

CAN AGENT OF A DISCLOSED PRINCIPAL BE HELD LIABLE IN A SHIPPING CONTRACT IRRESPECTIVE OF THE COMMON LAW POSITION AND THE INTRODUCTION OF SECTION 16(3) OF THE ADMIRALTY JURISDICTION DECREE (ACT) OF 1991

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Abstract

The General Rule in a simple law of contract is that, the rights and liabilities of a disclosed principal by an agent when dealing with a third party is vicariously liable to his principal. This means that the principal may sue or be sued on any contract made or money received on his behalf by an agent when dealing with third parties in so far as he is acting within the authorized scope of his principal. By the provision of Section 16(3) of the Admiralty Jurisdiction Decree Act of 1991 which provides that the agent of a principal in a shipping contract will no longer escape liability based on the common law doctrine of acting on behalf of a disclosed principal. Simply put, they should be held liable for their act even when they are working or acting on behalf of a disclosed principal. This paper intends to examine the doctrine/principles in details and relate it with the duties and functions of an agent in a shipping contract. The aim is to agree or disagree with his controversies, with the sole aim of seeing whether the act posed a threat to the duties of an agent in performing his functions under the circumstances as the case may be.

Introduction

Nigeria is by nature blessed with a Coastal boundary of 853 kilometres, Navigate Rivers and lakes of 3,122 Kilometres;¹ hence Coastal trade has never been alien to us. Undeniably, since the advent of Colonialism, 'Admiralty Law' has come to stay. As activities take place on the land, activities also take place on the Oceans and waters of the world. The Nations of the World and continents are involved in navigation of the oceans for huge commercial activities such as import, export, oil exploration, trade, exportation of natural resources, fishing etc. Accordingly, in the maritime world, demand and supply do not meet directly rather they make use of intermediary which is a Ship Agent.²

This paper attempts to introduce the concept of Agency and its liabilities and see whether or not an agent of a disclosed principal can or should be held liable in a shipping contract irrespective of the common law position and of section 16(3) of the Admiralty Jurisdiction Decree (Act) of 1991.

Agency Defined

Who actually is a Shipping Agent? An agent *simpliciter*, is someone who is authorized by another (called the principal) to act on his behalf to the extent of effecting the principal's legal relations with other persons known generally as third parties.³ A Shipping Agent is a person who deals with the transactions of a ship in every port the ship visits.⁴ The common law rule is that any person can act through an agent: *quod facit per alium facit per se*. The reason is for practical conveniences. The only exception to the rule occurs where a person occupies a position requiring

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¹O.S. A Obikeze and E. Obi, 'Nigerian Government and Politics' (Bookpoint Publishers, 2009) 1.

²<http://www.marineinsight.com/careers2> accessed 28-1-2021 at Warn.

³M.O. Adesanya, and E.O. Oloyede, *Business Law in Nigeria*, (Lagos & London: University of Lagos & Evans Brothers Limited, 1972) 5.

⁴<https://www.marineinsight.com/careers-2/who-is-a-shipping-agen/> accessed 30-1-2021.

performance or where the parties make a contract which expressly or impliedly prohibits delegation to an agent.⁵

Common Law Principles of Agency

With particular reference to Maritime Industry, a ship's agent is the agent of the ship owner at the particular port and therefore at that point, stands in the shoes of the ship-owner. Here, it is reasonable to suppose that he has the authority to do whatever the ship-owner has to do at that port. Therefore, at common law, the general rule in respect to the rights and liability of a disclosed principal in relation to third parties is that; the principal may sue or be sued on any contract made and any money received on his behalf by his agent where the said agent is acting within the scope of his authority, and this position is in no way affected by the fact that the agent is a foreigner.

The effects of this principle is that in law an act done by an agent on behalf of his principal is deemed to have been done by the principal. The law treats the agent as no more than an instrument through which the principal has acted. This was upheld in the case of *Niger Press Ltd. v N.KLCopr*.⁶

The Agent's Authority

The power of an agent to act on behalf of his principal as it relates to third parties flows from what is known as authority i.e, the principal authorizes the agent to do an act and the agent does it. Sometimes, however, cases may arise as a result of the conduct of the principal which creates the appearance of authority, although it does not in fact exist. If the principal addresses a third party to believe that the agent has authority and the third party relies and acts upon this so called apparent authority', the principal will be stopped from denying such authority and will be liable accordingly.⁷

The following are however types of authority an agent can exercise

Express/Actual Authority''-This is a power which has been expressly conferred on the agent by a principal. The principal is bound by acts of the agent falling within the scope of the authority and he will be liable to any third party dealing with the agent.⁸

Usual/Implied Authority''-This is the power which an agent derives from his position in a particular trade or business. A principal will be bound if an agent exceeds his actual authority but acts within his usual authority. A third party cannot rely upon an agent's usual authority if he knew that the agent was exceeding his usual authority.⁹

Apparent Authority/Agency by Estoppels

Where a person by his conduct holds out another person as having his authority to perform an act, that person will not be allowed to go back on his representation.¹⁰The general principle is that where there is a representation which was intended to be acted upon and indeed it was acted

⁵M C Okanny, *Nigerian Commercial Law* (Onitsha, Africans First Publishers Pic, 2009) 465.

⁶(1989)NWL(RPt107) 68.

⁷Racah v Standard Co. of Nigeria Ltd. (1922) 4 NLR 48.

⁸Odunfanade v Rossek (1960) FSC 358.

⁹Watteau v Fenwick (1893) 1 QB.346.

¹⁰M.O. Adesanya, and E.O. Oloyede, *Business Law in Nigeria*, (Lagos &London: University of Lagos & Evans Brothers Limited, 1972) 5.

upon by the representative who had relied on the representation, it becomes binding on the principal.¹¹ It should be noted that the representation must be made by the principal since it is the belief that was produced in the mind of the third party by the act of the principal which gives rise to his liability. It may be by words or by conduct.¹²

Authority by Ratification

This occurs where an initially unauthorized act is subsequently affirmed (or ratified) by the principal and thereupon becomes binding. It is a case of real authority given after the event has taken place.¹³ This may also arise if a principal subsequently adopts or ratifies unauthorized acts or contracts that had been made in the principal's name.¹⁴

Necessary Conditions

Principal must be capable at the time of the contract i.e. the principal must have had capacity to do the act at the time the agent did it. The act in question must be one capable of ratification. There must be knowledge of all material facts i.e., the principal must be aware of the material facts.¹⁵

Duties of an Agent

The principal obligation of an agent is to exercise due care, skill and diligence in the execution of his business. The ship's agent is to carry out his instructions strictly in accordance with his principal's customary requirements, which means that the agents must follow the ordinary and proper course of business in accordance with established usage and practice.

The agent must act solely in the interest of his principal and his personal interest must not conflict with his duty to his principal. The agent has an obligation to account to his principal for all monies received and for all payments made on his behalf.

The nominated agent who applies to bring in the ship through a (S.E.N) certificate and reports the ship to the following relevant authorities shall be accorded accredited agent for that voyage.¹⁶ In *Triana Ltd. v Polymakers Ltd.*¹⁷, an Agent authorized to conduct particular trades or business normally has the authority to do whatever is usually done by occupying such positions. He also has the authority to act in accordance with the custom and usage of the place or trade, provided such customs and usages are reasonable

The relevant authorities to take care of these responsibilities are:-

- a. The National Maritime Authority
- b. The Nigerian Port Authority
- c. The Nigerian Custom Service

Agents further obligations in a shipping contract

The shipping agent has obligations to the importer or exporter directly, or through the importer's clearing agent, or through the exporter's forwarding agent. To ensure that the cargo is loaded in

¹¹President Clothing and Co Ltd. v Anyanwu (1975) LLR 1.

¹²Scarf v Jardine (1882) 7 A.C 35 at 349.

¹³Re Mawasco Ltd. (1969) 1 ALL ER 188.

¹⁴M.C. Okanny, *Nigerian Commercial Law* (Onitsha, Africana First Publishers Plc, 2009) 465.

¹⁵Folashade v Alhaji Duroshola (1961) 1 ALL NLR Pt 1 p. 87.

¹⁶M.C. Okanny, *Nigerian Commercial Law* (Onitsha, Africana First Publishers Plc, 2009) 465.

¹⁷4NWLR(Pt.759)171CA.

full and in safety; and that exporters carrying vessel and their import cargo is promptly released to the bonafide owner.

To report vessel, lodge the full import cargo manifest and pay the relevant ship's dues to the above mention authorities. It is the responsibility of the importer to ensure that he receives all cargo clearance and delivery documents from his shipper and not from the ship's agent.

Agents Duty under a Charter Party Agreement

- a. To protect the vessel's interest at all times especially with regard to the quickest turnaround of a ship in port at lowest possible expenses.
- b. If a vessel by the charter-party is consigned to agents nominated by the charters, the agents so appointed must perform all the normal services to the ship and her master as if the agent had been appointed directly by the owners.

Duties of the Ship's Agent Appointed under Liner Agency

Calculating and payment of his (Principal) remuneration as well as defining the role and duties of the principal i.e., the ship owner,

To provide for, and administer a proper system of control and handling of container and RO-RO Traffic if necessary.

To represent the principal and undertake all activities while complying at all times with any specific instructions, which the principal may reasonably give.

To attend conference matters, if required on his principal's behalf,

To issue on behalf of the principals, bills of lading and manifests and such other documents as may be required,

To recommend and/or appoint stevedores, terminal operators, haulers, watchmen, tallymen, and all kinds of suppliers and sub agents if required

To provide marketing and sale activities to canvass and book cargo to the services, and to maintain contract with shippers, consignors, forwarding agents, port and other authorities including trade organizations,

To provide for an efficient communication system, as the agent must keep the principal informed continually on cargo bookings, space availability, conference matters, competition, local conditions affecting the operation of vessels.

To arrange for clearing, forwarding, reception and loading of outward cargo and discharge, and release of inward cargo and to attend to trans-shipment through cargo. This will involve arranging for surveys on damaged cargo, preparation of cargo condition reports, handling of claims and periodical returns,

To prepare disbursement accounts in respect to the call of each vessel, and to prepare periodic financial statements as required,

To keep the principal updated with regulations, amendments to port tariffs and all other charges as they become known.

Classification of the Principal

Principals are classified as: disclosed, partially disclosed and undisclosed.

Disclosed Principal: A disclosed principal is a principal whose identity is known by the third party at the time the contract is made by the agent.¹⁸

A Partial Disclosed: A principal whose identity is not known by the third party, but the third party knows that the agent is or may be acting for a principal at the time the contract is made.

An Undisclosed Principal: Is a principal whose identity is totally unknown by the third party, and the third party has no knowledge that the agent is acting in an agency capacity at the same time the contract is made.

Liability of a Disclosed and Partially Disclosed Principal

If an agent acts within the scope of his or her authority, a disclosed or partially disclosed principal is liable to a third party for a contract made by the agent. Ordinarily, if the principal is disclosed, an agent has no contractual liability for the non performance of the principal or of the third party. If the agent has no authority but nevertheless makes contract purportedly on behalf of a disclosed principal, the principal cannot be held liable in contract by a third party. Again if the principal is partially disclosed, the principal and the agent are both treated as parties to the contract.

Liability of an Undisclosed Principal

When neither the fact of agency nor the identity of the principal is disclosed, a third party is deemed to be dealing with the agent personally, and the agent is liable as a party on the contract.¹⁹ Once the undisclosed principal's identity is revealed, the third party has the right to elect and to hold either the principal or the agent liable on contract.

Circumstances in which Agents of a Disclosed Principal can be sued

An agent of a disclosed principal can be sued in:

Any matter arising within a Federal Port and its precincts including claims for loss or damage to goods occurring between the off-loading of goods across space from a ship and their delivery at the consignee's premises, or during storage or transportation before delivery to the consignee. This has been strengthened by 1991 Admiralty Jurisdiction Decree to include claims arising from damage to goods occurring between off-loading of goods and their delivery to the consignee's warehouses.²⁰

Any matter arising from the Constitution and powers of all port's authorities, airports authorities and the National Maritime authority.

A Ship Agent can be sued if he fails to provide a seaworthy vessel as agreed and ends up providing an unseaworthy ship to his customer. Unseaworthiness includes lack of

¹⁸Ataguba & Co. v Gura Nigeria Ltd. (2005) 8 NWLR (Pt. 927) p. 429.

¹⁹Ataguba & Co. v Gura Nigeria Ltd. (2005) 8 NWLR (Pt. 927) p. 429.

²⁰O Duru, 'Law of Agency Relationship'. https://www.academia.edu/6792779/Law_of_agency_Relationship accessed 28-1-2021.

sufficient bunker fuel or the voyage or where the voyage is a long one and the ship will fuel at ports of call for the particular stage of the journey during which the loss occurs. Unseaworthiness also includes an avoidable excess of load which makes it necessary for the ship to incur expenses for lightening.²¹

Failure to take cargo insurance routing to wrong destination. Failure to take cargo insurance where an agent of a disclosed principal fails to take cargo in-transit insurance before transportation of the cargo from port of discharge to the consignee and as a result the consignee claims of damages when some of the goods were lost in transit through diversion, can sue the agent.²²

An agent could be sued if he goes contrary to the agreement of the deviation which implies that the ship shall progress on the voyage without deviation from her proper course²³ Normally, if his route is not stated, the proper course is the ordinary trade route. Generally, the essence of deviation is the voluntary substitution of another voyage for the contract voyage. Nevertheless, where the master who was ill unintentionally stemmed a wrong course, it was held that there has been no deviation. Deviation can be justified in a common law when:-

For purposes necessary for the prosecution of the voyage or for the safety of the adventure;
To save human life-Deviation to save human life is always justified but not to save property, unless this is expressly stipulated.²⁴

However, when there has been unjustifiable deviation, the Agent cannot rely on the exception clause and is the only entitled to the benefit of the exceptions available to a common carrier, e.g Act of God, loss by the Queen's enemies, if he can prove that the loss would have occurred even if no deviation had taken place.

Reasonable Dispatch: The Agent/Ship-owner who undertakes the ship, shall proceed on the voyage with reasonable dispatch if he fails to carry out this understanding the shippers remedy depends upon whether the failure is such as to frustrate the adventure as a commercial enterprise; if it may repudiate the contract; if it is not, he has an action for damages for the delay, but to this the plea of excepted perils is a good answer.

An agent may be liable; if the Agent is in fact the principal. Thus in *Schmalz v Avery*²⁵, a person who was described in a charter party as "agent for the freighters" was held personally liable on proof that he himself was the freighter.

The courts may also hold an agent liable as in *Kelner v Baxter*²⁶, if he contracts on behalf of a non-existing principal or if on a true construction of the contract it is possible to reach this result. An agent is also liable if he signs the contract in such a way as to assume personal responsibility. The obvious example is the contract made on behalf of an undisclosed

²¹*Ibid.*

²²*Ibid.*

²³*Ibid.*

²⁴*Ibid.*

²⁵(1851) QB 16 655.

²⁶(1366)LR2CP. 174.

principal. Such case, a contract evidence is generally admissible to prove that another person, that is the disclosed principal is liable as well as the agent.²⁷

Liability for breach of warranty of authority. If an agent warrants an authority which he, in fact does not possess, a third party who relies on such warranty can sue the agent for breach of warranty of authority.²⁸

If the third party sues the principal who denies that the agent had authority to bind him, the plaintiff can join the agent as a co-defendant and can claim damages for breach of warranty of warranty; if it should be held that such authority did not in fact exist.

If however, an agent is sued on a written contract in which he appears as a contracting party, he cannot escape liability by proving that he was merely acting as agent for someone else. An Agent will be personally liable where he contracts in his personal capacity.

Principals Responsibilities and Liabilities for Act of the Agent's under Common Law

Below are ship owner's responsibilities, requirements and liabilities under Common Law.

He has responsibilities, under the common law, to owners of cargo loaded upon his vessel and also to any bills of lading issued by him or his servants (i.e. master of Agents) requiring him to make good any loss or change to that cargo.

He has obligation to the government or the flag of the ship in respect of standards of efficiency of equipment on board, to the proper manning and care of this crew (Merchant Shipping Agent) to hull and machinery maintenance to various safety regulations aimed at requirements laid down by government departments, Port Authorities, classification societies and others.

In regard to both crew and cargo, the master will also have responsibilities to health, customs, port, immigration, and other authorities which will require his attention and an acceptance of certain responsibilities.

In the event of ship owner entering into a contract of a freight e.g., a charter party, he will have obligations to the charterers and/or ship-owners and consignees, neglect of attention to which may well result in court action and possible damages assessed against him.

The ship owner can also have liability under certain circumstance e.g., damage caused by his ship to wart, other ships that is to say, third parties.

The principal is also liable for harm caused by an agent in the scope of his (Agents), duties and the principle of respondent superior applies to Agent-principal relationship for harm caused by an agent as long as the principal has the right of control over the agent.

A principal is expected in tortious liability whenever a third person sustains loss due to the agents mis-presentation, the way to a principal's liability are whether the agent was actually apparent or authorized to make representations and whether such representations were made within the scope of the agency.

²⁷Basma v Weeks (1950) 2 ALL ER 146.

²⁸Collen v Wright (1857) S.E. & B 647.

Principal's Authorization of Tortuous Conduct

A principal who authorizes an agent to commit a tortuous act may be liable to persons or property injured thereby, because the act is considered to be the principal.

Principal's Own Tortuous Conduct

A principal conducting an activity through an agent may be liable to harm resulting from the principal's own negligence, or recklessness, which may include giving improper instructions, authorizing the use of improper materials or tools or the like.

Admiralty Matters, Action in Personam

In 1991, the Admiralty Jurisdiction Decree was promulgated. This decree repeated the Admiralty Jurisdiction Decree of 1962, which gave the Federal High Court the exclusive right of exercising Admiralty Jurisdiction in Nigeria. Today in invoking Admiralty Jurisdiction, one has to consider the two types of action, which are available within the Admiralty Jurisdiction of the Federal High Court. The action *in personam* and the action *Rem*.²⁹The former is an action against persons who are usually the Ship Agents or owners of the ship or vessel that gave rise to the cause of action. The second is an action against '*Res*' or property which is usually the vessel itself.

It must be noted that the vessel is not only '*Res*' against which action may be taken. It may in certain circumstances proceed against the freight or cargo or even proceeds of sale. Therefore, an action against a ship is regarded as an action in *rem* rather than an action *in personam*.³⁰ However, our scope will be narrowed down to an action *in personam*, which is an action *inter partes* founded on the person of the defendant.

Admiralty action may be *in personam* against the 'Agent' named in the writ of summons. Such an action is like an action in tort or contract and it is necessary to look at the person who was liable *in personam* at the time when the cause of action arose.³¹ This invariably leads us to look at the provisions of the Act.

Provision of Section 16 Admiralty Jurisdiction Act 1991

Section 16 of the Admiralty Jurisdiction Act 1991 overthrew the disclosed principal rule. It introduced a revolution in the legal regime relating to liability of ship agents who act for disclosed principals. The old rule was that a ship agent was not liable for default or acts in the conduct of his principal's business in so far as, a third party knew or was in law presumed to know that the agent acted on behalf of the principal. This was the old Common Law doctrine of the disclosed principal in Agency. The new rule is contained in Section 16 referred to above and it provides as follows:-

The Charterer, Manager, operator or master of any ship in a Nigerian Port or Territorial waterways liability who authorizes an agent to act for the ship, on behalf of his principal in relations to any purpose and for which the ship is Agent in Nigeria, shall be liable for any act, declaration, default, omission or commission of his agent in carrying out his agency.

If the Owner, Charterer, Manager, Operator or Master of any ship entering or coming into Nigeria requested the services of an Agent in Nigeria, such request shall be notified in writing to the

²⁹ Admiralty Jurisdiction Decree (Acts) 1991, S5(2) and s5(2).

³⁰ *Ibid.*

³¹ *Ibid.*

Ports Authorized before or on the arrival of the ship, and the authorization shall only cease if no suit is brought against the ship within the institution period.

A person who acts as an agent of the Owner, Charterer, Manager or Operator of a ship may be personally liable irrespective of the liability of his principal for the Act, default, omission or commission of the ship in respect of anything done or failed to be done in Nigeria.

A person who does anything or carries out any duty under the provisions of this Decree or under the provisions of any law in force in Nigeria in respect of any ship in the territorial waters of Nigeria, shall be doing that as duty constitute himself the agent of the ship. The revolution in Section 16 is the creation of the statutory agent. It follows that ship agents will no longer escape liability based on the Common Law doctrine that they acted to disclosed principals.

What is the Effects of Section 16 of AJA

Section 16 (1) is in conformity with Common Law principle which makes a disclosed principal liable for the acts of his agent. Section 16 (2) imposes a duty on vessel owners, Operators, Charterer, Owners and Management to notify the Ports' Authorities on the authorization of any person to act as their agent.

Section 16 (3) operates to render an agent personally liable irrespective of the liability of his principal for the act, default, omission or commission of the ship in respect of anything done or failed to be done in Nigeria. The subsection uses 'may'. It follows that it is not in all cases that the agent will be personally liable. The courts would exercise discretion. Like in all judicial discretion, it will not only be exercised judicially but also judiciously putting the facts and circumstances of each particular case into consideration. Section 16(4) is a strict liability subsection; it makes any person who does anything in respect of a ship's agent liable in breach of a contract. Consequently, such person may be personally liable under Section 16(3). While subsection 3 is a radical departure from the Common Law, subsection 4 reestablishes the creation of an agency relationship by conduct.

Section 16 A.J.A and Decided Court Cases

In *Panalpina (Nig's.) Ltd.v Comet Shipping Agencies (Nig.) Ltd.*³²the plaintiff instituted an action for short landing of goods carried on board the defendant's vessel. The defendant prayed the court to dismiss the suit on the ground that they were agents and not principals. Anyaegbulam C.J. held in affirming the Common Law principle of agency, that generally an agent is not bound to disclose who his principal is but in the instant case, it has not been shown that the defendant are agents of the principal.

In *Panalpina v Elder Demspster Agencies Ltd.*³³. It was held that the defendant has not named its principal and the West Africa Joint Service is not named as the principal in the Bill of Lading. Since the defendant had not disclosed the existence of the principal in the statement of defence, they could not aver in their affidavit to support of the motion that West African Joint Service was their principal.

³²Vol. II N.S.C. 600.

³³Vol. III N.S.C.p.. 134.

In *West African Shipping Agency (Nig) Ltd. v Nablico Limited*³⁴ the court was confronted with the question of whether an agent can sue on a bill of lading in his personal name. It was held that the shipper or a consignee of goods is the only person entitled to sue upon a bill of lading. It is also clear that an agent of such a person is not competent to sue personally on it. At least, an agent could sue in a representative capacity if so authorized by the principal.

In *West African Shipping Agency & Anor v Kalla*³⁵ the plaintiff claimed for the delivery of a consignment of beans on \$12,000 being the value thereof which the defendants had contracted with the plaintiff to deliver by sea to Port Harcourt. The defendants claimed liability and argued that they were only agents of the shippers. The judge gave judgment to the plaintiff and awarded special and general damages against the principal, having been disclosed, the cargo's interest should have taken action against the principal. It was held that when a person makes a contract in his own name, without disclosing either the name or the existence of a principal, he is personally liable to the other contracting party even though he may be in fact acting on a principal's behalf. Once a person puts himself forward as a contracting party whether as an agent or a principal, he will continue to be liable even after the delivery of the agency by the other party.

Conclusion

The sum total of our submission in this paper is that, the courts should continue to observe the well established principles of agency law, particularly, with respect to loss or damage to or in connection with cargo or delay in delivery as Section 16 of AJA canvassed. If Section 16(3) is to be applied at all, it should be as a last resort in cases where the Hague Rules considerations do not apply and where the arrest of the offending ship or sister ship is not possible or, where in an action *in personam*, the disclosed principal has failed to appear in proceedings or cannot be traced at all.

³⁴Vol II VN.S.C.p.. 75.

³⁵(1978) 3 SC 21.