



**NATIONAL OPEN UNIVERSITY OF  
NGERIA**

**SCHOOL OF LAW**

**COURSE CODE:LAW 100**

**COURSE TITLE:INTRODUCTION TO LAW**

### 3.5.1 By Performance

A party's obligations under a contract may be discharged by performance. However its effect on the party's right and obligations will depend on the degree of performance. The party will be discharged by performance only if his or her performance is precise and exact. That is, it must comply strictly with the terms of the contract. A purported performance which falls short of that required by the contract does not discharge the performing party who is bound to perform precisely or be liable for breach of contract.

### 3.5.2 By Agreement between the Parties

The parties are at liberty at any time to put an end to their contract by mutual agreement (eg accord and satisfaction), or parties may agree to discharge a contract without reaching a new contract (eg through waiver or abandonment). The parties may themselves provide in their agreement that the contract shall be terminated at the will of either party or that it shall terminate on the occurrence of a particular event (a condition subsequent).

### 3.5.3 Operation of Law

We are not concerned with this mode of discharge but one common example is what is known as merger. Merger occurs where there is a substitution of a higher grade of obligation for a lower. A common example is where one party to a contract sues another and receives a judgment by the court. Here the cause of action merges in the judgment which is a higher grade of obligation which can be used against the defendant. Another example is the *Statute of Limitations* which provides that debts are automatically extinguished within six years from the date they were contracted.

### 3.5.4 By Frustration

Where a contract originally valid, subsequently becomes impossible, performance of it is said to be discharged by frustration. The question of whether or not performance has become impossible is primarily one of construction of the contract in question.

*Frustration occurs whenever the law recognizes that without default of either party, a contractual obligation has become incapable of being performance because the circumstances in which the performance is called for*

*would render it a thing radically different from that which was undertaken by the contract.*

The circumstances or event must not be provided for in the terms of the contract.

In *Taylor v Caldwell* (1863) 122 ER 309, the contract was discharged because the subject matter of the contract which was essential to its performance was destroyed. In *Codelfa Construction Pty Ltd v state Rail Authority of NSW* (1982) 149 CLR 337 (see Truner) the majority upheld that a contract should be discharged by frustration where there has been a fundamental or radical change in the surrounding circumstances and in the significance of the obligations undertaken. Government interference may cause such a change.

The effect of frustration on contractual rights and obligation is that they are terminated prospectively. Obligations in force the frustration eventually must be fulfilled. Thus any money paid under the terms of the contract cannot be recovered unless there has been a total failure of consideration.

### **3.5.5 Breach of Contract**

Breach of contract always give rise to a right to claim damages. It does not always discharge a contract. A breach will only give rise to grounds to terminate a contract where the guilty party's actions amount to repudiation. As a general rule this entitles the innocent party to choose between terminating or affirming the contract. If the innocent party accepts the repudiation and terminates the contract, contractual rights and obligations are terminated prospectively. Of course the innocent party may decide to affirm the contract in which case it remains on foot with both parties obliged to carry out future obligations and the guilty party being liable for damages resulting from the breach.

The exception to the general rule occurs where the reputation is such that the innocent party has no right of election. For example, the guilty party may before the time for performance arrives indicate that he/she will not paint the innocent party's portrait. The innocent party has no option to affirm the contract as the court would not make an order forcing the guilty party to perform the services contracted. In the circumstances the contract is at an end and the innocent party only has a right to damages.

Repudiation occurs:

- Where there is anticipatory breach ie the guilty party indicates before the contract is due for performance that he/she will not complete his/her contractual obligations;
- After performance has commenced when the guilty party indicates he/she is abandoning performance of his/her contractual obligation:
  - By failure to perform an essential term (condition); and
  - By conduct constituting substantial reputation.

It follows from the foregoing that:

- The right to damage of contract remains after discharge by breach;
- Obligations which occurred before termination can be enforced by either party; and
- Money paid or property transferred in pursuance of the contract be recovered unless there has been a total failure of consideration.

#### **SELF ASSESSMENT EXERCISE 4**

1. What is the difference between actual and anticipatory breath?
2. A contracted to supply B with floral arrangements for B's restaurant. A miscalculated the cost to her and subsequently wrote to B advising that she would be unable to supply at the contract price. B replied that she would get her flowers elsewhere, made arrangements with C and later sued A for the difference between the contract price and what she had, had to pay C. Advice A

### **3.6 Remedies**

If a citizen feels aggrieved by the actions of another whether it raises out of contract, tort or any other branch of the law factor which is going to be crucial to that citizen is the remedy that the law avails him or her to redress the wrong. Clearly of course it is pointless to consider remedies unless the party has standing (*locus standi*), a good cause of action and the evidence to prove his or her case.

You will recall that one of the principal reasons that equity courts developed in England was to overcome the vary narrow range of remedies available through the common law – there was little else available except damages. While equity and common law courts fused in the 19<sup>th</sup> century the different remedies available are still discussed under the equitable and common law headings. Statutory remedies are also becoming more prevalent.

### 3.6.1 Common Law

At common law the two major potential outcomes are termination of the contract because of anticipatory breach or breach of a condition or an award of damages for breach of warranty.

#### (a) Termination

At common law, anticipatory breach and breach of condition enable the innocent party to terminate the contract and sue for damages. Repudiation means the innocent party has a right to treat the contract as discharged. The right is however optional and the innocent party may choose to allow the contract to continue. In such a case the contract remains in existence and its provisions must be complied with by both parties, although the innocent party will still have the right to sue the defaulting party for damages for breach (as if it were a breach of warranty only).

Where the innocent party elects to treat the contract as discharged:

- He or she is thereupon released from any further liability of obligation under the contract, and
- He or she may sue the party in breach for damages for the repudiation of the bargain or on a quantum meruit for the value of work done or goods supplied by him or her under the contract.

#### (b) Damages

The only remedy available for a breach of warranty is an award of damages. The object of awarding a sum of money to the successful plaintiff has been to compensate him or her for damages arising from the other party's breach.

The questions to be decided by a court in assessing the damages are:

- For what loss should the party in breach be liable? It should not be too remote see *Hadley v Baxendale* [1854] 156 ER 145. As with the law of tort the courts have had to find a mechanism for limiting the plaintiffs' right to damages as a breach of contract can affect many people for many years. The defendant is liable for:
  - Losses arising **naturally** from the breach

- Losses **actually** contemplated as a probable result of the breach. Turner shows how those principles are tested in *Hadley v Blakendale*
- What amount is payable by that party to compensate the innocent party? The general rule is:

*That the plaintiff is entitled to recover such an amount as will put him in the same position so far as money can do so, as if the breach of contract had not taken place.*

The plaintiff also has an obligation to mitigate or minimize the loss suffered as a result of the defendants' breach. This requires the plaintiff to take reasonable steps in the ordinary course of business although the onus lies on the defendant to prove the plaintiff has failed to do so, rather than the plaintiff having to prove that he has done so. *See Payzu Ltd v Saunders* (1919) KB 581.

### 3.6.2 Equitable Remedies

Equity recognized that monetary damages may not always be appropriate and there developed two other remedies which may be available in the event of breach of certain contracts, namely:

- The decree of **specific performance** is a court order requiring the defaulting person to carry out his/her contractual obligation eg to complete the transfer of a piece of land.

As with all equitable remedies, this is only discretionary and the court will not make such an order if it considers damages to be adequate compensation.

Also the court will not make such an order in relation to contracts requiring personal services. *In Lumley v Wagner* (1852) 1DM and G604 the defendant had undertaken to sing at the plaintiff's theatre for a period of three months. It was held that specific performance was not available to compel her to sing as promised.

- An **injunction** is a court order restraining a party from doing an act or continuing to perform an act eg to stop a person trading, in breach of a valid restraint of trade clause.

In *Lumley v Wahner* the defendant has also promised not to sing anywhere else during the three month period and the court did grant an injunction to prevent her from breaching this clause.

An injunction is not only available in cases involving contract. It is often sought in the tort of defamation to prevent from continuing to defame the plaintiff by publishing the offending material.

### **SELF ASSESSMENT EXERCISE 5**

- 1a. What is mitigation?
  - b. Where there is anticipatory breach of contract, when does the duty to mitigate arise?
  - c. Which party has the burden of proving mitigation?
- 2a. What is specific performance?
  - b. When will it be ordered?
3. A agrees to sell B a consignment of goods which b contracts to sell to C at a profit. A fails to deliver and B loses the profit. Advise B. How would your answer differ if:
    - (a) B's Contract with C was especially lucrative because C had agreed to pay well over the market price.
    - (b) B was to process the goods before selling them to C and the profit was largely attributable to the added value created by the processing.

## **4.0 CONCLUSION**

In this unit, we discussed about forms of a contract, the capacity of parties to a contract, misrepresentation and how a valid contract can lose its legal effect. We also discussed how a contract is performed or dissolved, their effects and remedies. Contract law is basic to all laws, this concludes our outline of law of contract. Congratulation.

## **5.0 SUMMARY**

Most contracts are simple, expressive or implied and require no particular form, but the elements must be present. Some form is prescribed for contracts under seal, recognition or letters of credit. Statues also demands that some contracts must be manifested by some writing signed by the party against who it is sought to be enforced. An example is a contract for sale of interests in land. Contract by one who lacks capacity are generally avoidable by the minor only. Contract for necessities bind the minor and may be liable in quasi contract for reasonable value. In other cases he may be compelled to make restitution if the property is still in his/her possession. The adult must return any consideration he has received. A contract is vitiated by duress, undue influence and illegality.

A contract is illegal if it is contrary to statute or public policy. An illegal contract is void, and unenforceable. But it is severable, the blue pencil rule applies. A contract is discharged on performance or by agreement, breach, and operation of law. Remedies for breach at law and in equity range from damages (special, exemplary, nominal or liquidated), rescission, restitution to specific performance, injunction, reformation or quasi-contract. Damages may be mitigated, waived or stated.

## 6.0 TUTOR-MARKED ASSIGNMENT

- 1a. A vendor of a service station is aware of plans for a highway which will bypass his station and reduce his number of customers. In the course of negotiations, it becomes apparent to him that the purchaser is ignorant of the plans. Should the vendor make disclosure?
- b. An experienced employee of a petrol station owner grossly overestimated the petrol sales expected from a particular site to a prospective purchase of the site. The overestimation was innocent although negligent and influenced the purchaser to purchase the petrol station outlet.

Can the purchaser recover damages for the financial loss? Give reasons.

2. C is 16 and has been unemployed for twelve months. An acquaintance offers him a position in used car yard where C will be taught to do the business. C agrees not to leave without six months' notice in writing, to be present on each day between 8.30 and 5.15 and to attend to all tasks assigned him. Payment was on no fixed basis, and after four months of washing cars and sweeping the office, he has earned only N25,000. He wants to repudiate the contract. Advise.
3. A has a contract to build a house and shed for B at a cost of N20million. A three-quarter completed the house and refused to complete the rest. B advised he would waive the requirement to build the shed which represented N3million of the total contract if A completed building the house and B would pay him the N17million. A still refused to build the house.

Can A claim three-quarters of N17 million?



## 7.0 REFERENCES/FURTHER READINGS

*Graw, S. (1993) Introduction to the Law of Contract. Sydney: The Law Book Company Limited.*

*Robinson, S. (1973). Drafting. Sydney: Butterworth.*

*Vermeesch, RB & Lindgren, K. (1987). Business Law of Australia. Sydney: Butterworth.*

*Oyakhromen G. & Imiera, P. (2004). Compendium of Business Law in Nigeria.*

## UNIT 5 PRINCIPAL AND AGENT

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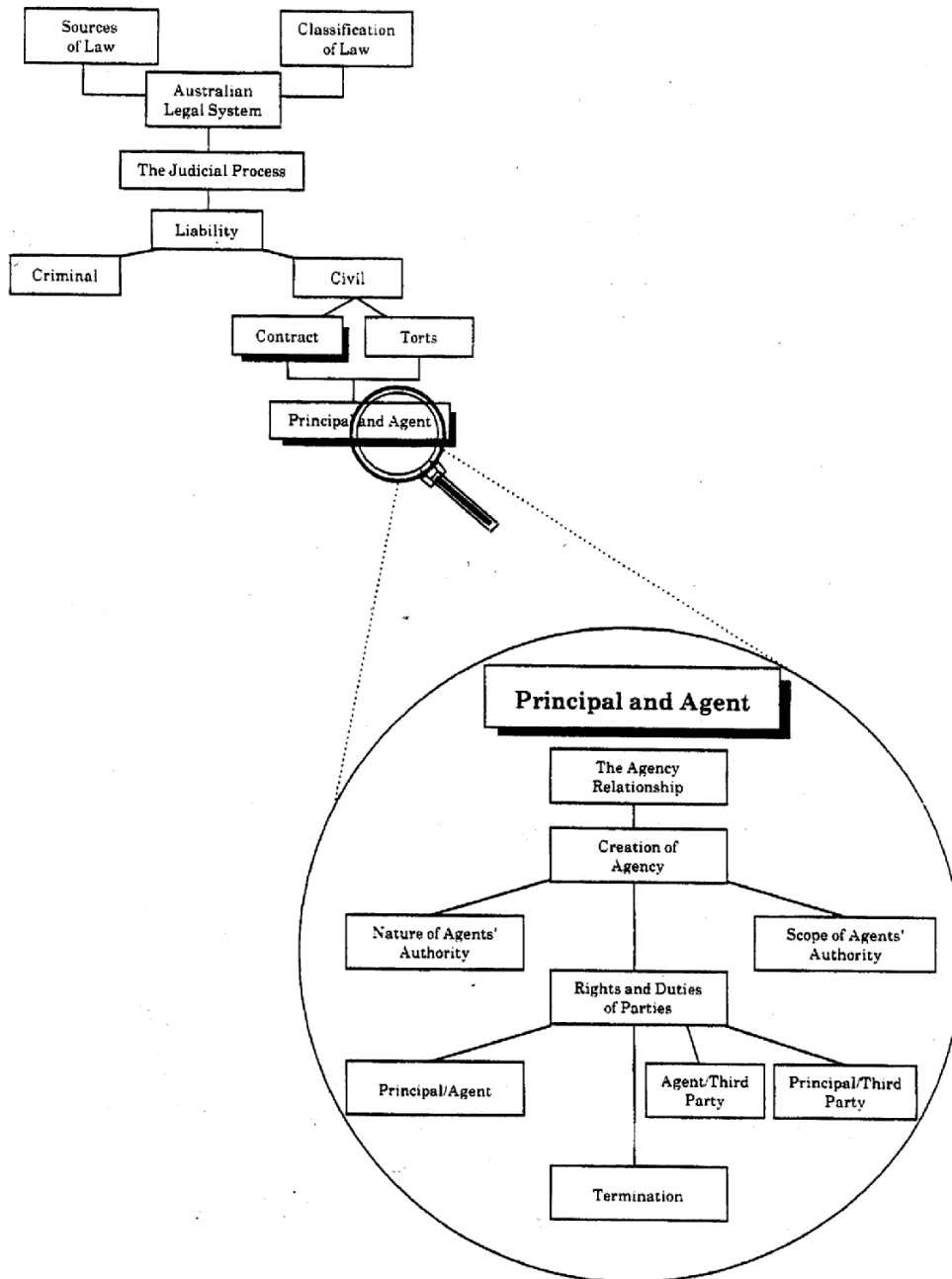
### 1.0 INTRODUCTION

The law of agency deals with the consensual relationship that arises when one person (called Agent) is used by another (Called Principal) to perform certain tasks on his/her behalf. Agency is a representative relationship. It is different from those of employment or independent contractors. In the contract law, two parties are directly connected in the law with each other either by the unilateral act of one or the mutual acts of both. In Agency Law, the Agent introduces a third party with whom he deals and whose conduct can affect the legal position of his principal. The use of a representative or agent enables one person to conduct multiple business operation and the problem and complication arising from the introduction of a third party that the special law of agency is

directed to regulate and this is the subject matter of the last unit of the course.

## Overview

### Principal and Agent



## **2.0 OBJECTIVES**

On successful completion of this module, you should be able to:

- define an agency relationship
- differentiate between the principal/agent relationship and other relationships
- describe the methods by which agency can be created and terminated
- define the terms ‘actual’ and ‘apparent’ authority, and distinguish between them in case examples
- explain the methods by which an agent can contract and the liability of the agent to the principal and third parties
- list the duties an agent owes to the principal and a principal owes to an agent, and the consequences of a breach of those duties;
- explain the rights of action a third party has against an agent for breach of warranty of authority
- recognize major components of secret commissions legislation
- demonstrate skill in applying the case and statute law studied to the solution of factual problems.

## **3.0 MAIN CONTENT**

### **3.1 Principal and Agent**

#### **3.1.1 The Agency Relationship**

Countless transactions in the commercial world are carried out through agents. Any decision to buy real estate, shares, commodities, goods, plant. Etc will almost invariably involve the use of agents by either the vendor or purchaser or both. Even in our personal lives agents are important, such as when we arrange a holiday through a travel agent, the agent will act on our behalf to make such bookings for hotels, airlines and tour operators, as we desire.

Bowstead on Agency (1985, p 1) defines agency as follows:

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf, and the other of whom similarly consents so to acts or so acts.

(Source: Bowstead on Agency 1985.p1)