) for the agent's own purposes or a third party's purposes.[74] See the case of **Tarnowski v. Resop**.[75]

ii. The agency relationship requires an agent to act carefully as well. An agent "has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances."[76] Moreover, "if an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge."[77]

iii. An agent also has a duty to disclose information to the principal. The agent must "use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person."[78]

iv. An agent also has a duty to act only as authorized by the principal.[79] It should come as no surprise, therefore, that an agent acting without actual authority is liable to his principal for any loss suffered by the principal

11.2: Principal's Duty to the Agent:

A principal's duties to an agent are not fiduciary in nature as fiduciary responsibilities run only from the agent to the principal. Never the less, a principal has several obligations to an agent. They include:

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[69] Restatement (Second) of Agency § 13 (1958); Restatement (Third) of Agency §§ 1.01, 8.01 (2006).
[70] Restatement (Second) of Agency § 388 (1958); Restatement (Third) of Agency §§ 8.02, 8.06.
[71]Restatement (Second) of Agency § 387 (1958); Restatement (Third) of Agency §§ 8.01, 8.06 (2006).
[72]Restatement (Second) of Agency §§ 389, 391 (1958); Restatement (Third) of Agency §§ 8.03, 8.06 (2006).
[73]Restatement (Second) of Agency § 393 (1958); Restatement (Third) of Agency §§ 8.04, 8.06 (2006).
[74]Restatement (Second) of Agency §§ 395-396, 398, 402, 404, 422-423 (1958); Restatement (Third) of Agency §§ 8.05, 8.06, 8.12 (2006).
[75]51 N.W.2d 801 (Minn. 1952).
[76] Restatement (Third) of Agency § 8.08 (2006); see Restatement (Second) of Agency § 379 (1958).
[77]Restatement (Third) of Agency § 8.08 (2006); see Restatement (Second) of Agency § 379 (1958).
[78]Restatement (Second) of Agency § 381 (1958).
[79]Restatement (Second) of Agency §§ 383, 385 (1958); Restatement (Third) of Agency § 8.09 (2006).

i. The right of remuneration is the most important right of an Agent. It is the duty of the principal to remunerate the agent for the services rendered. The duty arises whenever the agent is employed under such circumstances that reasonably justify the expectation that he should be paid, expect where the agent is acting gratuitously. The amount of remuneration that an agent can claim will depend on the agreement appointing the agent.

ii. A principal must perform his contractual commitments to the agent, must not unreasonably interfere with the agent's work, and must generally act fairly and in good faith towards the agent.[80]

iii. Also, if an agent incurs expenses or suffers other losses in carrying out the principal's instructions, the principal has a duty to indemnify the agent.[81]

iv. The Agent has a right to lien. A lien is a legal right that a creditor has to retain the goods of a debtor as security for the performance of an obligation.

12.0: Termination of an Agency Contract

The relationship between an agent and a principal is a consensual one. Actual authority from that relationship terminates when the objective of the relationship has been achieved, when the principal or the agent dies, and in a variety of other circumstances.[82] Actual authority also terminates when the principal revokes it or the agent renounces it.[83] If the agency relationship is based on contract, however, the decision to terminate actual authority may result in a breach of that contract. Nevertheless, actual authority has ended, even though contractual liability may exist for its termination.[84]

The contract can be terminated by operation of law under the following circumstances:

i. Through the death of either party.

ii. On the insanity of either party. In **Gordonv. Essien**,[85] where the principal had died and the daughter of the agent she had earlier appointed continued to collect rents on her behalf, it was stated that "it was trite law that death was one of the events which automatically determined an agency; the conception of authority demanded a continuing consent of the principal to the

[80]Restatement (Second) of Agency §§ 432-437 (1958); Restatement (Third) of Agency §§ 8.13, 8.15 (2006).
[81]Restatement (Second) of Agency §§ 438-440 (1958); Restatement (Third) of Agency § 8.14 (2006).
[82]Restatement (Second) of Agency §§ 105-124 (1958); Restatement (Third) of Agency §§ 3.06-3.10 (2006).
[83]Restatement (Second) of Agency § 117-119 (1958); Restatement (Third) of Agency §§ 3.09-3.10 (2006).
[84]Restatement (Second) of Agency § 118 (1958).
[85](1992) 1GLR232.

agent's act on his behalf and with the death of the principal the consent would not continue because the mind from which it issued had ceased to exist".

iii. Upon the bankruptcy of either party.

iv. By frustration.

v. If the subject matter of the agency is found to be illegal ab initio.

vi. Where the subject matter is no longer in existence.

vii. By expiration or effuxion of time.

viii. By subsequent illegality of either the transaction or of the status or capacity of either party.

13.0: Conclusion:

In almost every activity, we sometimes find ourselves acting on behalf of other people or asking other people to act on our behalf. It is the general law that an agent acting on behalf of a known and disclosed principal incurs no liability, but where tortuous or criminal liability arises as a result of the acts of an agent, it has to be determined first whether the agent is strictly one or an independent contractor; second, whether the principal authorized expressly or impliedly the tortuous or criminal acts of the agent; and third, whether the principal did not have a guilty mind or participate in the act of the agent that is a crime or tort. There are a number of duties and obligations both the Principal and agent owe to each other.

14.0: Recommendation:

A lot of businessmen in Nigeria are still ignorant of the importance of an Agency relationship. Both parties should have a firm understanding of the extent of their relationship before it becomes a contract. Also, most agents in Nigeria tend to act outside the extent of their authority. This should be checked to avoid conflicts between both parties.