Critique of the Doctrine of Undisclosed Principal as an Exception to the Rule of Privity of Contract

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Abstract

The principle of privity of contract precludes third parties from bearing burdens or obtaining benefits under a contract which they are not party to. However, under agency, an undisclosed principal shares in the rights and liabilities arising from a contract entered into by an agent and a third party even though the identity and existence of the principal may not be known to the third party at the time of making the contract. A third party, after discovering the fact of the agency, has to elect to sue either the principal or the agent. An agent could, therefore, be liable on a contract which he has not benefitted if the third party elects to sue him. This would occasion injustice to the agent. Using the doctrinal method which involves the analysis of cases and scholarly works on the subject, this article has examined the doctrines of undisclosed principal and privity of contract and found that the former is an erosion of the latter. The undisclosed principal has been accepted for commercial convenience even though it is more of a third party protection device particularly, against the agent who does not usually benefit from the contract but acts on another's behalf. Although the agent has a right to indemnity by the principal, such might be defeated if the agent has to wait and claim from the principal after the conclusion of the third party's case against him. As such, this article recommends that the principal's duty of indemnity should be enforced by the agent claiming against the principal through third party proceedings under relevant rules of court whenever the agent is sued by the third party. Alternatively, the court should insist on compulsory disclosure of the fact of the agency by the agent to third party at the time of making the contract to avoid the problems that would arise when the principal is subsequently discovered.

Key Words: Contract, privity of contract, undisclosed, principal

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Introduction

Generally, the principal is liable to third parties for all contractual or tortuous acts of his agent done in the discharge or execution of the terms of the agency and which are within the scope of his authority, actual or apparent. The principal is answerable to third parties for contracts entered into by his agent because the agent is merely intermediary between his principal and the third party. Whether rights and/or liabilities exist under such a contract will depend on whether the principal is named, disclosed, undisclosed or foreign. In the case of undisclosed principal, the identity of the principal and the fact of the agency are not made known to the third party at the time of making the contract, that is, both the name of the principal and his very existence are not disclosed. However, the rule is that the contract may be enforced by or against the principal provided the agent's act was authorized. This article interrogates the desirability of a stranger to a contract acquiring rights and liabilities under it via the doctrine of undisclosed principal to digest the reasoning behind it. The article will also examine the reason behind a third party electing to proceed against an agent who is just an intermediary in a contract between the principal and the third party. The article will also find out if there is a way out of liability for an agent under the principle of undisclosed principal.

Conceptual Clarifications

It is important to explain the following concepts for clarity.

a. Named Principal: Here the name and identity of the principal are disclosed to the third party by the agent at the time the contract is made. In such a situation, there is no contract with the agent, the principal becomes the right person to be held liable in the contract and not the agent. The principal shares both rights and liabilities alone and is the right person to sue and be sued. In *Ologbosere v Ezenwa*[1], it was held that where the agent acting within the scope of his authority makes a contract with a third party on behalf of a disclosed principal, the agent drops out completely and only the principal can sue and be sued by the

[1] (1962) LLR 35

third party. This means that, the agent is a mere conduit pipe in the contract and drops off the transaction as he is not a party to it. In *Akin Bojor Bros. v. Crek West Africa Line*[2] it was held that where the name of the principal is disclosed by the agent, he is not personally liable on the contract to the third party.

According to Akanki,[3]

> Where an agent having authority disclosed his agency, that is, the name or the existence of his principal is disclosed, only the principal can sue or be sued on the agent's act. The agent drops out and cannot by reason of his agency without more incure personal liability to the third party.

b. Unnamed Principal: Where an agent enters into a contract but does not name his principal at the time of the contract, the agent is not liable on it so long as it is clear that he did not pledge his personal credit. The agent only makes it known to the third party at the time of making the contract that he is acting on behalf of a principal. The agent is not liable in the circumstances. Where in a contract, a person makes it as an agent for, or on account of, or on behalf of, or simply for a principal, or where words of that kind are added after the agent's signature, he is not personally liable but the principal. In the case of *University of Calabar v. Ekpo Ephraim and Ors*[4]*,* it was held that the agent is not liable where it was known that he was acting for a principal.

> This means that, at the disclosure of the fact that there is a principal on whose behalf the agent acts, his name or identity need not to be revealed, it suffices if the third party is aware or ought to know that the person he is dealing with is acting for another person. It is, therefore, clear that a disclosed principal may be named or unnamed.

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2 (1970) NCLR 136
3 EO Akanki, *Commercial Law in Nigeria* (University of Lagos Press 2005) 257
4 (1993) NWLR (pt 271) 551

c. Undisclosed Principal: Under this situation, where a contract is made with a person who is actually an agent but the identity of the principal and the fact of the agency are not made known to the third party at the time of making the contract, the undisclosed principal as well as the agent are, as a rule, bound by the contract and entitled to enforce it. An undisclosed principal is one of whose existence, the third party is not aware, so that the third party does not know that the person he deals with is an agent to someone else. The rule is that the contract may be enforced by or against the undisclosed principal provided the agent's act was authorized. This rule was expressed in *Crompton Richmond & Co. Inc. v. Salami Alhaji Atanda*[5] where it was held that when a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it. In the case of *Yusufu v. Kopper Int'l*[6] the Supreme Court of Nigeria held that even where a director of a company (agent) contracts in his own name but really on behalf of the company which he did not disclose as his principal, the other party to the contract can sue the company (principal) if he/she later discovers the principal.

According to Yagba, Kanyip and Ekwo, whether the transaction is made with a person who is an agent but is not known to be such, the third party is entitled to elect who to sue within a reasonable time of discovering who the real principal is.[7] What is reasonable time is not stated by the learned authors and therefore may depend on circumstances of each case and is left for the court to decide. Therefore, the third party has an option to either sue the agent or the undisclosed principal and until he does so (elect) the third party can always hold the agent liable under the transaction. In *Crompton's case*[8], the plaintiff's assignee of a contractual right sued the defendant for damages for non-acceptance of goods ordered

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5 (1967) NWLR 383 at 385

6 (1996)30 LRCN 411

7 TAT Yagba, BB Kanyip, SA Ekwo, *Elements of Commercial Law.* (Tamaza Publishing Company Ltd 1994) 102.

8 (n, 5)

through the agent from the assignor, an undisclosed principal. The issue was whether an undisclosed principal could enforce a contract against a party with whom his agent had contracted without disclosing his existence. It was held that, the plaintiff''s to whom the undisclosed principal had assigned his rights under the contract were entitled to sue the defendant for the breach of the contract.

The undisclosed principal also has the right to sue the third party. However, where the agent expressly describes himself as the principal, the rule that the principal can enforce a contract where the agent makes it without disclosing that he is an agent does not apply. This means that even when the third party discovers that there is an undisclosed principal but the agent says he is the principal at the time of contracting, the agent will be held liable and the undisclosed principal cannot enforce the contract against the third party. It is submitted here that the agent should always disclose to third party the fact of agency as a matter of compulsion otherwise he should be held responsible.

As earlier stated, it may be stressed again that, for the principal to be bound on the contract to the third party, the acts of the agent must be authorized. In *Labode v. Otubu Custanavo (Nig) Ltd*[9], it was held that any unauthorized tortuous or contractual act of the agent cannot bind the principal. It is equally necessary to point out that the liability of a principal is not a joint liability with his agent, but an alternative one. The third party must elect, on discovering the existence of a principal whether to sue the agent or to proceed against the principal. Where he elects to sue one, he can no longer sue the other as was held in *Scarf v Jordine.* [10] Therefore an election of one discharges the other.[11] Hence recovery of judgment against the agent will amount to unequivocal election that discharges the principal. According to Okany [12] if a person dealing with the agent does not know and ought not from the circumstances to know of the existence of the principal, but assumes that the agent is acting on his own behalf, there is said to be undisclosed principal.

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9 (2001) FWLR (pt 43) 212
10 (1882)7 App Cas. 345
11 EO Akanki, *Commercial Law in Nigeria* (University of Lagos Press, 2015) p. 259
12 MC Okany, *Nigerian Commercial Law.* (African First Publishers Plc 1992) p. 492

Privity of Contract

The Privity of Contract is the basic rule of contract which states that a person who is not a party to a contract cannot derive any benefit or suffer any disability from it nor can he benefit from an exemption clause however widely worded.[13] According to Akanki, every person who sues to enforce a simple promise must show that he has given consideration for it which suggests that only the parties to a contract can sue on it.[14] Where two parties agree to confer a benefit or to impose an obligation on a third party, that third party cannot enjoy the benefit by bringing an action on the contract neither can he be compelled by legal action to discharge the obligation.[15] Therefore, the third party who is not privy to the contract, cannot be legally affected by it. In *Dunlop Pneumatic Tyre Co. Ltd v Selfridge Ltd*[16] a person sold tyres to Dew & Co. on terms that he would extract from the customer a similar undertaking. Dew & Co. sold the tyres to Selfridge who also agreed to observe the restrictions and to pay Messrs Dunlop the sum of £5 for each tyre sold in breach of this agreement. Selfridge supplied tyres to two other persons below the listed price and Dunlop sued them for the liquidated damages. The Court held that Dunlop could not succeed because it was not a party to contract between *Dew & Co. v Selfridge* even though the contract was made for Dunlop's benefit.

According to Umenweke[17] the doctrine of privity means that a non party to a contract cannot bring an action on the contract as it is only those who furnished consideration towards the making of the contract that can bring an action on it. Hence, a contract cannot be enforced against a stranger to it even if the contract is under seal. In *Incar (Nig) Ltd and Great Nigeria Insurance Co. Ltd v. Chief J.A.O. Ojomo*[18] where the respondent was appointed by the first appellant as a pensions consultant in 1970, his main duty was to advise the first appellant on personal matters affecting the first appellant's staff and

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13 *Adler v Dickson* (1955)1 QB 158, *Chuba Ikpeazu v. ACB Ltd* (1965) NMLR 374.
14 EO Akanki (n, 11) p. 199
15 *Price v Easton* (1933)4 B & D 433
16 (1915)AC 847 at p. 853
17 Meshach Nnama Umenweke, Jude Uche Okoye, Elizabeth Ama Oji, *Commercial Law and Practices in Nigeria.* (NOLIX Educational Publications (Nig.) 2009) p.29
18 (1988)7 NWLR (Part 307) 534

liaise with the insurance company (the second appellant). The first appellant terminated the appointment of the respondent and the respondent sued both first and second appellants. The Court of Appeal held that the second appellant which is the Insurance Company cannot be liable in a contract between the respondent and the first appellant since the insurance company was not a party to the contract between them.

In the case of *Rebold Industries Limited v. Mrs. Olubukola Magreola and Ors*[19] the services of the respondent, a firm of solicitors were retained by Mandela's Group Ltd for preparation and engrossment of a deed of sublease between Mandela's Group Ltd and the appellant. The sublease was in respect of property situate at Creek Lane Lagos. It was a term of a sale agreement between Mandela's Group Ltd and the appellant that the appellant would be responsible for the fees legally incurred in preparing the deed of the sublease. The appellant failed to make good the terms of the agreement and the respondent took out the writ of summons against the appellant for the preparation and engrossment of the deed. The appellant having failed to respond to the summons of the respondents, a default judgment was entered for the respondent.

After the judgment was delivered, the appellant filed a motion on notice before the Lagos State High Court challenging the jurisdiction of the Court on the ground that the respondent lacked the *locus standi.* The High Court dismissed the motion on notice. Aggrieved by the said ruling, the appellant appealed to the Court of Appeal. The Court of Appeal dismissed the Appeal on the ground that though the respondent was not party to the deed of sublease, he has *locus standi* to sue on a representation made by the appellant on the deed to pay the respondents' fees. Dissatisfied, the appellant appealed to the Supreme Court of Nigeria, which allowed the appeal and held that there was no privity of contract between the appellant and the respondent and as such, the respondents lacked the *locus standi* to institute the action. This decision is in line with the principle of privity of contract.

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[19] (2015)8 NWLR (part 1461) 210.

Undisclosed Principal and Privity of Contract

The principle of privity of contract states that only a party to a contract can benefit and share in the liability under the contract. There are however instances where the principle of privity of contract can be evaded to avoid hardship being caused by its strict application. One of such instances is agency relationships. Under agency, a person who is an agent can enter into contract with another person for the benefit of yet another person which is referred to as the principal.[20] So the contract becomes that of the principal and only him can sue and be sued under the contract. This means that under Agency, a person who is not a party to a contract acquires rights and liabilities under it. Therefore once it is certain or undisclosed that the agent is acting on behalf of another (principal), the principal becomes liable for the contract. This is an aberration from the spirit behind privity of contract.

One of the foundational principles of contract law is that each party must objectively manifest an intention to enter into contractual relations with the other. Such a meeting of minds can exist only between the third party and the agent, and still only objectively, for the agent must at all times intend to act on behalf of the principal. The agent who fails to disclose his true position should be personally liable as a party under the contract is consistent with privity of contract. Only a party to contract can sue or be sued under this doctrine.[21] The value of the privity of contract doctrine has weakened due to the development of exceptions to the rule.

According to Akanki:

> From the view point of commercial men, the doctrine of privity of contract is quite an inconvenient one. In modern commercial transactions, there are many occasions in which a contract is made for the benefit of a third party with the exception that the beneficiary should have full rights to enforce the contract. In most cases

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20 Meshach Nnama Umenweke (n 20) p. 66, *Ironbar v Cross River Basin and Rural Development Authority* (2003) FWLR (165)375 and *First Bank of Nigeria Plc v Excel Plastic Industry Ltd* (2003) FWLR (Pt 160) 1624.

21 Stephen Todd. 'Privity of Contract' in John Burrows and Jeremy Finn and Stephen Todd (eds) Law of Contract in New Zealand (4th ed, Lexis Nexis, 2012) 562.

> the doctrine complicates judicial process by necessitating double litigation. As a result many exceptions have evolved.[22]

A controversial exception to the rule is undisclosed agency. Unlike disclosed agency, the third party contracts with the agent and not the undisclosed principal because the third party is unaware of the undisclosed principal's existence.[23]

The general idea of undisclosed agency corrodes the notion of privity of contract. However, the circumstances placed on the undisclosed principal's ability to intervene reflect cohesion to privity of contract where it may be arbitrary to the third party to have him barge in or intervene in that contract. Mechem[24] states that the principle of undisclosed agency doubles an anomaly, but even so…as well settled as any other rule in the law of agency. It is evident that the law on undisclosed agency does undermine the notion of privity of contract as the undisclosed principal can in certain circumstances, intervene in a contract between the agent and the third party. However, the courts will only undermine the rule and allow intervention upon terms which exclude injustice,[25] this includes where the contract terms suggest there is no undisclosed principal or where the personal nature of the agreement means that the privity between the agent and the third party becomes fundamental to the contract itself.

According to Krebs:[26]

> Although the rule is anomalous within the constraints set by the privity of contract doctrine, it is an exception that will continue to have great importance within commercial transactions. The acknowledgment of third party intervention via an

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22 EO Akanki (n 14) 200

23 Critically Analyze the Extent to which the Principles of Undisclosed Agency Undermine the Notion of Privity of Contract. https://mesonhayes.co.uk>critically... Accessed 28th March, 2020.

24 Floyd R. Mechem, 'The Liability of the Undisclosed Principal' (2010) (23) (7) *Harvard Law Review*. p.515.

25 *Keighley Maxsted and Co v Duranct* (1901) AC 240 page 262.

26 Thomas Krebs, *English and European Perspectives on Contract Commercial Law* (1st edn, Hart Publishing, 2017) 181.

> undisclosed principal will be bemoaned by doctrinal purists, but will generally be welcomed by commercial pragmatists.

The doctrine of undisclosed principal has been disparaged as being unjust to the third party or clashing with the principle of law of contract as a person who apparently is not a party to a transaction may acquire rights and shares in the liabilities contrary to the doctrine of privity of contract. However, it is justified on grounds of business efficacy and convenience. This is more so that an undisclosed principal through his agent acquires the benefit of the contract.

According to Imhanze,[27] growing consumer rights questions constituted immensely to the shift from the general rule of privity of contract. There is, therefore, an urgent need for an avenue for redress to genuinely affected persons who the strict common law interpretation of privity might have deprived of such. The courts in Nigeria have also started to recognize this important aspect of business. Due to current relaxed requirements of modern contract law in relation to privity of contracts and with the increasingly complex world of commerce there must be some changes to accommodate certain exceptions to the general rule and guarantee restitution to the aggrieved.[28] This will no doubt strengthen the world of commerce. In *Alphonsus A. Udo v Government of Akwa Ibom State & Ors*, per Tur, JCA,[29] it was held that;

> while privity of contract is still good law, the banking law and transactions are so vital to international maritime and commercial business that to apply principles of privity of contract would destroy initiative and sometimes make transactions impossible. The principle of privity of contract has been so watered down over the years

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27 Ihuah Imhanze, Only parties to a contract can enforce it; A Review of the Supreme Court's Judgment in *Rebold Industries Limited v. Mrs. Olubukola Magrela & Ors* (2015)8 NWLR (Part 1461) 210. March (2016) (2) (1) *Journal of Commercial Law.* p. 107 - 308

28 Jain S. "Rule of Privity of Contract: Study in English and Indian Context" (July 2, 2014) SSRN: https://ssrn.com/abstract=2461688. Accessed 29th March, 2020.

29 (2012) LPELR 197 27 pp 21 - 22

> by remoteness principle and practice of banking and international commerce that our court must hesitate before applying them.

Therefore, to evade any injustice that may raise its ugly head from the sudden appearance or discovery of the principal, certain circumstances exist under which the third party cannot sue or be sued by the undisclosed principal.[30] First is where the contract entered into by the agent is personal in nature. Therefore, where there is a personal element in the contract and the identity of the undisclosed principal would have made a material difference in the decision of the third party to enter into the contract, for example, in a contract of service, principal cannot benefit or be liable as was held in *West Africa Shipping Agency & Anor v Alhaji Kalla*[31] and *Said v Butt*[32] where someone bought in his name for another person a ticket to enter theatre to watch a play but the person was not allowed to enter. It was held that the person could not sue because the personal identity of the ticket holder was important to the third party who would have not dealt with the principal.

Secondly, where the terms of the contract or the conduct of the agent are or is inconsistent with the agency relationship. For example, where an agent in a contract describes himself as the owner of the subject matter of the agency. In *Humble v. Hunter*[33] someone engaged another person to effect a charter party in respect of his ship. The person without disclosing his agency described himself as owner of the ship. It was held that the principal could not be sued.

Thirdly, where the contract expressly provides that the agent is solely bound. That is where the agent expressly states in the contract that he is the principal and is to be bound by the contract as in *Pabod Suppliers Ltd v. Beredugu,*[34] the principal will not be sued.

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30 EO Akanki, *Commercial Law in Nigeria*. (University of Lagos Press 2005) p. 259
31 (1978)3 Sc 21 at 28
32 (1920)3 K.B 497
33 (1848)2 Q13. 310
34 (1996)5 NCWR (Pt 448) 307

Personal Liability of the Agent

There are instances where though the agent has contracted on behalf of the principal, he will still be personally liable on the contract. These include;

a. Where the agent contracted personally. That is, when he contracted in his own name with or without disclosing the fact of the agency or identity of the principal. Here, the third party has the right to sue whether the principal or the agent. In *Abdulkarim Basma v. Gladys Muriel Weeks & Ors*[35] a solicitor purchased some real properties in his name for his client. The defendants who were vendors knew he was an agent but the contract contained no reference to the principal. It was held that the agent was bound. Similarly in *West African Shipping Agency & Anor v. Alhaji Kalla*[36] it was held that if a person contracts in his name without disclosing the existence of principal he is liable to the third party even when he is acting for his principal. It was also held that he will still be liable even after the discovery of the agency by a contracting party. It is submitted that though the agent is not disclosed, where it is finally discovered that a principal exists, the principal should be personally liable unless it is clear that the agent benefitted personally in the contract.
b. Where the agent acts for a foreign principal. Here, the agent is personally liable because national laws bind citizens of Nigeria and foreigners within the country but not those of other countries as was held In *Asafa Foods Factory Ltd v Alraine Nig. Ltd,*[37] however, this again depends on if the intention is that the principal be bound, then, the agent will not be liable as was held in *West African Umbrella Limited v Royal Interocean Lines.*[38]
c. Where the principal is fictitious and nonexistent as in *Kelner v. Baxter*[39] where a person purported to enter into a written contract on behalf of a company not yet incorporated. The agent was personally held liable even though he expressed himself as

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35 (1947)12 WACA 35
36 (1978)13 Sc 21
37 (2002) FWLR (Pt 125) 756
38 CCHCJ/4/74 p.391
39 (1866) L.R 2C. p174

contracting for a company. However in *Emmanuel Urhobo v Chief JS Tark*[40] it was held that if a pre-incorporation contract was purported to have been made by a company which did not exist, the contract was a nullity and neither the company when formed nor the promoter whose signature was added could sue or be sued in the contract.

d. Where a person purports to contract as an agent but it turns out in reality that he is the principal himself. In *Harper & Co. v. Viger Bros*[41] a ship broker entered into a contract with the defendant as charterers for the supply of a ship but it turned out that the ship broker was only speculating on freight as agent of the ship owners were not named and he was in fact the principal.

e. Where the contract is in writing and the agent signs his name absolutely without qualification. In *Gadd v. Houghton,*[42] it was held that an agent who signed a contract in writing in his name without qualification to show that he was acting as agent would be personally liable. This means that when an agent signs in his name but for the principal, the agent will not be liable. This means that where an agent signs his name even though he is acting for someone, he will be liable. It is again submitted here that, once it is discovered that the agent is acting for someone, even if he signs in his name, the principal should be liable unless where it is established that the agent benefitted personally.

f. Where the contract is by deed and the agent executes the deed in his own name. In *Schalk v. Anthony,*[43] it was held that the principal may not sue or be sued on any deed inter-partes, even if it is expressed to be executed on his behalf, unless he is described as a party to it and it is executed in his name. The rule here is rather strict so much so that even if the agent is describe in the document as agent acting for and on behalf of a named principal, the agent will still be personally liable. It is submitted that, this is too strict because if the agent does not personally

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40 (1976)11 CCHCJ 2629, 34, 39, 63, 66, 137
41 (1909) 2KB 549
42 (1876)1 Exch. D 357
43 (1818)1 M & S 573

benefit, he should not be liable otherwise it will amount to injustice to him.

g. Where the contract is a negotiable instrument e.g. a bill of exchange, cheque or promissory note and the agent signs his signature or endorses or accepts it, he is personally liable thereon. However, when he signs as a drawer, endorser or acceptor, adding to the signature words indicating that he signs not only as agent for the principal but also as agent for a specific principal, he incurs no liability. It is, therefore, submitted that the principal must be disclosed under the document for the agent to escape liability. This also means that, if he signs outside his limited authority, he will be personally liable.

h. Where the agent purports to act on behalf of a principal who lacks capacity to execute such a transaction, the agent is liable personally. It is submitted that this is justified because a person who lacks capacity to contract also lacks the capacity to appoint an agent to act for him and therefore he cannot give what he does not have.

i. Where it is customary for the agent to be liable on the transaction e.g. liability of an agent in contract of carriage of goods by sea. In *MV "Caroline Maersk" v Nokoy Investment Ltd,*[44] it was that, normally an agent is not vicariously liable for the default of his principal, however, section 16(3) of the Admiralty Jurisdiction Act creates special liability of the agent in the following terms; 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 in Nigeria.

j. Where there is an implied warranty of authority i.e, where the agent purports to be acting on behalf of the principal but it turns out that he was acting without authority, he will be personally liable to the third party for breach of implied warranty of authority.[45]

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44 (2002) FWLR (pt 113)213

45 *Collen v Wright* (1857)8 E & B 647

In *Scrimshire v Alderton*[46] it was found against an undisclosed principal who had asked a third party to account to him directly and subsequently pursued the third party for the contract price after the third party had nevertheless accounted to the agent.

There is no ambiguity however, that the ability to sue on the contract is commercially acceptable and tuned to the actuality of modern trade. According to Lang[47] the most significant consequence of the undisclosed principal doctrine is that the agent acquires personal rights and liabilities and the third party may elect to hold either the agent or the principal liable on the contract. Similarly, subject to any adverse consequences for the third party, either the agent or the principal may enforce the contract against the third party under undisclosed principal.[48] The distinguishing feature of undisclosed agency is that third party does not know of the principal's existence.[49] The third party must believe that the agent is dealing with him or her on the agent's own behalf. A blunt significance here is that the agent's authority must always be actual (express or implied) and cannot be delusive. It cannot come from a representation made by the principal to the third party as to the agent's power to affect the principal's legal relations. Clearly, the third party cannot pretent or proclaim to rely on representations made by a person of whom he is ignorant. Understanding agency arrangements require that the agent has the authority to create privity of contract as between the principal and third party without disclosing to third parties that he is doing so.[50] The undisclosed principal doctrine does not answer the question of whether privity immediately exists between the principal and third party because rights and liabilities between them will arise by operation of law, without, and sometime against, either's intentions.[51]

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46 (1743)2 St. 118 93 Er 111

47 Ania Lang, 'Unexpected Contracts versus Unexpected Remedies: The Conceptual Basis of the Undisclosed Principal Doctrine' (2010) (18). Auckland University Law Review. www.nzlii.org>8pdf Accessed: 22nd March, 2020.

48 *Siu Yin Kwan v Eastern Insurance Co. Ltd.* (1994)2 AC 199 (PC) at 207

49 Ania Lang (n 47)

50 Peter Watts and FMB Reynolds Boustead *Leynolds on Agency* (19th ed, Sweet and Maxwell 2010)) 8

51 Martin Schiff 'The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract' (1983) 88 *Com LJ* 229.

The question is on what basis does an undisclosed principal exercise rights against third parties in the first place? Does the undisclosed principal intervene on and enforce a contract of the agent against the third party or is the principal liable and entitled on an implied contract arising directly between him and the third party?

Lang's article[52] takes the position of an intervention approach, which posits the contract as being that of the agents and best neglects the approach of case law and affords the most appropriate practical consequences. He, however, concludes that while this has been accepted as better view by the leading commonwealth agency law texts it has rarely received judicial recognitions.

It is submitted that the idea of an undisclosed principal, partaking in the contract that he was not a party to sterms from the fact that the third party should not suffer injustice even though it is against the notion of privity of contract. This gives protection to third party who never knew that the principal exists when he entered into a contract with agent and therefore if he gets to know that there is a person behind the transaction (principal), such person should be held responsible if the third party elects to sue the principal. This supports the notion 'Respondent superior' which means let the superior, in this case the 'principal', answer. It also protects the interest of the third party against the principal wanting to jump into the contract from nowhere to benefit. Here too, the third party may elect or decide to proceed against the agent. It, therefore, means that the protection given to the third party under the doctrine of undisclosed principal is in two ways; one where the intervention of the undisclosed principal will create hardship for the third party, he will proceed against the agent and secondly, where proceeding against the agent will also cause hardship to the third party he will proceed against the principal. It should be pointed out that this choice works in alternative, not concurrently. Therefore a third party who fails to recover from the agent cannot turn around and sue the principal and vice versa.

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52 Ania Lang (n, 49)

Furthermore, the undisclosed principal liability also gives an advantage to a person who is not a party to a contract as it ascribes rights to the principal to benefit even when the third party did not have any knowledge of his existence while contracting. This is contrary to privity of contract but is accepted for business conveniences.

It is also not favourable to the agent, especially where the third party elects not to proceed against the principal but the agent. In this case the agent will be liable to pay for what he has not benefitted from while the principal who actually benefits from the contract will go free. The doctrine in this sense does not protect the agent, but amounts to an injustice to him. The question here is, where the third party elects to sue the agent, can the agent thereafter claim against the principal? In the circumstances, it does appear that the agent may proceed against the principal by way of evoking a third party proceeding under relevant rules of court. Therefore, due to the fact that the principal, though undisclosed, is the beneficiary of the contract entered into by the agent, if third party elects to sue the agent and not the principal, when discovered the law should permit the agent to recover whatever he has paid to the third party from the principal. This should come under the principal's duty of indemnity and reimbursement of the agent for liability and expenses incurred in the execution of the agency and the only way to do this is by way of third party proceedings. In this situation the agent will not allow the case to be determined before claiming reimbursement from the principal because that will amount to multiplicity of suits which is not allowed in law. In *Alhaji Batule Gafai v United African Company Ltd,*[53] the plaintiff agreed to buy a lorry from the defendant and paid the purchase price. On failure of the defendant to deliver the lorry, he successfully brought an action against him in a District Court for a particular sum as consideration. He subsequently brought an action to the High Court claiming general damages. The defendant pleaded the District Court's action. It was contented that the plaintiff had two actions one for the consideration of the contract which wholly failed and the other for damages. It was held that if plaintiff is entitled to

[53] (1961) All NLR P. 184

two separate sources of relief under one action and he proceeds to enforce one source of relief, he cannot subsequently proceed on the second source of relief. Where the course of action in the second action is the same as that for which the plaintiff had obtained judgment in the first although the relief sought for differs, the second action is not maintainable. In *Serrao v Noel,*[54] Bowen LJ stated that "the principle is that, where there is one course of action damages must be accessed once and for all".

Recommendations

a. This article recommends that the principal's duty of indemnity should be enforced by the agent claiming against the principal through third party proceedings under relevant rules of court whenever the agent is sued by the third party.
b. It is also suggested that where the third party eventually finds out that there is someone behind a transaction other than the agent, there should be no need for the third party to elect between the agent and the undisclosed principal. The third party should proceed straight against the principal alone and not either of them. This will remove the huddles in electing who should be sued or should sue and make businessmen transact freely and without suspicions.
c. Alternatively, the law of privity of contract gives exception by way of agency and as such even an undisclosed principal who is not directly involved in a contract benefits and also shares in the liability of the contract. It is, therefore, submitted that the court should always insist on compulsory disclosure by the agent to the third party the fact of contract of agency. Where an agent does not disclose, he should be personally held liable. This will prevent injustice being meted on an agent who has not benefitted from a contract but only makes a representation. It will also prevent gambling by way of electing who should be sued between the agent and the principal by third party under the doctrine of undisclosed principal.

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54 (1885)15 QB D 549 at 559

Conclusion

The right of a principal to sue under the principle of undisclosed principal depends on whether the third party knows that the agent dealing with him is doing so on behalf of another person who is the principal. If the agency is not disclosed, the principal may sue the third party under the contract even though the third party is ignorant of his existence. The third party also has the right to elect as between the agent and the principal who to sue.

This arrangement even though is contrary to the principle of privity of contract, is considered to be useful for commercial convenience and to avoid injustice in commercial transactions. However, the principle of undisclosed principal is more of the third party protection and an agent may suffer loss in a contract which he did not benefit from if the third party elects to sue the agent for the contract.