AGENTS' COMMISSION: THE NEED FOR JUDICIAL RETHINKING

Commercial Law governing business transactions is regarded as a very important aspect of the law. Little uncertainty exists in those areas of Commercial Law which have been covered by legislation,[1] at least the statutes are clear, though the interpretation of them may have given rise to difficulty. Those areas which are not covered by legislation are not only largely uncertain but have given rise to considerable difficulty and confusion. A glaring example of this is the rule on the payment of an agent's commission. Here, in particular, the law is not only uncertain, it is confusing, difficult and sometimes unjust. It is proposed in this paper to examine the law relating to the agent's commission, point out its weakness and suggest a possible solution to this problem which has plagued the Court for years.

Agency relationship being essentially contractual,[2] the rights and obligations of the parties are contained in the agency agreement. Accordingly, the Courts are faced with the task of interpreting the terms of the agreement. In doing this, they seek to reconcile two conflicting interests — those of the principal and agent — a task too difficult, if not impossible, to perform. The result is alarmingly disappointing.

The right to receive commission arises from a contract which may either be express or implied.[3] In such a case, the right of the agent to receive commission is subject to the fulfilment of certain conditions.[4] The most important, perhaps the most crucial, which is relevant to the present discussion is that the agent must have earned his commission. To earn his commission an agent must have done substantially all that he undertook to do and he must be the effective rather than the accidental cause of the result upon which the commission becomes payable.[5] This is a question of fact but certain legal principles emerge from the cases. Thus, if the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission although the actual sale

1. See for example English Sale of Goods Act 1893; Sale of Goods Law Cap. 115, Laws of Western Nigeria 1959; Nigerian Hire-Purchase Act 1965; Nigerian Companies Decree 1968; Nigerian Bill of Exchange Act 1964.
2. But there are instances when agency relationship may not be contractual — agency arising by operation of law.
3. See Powell, *Law of Agency* 1961, p. 332; Fridman, *Law of Agency* 1971, pp. 140-149.
4. See Lowe, *Commercial Law*, 1967, pp. 16-21; Fridman, *op. cit.*, pp. 121-139.
5. It is this condition which has given rise to the most difficult problem and to which no satisfactory solution has yet been found.

has not been effected by him.[6] But in order to found a legal claim for commission there must not only be a causal but also a contractual relation between the introduction and the ultimate transaction of sale.[7] Denning, L.J., succinctly summarised the situation thus:[8]

> "When a house owner puts his house into the hands of an estate agent, the ordinary understanding is that the agent is only to receive a commission if he succeeds in effecting a sale, but if not he is entitled to nothing.... The agent in practice takes what is a business risk. He takes on himself the expense of preparing particulars and advertising the property in return for the substantial remuneration — reckoned by a percentage of the price — which he will receive if he succeeds in finding a purchaser."

But the decision in *Trollope & Sons* v. *Martyn Bros.*[9] is to the effect that if the principal unreasonably refused to sell to a willing purchaser introduced by the agent he was liable to the agent either on a *quantum meruit* or in damages for having wrongfully deprived him of the opportunity of earning his commission. This decision which was followed in *Trollope & Sons* v. *Caplan*[10] was overruled by the House of Lords in *Luxor (Eastbourne) Ltd. v. Cooper*[11] where the House held that the agent's rights depended solely on the express terms of the agreement and that it was not possible to imply a term that the principal would not withdraw from the negotiations prior to the fulfilment of the condition upon which commission was to be payable. The House went further to say that until a legally binding agreement of sale was entered into the principal was entitled to withdraw; by so doing he did not act wrongfully and hence the agent was not entitled to claim commission or damages or on a *quantum meruit* basis.

Notwithstanding this, the House of Lords was of the view that there are two instances, possibly irrespective of an express or implied term, when an agent is entitled to something even though he has not completed the contract beneficially to his principal. The first is when the contract states that he is to be paid commission for introducing the principal to a purchaser for a stipulated price.[12] The second is where the agent is entrusted with the disposal of property, and spends time and money and labours unsuccessfully on such task.[13] Are these instances really effective so as to protect the agent against possible deprivation of his commission? The first instance would perhaps be very rare, though not impossible, in that the principal who is in the stronger position would hardly agree to the inclusion of such a clause in the agreement. The second is not only an over-simplification but superfluous in that even without an agency agreement the party will be entitled to reimbursement but not to compensation.

6. *Green v. Bartlett* (1863) 14 C.B. (N.S.) 681; *Burchell* v. *Gowrie Collieries* [1910] A.C. 614.
7. *Toulmin* v. *Millar* (1867) 58 L.T. 96; *Taplin* v. *Barrett* (1889) 6 T.L.R. 30.
8. *Dennis Reed* v. *Goody* [1950] 1 All E.R. 919 at p. 823.
9. [1934] 2 K.B. 436.
10. [1936] 2 K.B. 382.
11. [1941] A.C. 108.
12. *Ibid*., at p. 120, per Lord Simon.
13. *Ibid.*

The reception of English Law [14] and the practice of Nigerian courts to follow post-1900 English decisions are largely responsible for the similarity between English and Nigerian Law. The result is that Nigerian Law by taking its root from English Law has not developed its own distinctive attribute. Thus, in *Ebun Omoregie* v. *A.G. Mid-western State &* Ors.,[15] a case touching upon agents' commission, the Court merely cited English cases with approval[16] without attempting to examine the facts critically to ascertain whether there might be a justification for a departure from those cases.

The question for determination [17] in *Omoregie's case* was whether an agent who was employed by the principal to secure an overseas financier to finance various government projects was entitled to commission on a *quantum meruit* basis after he had secured such a financier but the negotiation broke down because his principal refused to pay a certain percentage of the loan in the financier's country's currency in accordance with currency regulation. The facts are simple: The plaintiff stated that he was commissioned by the Military Governor of the Mid-western State to raise an external loan from overseas financiers for a number of government projects and was promised orally a commission of 5% for his services. He ultimately succeeded in securing a loan of £3.180 million from Messrs. Gexco Italia S.P.A. whom he introduced to the Governor. But negotiation between the company and the govern-ment broke down and no contract was finally entered into. Neverthe-less, the plaintiff sought *inter alia* a declaration against the defendants that he was entitled to the agreed commission or in the alternative to a reasonable sum on a *quantum meruit* basis.

The defendants, besides putting the plaintiff to the strictest proof of the alleged facts, averred *inter alia* that the event upon which the plaintiff's entitlement would have arisen did not occur.

It was held that a person who claims to be entitled to commission must strictly prove the contract which he alleges entitles him to it; that where an agent is promised a commission on the happening of an event the agent will not be entitled to any commission until the event has happened; that benefit is the key-note of the operation of the *quantum meruit* principle and that in the instant case no benefit of the plaintiff's services accrued to the government as he did not succeed in raising loans for the projects, nor was he able to get any one to execute the projects on "contractor financier" basis as required; that as the desired end was not achieved and the alleged services were useless, the plaintiff had no cause of action.

14. See s.45(l) Law (Miscellaneous Provisions) Act 1964; S.14 Eastern Nigerian High Court Law (Cap. 61) 1963; S.28 Northern Nigerian High Court Law (Cap. 49) 1963; Ss. 3 and 4 Law of England (Application) Law (Cap. 60) Laws of Western Nigeria 1959.

15. Unreported Suit No. B/47/1971, High Court of Midwestern State.

16. *Howard Houlder & Partners Ltd.* v. *Marx Steamship Co.* [1923] 1 K.B. 110; *Alder* v. *Boyle* (1847) 4 C.B. 635; *Mason v. Clifton* (1863) 3 F & K 899; *Martins* v. *Tucker* (1885) 1 T.L.R. 655.

17. There was also the question, though irrelevant here, whether the plaintiff could sue the government without first obtaining the governor's fiat in accordance with the Petition of Rights' Law.

However, the decision in *Omoregie's case* is not free from objections. First, benefit is not necessarily the key-note of the operation of the *quantum meruit* principle, for in *Prickett v. Badger*[18] *quantum meruit* was allowed for work done by an agent even though nothing had been gained by the principal.[19] Secondly, it would appear in *Omoregie's case* that it was the principal who deprived the agent of earning his commission since the agent procured a financier who was willing to finance the government projects, negotiation only broke down at the last stage when the principal refused to repay a certain percentage of the loan in Italian currency in accordance with Italian currency regulations, a condition over which neither the agent nor the company had control.

Finally, the courts have not been able to work out a satisfactory solution on this aspect of the law relating to agents' commission. But the view expressed in *Dennis Reed* v. *Goody*[20] is perhaps a fairer one since it is based on the premise that normally the agent shall only obtain his full commission if a sale is effected but that he may obtain something for his trouble, if not. Lord Denning expressed himself thus:[21]

> "When an agent gets an offer which the house owner does not accept, it might be quite reasonable for the agent to ask for his out-of-pocket expenses or even for a reasonable reward for his time and labour, but it is not reasonable for him to ask for full commission at the same rate as if he had actually procured a sale. The commission is a substantial remuneration not based on time, labour or money expended — which may be little — but on a percentage of the purchase price."

A similar conclusion was earlier reached by Pollock, C.B. in *Prickett v. Badger*[22] which was later disapproved by the House of Lords in *Luxor's* case, Denning's view in *Dennis Reed* v. *Goody*[23] is perhaps the most equitable in the circumstance in that it maintains an equilibrium between the two conflicting interests. The agent who is employed to carry out a specific transaction, no matter whatever its scope, on behalf of his principal and who spends money and time in executing the principal's instruction deserves to be compensated for the time and labour in addition to being indemnified for expenses incurred. It does not matter if the principal has not benefited from the agent's efforts. This seems to be Lord Denning's view which, it is submitted, is equitable and just.

It is easy to follow the strict view that agency relationships being contractual the agent is not entitled to his commission or indeed to anything apart from indemnity unless he has discharged his obligation

18. (1856) 1 C.B. (N.S.) 296.

19. It should be added, however, that the House of Lords criticised *Prickett's case* in *Luxor's case* and it was said to rest on its special facts.

20. [1950] 1 All E.R. 919 at 924.

21. *Ibid*., at p. 924.

22. (1856) 1 C.B. (N.S.) 296.

23. See note 20.

under the agency agreement. This seems to be the popular view. Thus, a learned writer states:[24]

> "The remuneration of the agent frequently takes the form of a commission, being a percentage of the value of the transaction the agent is to bring about for the principal. In such cases the agent does not become entitled to his commission until the event has occurred upon which his entitlement arises. What this event is must be ascertained from the terms of the agency contract. In most cases where the agent is engaged to find a third party to enter into a contract with his principal there will be little difficulty because the event will occur when the principal and the third party enter into a contract which the agent was engaged to bring about...."

The learned writer concluded:

> "Where the contract makes express provisions for the agent to be remunerated only upon the happening of a certain event, he will not normally be entitled to claim reasonable remuneration on a contractual quantum meruit."[25]

The weight of judicial authority is also in support of the latter view.[26] It is submitted that Lord Denning's view though not yet judicially accepted[27] is more equitable and ought to be preferred and adopted. Even as regards Lord Denning's view, a conservative lawyer is likely to argue that to adopt that view would be to re-write the agency agreement for the parties, a thing which the Court will never do. Indeed Professor Gower has suggested[28] that in view of the decision in *Luxor's* case it is difficult to see how Lord Denning's view can be sustained unless the courts are prepared to censor the parties' contract and re-write it for them on the principles of *aequum et bonum.* He suggested further that this is the last resort from which Lord Denning does not flinch and for which the early equity cases on "surprise" might furnish some authority.[29]

However, it is submitted that to adopt Lord Denning's view does not mean re-writing the agency agreement for the parties; instead the court is merely giving effect to the latent intention of the parties and thereby implying certain terms into the contract. For, it is the intention of the principal that the agent should carry out his instruction while it is similarly the implied intention of the agent to carry out the principal's instruction. Thus, if despite genuine effort of the agent to carry out his instruction, the end result is not achieved but this is not due to the default of the agent, there is no reason why the agent should not be

24. *Chitty on Contracts*, 23rd ed., vol. 2, para. 104.

25. *Ibid*., para. 111.

26. *Howard Houlder & Partners Ltd. v. Marx Steamship Co.* [1923] 1 K.B. 110; *Alder* v. *Boyle* (1847) C.B. 635; *Martins* v. *Tucker* (1885) 1 T.L.R. 655; *Mason* v. *Clifton* (1863) 3 F & K 899; *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108.

27. It is noteworthy that there are instances when his minority view has been subsequently judicially approved. For example his minority view in *Chandler* v. *Crane Christmas & Co.* [1951] 2 K.B. 164 was adopted in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1963] 3 W.L.R. 101.

28. See L.C.B. Gower. "Estate Agents' Commission" (1950) 13 M.L.R. 491.

29. *Ibid*.; see for example *Bath* v. *Montague's* case (1695) 3 Cas. Ch. 55; *Evans* v. *Llewellyn* (1787) 1 Cox 333; *Townsend* v. *Strongman* (1801) 6 Ves. 328; *Picket* v. *Loggon* (1807) 14 Ves. 215; *William* v. *W.* (1809) 16 Ves. 72.

compensated[30] for his time and labour. This can be deemed to be within the expectation of the parties and since the law seeks or should seek to satisfy the reasonable expectation of persons,[31] this suggestion will not be out of place. Thus a learned author has said:[32]

> "... Where the event upon which the agent's entitlement to remuneration arises does not occur, the agent will not be entitled to receive remuneration on a *quantum meruit* unless provision for this is expressly made in the agency contract, or *unless a term to such effect can be implied into the agency contract in order to give it business efficacy, otherwise to effect the intention of the parties."*[33]

The judicial view that the agent is not entitled even to compensation if he does not bring about the event upon which commission is payable, is not only unjust, but it is also inconvenient to the agent. This is demonstrated by the *Omoregie's* case where inspite of the agent's efforts, he was not entitled to the 5% commission which the principal promised him simply because he had not brought about the event upon which commission was payable. The agent was not even entitled to compensation for his labour and time, for it was in evidence that the agent travelled several times to Europe, Canada and U.S.A.

However, while the decision in *Omoregie's* case, as unjust as it is, is supported by judicial authorities,[34] the point for consideration here is whether the law should be allowed to remain in this unsatisfactory state. It is submitted that the time is ripe for judicial reassessment of the existing law. In this connection, it is suggested that an agent, who undertakes to bring forth an event and genuinely proceeds to achieve this objective and fails but the failure is not due to his default should be entitled not only to an indemnity but to compensation for his labour and time. This, it is submitted, is the direction in which the law should develop because it appears to be the most equitable. It is true that this may be a departure from the accepted rule, but this is not the first occasion on which such a departure has been made. Only recently such a departure was made in another branch of the law.[35] Lord Denning in *British Movietonews* v. *London Cinemas*[36] said:

> "It is, as he says, a recognition of the fact that parties with their minds concerned with the particular objects about which they are contracting are apt to use words, phrases or clauses which taken literally, are wider than

30. Compensation, as used here, does not mean damages in the technical sense but a sum of money fixed by court in the exercise of its equitable jurisdiction to reward an agent who has laboured genuinely to carry out the principal's instruction without success. But the failure was not due to his default but to that of the principal.

31. Seavey, "The Rationale of Agency" (1920) 29 Yale L.J. 859 at p. 887.

32. *Bowstead on Agency*, 13th ed., article 70.

33. Emphasis supplied.

34. See *Howard Houlder & Partner Ltd.* v. *Marx Steamship Co.* [1923] 1 K.B. 110; *Alder* v. *Boyle* (1847) 4 C.B. 635; *Luxor (Eastbourne) Ltd. & Ors.* v. *Cooper* [1941] A.C. 108.

35. See *Lindsay Parkinson & Co. Ltd.* v. *Commissions of Works and Public Buildings* [1950] 1 All E.R. 208; *British Movietonews* v. *London Cinemas* [1950] 2 All E.R. 390.

36. [1950] 2 All E.R. 390 at pp. 395-396.

> they intend, or I may add, cover situations which they never contemplated. Recognising this fact, the court refuses to apply them literally to an uncontemplated turn of events. This does not mean that the courts no longer insist on the binding force of contracts deliberately made, it only means that they will not allow the words in which they happen to be phrased to become tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the contemplated scope of the contract. Even if the contract is absolute in its terms, nevertheless, if it is not absolute in intent, it will not be held absolute in effect. The day is gone when we can excuse an unforeseen injustice by saying to the sufferer:
>
> 'It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.'
>
> We no longer credit a party with the foresight of a prophet or his lawyer with the draftmanship of a Chalmers. We realise that they have their limitations and made allowances accordingly."

The view which has persisted through the ages is that agency relationship being contractual the terms must be strictly construed; that the parties will not be entitled to derive benefits under the agreement until they have discharged their obligations. Thus, an agent is not entitled to his commission or indeed for that matter to any compensation even though it is the principal who deliberately deprived him of the performance of his obligation, unless there is express provision in the contract to the contrary. This view will receive a rude shock if Lord Denning's view, which is the majority view in the above case, were a pointer to future judicial development. For the court will no longer credit the agent with the foresight of a prophet or his lawyer with the draftmanship of a Chalmers, allowances will be made for their limitations. The result will be that even when the agency agreement does not contain provisions relating to certain circumstances, the court will imply terms which will render such a contract meaningful and efficacious in the sense that either partly to the agreement will not suffer unduly. This will be a great improvement in the law.

Recently, the inherent flexibility of the Common Law in dealing with the rights and remuneration of commission agents was demonstrated in *Roberts v. Elwells Engineers Ltd.*[37] There, the general rule that liability to pay commission ceases as to the future upon cessation of employment, in the absence of a reasonably clear intention to the contrary[38] was re-examined. In *Robert's* case, the trial Judge granted a declaration that the plaintiff whose agency was terminated by the principal was entitled to an account in respect of his commission "to the crack of doom" and payment of the amount found due. The Court of Appeal however indicated that a declaration for an account could raise serious difficulties of proof of causation each time it was sought to take an account. Instead of a declaration for an account, the Court of Appeal unanimously made an order for an inquiry as to damages. This would estimate the value of the likelihood of the defendants receiving repeat orders from customers introduced by the plaintiff less allowances for the fact that the plaintiff would no longer have to bear the expenses of entertaining and canvassing customers. Here, the Court recognised the inadequacy of the Common Law and remoulded it into a shape which fits the current development.

37. [1972] 3 W.L.R.l.

38. See McCardie, J., in *Marshall* v. *Clanvill* [1917] 2 K.B. 87 at p. 92.

An attempt has been made to state the general principle relating to the commission of agents. In the process, the weakness and the inadequacy of the existing principle has been demonstrated. It has been seen that under the existing rule an agent, who has not completely performed his obligation under the agency agreement is not entitled to compensation for his time and labour unless, of course, there is an agreement to the contrary.[39] The point has been made elsewhere in this paper that this principle of law is unjust and may cause hardship to an agent who genuinely takes steps to perform his obligation under the agreement but for circumstances beyond his control cannot complete the performance. Agency agreements do not usually provide for compensation in such a situation. Thus, the conservative jurist wishing to preserve the sanctity of contract would deny compensation, for to do so would amount to re-writing the contract for the parties. Recent development in other branches of law has stripped this argument of its potency, in that rules of law which have been found to cause hardship have been modified through the process of judicial rethinking. Surprisingly, the law relating to agents' commission, archaic, unjust and burdensome as it is, has survived the ages. It can only be hopefully expected that the view expressed in this paper, that the agent in some cases should be entitled to compensation for his labour and time, even when he has not succeeded in carrying out the principal's instruction, provided he took genuine steps towards its execution and the failure was not due to his default but to that of the principal, may soon be judicially accepted.

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39. *Luxors (Eastbourne) Ltd. & ors.* v. *Cooper* [1941] A.C. 108.

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