

# Fundamental elements of agency relations under Nigerian commercial law

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## **Abstract**

*This paper is informed by the need to highlight, clarify and evaluate key aspects of the Nigerian law of agency against the background of the increasing usage of the services provided by agents in the progressively complex commercial transactions in an era of globalization. The paper has found that contemporary business deals and contracts have increasingly depended on agency services and has, therefore, explored the attitude of Nigerian Courts to various significant aspects of agency relationship for the proper enlightenment of parties to contracts of agency who may be interested in doing business in Nigeria and on the international platform.*

**Keywords:** Agency, disclosed principal, tortious liability, contract of agency, indemnity.

**JEL Classification:** K22, K34

## **1. Introduction**

Nigerian law of agency is founded principally on common law and judicial precedent. Agency relations have today assumed currency in the public domain and command attention under contemporary Nigerian commercial law. This is mainly due to increasing demand for agency services and the growing complexity and, for that matter, indispensability accompanying its utilization in Nigeria as in other developing economies. As the frontiers of international trade expand, increasing number of businessmen and corporate institutions from across the globe find it progressively indispensable to deal and relate with each other through agents. This has been necessitated by the need to reduce the distance of travels and minimize the stress of inspection of goods produced abroad prior to purchase. Though high technology communication systems and social media have come in handy to mitigate the hardship of long distance journeys, it has not supplanted the vital role that agents can play in this regard. More so, the expertise, technical know-how and specialized services which only agents can offer continue to make them indispensable in modern day commercial transactions both in Nigeria and globally. This paper evaluates fundamental elements of the law relating to agency in Nigeria, and examines the role and relevance of agents in commercial transactions in the country.

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## 2. Conceptual framework

The Nigerian Supreme Court has in a plethora of cases defined who an agent is for the purpose of applicability of the law of agency. In *Eden vs. Canon Balls Ltd*,<sup>2</sup> the court described an agent as one who has the authority to act on behalf of another called the principal. In *Cotecna International Ltd vs. Churchgate Nigeria Ltd and Anor*,<sup>3</sup> 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. This, no doubt, is not a contentious proposition since the validity of any contract is founded on the perfection of the will and intention of the parties, agency being a clear subject of contract.

The Black's Laws Dictionary defines agency as a fiduciary relationship created by express or implied contract or by law, in which one party, agent, may act on half of another party, the principal, and bind that other party by words or actions. Friedman has offered a much more comprehensive definition of agency to mean that it is the relationship that exists between two persons when one called *the agent* is considered in law to represent the other, called principal, in such a way as to be able to affect the principal's legal position in respect of strangers on the relationship by the making of contracts on the disposition of property<sup>4</sup>. Invariably, the Nigerian Court of Appeal has in *Mikano International Ltd vs. Ehumadu*<sup>5</sup> clarified that: *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. Any person other than the principal and the agent may be called a third party. The basic idea behind the law of agency is that the law recognizes that a person need not always do things that change his legal relations in person, and he may use the services of another person to change them or to do something during the course of which they may be changed. The long and short of it is that the law recognizes that in some circumstances, the agent can affect the principal's legal position by certain acts which, though performed by the agent, are not really to be treated as the agents own acts but as acts of the principal.*

Furthermore, in *Vulcan Gases Ltd vs. G.F. Industries Gasvenwertung A.G.*,<sup>6</sup> the Nigerian Supreme Court held that the relationship of principal and agent

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<sup>2</sup> (2005)1 CNQLR 362, see also *Bangboye vs. University of Ilorin* (1991)8 NWLR (pt 168) in Yerokun, Olusegun (2005). *Casebook on Commercial Law: Comments and Cases*. Lagos: Princeton & Associates Publishing Company Ltd., p. 415.

<sup>3</sup> (2010)44 NSCQR 641.

<sup>4</sup> Friedman, T. L. (1971). *The Law of Agency*. London: Butterworths, p. 73.

<sup>5</sup> (2013)1 CLRN 83. See also *University of Calabar vs Ephraim & Ors* (1993)1 NWLR 551; *Ayodele James vs. Mid Motors Nigeria Co. Ltd* (1978)5 SC 112.

<sup>6</sup> (2001)5 SC (pt. 1)1.

may arise in five ways, namely, by express appointment, whether orally or by letter of appointment or indeed, by a power of attorney<sup>7</sup>; ratification of the agent's acts by the principal; through the doctrine of estoppel; by implication of law in the case of agency by necessity; and by presumption of law in the case of co-habitation. Subsequent court decisions have, through the doctrine of judicial precedent, echoed and applied this overriding decision of the Supreme Court as, for instance, in *Takum Local Government vs. United Community Bank Nigerian Ltd.*,<sup>8</sup> in relation to agency by ratification where the Court of Appeal held that where the principal acknowledges the act of his agent it constitutes evidence that it has ratified the action of the agent; and in *Incar Nigeria Plc & Anor vs. Bolex Enterprises Nigerian Ltd*<sup>9</sup> when the court held in relation to agency by estoppel that where any person by words or conduct represents or permits it to be represented that another person is his agent, he will not be permitted to deny the agency with respect to anyone dealing on the faith of such representation with the person so held out as agent.

### 3. Fundamental elements of agency relations in Nigeria

The basic qualities and texture of agency relations in Nigeria involve issues relating to the extent and limits of the authority and power of an agent; the legal consequences of an action taken by an agent who has or has 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 recoverability of compensation or remuneration by the agent from his principal. In *Incar Nigeria Plc & Anor vs. Bolex Enterprises Nigerian Ltd*,<sup>10</sup> 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.*

Again, in *Vinz International Nigeria Ltd vs. Morohundiya*,<sup>11</sup> 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. And in *Summit Finance Co. Ltd vs. Iron Baba & Sons Ltd*,<sup>12</sup> the court took a further step to hold that the principal of an agent is stopped from denying the action of the agent done within the scope of his authority.

<sup>7</sup> The Court noted that where the authority of the agent is to execute a deed on behalf of a principal, the agency itself must be created by deed.

<sup>8</sup> (2003)16 NWLR 288 In *New Nigeria Bank Ltd vs. Odiase* (1993)8 NWLR 235, the Court of Appeal earlier held that an informal appointment of an agent may be ratified subsequently.

<sup>9</sup> (2003)6 NWLR 288.

<sup>10</sup> *Supra.*

<sup>11</sup> (2009)11 NWLR 563.

<sup>12</sup> (2003)17 NWLR 89.

All of these cases illustrate that the acts or actions of an agent effectively bind the principal. But the agent must at all times act within the scope of his express authority. By implication, where the agent steps outside his actual or ostensible authority, he would bear the legal consequences of his misdemeanor and any negative outcome of his unauthorized action shall rest squarely on his shoulders. More than that, an agent must not allow his own interest to conflict with his own obligation to his principal. In *Odudu vs. Onyibe*,<sup>13</sup> 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 of agency as illegal and unenforceable. Also untenable is 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. The Court of Appeal in *Ilesa Local Planning Authority vs. Olayide*,<sup>14</sup> has described such situation as an anomaly that cannot be supported by law. The Supreme Court appears to have rested the issue of conflict or authority when it held in *Edem vs. Cannonballs Ltd & Anor*<sup>15</sup> that an agent must have authority donated by the principal to act on behalf of the principal.

A 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*,<sup>16</sup> 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 position is an adoption and amplification of the common law principle expressed in the Latinic maxim that *Qui facit per alium facit per se, a sum facere indepud*, 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*,<sup>17</sup> to highlight the general law that a contract made by an agent acting within the

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<sup>13</sup> (2001)13 NWLR (pt. 729) at 140.

<sup>14</sup> (1994)5 NWLR 91.

<sup>15</sup> (2005)8 CLRN 1.

<sup>16</sup> (2014) 4 NWLR 45. See also an earlier court decision in *University of Calabar vs. Ephraim & Ors* (1993)1 NWLR 551, to the end that when an agent is acting for a disclosed principal, the contract is the contract of the principal and not that of the agent, and the only person who can sue and be sued is the principal.

<sup>17</sup> (2005)8 NWLR 429.

scope of his authority for a disclosed principal is in law the contract of the principal and the principal, and not the agent, is the proper person to sue or be sued upon such contract. Notwithstanding this decision, the court pointed out that a very important exception to the 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.<sup>18</sup> In *Osigwe vs. P.S.P.L Management Consortium Ltd & 13 ors*,<sup>19</sup> 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. The court held that: *Where a person in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make it, he is not, as a matter of general principle, liable on the contract to the other contracting party. Indeed, an agent acting on behalf of a known and disclosed principal incurs no personal liability even where the disclosed principal is a **foreigner**. In other words, a contract made by an agent acting within the scope of this authority with a disclosed principal is, in law, the contract of the principal, and the principal and not the agent is the proper person to sue and be sued upon such contract.*

But the position of the law changes where the principal is not disclosed. On this score, the Supreme Court in *Ogida vs. Oliha*,<sup>20</sup> has held that *it is settled law that where a person makes a contract in his own name without disclosing either the name or the existence of a principal, he is personally liable on the contract to the other contracting party even though he may be in fact acting on the principal's behalf*. 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, the person so professing to contract may sometimes be presumed to have intended to contract personally.<sup>21</sup> In such a situation, both parties can sue and be sued directly. The court took the opportunity to re-affirm that a non-juristic, non-legal or non-existent person cannot sue or be sued in any action, and any contract entered into with a non-legal or non-juristic person is null and void, since an offer or its acceptance cannot be made to a non-existing person. There is also a curious decision of the Supreme Court in *Yesufu vs. Kupper International*,<sup>22</sup> that even where a company director contracts in his own name but really on behalf of the company, the other

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<sup>18</sup> This exception had earlier been applied in 2002 by the Supreme Court in the case of *Okafor vs. Ezenwa* (2002)13 NWLR (pt. 784) at 319.

<sup>19</sup> (2009)3 NWLR 378.

<sup>20</sup> (1986)1 NWLR 786.

<sup>21</sup> See *Nigerian National Supply Co. Ltd vs. Agricor Inc.* (1994)3 NWLR 329.

<sup>22</sup> (1996)4 SCNJ 40.

party to the contract can generally on discovering that the company is the real principal sue the company as undisclosed principal on the contract. This decision contradicts the doctrine of privity of contract and a host of other Supreme Court decisions on contractual liability where the principal, is undisclosed. It must therefore be qualified for it to apply as, for instance, the company must be the direct beneficiary of the contract and the director must have acted in good faith; failing which the decision remains a bad law and unenforceable.

A 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. The courts have over time been able to articulate some of these duties and they include the duty of performance;<sup>23</sup> duty of obedience or loyalty;<sup>24</sup> duty of care and skill;<sup>25</sup> duty of personal performance;<sup>26</sup> duty to act in good faith;<sup>27</sup> and most importantly, duty to account.<sup>28</sup> With respect to the duty of care and skill, it needs be appreciated that a principal who appoints an agent knowing his skill and experience is not entitled to expect or require from that agent a higher measure of skill or knowledge than one of his position and experience could reasonably be expected to possess. Supporting this position, the court in *Omotayo vs. Ojikutu*,<sup>29</sup> 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.*

Whereas this law is easily applicable with respect to career professionals, it is difficult to see how an ordinary person hired as an agent can meet the test and deliver as such without descending down the slippery slope of abuse that may be justified in the present circumstances as human error.

As it concerns the agent's duty of personal performance, the rule of common law, adopted and applied by the courts, has long been established that a delegated authority cannot be further delegated by the initial done. This has often been expressed by the Latinic 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. Failing this, it stands to reason that

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<sup>23</sup> See *Hamman vs. Senbanjo & Anor* (1962)2 ANLR 139 where the court held that "it is the duty of an agent to carry out the business he had undertaken. This was his obligation unless he had in his contract expressly excluded responsibility".

<sup>24</sup> *Esso West Africa Inc. vs. Ali* (1968) NMLR 414.

<sup>25</sup> *Spiropolous Co. Ltd vs. Nigerian Rubber & Co. Ltd* (1970) NCLR 94.

<sup>26</sup> *Bangboye vs. University of Ilorin* (1991)8 NWLR 1.

<sup>27</sup> *Igben vs. Etawarie* (1971)1 NCLR 85.

<sup>28</sup> *Majekodunmi vs. Joseph Daboul Ltd.* (1975) CCHJ 161.

<sup>29</sup> (1961) ANLR 931.

an agent who sub-delegates his authority or any part of it cannot release himself from liability for non-exercise or wrongful exercise of such authority. Furthermore, the requirement of the duty to act in good faith has relieved the complication often brought to bear on agency relations by avaricious and unscrupulous agents who act for both the principal and third parties for personal financial advancement or other gains. This was the question that arose from the determination of the court in *Odudu vs. Onyibe*,<sup>30</sup> and the court resolved the issue when it held that: *An estate agent cannot act for both the seller and the buyer of a property and claim agency fees from both parties because it would lead to a conflict of interest between the agent and the parties. Consequently, where an estate agent so acts, the contract of agency is illegal and unenforceable.*

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. According to Aluko, an agent must render account to his principal in respect of the goods of his principal in his hands, and where there is no dispute as to the receipt of goods, the value of which is ascertained, it is open to the principal without going into an action for account, to sue the agent for the ascertained sum that he is owing<sup>31</sup>. This position finds support in the decision of the Supreme Court in *Messrs MIZP (Nigeria) Ltd vs. Ibrahim*.<sup>32</sup> And in *First Bank Nigerian Ltd vs. African Petroleum Ltd*,<sup>33</sup> 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 enriched himself, there can no liability on his part.

It is apparent from the foregoing analysis that agents owe fiduciary and sundry other duties to their principals which duties they must discharge with integrity and transparency. Accordingly, where an agent gets enmeshed in tortious or criminal acts against his principal or third parties the law is handy to deal firmly with such abnormality. This brings us to the fourth issue of tort or crime involving an agent. The Supreme Court of Nigeria has in *Iyere vs. BFFM*,<sup>34</sup> clarified the role of an agent in situations where an employee or servant becomes an agent for the

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<sup>30</sup> *Supra*.

<sup>31</sup> Aluko, Oluwole (2001) *Lawyers Companion on Law*. Ibadan: Brighter Star Publishers (Nigeria) Ltd., p. 27.

<sup>32</sup> (1974) 5 SC 55.

<sup>33</sup> (1996) 4 NWLR 439.

<sup>34</sup> (2009)37 NSCQR 290.

employer.<sup>35</sup> 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.*

This decision, though much more far-reaching and definitive follows an earlier one in *James vs. Mid Motors (Nigeria) Co. Ltd.*,<sup>36</sup> in which the court stated that where a company is said to have done an act by the very fact of a company not being a human being, it can only do the act through its human agents or servants; and, where the said agents or servants have committed an act, the company may rightly be said to have committed an act since by the legal principle of vicarious liability the act of the agent is the act of the company. Consequently, according to the court, the evidence by which the act is to be proved against the company would be the conduct of the agent or servant. From the foregoing, it is clear that in situations of agency, liability falls on the principal where he gives his agent express authority to do a tortuous act or that which results in a tort. Again, the agent may also be liable for a tort committed by his agent while acting under the scope of his implied authority. Notwithstanding this, where the tort by the agent falls entirely outside the scope of his authority, express or implied, the principal is by no means liable. Another point to be noted is that an agent who is an independent contractor can be sued without his principal for a tortuous act because though the agent is employed, his employer does not control his method of work. Nevertheless, the Court of Appeal has in *I.S.C Services Ltd vs. Genak Continental Ltd. & Anor*<sup>37</sup> given instances where an agent who is an independent contractor may be sued jointly with his principal and these include where the employer authorized the tortuous act and where the master or principal authorized the acts which are intrinsically dangerous or a statutory breach of duty.

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

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<sup>35</sup> M.C. Okany has made a distinction between an agent and a servant to the effect that a servant is a person employed to render services under the instructions or directions of his master who is not liable for the contract of his servant while an agent is a person appointed to arrange contracts between the principal and third parties – see Okany, Martin Chukwuka (1992). *Nigerian Commercial Law*. Onitsha: Africana-FEP Publishers Ltd., p. 52.

<sup>36</sup> (1978)11–12 SC 31.

<sup>37</sup> (2006) 6 NWLR 481.



*African Continental Bank Plc & Anor vs. Ndoma-Egba*.<sup>38</sup> Again, in *Nirchandani & Anor vs. Pinheiro*,<sup>39</sup> the Court of Appeal held that a principal cannot generally be liable for the fraud of his agent unless it is proved that the principal had a guilty mind in respect of that offence and that he indeed participated in it. Curiously, the Supreme Court, relying on section 144(2) of the Electoral Act, 2006, held in *Dina vs. Daniel & Ors*,<sup>40</sup> that there can be no agency in criminal conduct. The Supreme Court position on this matter can only be valid if it is shown in evidence that the principal did not authorize or had any guilty mind or participated in the act of the agent that amounts to a criminal conduct and that the performance of the duties of the agent could not have reasonably or naturally culminated in the commission of crime. Failing this, the Supreme Court position would be unsupported by the Nigerian criminal law which defines parties to an offence as every person who actually does the act or makes the omission which constitutes the offence; every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; every person who aids another person committing the offence; and *any person who counsels or procures any other person to commit the offence*.<sup>41</sup> Under Nigerian law, parties to an offence are punished equally. Accordingly, the Supreme Court decision in *Dina vs. Daniels* would have to be subordinated and blend itself with the express provisions of the Nigerian Criminal Code Act and the Penal Code Act and be interpreted in that light otherwise it remains a bad and invalid law of which the Supreme Court requires to reverse itself at any early opportunity.

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, re-imburse, and indemnify him. However, as the Court of Appeal stated in *Odudu vs. Onyibe*,<sup>42</sup> 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, re-imbursed 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.

#### 4. Conclusion

The law of agency in Nigeria is founded on common law and equity, amplified and consolidated by the courts who through the doctrine of *stare decisis* have shaped this special area of law. Agency itself arises *ex-contractu* between one

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<sup>38</sup> (2000) 10 NWLR 229. Note that under Nigerian Law, fraud is a crime as it is in almost all criminal jurisdictions.

<sup>39</sup> (2001) FWLR 130.

<sup>40</sup> (2010) 11 NWLR 137.

<sup>41</sup> See section 7 of the Criminal Code Act, CAP C 33, Laws of the Federation of Nigeria, 2004.

<sup>42</sup> *Supra*.

party known as the principal and another party known as the agent. It is the general law that an agent acting on behalf of a known and disclosed principal incurs no liability. But where tortious or criminal liability arises as a result of the acts of an agent; it has to be determined first whether the agent is one strictly said or an independent contractor; second, whether the principal did authorize expressly or impliedly the tortious 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 that the agent owes to his principal including the duty to perform; obey and show reasonable care and skill as well as the duty not to delegate his authority, to act in good faith; and to account to his principal money had and received. On his part, the principal owes his agent the duty to remunerate, re-imburse and indemnify him on the contract. All of these and more have been explored in this paper with a view to highlighting Nigerian law of agency as part of the larger law of commercial transactions.

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6. Nigerian Criminal Code Act.
7. Nigerian Penal Code Act.