- distinguish between the obligations of the principal and those of the agent
- discuss the modes of termination of agency

5.1 Introduction

Anytime we ask somebody to do something for us, which will create a legal relationship between us and third parties, we create an agency relationship. We are the principals and the persons we ask to act on our behalf are the agents. The various ways through which agency relationship could be created as well as the rights and obligations of agency and ways of terminating agency are treated in this chapter

5.2 Definition, creation and types

5.2.1 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.

Agency has been described as a triangular relationship. These are Principal/Agent relationship, Agent/Third Party relationship and Principal/Third Party relationship.

The three features of agency are service, representation and power to affect the legal position of the principal. An agent can acquire rights for his principal and subject his principal to liabilities. In the case of *Montgomerie v. United Kingdom Mutual Steamship Association*, **(1891) 1 QB 3704, *Wright* J**opined that "where a person contracts as an 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 may sue is the principal.". See also ***Okwejiminor v. Gbakeji* (2005) 5 NWLR (pt. 1079) 223.**

5.3 Creation of agency

Agency relationship may be created or may arise in any of the following ways:

(a) Express appointment

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. Contrarily, where there is an express prohibition precluding the existence of an agency relationship, any act done by the purported agent will be invalid. In *White v. Lucas* (1887) 3 TLR 516, 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.

(b) Implied agency

This is agency that arises by implication. 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. Usual authority relates to the kind of authority that an agent in a trade, business and profession or at his place of employment is vested with, to enable him discharge his commission. In terms of customary authority, the agent must act impliedly according to the customs and usages of the place, market or business. Such customary authority must either be known to the principal or must be so notorious that the principal cannot deny knowledge of it. With apparent or ostensible authority, a person is allowed to appear as if he is the principal's agent when in fact he is not. The principal has led other parties to believe that a person has the authority to represent him.

In the Ghanaian case of ***Buama* v *Oppong***, [1992] 2 GLR 213 the defendant was the owner/driver of a commercial vehicle. The plaintiff who paid a fare to travel on the vehicle could not find his bag on reaching his destination. He had paid freight for the bag to a bookman who took the bag from him and kept it in the booth of the vehicle. The plaintiff sued for the value of the bag and the items in it, consequential loss and damages. In his defence the defendant contended inter alia that the bookman was not his agent. It was found that the bookman gave the money he had received as freight from the plaintiff to the defendant and that even though the bookmen were employees of the Ghana Private Road Transport Union they were the ones who dealt with the passengers by collecting the fares and freight from them. The defendant was vicariously liable for the loss of the plaintiff's bag by the bookman because if a person is represented or permitted himself to be represented, that representative had authority to act on his behalf, and he would be bound in the same way a she would be if that other had infact authority to act. Since the defendant was present when the fee was charged and also clear that the defendant had given authority to him, it was an apparent authority to the bookman to act on his behalf. Accordingly, there was an agent and principal relationship between the bookman and the driver. Again, in law, the usage of the trade or business in which an agent was employed would in the absence of express direction, frequently determine the liability of the principal.

(c) Agency of necessity

This agency may arise in emergency situations where a person is obliged to act to prevent irreparable loss to another. Such an agency may be implied where the following conditions exist:

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This agency may arise in emergency situations where a person is obliged to act to prevent irreparable loss to another. Such an agency may be implied where the following conditions exist:

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.

(d) Agency by ratification

This is a situation whereby a person acts without authorisation 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* (1870) LR 6 Ex 89 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. 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* (1901) AC 240;

(ii) The principal must have been in existence at the time the agent entered into the contract. See *Kelner v. Baxter & Others* (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)* (1957)1 WLR 1051.

(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* [1993] 2 Lloyds Rep 225 (QB);

(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* (1890) 6 TLR 217 (QB)

(e) 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.

(f) Apparent agency

This occurs when a principal has not taken due precaution to prevent a situation in which somebody portrays himself as having authority to act as his agent.

5.4 General agents and special 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.

On the contrary, an agent that is appointed for a special purpose or a specific occasion is called a special agent, which are of four types as follows:

(a) Factor

A factor is a merchantile 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.

(b) 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.

(c) Auctioneer

An auctioneer is a person licensed by law and authorised 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.

(d) *Del credere* agent

A *del credere* agent is an agent who in return for a higher rate of commission promises to indemnify the principal if the third party with whom he contracts in respect of goods fails to pay or deliver under the contract. He is a surety of the buyer.

5.5 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 and accordingly, agency relationships have been classified as: Actual or Express authority; Implied Authority; Apparent authority; Ostensible authority; and usual authority. These forms of authority will be considered seriatim below.

5.5.1 Actual or express authority

This type of authority is invested on the agent in writing and sometimes by deed under seal.

5.5.2 Implied authority

This form of authority of the agent is usually inferred from the conduct of the parties especially the principal. An agent may also have the implied authority to acts that are incidental to the acts for which he has actual authority.

5.5.3 Apparent authority

An agent may by his conduct show to third parties that he has authority to contract for the principal and thereby make the principal liable.

5.5.4 Ostensible authority

This authority is inferred or observed from the words of the principal and the agent would also act within the confines of such authority.

5.5.5 Usual authority

This authority would normally derive from the agent's normal business for his principal. Such authority would not be ambiguous.

An agent's scope of authority must not exceed that of the principal to act on his own behalf. Where an agent acts outside the scope of his authority in good faith, the principal would be bound by the acts. An agent will however be personally liable if he has no authority at all to act on behalf of another and would indemnify the third parties in damages. An agent who is employed to act in the course of his work or profession or business has implied authority to do whatever is usual in such profession or business or trade. An agent's illegal act will not bind his principal; neither can he be remunerated for, or indemnified against an illegal act committed by him.

5.6 Rights and obligations of principal and agent

Agency imposes rights and duties on both the agent and the Principal.

5.6.1 Rights of an agent

Every agent has some rights, which include the following:

(a) As a general rule, an agent is to be indemnified by the principal in the course of the performance of his duties;

(b) An agent is to be paid the reward or commission for work done;

(c) An agent is entitled to have his lawful actions ratified by his principal;

(d) A disclosed principal must also assume responsibility and liability for the authorised act of an agent;

(e) An agent has the right to enforce a contract against a third party; and

(f) An agent has a right of lien over the goods of his principal for his commission and other moneys due to him.

5.6.2 Duties of an agent

The duties of an agent include the following:

(a) An agent is bound to follow the principal's instructions;

(b) An agent must not delegate his authority unless he is expressly authorised by

(c) An agent must act in good faith and avoid conflict of interests;

(d) An agent must exercise due care and skill professed by him;

(e) An agent must not make secret profit;

(f) An agent must not disclose confidential information; and

(g) An agent must render an account to the principal as at when due

5.6.3 Duties of the principal

The duties of the principal depend on the nature and type of the agency. Some of these duties include the following:

(a) Duty to pay the agent's fee or commission;

(b) Duty to indemnify the agent for all lawful acts carried out by the agent on the principal's behalf;

(c) Duty to ratify the act of the agent as the case may be;

(d) A disclosed principal must assume responsibility and liability of the authorised act of the agent; and

(e) The principal is liable to third parties under all contracts entered into by the agent within the agency whether the principal is disclosed or not.

5.7 Termination of agency

An agency relationship may be terminated in the following ways:

(a) Act of the parties

The parties can bring the contract of agency to an end by mutual agreement of the parties. This is when the termination is from both of them. In other instances, the termination comes from only one of the parties. It may either originate from the principal or from the agent. The termination may be through revocation by the principal by notice or summarily. It may also be through renunciation of the agency by the agent;

(b) **Operation of law**

An agency may 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,*[1992]1GLR232 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 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.

5.8 Summary

Agency is one kind of relationship that runs through several human endeavours. In almost every activity, we sometimes find ourselves acting on behalf of other people or asking other people to act on our behalf. The proper understanding of agency is therefore essential for a true appreciation of its practical significance. The whole realm of what constitutes agency in terms of what agency is, the types, its creation, the obligations of the agency as it touch the duties of the principal and the agent, and how the relationship (of agency) is terminated, were highlighted to ensure a good grasp of the area of study.

5.9 REVISION QUESTIONS