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Quest for a Legislative Reform of the Status, Duties and Liabilities of Insurance Intermediaries in Nigeria

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Abstract

Over the years, insurance intermediaries have become major stakeholders in the formation of insurance contracts and in the smooth operation of the insurance business across nations. This is particularly so in view of the increasing complexity of the insurance business and other intricacies associated generally with insurance contracts. In Nigeria, insurance intermediaries, agents and brokers, in particular, are subject to the common-law rules of agency in general, as well as varied statutory controls in terms of authorisation and operational requirements. The article examines the law regulating insurance intermediaries in Nigeria with a view to determining its adequacy in the protection of the insuring public against possible losses from the intermediaries' activities. While the issue of non-remittance of premiums by intermediaries has been statutorily addressed by prescribing the time frame within which such should be forwarded to the insurer, the status of insurance intermediaries, to whom certain pre-contractual disclosures have been made, as well as section 54(1) of the Nigeria Marine Insurance Act, identical to section 53(1) of the United Kingdom's Marine Insurance Act 1906, on the liability of a broker for premiums in marine insurance contracts are yet to be given the desired attention. It is argued that the common-law rule, as exemplified

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in Nigerian law, that the insured agent is the agent of the insured when completing a proposal form, especially in a country with a high incidence of illiteracy, has inflicted untold hardship on the insureds. The article concludes that there is a need to reform Nigerian law on the status of insurance intermediaries in receiving pre-contractual disclosures as well as the liability of brokers as expressed in the Marine Insurance Act in the public interest and in line with reform measures in other common-law jurisdictions.

Keywords: Regulation of insurance intermediaries; insurance agents; brokers, duties, liabilities

1 INTRODUCTION

Like any other commercial agency, the common law recognises the roles of intermediaries in the business of insurance. Intermediaries are involved at almost every stage of the insurance contract - from inception up to the claims stage when payment is made on the occurrence of the insured risk.[1] An insurance intermediary may be described as a person who, *inter alia,* intermediates between the insurer and the insured in soliciting, negotiating, or procuring a contract of insurance.[2] Thus, insurance intermediaries are the agents and brokers who act as middlemen in bringing the insurer and the insured into a contractual relationship. While an insurance agent could be a representative of the insurance company in such capacity as, for example, the managing director, director, branch manager,[3] or a full-time commission agent working for the insurer under one contract of service or another, an insurance broker is, generally, described as a professional who holds himself out as having a specialised or expert knowledge of insurance and the insurance market.[4] Furthermore, while the agent is, *prima facie*, regarded as the agent of the insurer,[5] a broker is presumptively the agent of the prospective insured in matters relating to the placing of an appropriate policy or in matters arising when a claim is made.[6] Nonetheless, the common law gives recognition to the insurance trade custom which allows an intermediary to perform the dual role of being the agent of the insurer and

1 See, e.g., *Bawden v London, Edinburgh and Glasgow Assurance Co* (1892) 2 QB 534; *Rozanes v Bowen* (1928) 31 Lloyd's L Rep 321; *North and South Trust v Berkeley* (1971) 1 W L R 470; *Drake Insurance v Provident Insurance* (2004) Lloyd's Rep IR 277; *Winter v Irish Life Assurance plc* (1995) 2 Lloyd's Rep 274; *Esewe v Asiemo* (1975) NCLR 433.

2 See, e. g., *Bawden v London, Edinburgh and Glasgow Assurance Co* 534; *Esewe v Asiemo* 433; *Nasidi v Mercury Assurance Co Ltd* (1971) 1 NCLR 387; *Ngillari v National Insurance Corporation of Nigeria* (1998) 8 NWLR (Pt 560) 1.

3 Insurance business is mostly carried on by incorporated associations which are regarded as artificial persons and which could only act through their human agents. In Nigeria, for example, by s 3 of the Insurance Act 2003, Cap I17, Laws of the Federation of Nigeria (LFN) 2004, no person can engage in insurance business unless a company duly incorporated as a limited liability company under the Companies and Allied Matters Act (CAMA) 1990 or a body duly authorised by or pursuant to any other enactment to transact the business of insurance or reinsurance. It is to be noted, however, that the CAMA 1990 has been repealed and replaced by the CAMA 2020.

4 See *Power v Butcher* 1830 10 B and C 329.

5 *Onwuegbu v African Insurance Co Ltd* (1965) 2 All NLR 111 116; *Esewe v Asiemo* 433 436.

6 *Rozanes v Bowen* 321; *in Empress Assurance Corporation Ltd v Bowering and Co Ltd* (1985) 11 Com Cas 107, it was held that a broker who accepts instruction from underwriters to act on their behalf in connection with an investigation of a claim without the full knowledge and consent of the assured, commits a breach of the duty which he owes to his principal, the assured; in *African Insurance Brokers v Veritas Insurance Co* (1985) HCNLR 146 149, Sowemimo, J observed that: "The law is clear about the relationships between the broker, assured and insurance company; and it is settled that in all matters relating to the placing of insurance, the insurance broker is the agent of the assured and of the assured only."

that of the insured in the same transaction.[7] Generally, the relationship between the insurer and insurance intermediary is dependent on the agency contract theory. Thus, the liability of the insurer for any act or omission of either category of intermediaries is determined by the actual or ostensible authority that they possess. It is a settled principle of the law of agency that an insurer, in its capacity as the principal, cannot generally be bound by any act of an intermediary, as its agent, that is done without the requisite authority to act. In some circumstances, the liability of an insurer may be excluded by contract.[8] Actual authority is that which is expressly or impliedly conferred by the insurer,[9] while ostensible or apparent authority is that inferred from the performance of an act which a reasonable person or a person of ordinary prudence, familiar with the custom and usage of the particular trade, business or profession where the agent is employed, would be justified in assuming that the agent has authority to perform.[10]

In Nigeria, the regulation of insurance intermediaries was first introduced by the Insurance Decree 1976. Prior to the promulgation of the Decree, insurance intermediaries were not subject to any form of regulation. The result hereof was that intermediaries perpetrated several wrongful acts, including holding themselves out as intermediaries of particular insurers and collecting premiums without remitting same to the insurers who were, most often, non-existent.[11] The

7 In certain cases, such as in a binder arrangement or in the performance of some administrative functions for the insurer, the broker could be held to be the agent of the insurer. A binder is an arrangement under which a broker is authorised by the insurer to grant final cover himself and, in some cases, to settle claims in certain classes of business subject to a specified limit: in *Salami v Guinea Insurance & Gode* (1977) NCLR 161, the broker was entrusted with blank cover notes capable of use for both Third Party Liability and Comprehensive Insurances, but with express authority to bind the insurer only in respect of Third Party Motor Liability and that comprehensive motor insurance could only be granted after the proposal form had been accepted by the insurer. It was held that by placing comprehensive cover notes at the disposal of the broker, the insurer held him out as having authority to issue them on its behalf; in *Woolcott v Express Insurance Co Ltd* (1979) 1 Lloyd's Rep 231, a broker was held to have received material facts as the agent of the insurer such that his knowledge of the facts was imputed to the insurer; in *Stockton v Mason* (1978) 2 Lloyd's Rep 430, it was held that the fact that the broker had the authority to bind the insurer to temporary cover meant that the oral information given to the insured's wife that he was covered on the terms of his old contract was given on behalf of the insurer; *Anglo-African Merchants Ltd v Bayley & Ors* (1970) 1 QB 311; *Lloyd's Insurance Co v African Trading* Co (1975) 1 ALR Comm 250; Adeyemi,"Reflections on Insurance Law Reforms in Nigeria" in Sagay and Oluyide (eds) *Current Developments in Nigerian Commercial Law* (1998) 185 188.

8 *Halbury's Laws of England* 4 ed (1973) 496 para 826; *Montgomerie v United Kingdom Mutual S S Association* (1891) 1 QB 370; *United Kingdom Mutual S S Assurance Association v Nevill* (1887) 19 QB 110.

9 *Freeman & Lockyer v Buckhurst Park Properties Ltd* (1964) 1 All FR 630 644; *Birds' Modern Insurance Law* 4 ed (1997) 178.

10 *Birds' Insurance* 178–179; in *Nasidi v Mercury Assurance Co Ltd* 387, the issue that arose for determination was whether the insurer was bound to pay on a cover note issued by its local branch manager above his expressly authorised limit of insured value, and where the manager gave the insured credit for unpaid premiums in breach of his express authority. It was held, *inter alia*, that an employer, by placing an employee in a position in which he acts on the employer's behalf, impliedly holds out the employee as having the authority which is usual for an employee in that position to have and that all persons dealing with the employee are entitled to assume, unless they have notice to the contrary, that he possesses such authority; see also *Esewe v Asiemo* 433; *Murfitt v Royal Insurance Co Ltd* (1821) TLR 334; *Mackie v European Assurance Society* (1869) 21 LT 102; *Eagle Star Insurance Co v Spratt* (1971) 2 Lloyd's Rep 116.

11 In *Abumere v The Commissioner of Police* (1980) 2 CA 179 182, for example, the accused was arraigned and convicted on a three-count charge of stealing a motor car, obtaining money by false pretences and stealing the sum of ₦200 (Naira). The accused had represented himself as an agent and representative of an overseas insurer, the Neptune Insurance Company of Aldershot. In convicting the "agent" on all three counts, the trial Magistrate observed *inter alia* that "The accused claims that his company insured the car … The Brodrick and Company Agencies Ltd is not an authorised insurance company and there is nothing before me to substantiate the evidence of the accused that his company is an underwriter for the Neptune Insurance Company Ltd"; see also *James v Mid-Motors Ltd* (1978) NCLR 119.

insurance intermediaries are now strictly regulated under the Insurance Act.[12]

The aim of this article is to examine the law regulating insurance intermediaries in Nigeria with a view to determining its adequacy in protecting the insuring public against losses that could possibly emanate from the insurance intermediaries' activities. In this article, regulatory challenges associated with insurance intermediaries in Nigeria would be highlighted and suggestions for reforms proffered by drawing lessons from the regulation of insurance intermediaries in some select common-law jurisdictions, including the United Kingdom (UK) and Australia. The choice of the UK and Australia has been largely informed not only by their being common-law countries like Nigeria, but also because the Nigerian Marine Insurance Act[13] and the Australian Marine Insurance Act,[14] which are relevant legislation in our discussion, are a replica of the UK Marine Insurance Act.[15] The discussion in this article is limited to the regulation of agents and brokers as intermediaries. As such, loss adjusters, although they may be described as quasi-intermediaries, are not covered by the ensuing discussion.[16]

To give effect to this article's aim, it is divided into seven parts. The next part focuses on the requirements of authorisation for engaging in the business of insurance as an intermediary in Nigeria. The third and the fourth parts examine the rights and duties of insurance intermediaries at common law and their duties and liabilities as spelt out by statutory enactments in Nigeria. The fifth part focuses on issues emanating from the common law rules and statutory controls, while the sixth part examines relevant laws of some common law countries with a view to drawing out best practices that could aid reform measures in Nigerian law. The seventh part is the conclusion and recommendations.

2 AUTHORISATION OF INSURANCE INTERMEDIARIES

In Nigeria, it is a punishable offence for anyone to engage in the insurance business as an intermediary, either as an agent or a broker, without having been duly licensed or registered as such by the regulatory authorities.[17] For agents, the threshold conditions for practising in the insurance industry are spelt out under section 34 of the Insurance Act, which makes it mandatory for any person desirous of transacting business as an insurance agent to possess the certificate of proficiency issued in the name of the individual by the Chartered Insurance Institute of Nigeria (hereinafter referred to as the Institute) and to be duly appointed by an insurer and licensed in that behalf under the Insurance Act. In addition, such a person must have been duly licensed as an agent by the National Insurance Commission (hereinafter referred to as the Commission) pursuant to an application made in the prescribed form and accompanied by the

12 2003 Cap I 17 Laws of the Federation of Nigeria (LFN) 2004, hereinafter referred to as the Insurance Act; Relevant provisions of the Insurance Decree 1976 on insurance intermediaries have been re-enacted in subsequent legislation such as the Insurance Decree 1991, Insurance Decree 1997 and the Insurance Act 2003.

13 1961 Cap M2 LFN 2004, hereinafter referred to as the MIA 1961; the MIA 1961 is a *mutatis mutandis* enactment of the Marine Insurance Act 1906 (UK).

14 1909, hereinafter referred to as the MIA 1909.

15 1906, hereinafter referred to as the MIA 1906.

16 Loss Adjusters are also a group of insurance intermediaries that are engaged in the business of insurance usually at the claims stage. A loss adjuster is not *stricto sensu* an insurance intermediary since it does not generally mediate the insurance contract between the insurer and the insured but rather ascertain the propriety or otherwise of an insurance claim and the determination of the claims payable; according to Bruce, J in *The County Council of Buckinghamshire County and The County Council of Hertfordshire* (1899) 1 QB 515 537, "The word 'adjustment'… is commonly applied to the settlement among various parties of their several shares in respect of claims, liabilities or payments relating to a general average claim. When there are matters which require rearranging, regulating, setting right, or equalising, so as to restore the true balance, the process of so rearranging, regulating, setting right, or equalising may be described as adjusting."

17 Sections 35(4) and 36(8) of the Insurance Act.

prescribed fees and such other relevant documents as may be prescribed from time to time by the Commission.[18] Such a licence entitles the holder to act as an insurance agent for the insurers named therein and is subject to annual renewal on the payment of the prescribed fee.[19] Thus, under Nigerian law, an insurance agent is an expert who has been licensed by the appropriate regulatory authorities on that behalf to solicit for insurance risks and gets remunerated for his services by way of commission. The Insurance Act, however, prohibits certain categories of persons from practising as an agent in the industry. These include a minor, or a person who has not been certified as an insurance agent by the Institute, or who has, prior to the date of his appointment, been convicted by a court of an offence in the nature of criminal misappropriation of funds or breach of trust or cheating.[20]

Registration as an insurance broker is also a prerequisite to carrying on insurance brokerage in Nigeria as it is a punishable offence for any person to transact business as an insurance broker without having been duly registered under the Insurance Act as such.[21] Thus, under section 36 of the Insurance Act, an application for registration is required to be made in the prescribed form to the Commission, accompanied by the prescribed fees and such other relevant documents as may be required. Unlike an insurance agent who, in most cases, engages in the insurance business as an individual, such as a commission agent, the business of an insurance brokerage may only be carried on by a partnership or a limited liability company duly registered under the Companies and Allied Matters Act 2020 and which possesses the prescribed qualifications.[22] It is further statutorily required that each partner, chief executive, and executive director must have been registered as an insurance broker by the Institute.[23] Once the prescribed conditions have been met, the applicant is entitled to be registered as an insurance broker and issued with a certificate.[24] However, where the Commission is not satisfied with any of the prescribed conditions, notice of rejection of the application is required to be given to the applicant.[25] Under section 7 of the Insurance Act, an aggrieved applicant, within 30 days of the receipt of the notice of the Commission's intention to reject the application, has the right of appeal to the Minister of Finance who is also required to give his decision within 60 days of the receipt of the appeal. Where the appeal is allowed, the applicant shall be duly notified by the Commission and a certificate of registration issued accordingly, while notice of an appeal that is disallowed is required to be published in the Gazette and in such other manner to ensure wide publicity as the Commission may determine.[26] The requirement of publication of a failed application, no doubt, is to caution the public, particularly insurers, against transacting business with the unsuccessful applicant.[27] It is noteworthy, however, that, although section 36(7) of the Insurance Act provides that the certificate could lapse if not renewed within three months from the date of expiry, there is nowhere in the Insurance Act that the duration of the validity of the certificate is stated. One

18 Section 34(2) and (3) of the Insurance Act.

19 Section 34(4) of the Insurance Act. In Nigeria, a licensed insurance agent is permitted to serve as an agent for a maximum of five insurers in respect of a particular class of insurance business. The Act, in s 35 thereof, has also mandated an insurer who employs the services of an insurance agent, as well as any person who acts on that behalf, to maintain a register showing the names and addresses of every insurance agent and the date on which their services were employed and, where applicable, terminated.

20 Section 34(5) of the Insurance Act.

21 Section 36(1) of the Insurance Act.

22 Section 36(3) (a) and (b) of the Insurance Act.

23 Section 36(4) of the Insurance Act.

24 Section 36(3)(b) of the Insurance Act.

25 Section 36(5) of the Insurance Act.

26 Section 7 (6) and (7) of the Insurance Act.

27 Under s 36(4) of the Insurance Act, it is an offence, punishable on conviction to a fine of ₦500, 000 for any insurer to knowingly or recklessly transact insurance business with a broker who has not been registered in that behalf under the Act.

may safely presume that the certificate is renewable annually as it was hitherto.[28]

Furthermore, subject to the approval of the Commission, a registered insurance broker could engage in reinsurance broking.[29] An approval may be given for this once the Commission is satisfied that the insurance broker possesses the requisite expertise to conduct the class of the reinsurance business and, at least, one partner or director of the insurance broking firm or company has, at least, five years working experience in the middle management cadre of a reinsurance broking firm or company.[30] A contravention of this provision is punishable on conviction with a fine of ₦250, 000 (Naira) and the reinsurance business in question is rendered null and void.[31]

Meanwhile, the registration of an insurance broker could be cancelled by the Commission if such a broker has knowingly or recklessly contravened the provisions of the Insurance Act, or practiced as a loss adjuster, or has, for the purpose of obtaining a licence or paying a levy to the Commission, made a statement which is false in any material particular, or has been found guilty by a court of competent jurisdiction of fraudulent or dishonest practice, including misappropriation of a client's money or has taken actions contrary to the Code of Conduct of the profession.[32] The requirement of a fair hearing is also required to be complied with by the Commission in the exercise of its power to cancel by giving notice in writing to the broker of its intention to cancel the registration and the due process of appeal spelt out under section 7 of the Insurance Act shall apply.[33] Similarly, under section 39 of the Insurance Act, the registration of a broker could be suspended for a period of not more than six months by the Commission in any case the insurance broker fails to comply with the provisions of the Act and it is a punishable offence for any insurer to transact business with such a suspended broker.

3 COMMON-LAW RIGHTS AND DUTIES OF INSURANCE INTERMEDIARIES

Insurance intermediaries are entitled to the same rights and subject to the same duties as those available under the general principle of the law of agency at common law.[34] In this respect, as between the insurer and the insurance agent on the one hand and the proposer/insured and the broker on the other, the common-law rights of the intermediary include the right to commission for services rendered,[35] the right of indemnity in respect of expenses incurred while acting on behalf of the principal, and a right of lien.[36]

The common-law duties of an insurance intermediary can be classified into two categories. The first is the fiduciary duty and the second is the general duties. The fiduciary duty of an

28 Under s 36 of the repealed Insurance Act 1997, the certificate of registration of a broker was renewable annually; Nnabugwu "FG to Review Annual Renewal of Insurance Brokers' Licenses" (2016) https://www.vanguardngr.com/2016/08/fg-review-annual-renewal-insurance-brokers-licenses/ (accessed 28-02-2022); in the Zero Draft Guidelines for the Regulation of Insurance Brokers in Nigeria issued by the National Insurance Commission in 2018, it is provided that the license of registered brokers shall, when it becomes effective, be valid for two years from the date of issue: see National Insurance Commission "Zero Draft Guidelines for the Regulation of Insurance Brokers in Nigeria" (2018) Guideline 31 1 https://ncrib.net/wp-content/uploads/2019/12/Guidelines-for-the-Regulation-of-Insurance-Brokers-in-Nigeria-ZERO-DRAFT-27.06.2018.pdf (accessed 28-02-2022).

29 Section 43(1) of the Insurance Act.

30 Section 43(2) of the Insurance Act.

31 Section 43(3) of the Insurance Act.

32 Section 37 (a) – (e) of the Insurance Act.

33 Section 37 of the Insurance Act.

34 Yerokun *Insurance Law in Nigeria* (2013) 460 – 464; *Birds' Insurance* 183 – 185; Fridman *Law of Agency* 7 ed (1996) 155–188.

35 *Gold v Life Assurance Co of Pennsylvania* (1971) 2 Lloyd's Rep 164; a broker's fee is called brokerage.

36 *West of England Bank v Batchelor* (1882) 51 L J Ch 199.

insurance intermediary, like any other intermediary, connotes that the intermediary acts with the highest good faith and honesty and must not place himself in a position where his personal interest conflicts with the duties owed to the principal.[37] Thus, the position occupied by the intermediary, being one of special trust, prohibits him from accepting any other engagement which is inconsistent with his duty to the principal, unless he first makes the fullest disclosure of all material facts to both principals and obtains their informed consent to his so acting.[38] Also, the intermediary cannot accept any bribe or secret commission from a third party and where such commission is received, it must be accounted for by the agent to the principal.[39] Moreover, the intermediary has the fiduciary duty to preserve confidential information, given or acquired, and is prohibited from using such information for his own purpose or in ways that would be detrimental to the interest of the principal.

The general duties of insurance intermediaries include the duty to obey the instructions given by the principal in accordance with the terms of his authority.[40] In this respect, an intermediary who exceeds the authority given by the principal is fully accountable to the latter for any damages occasioned by the loss arising therefrom. However, where the principal's instruction is ambiguous or so broad as to confer some level of discretion on the intermediary, the latter will be relieved from liability to the principal if he acts reasonably under the circumstances. In *Ireland v Livingstone*,[41] it was held that if the principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense, of which it is equally capable. Also, where a broker acts in accordance with the express instruction of the insured, he is exonerated if any loss is suffered as a consequence thereof.[42]

Another duty of the intermediary is the obligation to faithfully carry out the instruction and not to delegate his/her duties to any other person, except with the prior authorisation of the principal. By virtue of the principle *delegatus non potest delegare* (a delegate cannot further delegate his delegated duties and authority to another person), the principal is, generally, not bound by nor entitled to any benefit from any contract or transaction carried out by a sub-agent.[43]

Another duty of the intermediary, particularly brokers, is the duty to act with the care and proper skill that a reasonable and prudent person engaged in the insurance business would use under similar circumstances. A breach of this duty entitles the insurer to damages for any reasonably foreseeable losses arising therefrom either in tort (delict) or in contract.[44] In *Cherry Ltd v Allied*

37 Fridman *Agency* 175; *Aaron Acceptance Corpn v Adam* (1987) 37 DLR (4th) 133; *Boardman v Phipps* (1967) 2 AC 46.

38 *Fullwood v Hurley* (1928) 1 K B 498 502, Scrutton, LJ; while it is an acceptable practice for brokers to act for the insurer in certain matters, it has been established in *Anglo-African Merchants v Bayley* (1970) 1 QB 311 323, and *North and South Trust v Berkeley* 470 that, at least, with respect to Lloyd's brokers, they cannot act for the insurer in investigating a claim without being potentially in breach of duty to their principal, the insured.

39 *Palmer of Nigeria Ltd v Fonseca* (1946) 18 NLR 49.

40 Fridman *Agency* 157: *Cunliffe-Owen v Teather and Greenwood* (1967) 1 WLR 1421.

41 (1872) LR 5 H L 395.

42 *University of Nigeria, Nsukka v Turner* (1968) 1 ALR Comm 290.

43 *Calico Printers' Association Ltd v Barclays Bank* (1931) 145 LT 51; *Caitlin v Bell* (1815) 4 Camp 183.

44 *Henderson v Merrett Syndicates Ltd* (1995) 2 AC 145.

Insurance Brokers Ltd,[45] the defendant brokers had handled the plaintiff company's business for over 50 years. Dissatisfied with the quantum of the premium they were charged given their low claim record, the plaintiffs decided to place their business in the hands of other brokers and instructed the defendants to terminate all their policies held through the latter well before their renewal date. At a meeting with the defendants on 13 August 1974, the plaintiffs were informed that the first insurers refused to cancel cover mid-term. In order to avoid double insurance, the plaintiffs cancelled the new policies, but failed to inform the defendants. Subsequently, the first insurers agreed to a cancellation of the original policy, but the defendants did not communicate this information to the plaintiffs. The plaintiffs suffered an insured loss and later learnt that they were uninsured for the risk because both policies had been cancelled. They, therefore, sued the defendants on the basis of negligence. The plaintiffs were held entitled to succeed in the action on the ground that the defendants failed to exercise the duty of care required of them in failing to advise the plaintiffs of the first insurer's cancellation, having given information at the meeting of 13 August 1974 within their specialised knowledge and knew, or ought to have known, that it would be taken seriously and acted upon in a transaction of importance.

Similarly, in *University of Nigeria, Nsukka v Turner*,[46] it was held that an insurance broker acting as agent of the insured, has a contractual duty to exercise, to a reasonable extent, the amount of skill, ability and experience demanded of a professional adviser in insurance and related matters. Failure to act accordingly renders him liable for damages for losses that his client suffers as a result of his professional negligence. It is noteworthy, however, that while a broker is expected to be a professional possessing an appropriate degree of skill and experience in insurance brokerage, an agent does not, generally, hold himself as possessing any special skill in the industry. An intermediary, whether as an agent or broker, is, nevertheless, expected to perform his duty with reasonable care in order to minimise any loss that could be caused by fraud or negligence.[47]

Another duty of an intermediary is the obligation to account for all money received on behalf of the principal, and to maintain a proper record of all transactions.[48] Thus, an insurance intermediary who collects premiums on behalf of the insurer is duty-bound to remit the premiums promptly and in the manner stipulated by the law or as agreed between the parties. Where the principal incurs a loss on account of the breach of this duty, the intermediary will be liable.[49] It is noteworthy that, contrary to the established rule of agency law that an agent is not personally liable for contracts effected on behalf of the principal, especially where the principal is disclosed, the established custom for marine insurance contracts, as codified in section 53(1) of the MIA 1906 is that, unless otherwise agreed, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may

45 (1978) 1 Lloyd's Rep 274. Cantley J, in holding the defendants liable quoted the principle stated by Lord Morris in the *locus classicus* case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) AC 464 501–502 that: "I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgement or skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allow his information or advice to be passed on to another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

46 (1968) 1 ALR Comm 290.

47 *Cherry Ltd v Allied Insurance Brokers Ltd* 274.

48 Yerokun *Insurance* 463.

49 *Ibid*.

be payable in respect of losses, or in respect of returnable premiums.[50] In *Universo Insurance Co of Milan v Merchants Marine Insurance Co Ltd,* Lord Justice Chitty asserted that:

> The established custom in marine insurance effected through a broker is that the assured is not, and that the broker is, liable to the underwriter for the payment of the premium. The ground of the custom appears to be that in most cases the assured is not, and the broker is, known to the underwriter, and, accordingly, that the underwriter gives credit to the broker alone; and that there is an account between the broker and the underwriter in which credit is given for the payment of the premium. In order to sustain this course of business, and to enable the underwriter to recover from the broker the premium, when it is not in fact paid, it is considered in law that the premium has been paid to the underwriter by the broker, and that the underwriter has lent the premium to the broker.[51]

In the instant case, a reinsurer had initiated an action to claim the premium due to it from the policyholder rather than from the broker which had become insolvent on the supposition that the custom was only applicable to policies written at Lloyd's and that the policy contained an express promise by the policyholder to pay the premium. The Court, however, dismissed these arguments and held that the custom was of general application to marine business and that the promise by the assured to pay the premium may be read as a promise to pay in the customary manner, namely by the broker. Accordingly, unless it is otherwise provided for in the policy, an insurer may not refuse to pay the insured sum on the happening of the insured risk on the ground that the broker has not yet paid the premium.[52] Also, with respect to the effect of the receipt of the premium on marine insurance policy, once a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgement is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and the broker.[53] On the other hand, the assured remains liable to the broker for the premium which the broker is entitled to recover from the assured as soon as the contract of insurance is concluded notwithstanding that the broker is yet to pay the premium since the insurer could call upon the latter to pay at any time. In *JA Chapman & Co Ltd v Kadirga Denizcilik Ve Ticaret AS Ors*, the court noted that:

> As a general rule, the broker can recover premiums even if he has not yet paid them to the insurer . . . it is true that section 53 of the 1906 Act does not deal expressly with the rights and liabilities between the broker and the assured . . . But it was common ground that it is the general rule that the broker has a cause of action in his own right against the assured in respect

50 Section 54(1) of the MIA 1961; s 53(1) of the MIA 1906 is a codification of a custom of the marine insurance industry under which the insurer did not claim the premium from the policyholder but from the broker. It has been noted that the custom was probably intended to provide underwriters with some security against unfamiliar policyholders. The view has been expressed though that the custom does not apply to a non-marine insurance policy: English and Scottish Law Commission (ESLC) "Reforming Insurance Contract Law Issues Paper 8: The Brokers Liability for Premiums: Should Section 53 be Reformed?" (2010) 10 part 2 2 and 2 25 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL8_Brokers_Liability_for_Premiums.pdf (accessed 24-08-2021) [hereinafter referred to as ESLC Reforming Insurance Contract Law Issues Paper 8 (2010); In *Pacific and General Insurance Co v Hazell* (1997) BCC 400, it was held that a broker was not liable for the premium due under Lloyd's non-marine policy when the policyholder had gone into liquidation; *Wilson v Avec Audio-Visual Equipment Ltd* (1976) 1 Lloyd's Rep. 81.

51 (1897) 2 QB 93 99–100; similarly, in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* 1986 160 CLR 226, where the issue raised was whether an insurer may recover outstanding premiums from an assured who has already paid them to his insurance broker, but which the broker has failed to remit to the insurer, it was held that unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium. The necessary corollary is that an insurer has no recourse against the assured if the broker defaults on payment of the premium. The insurer is thus put at risk from the outset of the policy even where it is yet to receive the premium.

52 *Scott v Irving* (1830) 1 B & Ad 605; *Sweeting v Pearce* (1861) 9 CB (NS) 534.

53 Section 54 of the MIA 1906; s 55 of the MIA 1961.

of the unpaid premium.[54]

Furthermore, under section 53(2) of the MIA 1906, subject to any contrary agreement, the broker is provided with a lien over the insurance policy for the amount of the premium and his charges in respect of effecting the policy thereby allowing it to recover any money it is owed by the policyholder.

In general, a breach of any of the afore-mentioned duties by an intermediary will entitle the principal to claim damages for breach of contract or, where the agent has been guilty of fraud or negligence, bring an action in tort for the appropriate wrong, depending on the circumstances of the case.[55] The principal could also, if desired, terminate the agency.[56]

4 STATUTORY DUTIES AND LIABILITIES OF INSURANCE INTERMEDIARIES

Nigerian law has not provided any special duties owed by an agent to the insurer except that, an insurance agent through whom any insurance business is transacted is required, at the risk of being found criminally liable, to immediately pay over to the insurer any premium collected by him/her.[57] The requirement to immediately pay over premiums collected from the insured is aimed at curbing the excesses of insurance agents' failure to remit premiums to insurers after collecting same from the insured.[58] A gap that should be addressed by the policymakers in this regard, however, is the failure to define the word "immediately". Although there is, yet, no judicial pronouncement on, or interpretation of the word "immediately" in this context, section 35(2) of the current Insurance Act as well as similar provision in section 35(2) of the repealed Insurance Decree 1997 is a clear departure from the definitive provision of section 28 of the repealed Insurance Decree 1976, which required that premiums collected by an insurance agent be paid to the insurer not later than 15 days after receipt thereof by the agent. As such, it is more desirable to give a specific timeline as it is required of brokers in section 41(1) of the Insurance Act for purposes of clarity and objectivity.[59]

On the other hand, the brokers are subject to various statutory duties probably on account of the independent nature of their business and the fact that they are specialists of professional standing in the field.[60] The first of such statutory duties is the duty to pay to the Commission, not later than 30 June of every year, a levy equivalent to one per cent of its gross commission or

54 (1998) CLC 860 862 and 865.

55 Fridman *Agency* 204; in *Martin (L B) Construction Ltd v Gaglardi* 1979 ILR 1–1061, the insurance agent was held liable for negligence by representing that insurance had been placed when it had not; in *Cherry Ltd v Allied Insurance Brokers Ltd* 274, the defendants were held liable in damages for the amount which the plaintiffs would have recovered from their insurer had they been insured.

56 Fridman *Agency* 204.

57 Section 35(2) of the Insurance Act.

58 In *Esewe v Asiemo* 433, the branch manager of the insurer was invested with the authority to conclude insurance contracts, receive premiums and issue cover notes and certificates on behalf of the insurer. The manager issued a cover note and certificate to the insured upon receiving premiums. On a claim for indemnity on the insured vehicle, the insurer repudiated the claim on the ground *inter alia* that they never received the premium. The court found that the manager was nonetheless the servant of the defendant insurer acting within the scope of his business in the execution of his master's business. Similarly, in *Onwuegbu v African Insurance Co Ltd* 111, it was held on a similar point that the defendants were bound by the action of their agent and that if the agent misappropriated the money which he collected as a premium on their behalf, the defendants were nonetheless liable.

59 Section 41(1) of the Insurance Act requires an insurance broker through whom an insurance business is transacted to remit the premiums collected by him to the insurer not later than 30 days of collecting the premium.

60 *Power v Butcher* 329; Yerokun *Insurance* 468.

₦25,000, whichever is higher.[61] Secondly, under section 38 of the Insurance Act, every broker is required to maintain a professional indemnity cover of not less than ₦10 million or 50 per cent of its annual brokerage income for the preceding year, whichever is the greater. This is generally geared towards safeguarding against brokers' inability to pay for losses sustained by the insured due to the professional negligence of the broker. Also, to maintain professional standards, it is required of every broker in Nigeria to have as a member of its senior management staff, at least, one person who has a professional qualification in insurance or, at least, seven years' experience at senior management level with an insurer or insurance broking firm.[62] An insurance broker is also prohibited from holding directly or indirectly a financial interest in excess of ten per cent in an insurance company or in a loss adjustment company in Nigeria.[63]

Additionally, for purposes of transparency and to ensure that premiums collected are not mingled with the general account of the broker and are duly accounted for, it is required of every registered broker to keep a register of business transacted on an annual basis,[64] as well as to establish and to maintain at all times, a client's accounts into which all monies, premiums, claims and recoveries from and on behalf of clients, insurers and reinsurers are to be paid.[65] Also, in line with the tenor of the provisions of section 50 of the Insurance Act on "no premium, no cover"[66] and the rule that a premium in respect of a marine insurance policy transacted through the insurance broker is deemed to have been paid to the insurer involved in the transaction,[67] every registered broker is required, under section 41 of the Insurance Act to, not later than 30 days of collecting premiums, pay same to the insurer. To ensure strict compliance, an external auditor who audits the accounts of an insurance broker is required, at the conclusion of each audit, to issue a certificate that all premiums collected by the insurance broker have been duly paid to the insurer with whom he transacted business during the year.[68] This, no doubt, would ensure the continued liquidity and financial stability of insurance companies toward settling claims arising under policies.[69]

Furthermore, under section 42 of the Insurance Act, an insurance broker is required to keep separate records of all insurance business handled by him with insurers registered under the Act and those with persons outside Nigeria. Also required to be kept are accounting records, which give a true and fair view of its business at the accounting date as well as show and explain the business transacted by the broker and disclose its true financial position.[70] Moreover, an audited statement of account comprising revenue, the profit and loss account, and the balance sheet in the prescribed form is required to be submitted to the Commission not later than six months

61 Section 36(10) of the Insurance Act. The levy is subject to upward review by the Commission as may be necessary.

62 Section 38(b) of the Insurance Act.

63 Section 38(c) of the Insurance Act.

64 Section 38(d) of the Insurance Act.

65 Section 40 of the Insurance Act.

66 Section 50(1) of the Insurance Act provides that: "The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance, and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance."; *Corporate Ideal Insurance Ltd v Ajaokuta Steel Co Ltd* (2014) 7 NWLR (Pt 1405) 165; *Industrial and General Insurance Co Ltd v Adogu* (2010) 1 NWLR (Pt 1175) 337.

67 Section 53(1) of the MIA 1906; s 54(1) of the MIA 1961; the Insurance Act, in s 50(2), also provides that a premium collected by an insurance broker in respect of an insurance business transacted through the broker is deemed to be a premium paid to the insurer involved in the transaction.

68 Section 41(3) of the Insurance Act.

69 The primary and most important source of income to insurers is the premium paid by policy holders which is, in turn, committed to specific investment channels that generate a secondary source of income to insurers to meet their contractual obligations: Yerokun "Legal Control of Insurance Premium in Nigeria" in Sagay and Oluyide (eds) *Current Developments in Nigerian Commercial Law* (1998) 214 214.

70 Section 42(2) (a) and (b) of the Insurance Act.

after the accounting date.[71]

Also, under section 44 of the Act, it is required of every direct insurance broker, who places a business of insurance with a foreign insurance company, to serve the Commission notice of the contract within 30 days of its being signed. Such notice must include any commission received on the transaction as part of the gross commission received by the insurance broker during the relevant year.

Generally, failure to observe any of the foregoing duties is punishable with a fine ranging from ₦10, 000 to ₦250, 000 depending on the nature of the offence.[72] In addition, the registration of an erring broker may be suspended or even cancelled in appropriate cases.[73] It is noteworthy that in respect of the retention of premiums, a recalcitrant broker who commits a third offence is liable on conviction to a fine of ₦250, 000 as well as have its certificate of registration cancelled.[74] Moreover, the persons, or in the case of a partnership, the persons constituting the firm or the directors of the company risk disqualification from being again involved in the setting up of the business of insurance brokerage either by himself or themselves or in conjunction with any other person or body.[75] Furthermore, failure of an insurance broker to remit premiums as and when due to the insurer as well as the giving of a false declaration of its income or remittance of premiums collected constitutes a ground for the cancellation of the certificate of registration of such broker.[76]

The Nigerian policymakers have, arguably, demonstrated a strong resolve to ensure that the insurance industry in Nigeria remains vibrant and continues to contribute to the social and economic development of the country. Nevertheless, the regulatory framework is not without some drawbacks which should be our focus in the next section and to which we now turn.

5 REGULATORY CHALLENGES IN THE NIGERIAN LAW

A major thorny issue in the regulation of insurance intermediaries in Nigeria relates to the status of the intermediary in relation to pre-contractual disclosure of material facts, especially where a proposal form has been deployed. Section 21 of the MIA 1961[77] imposes a duty on the agent effecting insurance for the assured to disclose to the insurer every material circumstance which is known to the agent and the agent is deemed to know every circumstance which, in the ordinary course of business, ought to be known by or to have been communicated to him.[78] Also required to be disclosed by the agent is every material circumstance which the assured is bound to disclose unless it comes to the latter's knowledge too late to communicate it to the agent.[79] Arguably, there might not be any contention regarding the status of the broker since it is generally judicially acknowledged that, despite being paid his commission based on a

71 Section 42(3) of the Insurance Act.

72 Sections 40(2), 41(2), 42(4), 43(3) and 44(2) of the Insurance Act.

73 Sections 37 and 39 of the Insurance Act.

74 Section 41(2) of the Insurance Act.

75 Section 41(2) of the Insurance Act.

76 Section 41(4) and (5) of the Insurance Act.

77 Replica of s 19 of the MIA 1906.

78 Section 21(a) of the MIA 1961. In *HIH Casualty & General Insurance Co v Chase Manhattan Bank* (2003) 2 Lloyd's Rep 611, it was noted that an agent to insure owed an independent duty of utmost good faith to the insurers but that it did not give rise to damages as such. The agent to insure would not be liable for pure non-disclosure despite the provisions of s 19(a) of the MIA 1906, but could be liable to the insurers in damages where the agent's conduct amounted to negligent or fraudulent misrepresentation.

79 Section 21(b) of the MIA 1961. In *PCW Syndicates v PCW Reinsurance* (1996) 1 WLR 1136, it was stated that an "agent to insure" only encompasses those who actually deal with the insurers concerned and make the contract in question.

percentage of the premium by the insurer with whom the business has been placed, a broker is presumptively the agent of the insured.[80] Thus, any disclosure made by the insured to the broker cannot, generally, be imputed to the insurer.[81] In *Arif v Excess Insurance Group Ltd*,[82] a hotel owner bought insurance through his bank to cover a hotel owned by a partnership he was involved with. The insurers later sought to avoid the policy on the ground of lack of insurable interest. The argument of the policyholder that the bank was fully aware of the partnership arrangement and the fact that he bought the insurance on behalf of the partnership was rejected by the court which held that the bank had acted as his agent rather than the insurer's agent and, therefore, the knowledge of the bank could not be imputed to the insurer. In this respect, a successful repudiation of the policy by the insurer on grounds of non-disclosure of material fact given to the broker could only entitle the insured to sue the latter for professional negligence. The position of an employee of the insurer as well as a tied or commission agent is, however, different in this respect. He is generally regarded as the agent of the insurer even though the authority given to him by the insurer may not extend far beyond the submission of proposal forms.[83]

Generally, where the agent acts within the scope of his actual or ostensible authority, or where the agent had the authority to bind the insurer, disclosure of any material fact by the proposer/insured is imputed to the insurer.[84] Some issues could, however, arise from the common-law exception to this general rule in cases where the agent, for instance, has assisted the proposer/applicant to complete a proposal form.[85] In *Bawden v London, Edinburgh and Glasgow Assurance Co*,[86]

80 See, for example, *Rozanes v Bowen* 321; *Empress Assurance Corporation Ltd v Bowering and Co Ltd* 107; *African Insurance Brokers v Veritas Insurance Co* 146 149.

81 *Anyaegbunam v Crystal Brokers* (1977) NCLR 135 140–141; *Kenneth Roberts v Patrick Selwyn Plaisted* (1989) 2 Lloyd's Rep 341; *Anglo-African Merchants Ltd & Exmouth Clothing Co Ltd v Bayley* (1969) 1 Lloyd's Rep. 81; *Wilson v Avec Audio-Visual Equipment Ltd* (1974) 1 Lloyd's Rep 81; in *Hazel v Whitlam* (2005) Lloyd's Rep IR 168, in a motor insurance policy, the insured's broker made some slight alterations to the description of the insured's occupation in the proposal form. Consequently, there was no mention of the fact that, in addition to his full-time job, the insured was training to be a golf professional. It was held that the insurers were entitled to avoid the policy on the grounds of material non-disclosure.

82 (1986) SC 317; *Winter v Irish Life Assurance Plc* (1995) 2 Lloyd's Rep 274.

83 See, e.g., *Onwuegbu v African Insurance Co Ltd* 111; *Esewe v Asiemo* 433; *Nasidi v Mercury Assurance Co Ltd* 387; *Mackie v European Assurance Society* 102; *Eagle Star Insurance Co v Spratt* 116.

84 *Stone v Reliance Mutual Insurance Society Ltd* (1972) 1 Lloyd's Rep 469; In *Woolcott v Excess Insurance Co* Ltd (1979) 1 Lloyd's Rep 231, while the evidence called by the defendant that the plaintiff's criminal past affected the risk and ought to have been disclosed by him, it was found that the third party, as agents for the defendants, knew something of the plaintiff's past and had in some way acquired this knowledge in the ordinary course of its business as brokers and as agents for the defendants, the insurers. It was, therefore, held that this knowledge was to be imputed to the defendants and that the assured had no duty to disclose his past to the third party. It was further held that whilst the defendants could not avoid the policy, they were entitled to be indemnified by the third party. The Nigerian Insurance Act, in s 54(3) thereof, also provides that a disclosure or representation made by the insured to the insurance agent is to be deemed a disclosure or representation to the insurer provided the agent is acting within his authority.

85 In *Salako v Lambard Insurance Coy Ltd* (1978) 10-12 CCHCJ 215, it was held, *inter alia*, that it is the responsibility of the proposer to fill and sign the proposal form and if, for any reason, the proposer allows any other person to fill the proposal form before he signs; such person must be regarded as the agent of the proposer.

86 (1892) 2 QB 534; In *Keeling v Pearl Assurance Co Ltd* (1923) All ER Rep 307, the court rejected the defence of the insurance company which had tried to repudiate a life assurance policy effected by a wife on the life of her husband. The court found that the agent had authority from the company to negotiate and complete proposal forms and was therefore the agent of the insurer for that purpose. According to the court, the discrepancy between the date of birth and the age next birthday was a glaring inaccuracy and if companies insist that the answers are crucial to their judgement of the risk, they cannot avoid the consequences of their own negligence in not recognising the mistake. Also, in *Golding v Royal London Auxiliary Insurance Co* (1914) 30 Times LR 350 and in *Ayrey v British Legal and United Provident Assurance Co* (1918) 1 KB 136, disclosure of the true facts to the respective insurance company's agent was held to bind the insurance company although the answers on the proposal form were incorrectly stated.

an action was brought by the administratrix of one Bawden, deceased, to recover the amount secured to the deceased by a policy of insurance against accidental injury granted to him by the defendant company. Bawden was an illiterate man who could only write his name. At the time the contract was initiated, the agent produced a printed proposal for a policy of insurance against accidental injury, filled up the blanks in the form at Bawden's dictation and Bawden then signed his name to it. The form contained a warranty that the proposer had no physical deformity and that there were no circumstances that rendered him peculiarly liable to accident. However, when Bawden signed the proposal, he had lost the sight of one eye, a fact of which the defendant's agent was aware, though he did not communicate it to the defendants. The assured, during the currency of the policy, met with an accident which resulted in the complete loss of sight in his other eye such that he became permanently blind. It was held, *inter alia,* that the knowledge of the defendant's agent of the fact that Bawden had only one eye was, under the circumstances, the knowledge of the defendants and that they were liable on the policy.[87]

However, in *Newsholme Bros v Road Transport and General Insurance Co Ltd*,[88] where a similar issue was decided, a different conclusion was reached by the court. In the instant case, the plaintiffs had insured a motor bus through a man named Willey, who was said to be appointed by the Road Transport and General Insurance Co Ltd to canvass and procure proposals for them. The agent completed an accident policy proposal form, which was later approved for cover by the insurers. When a claim occurred, it was found that Willey had entered inaccurate answers to three of the questions on the proposal form, even though he had been given the correct information by Newsholme Bros. The insurer repudiated liability for breach of warranty and rejected the claim. The court found for the insurers on the ground that the agent had the authority to obtain completed proposal forms and to receive premiums, but that he had no authority to complete the proposal forms and no authority to issue cover notes.[89] The insurers were, therefore, held entitled to repudiate liability since in completing the proposal form, the agent was the *amanuensis* of Newsholme Bros and his knowledge of the truth could not be imputed to the insurer.[90] The court distinguished *Bawden v London, Edinburgh and Glasgow Assurance* Co[91] wherein the matter misrepresented was the physical infirmity of the proposer which was plainly evident to the insurer's agent by arguing that the principle did not apply in the instant case where the agent completed the proposal form at the request of the insured, in which case, the agent must be the agent of the customer for that specific purpose.[92]

Similarly, in *Northern Assurance Co Ltd v Idugboe*,[93] the defendant insurance company repudiated a policy of insurance on the ground, *inter alia,* that the plaintiff insured, who was an illiterate, had failed to disclose in the proposal form that another insurance company had earlier refused to grant a comprehensive cover in respect of the insured vehicle. The plaintiff, however, stated that he disclosed the material fact to the company's agent who had assisted him in filling the proposal form. The trial judge, relying on *Bawden v London, Edinburgh and*

87 *Bawden v London, Edinburgh and Glasgow Assurance Co* 534 539, Lord Bowen, MR.

88 (1929) 2 KB 356; *Biggar v Rock Life Assurance Co* (1902) 1 KB 516.

89 *Newsholme Brothers v Road Transport and General Insurance Co Ltd* 356 365 and 377.

90 It has been observed in some quarters that the decision in *Newsholme* and such others as *Biggar v Rock Life Assurance Co* 516 and *Facer v Vehicle and General Insurance Co Ltd* (1965) 1 Loyd's Rep 113 is based on the argument that one is bound by one's signature and failing to read over a document before signing it is a fault that should rest squarely on that person's shoulders: See English and Scottish Law Commissions "Intermediaries and Pre-Contract Information Issues Paper 3" (2007) 21 part 3 14. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL3_Intermediaries_and_Pre-contract_Information.pdf (accessed 21-06-2021).

91 (1892) 2 QB 534.

92 *Newsholme Brothers v Road Transport and General Insurance Co Ltd* 356 375–376, Scrutton, LJ.

93 (1966) 1 All NLR 88.

Glasgow Assurance Co[94] and *Golding v Royal London Auxiliary Insurance Co Ltd* [95] gave judgement to the plaintiff insured on the ground that the company's agent's knowledge was the knowledge of the principal and that his failure to write the correct answers did not absolve the company from liability to pay the claim. On appeal by the insurance company to the Supreme Court, the Court distinguished *Bawden's* and relied on *Newsholme* to hold that in filling in the proposal form, the agent was the plaintiff's agent and that it was wrong to impute the agent's knowledge to the company.[96]

Also, in *American International Insurance Co v Dike*,[97] the proposal form was filled in by an agent of the plaintiff from information supplied to him by the defendant insured, an illiterate, in respect of a goods-in-transit insurance policy. The plaintiff alleged that the defendant's answers to some of the questions asked were untrue. It was further alleged that the defendant's representations were made fraudulently and designed to deceive the plaintiff into entering into the contract of insurance. The proposal form contained the usual declaration that the defendant warranted the truth of the information and that it should form the basis of the contract between him and the company. The insurers were held entitled to avoid the policy on the ground that in filling in the proposal form, it was wrong to impute the agent's knowledge to the insurance company.

The Illiterates Protection Act,[98] which aims to provide protection to illiterate persons against fraud, requires that the content of any document written at the request of, or on behalf of, or in the name of an illiterate person be read over to, and explained in the language understood by the illiterate person before the latter appends his signature or mark to the document. This is to ensure that the document represents the real intention of the illiterate person.[99] This provision, it is submitted, may not give the desired protection to the insured if the agent is regarded as his agent while completing the proposal form. Indeed, failure to comply with the statutory obligation imposed on a writer under Nigerian law is only punishable on conviction with a fine of ₦100 or, in default of payment, imprisonment for six months.[100]

Nevertheless, the Nigerian courts have consistently held that where any document that is purportedly made in violation of the prescribed regulation creates legal rights from which the writer derives some benefits, such document is not enforceable at the instance of the writer even though the document remains a valid document.[101] Thus, as between the insured and the agent (writer) who has assisted in completing the proposal form, the form remains unenforceable against the insured if the prescribed conditions laid down in the Illiterates Protection Act have

94 (1892) 2 QB 534; In *Stone v Reliance Mutual Insurance Society Ltd* (1972) 1 Lloyd's Rep 469, the agent was authorised by the insurer to collect the information and complete the form, and for this reason was held to remain the agent of the insurer when doing so.

95 (1914) 30 TLR 350.

96 It has, however, been held in *Ogbebor v Union Insurance* (1967) 3 ALR Comm 166 that where an insurance agent, after the proposer signs a form in blank, inserts in it false statements without the proposer's knowledge, then, even though the agent is acting on behalf of the proposer in filling the form, the latter is not bound by the false statements and the insurer will be estopped from relying on them to nullify the contract.

97 (1978) NCLR 402.

98 1958.

99 See s 2 of the Illiterates Protection Act; in *UAC v Edems* (1958) NRNLR 33 34, the court stated that: "The object of the Ordinance is to protect an illiterate person from possible fraud. Strict compliance therewith is obligatory as regards the writer of the document. If the document creates legal rights and the writer benefits thereunder, those benefits are only enforceable by the writer of the document if he complies strictly with the provisions of the Ordinance."

100 See s 3 of the Illiterates Protection Act; a "writer" is defined in s 5 of the Act as a person who writes a letter or document at the request, on behalf, or in the name of an illiterate person. It is noteworthy that there has been no reported case involving any insurance agent till-date that the provisions of the Act have been invoked.

101 *UAC v Edems* 33 34; *Ojukpan v Orovuyovbe* (1967) NMLR 287 291.

not been complied with, while as between the insurer and the insured, the insurer could repudiate the policy on account of non-disclosure since the agent, in this instance is not its agent, but that of the insured. It is noteworthy that in contrast to Nigerian law, the Supreme Court of Sierra Leone held, in *Zabian v New India Assurance Co Ltd*,[102] that, where a proposer is blind or illiterate to the knowledge of the insurer's agent who completes a proposal form on the basis of information supplied, there is an implied request by the proposer that the agent will read over the form to him, and that the agent's failure to read it debars the insurer from relying on any non-disclosure or misrepresentation in the proposal.

The common-law rule, as exemplified in judicial decisions such as in *Newsholme Bros v Road Transport and General Insurance Co Ltd*,[103] and *Northern Assurance Co Ltd v Idugboe*,[104] has been given statutory expression in section 54(2) of the Nigerian Insurance Act wherein it is provided that:

> The proposal form or other application form for insurance shall be printed in easily readable letters and shall state, as a note in a conspicuous place on the front page, that 'An insurance agent who assists an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant.'

It is submitted that the above provision has not given due recognition to the high level of illiteracy in Nigeria and to the reality of insurance sales using proposal forms.[105] It is remarkable that in canvassing for sales of insurance products by agents, the insuring public, most often than not, put a lot of confidence in the agents and do rely on them for the filling in of proposal forms which are, most often than not, unnecessarily lengthy and very technical to comprehend even by the educated proposer.[106] Also, the provision is limited to agents whilst ignoring the fact that, in some cases, insurers do engage the services of brokers to issue cover notes, collect premiums and issue renewal notices.[107] Moreover, the provision is limited to cases where an insurance contract is initiated by the use of a proposal form. In cases where a proposal form is not used, the common-law rule is applicable. Nevertheless, by section 54(3) of the Insurance Act, a disclosure or representation made by the applicant/insured to the insurance agent shall be deemed to be a disclosure or representation to the insurer provided the agent is acting within his

102 (1964) 1 ALR Comm 4.

103 *Newsholme Bros v Road Transport and General Insurance Co Ltd* 356.

104 *Northern Assurance Co Ltd v Idugboe* 534.

105 In Nigeria, it has been disclosed by the National Commission for Mass Literacy, Adult and Non-formal Education that available statistics indicate that about 38 per cent of Nigerians are non-literate. The out-of-school children are said to be 11 million, while the non-literate Nigerians comprising the youths and adults are about 60 million: "38 % of Nigerians are Illiterates" *Vanguard* (07-12-2018) https://www.vanguardngr.com/2018/12/38-of-nigerians-are-illiterates/ (accessed 18-07-2021); Editorial "Nigeria: Addressing Illiteracy in Nigeria" *This Day* (22-05-2020) https://allafrica.com/stories/202005220290.html (accessed 18-07-2021). An illiterate has been judicially defined in *Ntiashagwo v Amodu* (1959) WRNLR 273, as ". . . a person who is unable to read with understanding and to express his thoughts by writing in the language used in the document made or prepared on his behalf." See also *Otitoloju v Governor of Ondo State* (1994) 4 NWLR (Pt 340) 518. In *P.Z. & Co Ltd* v *Gusau* (1961) NRNLR 1, an illiterate has also been defined to mean a person who is unable to read the document in question in the language in which it was written, and includes a person who, though not totally illiterate, is not sufficiently literate to read and understand the contents of the document. In *Osefor* v *Uwania* (1971) 1 ALR 421, an illiterate has been defined to mean a person who is unable to read with understanding, the document prepared on his behalf.

106 In *Insurance Corporation of Channel Islands v Sun Alliance Insurance Ltd* (1998) Lloyd's Rep IRI 151, for example, Mance J stated that it was a matter of expert evidence, along with the question of fact and degree, to decide whether the prudent underwriter would have taken into consideration the particular act of dishonesty in weighing up the risk; in *Joel v Law Union and Crown Insurance Coy* (1908) 2 KB 863, many of the questions that were asked the assured related to matters of health, the answers to which could only be matter of opinion, even if given by a medical expert.

107 See, for example, *Stockton v Mason* (1978) 2 Lloyd's Rep 430.

authority. However, there is still the problem of ascertaining whether the agent is acting within the scope of his authority at the material time.[108] Usually, such an issue is a question of fact that can only be decided after evidence has been adduced in court.

Another regulatory challenge relates to the potential for conflicts of interest in the mode of payment of the commission of brokers.[109] The general practice of brokers receiving commission from the insurer, rather than the insured, is one of the exceptions to the rule of agency that an agent is entitled to remuneration from the principal and that any other form of remuneration from a third party amounts to a breach of fiduciary duty not to make a secret profit unless the principal is duly informed.[110] In insurance law, the presumption is that the insured has impliedly consented to the broker's remuneration by a third party.[111] The general effect of this, however, is the likelihood of a conflict between the duty owed by the intermediary to the insured to place the insurance with the insurer offering the best product for the class of insurance and the broker's interest in getting the highest paid commission from any insurer regardless of the insured's interest to have products that best suit his/her need.[112] In the bid to address this problem, the Insurance Act 2003, in section 53(1) thereof, prohibits an insurer from paying by way of commission to an insurance agent, broker or any other intermediary, an amount exceeding 12. 5 per cent of the premium in respect of motor insurance business, or 20 per cent of the premium in respect of any other subdivision of general business. It is further provided that no alteration is to be made in the prescribed rates of commission, except with the prior approval of the Commission. The provision, no doubt, is also geared towards the prevention of speculative claims for commission and to standardise brokerage commission. The issue arising from this mode of payment of a commission, however, is that, since the commission payable to the broker is directly linked to the premiums on specified policies irrespective of any additional efforts made by the broker to secure cover at the lowest possible price for the client, there is the general tendency for brokers to want to recommend policies attracting higher premiums in order to receive a higher commission.[113]

It is also noteworthy that since section 53 of the Insurance Act has merely prescribed the maximum rate of commission payable by insurers to intermediaries, the possibility of having different rates across the different spectra of insurance products in the general insurance business still exists (once the maximum limit is not exceeded) including the likelihood of intermediaries

108 In cases like this, the insurer's employees would generally be regarded as acting for the insurer in so far as they act within the scope of their authority or on the ground that they have apparent authority to so act. However, for tied agents, determination of their liability in this respect might be a bit difficult.

109 Generally, commission, based on a percentage of the premium, is one of the means by which a broker receives remuneration from the insurer with whom the business has been placed. Other ways by which a broker may be remunerated for services include a simple fee arrangement under which the amount payable is negotiated between the broker and the client; contingent commission from placement service agreement with the insurer under which the broker is paid an additional fee based on the volume of business referred or on a share of the insurer's profit as well as service agreement: see e.g. Financial Conduct Authority (FCA0 "Insurance: Conduct of Business (ICOBS)" (2021) s 4 3 https://www.handbook.fca.org.uk/handbook/ICOBS.pdf (accessed 15-08-2021) [hereinafter referred to as FCA ICOBS (2021)].

110 Fridman *The Law of Agency* 181.

111 In *Great Western Insurance Co Cunliffe* (1874) 30 LT 661 665 Mellish LJ stated that: "[I]f a principal employs an agent, and does not state what his remuneration is to be, and the agent goes on and transact business on that footing, the principal knowing that the agent is to receive his remuneration from the other persons with whom he deals, and not choosing to ask what the amount is, he is bound by what the custom and usage is, though he does not know it."

112 It has been rightly observed in some quarters that: "Perhaps, the greatest difficulty arises from the source of commission payments. The fact that these payments are made by insurers places brokers, and to a lesser extent part-time agents, in a rather unusual and incompatible commercial and legal position."; Colenutt "The Regulation of Insurance Intermediaries in the United Kingdom" 1979 *Journal of Risk and Insurance* 77 80.

113 Colenutt *Journal of Risk and Insurance* 1979 81–82.

seeking for the highest paid insurer for particular products. Also, transparency could be an issue in the whole process as there is no provision in the Insurance Act which mandates the broker to disclose to the insured the nature or amount of the commission so received from the insurer. Furthermore, section 53 of the Insurance Act is not all-encompassing as it does not cover life insurance business.[114] The prohibition of payment of commission above the given percentage is limited under the section to motor insurance business and other subdivisions of general business.[115] Since the Insurance Act is silent on life insurance business, as the other main class of insurance business in this regard, it can be reasonably inferred that an insurer, in respect of life insurance business, is, generally, at liberty to pay differing rates of commission on the different kinds of life policies underwritten by it.

Another issue of concern is the provisions of section 53(1) of the MIA 1906, which has been enacted verbatim under section 54(1) of the MIA 1961. Section 54(1) of the MIA 1961 provides that, unless it is otherwise agreed, the broker is directly responsible to the insurer for the premium in respect of a marine policy effected on behalf of the assured, while the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.[116] Thus, the broker is liable for the premium whether it has actually been paid or not by the policyholder. In the absence of a contrary agreement, the broker is given a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy.[117] The issue that could arise from the implied transfer of credit risk as contained in section 54(1) becomes of considerable practical importance in the event of the insolvency of the broker, the policyholder, or the insurer. This is so because, in the event of the insolvency of the broker who has not yet remitted the premium collected from the policyholder to the insurer, for example, the insurer cannot proceed directly against the policyholder for recovery of the premium and would, at the same time, be liable to the policyholder for the insured sum should the insured risk occur.[118]

Moreover, one is of the view that the provisions of section 50(2) of the Insurance Act 2003 to the effect that a premium collected by a broker in respect of an insurance business transacted through the broker is deemed to be paid to the insurer involved in the transaction are applicable to insurance contracts other than marine insurance contracts. This is premised on the fact that section 54(1) of the MIA 1961, a replica of section 53(1) of the MIA 1906, is still the law in force as it has not been expressly repealed by any known statutory enactment or by implication from general practice. Thus, in Nigeria, in a marine insurance contract, in the event of the insolvency of the broker, the insurer bears the risk of non-remittance of the premium by the

114 Under s 2(1) of the Insurance Act, insurance business is classified into two main classes, namely, life insurance business and general insurance business.

115 See s 53(1) (a) and (c) of the Insurance Act; the third type of insurance business mentioned in s 53(1) (b) of the Insurance Act is the workmen's compensation, which maximum commission was fixed at 15 per cent of the premium. The provision of this sub-sec has, however, been rendered nugatory with the repeal of the Workmen's Compensation Act (WCA) 1987, which required specified categories of employers to insure their respective liability to their employees for work injury benefits with insurance companies. A social insurance scheme has been institutionalised under the Employees' Compensation Act 2010, which replaced the WCA, and it is being managed by the Nigeria Social Insurance Trust Fund Management Board.

116 In non-marine insurance contracts, the common-law rule is that the insured is still liable to the insurer where payment of premium is made to an insurance broker and the latter becomes insolvent before the sum is remitted to the insurer, Thus, the custom codified in s 53(1) of the MIA 1906 is limited to the marine insurance market: See ESLC Reforming Insurance Contract Law Issues Paper 8 (2010) part 2 40.

117 See s 53(2) of the MIA 1906; s 54(2) of the MIA 1961.

118 In the Australian case of *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, it was held that it was a "necessary corollary" of the broker's liability for the premium that the insurer could not recover the premium from the policyholder directly.

insolvent broker.

Furthermore, section 50(1) of the Insurance Act, which makes the payment of premiums a condition precedent to the validity of an insurance contract, is not applicable to marine insurance contracts. A contrary view, especially where the broker has actually not been paid the premium, would result in an inconsistency between the provisions of the said section 50(1) of the Insurance Act and section 54(1) of the MIA 1961 wherein the broker is deemed to have been paid the premium by the insured, forwarded same to the insurer who then loans it back to the broker. By the legal fiction of lending embedded in that section 54(1) of the MIA 1961, no marine insurance contract would ever be declared invalid on account of non-payment of the requisite premium since the insured was always to be taken as having paid it.[119]

The foregoing lacunae in Nigerian law, no doubt, calls for appropriate legislative intervention. The statutory intervention in the common law rules on the status, remuneration as well as duties and liabilities of insurance intermediaries in the UK and Australia will engage our attention in the following section.

6 LESSONS FROM REGULATORY REGIMES IN SELECT JURISDICTIONS

6 1 The United Kingdom

First, the common-law rule on the status and liability of an insurance agent in the transaction of insurance business has, generally, given way in the UK to more stringent regulations that make the insurer more accountable for the act or omission of its authorised agent.[120] Under section 39(3) of the UK's Financial Services and Market Act,[121] an insurer who appoints a firm or person as its "appointed representative" is responsible, to the same extent as if he had expressly permitted it, for the representative's actions or omissions in carrying on the business for which he has accepted responsibility.[122] In effect, an insurance agent is now, generally, regarded for all purposes as the agent of the insurer.

Also, unlike the current regulation in Nigeria which places restrictions on commissions payable to intermediaries, no such restriction is found in the UK law. Rather, a much more comprehensive regulation has been made to ensure that any remuneration arrangements by the intermediaries do not conflict with their duty to act in the customer's best interest.[123] The regulatory measures

119 Section 53(1) of the MIA 1906 codified a custom of the marine insurance industry under which the insurer does not claim the premium from the policyholder, but from the broker. The custom overrides the normal rule of agency law that an agent is not personally liable on a contract effected for its principal. The legal basis for the custom is a fiction that the broker had paid the premium to the insurer, thus discharging the policyholder's liability to pay, and that the insurer has lent the money back to the broker. This creates a personal debt obligation between the broker and the insurer, while discharging the policyholder's liability to pay the premium to the insurer: See ESLC Reforming Insurance Contract Law Issues Paper 8 (2010) 3–4 part 2 2–part 2 5; *Universo Insurance Co of Milan v Merchants Marine Insurance Co Ltd* 1897 2 QB 93 99–100, Chitty, LJ.

120 See, e.g., the Financial Services and Market Act 2000; FCA ICOBS (2021).

121 2000, as amended by the Financial Services Act 2012.

122 Furthermore, in determining the status of agents in insurance contracts, the Consumer Insurance (Disclosure and Representations) Act 2012 (UK), in sch 2 thereof, has spelt out some rules for the determination of the status of an agent through whom a consumer insurance contract is effected. The agent is deemed the insurer's agent when the agent does something in the agent's capacity as the appointed representative of the insurer for the purposes of the Financial Services and Markets Act 2000; when the agent collects information from the consumer, if the insurer had given the agent express authority to do so as the insurer's agent and where the agent enters into the contract as the insurer's agent, if the insurer had given the agent express authority to do so. In any other case, it is to be presumed that the agent is acting as the consumer's agent unless, in light of all the relevant circumstances, it appears that the agent is acting as the insurer's agent.

123 See e.g., FCA ICOBS (2021) s 2.5.4.G.

have also been designed to ensure transparency in the remuneration of insurance intermediaries in order to enable the prospective insured to make an informed decision about products recommended to them by the intermediaries.[124] In this regard, insurance intermediaries are generally required to act honestly, fairly, and professionally in accordance with the best interests of the customer.[125] As such, insurance intermediaries are specifically mandated, in good time before the conclusion of the initial contract of insurance and on its amendment or renewal as the case may be, to provide the customer with information on the nature of the remuneration received in relation to the contract of insurance.[126] The basis of remuneration, that is, whether it is a fee; a commission, or any other type of remuneration, including an economic benefit of any kind offered or given in connection with the contract or that it is on the basis of a combination of any of the three must also be given. This duty is also applicable in respect of remuneration received by the firm's employees in relation to the contract of insurance.[127] In cases where a fee is payable, the customer is to be informed of the amount of the fee before the customer incurs liability to pay the fee, or before the conclusion of the contract of insurance, whichever is earlier.[128] In the event that it is not possible to provide the amount payable, the customer is required to be given the basis for the calculation.[129]

In the same vein, a commercial customer is entitled to be promptly informed, upon request, of the commission that the intermediary or any associate receives in connection with a policy.[130] Such disclosure is to be given in cash terms, estimated if necessary, and where this is not possible, the firm is required to give the basis for calculation.[131] Furthermore, all forms of remuneration from any arrangement including arrangements for sharing profits, or for payments relating to the volume of sales, and for payments from premium finance companies in connection with arranging finance are required to be disclosed by the intermediary.[132] Any disclosure required by the regulation is to be made free of charge in a clear and accurate manner and in a way comprehensible to the customer in writing on a paper, or any other durable medium, or a website provided the website conditions are met.[133] Also, remuneration which could conflict with the customer's best interests rule such as that which incentivises the firm to offer a product that is not consistent with the customer's demands and needs or that which is inconsistent with or not bearing a reasonable expectation to the costs of the benefits/services that the broker provides to the customer is discouraged.

Furthermore, section 53(1) of the MIA 1906 which provides for the liability of insurance brokers for premiums is no longer applicable in practice, although not yet repealed. The default provision outside of section 53, generally, relieves the broker of incurring any personal liability

124 Financial Conduct Authority "2019 FG 19/5 The GI Distribution Chain: Guidance for Insurance Product Manufacturers and Distributors" 12 para 4.9 https://www.fca.org.uk/publication/finalised-guidance/fg19-05.pdf (accessed 20-08-2021).

125 FCA ICOBS (2021) s 2.5-1 R.

126 FCA ICOBS (2021) s 4.3-6 R; the definition of "remuneration" is very broad and includes revenue from commission, profit share agreements, fees and all other economic or non-economic benefits received as part of the distribution of an insurance product: Financial Conduct Authority "2019 FG 19/5 The GI Distribution Chain: Guidance for Insurance Product Manufacturers and Distributors" https://www.fca.org.uk/publication/finalised-guidance/fg19-05.pdf 12 para 4.8 (accessed 20-08-2021).

127 FCA ICOBS (2021) s 4.3. – 3 C.

128 FCA ICOBS (2021) s 4.3.1.R (1) and (2).

129 FCA ICOBS (2021) s 4 3 1R. (3).

130 FCA ICOBS (2021) s 4.4.1R.

131 FCA ICOBS (2021) s 4 4 1 R.

132 FCA ICOBS (2021) s 4 4 2 .G.

133 FCA ICOBS (2021) s 4 1A .2.

to the insurer for premiums.[134] As such, the current practice in the industry is that, in the absence of either section 53(1) of the MIA or some implied term in their contract, a broker acting within the scope of its authority is not personally liable to the insurer for the premium, but the policyholder as the broker's principal.[135] In essence, where the premium has been paid by the policyholder to the broker and the latter defaults in remitting same to the insurer, the policyholder is not generally relieved of the obligation to pay the said premium to the insurer.

Nevertheless, in view of the regulatory requirement that authorised firms carrying on insurance mediation activities must hold client money in a statutory or non-statutory trust account in accordance with the Client Assets Sourcebook, some measure of protection is afforded the policyholders in the event of their brokers' insolvency. In this event, policyholders' claims to such broker's segregated client money account take priority over any insurer's money validly being held in the accounts.[136]

6 2 Australia

Like in the UK, the status of the agent and liability of the insurer for their activities is now strictly regulated under the Financial Services Reform Act 2001 (FSRA). Under sections 917A and 917B of the FSRA, a financial services licensee is now responsible, as between the licensee and the client, for the conduct of its authorised representative, such as an employee, or director of the licensee, or any other representative to whom authority has been given by the licensee, that relates to the provision of a financial service and on which a client could reasonably be expected to rely and on which the client in fact relied in good faith, whether or not the representative's conduct is within authority.[137] Furthermore, under section 917E of the FSRA, the responsibility of a financial services licensee extends so as to make the licensee liable to the client for any loss or damage suffered by the client as a result of the representative's conduct. In this respect, under section 917F thereof, any remedy that is available to the client could be enforced against the licensee as well as the representative as they are both jointly and severally liable to the client in respect of those remedies and any agreement which purports to alter or restrict the operation of the relevant provisions in this regard is void.

Also, like in the UK, no restriction is placed on the commission payable to intermediaries. The Corporations Act,[138] however, requires an authorised representative, including insurance brokers, to disclose to retail clients more detailed, timely and specific information about the remuneration (including commission) or other benefits, other interests whether pecuniary or

134 ESLC Reforming Insurance Contract Law Issues Paper 8 (2010) 37 para 5.8.

135 *Ibid.*; It has been noted in *Allianz Insurance Co Egypt v Algaion Insurance Co SA* 2008 EWHC 1127 that: "[P]ractically no one in the market is now aware of the fiction that enabled the insurer to look to the broker for the payment ...".

136 ESLC Reforming Insurance Contract Law Issues Paper 8 (2010) 40, para 5.17. In addition, the Financial Services Compensation Scheme provides financial compensation when authorised firms are unable or likely to be unable to satisfy claims against them. This, however, applies mainly to claims from retail consumers and small businesses for "protected contracts of insurance": ESLC Reforming Insurance Contract Law Issues Paper 8 (2010) 38 para 5. 12.

137 See also s 10 of the New Zealand Insurance Law Reform Act 1977 wherein a representative of the insurer, who acts for the insurer during the negotiation of any contract of insurance, and so acts within the scope of his actual or apparent authority, is deemed, as between the insured and the insurer and at all times during the negotiations until the contract is concluded, to be the agent of the insurer. Furthermore, notice is imputed to the insurer in respect of all matters material to a contract of insurance which is known to the representative of the insurer concerned in the negotiation of the contract before the proposal of the insured is accepted by the insurer. In this context, representative is defined to include any servant or employee of the insurer and any person entitled to the receipt of commission or other valuable consideration from the insurer in consideration for the person's arranging, negotiating, soliciting or procuring the contract of insurance between a person other than himself and such insurer.

138 2001 (Cth), hereinafter referred to as the Corporations Act.

not and whether direct or indirect.[139] Also required to be disclosed is information about any association or relationships that might reasonably be expected to be, or have been capable of influencing the providing entity in providing the services in a Statement of Advice to be given to clients.[140] The level of detail required in the Statement of Advice is such as a person would reasonably require for the purpose of deciding whether to act on the advice as a retail client.[141] In addition, a Financial Services Guide is required to be given by an authorised representative of a financial services licensee in any case that a financial service is provided to a retail client.[142] However, where financial services are provided to wholesale clients, the need to give the Financial Services Guide and the Statement of Advice does not apply. Nevertheless, brokers are generally required to disclose some information regarding remuneration, association and other interests to all categories of clients.[143] This is in line with the common-law duty to avoid conflicts of interest; the prohibition of receipt of gifts or secret commission in return for advice given to clients;[144] the obligations imposed on financial services licence holders under the Corporations Act to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly, and fairly; and the duty to have in place adequate arrangements for the management of conflicts of interest that may arise, wholly or partially, in relation to the activities undertaken by the licence holder or the representative.[145] Like it is required under the UK Regulation, statements and information included in the Statement of Advice are required to be worded and presented in a clear, concise and effective manner.[146]

Nevertheless, in contrast to the general practice in the UK, section 59(1) of the MIA 1909, a replica of section 53(1) of the MIA 1906 has been repealed. The position of the insured is currently regulated under section 985B(1) of the Corporations Act, which generally discharges the insured from any further liability to the insurer for any premium or otherwise, in respect of any payment to an intermediary under or in relation to a contract of insurance arranged or effected by the latter.[147] Any agreement which purports to alter the effect of this provision is void.[148] Thus, in contrast to section 53(1) of the MIA 1906 and the repealed section 59(1) of the Australian MIA 1909, brokers in Australia are no longer directly responsible for the premium, but the policyholder. However, a risk transfer arrangement is imposed on the insurer and the broker such that once payment of the premium has been made to the broker, the policyholder's liability to pay the insurer is deemed discharged. As such, the risk of a broker's insolvency is

139 See Part 7.7 s 942 C (2) (e) of the Corporations Act.

140 See Part 7.7 s 942C (2) (f) of the Corporations Act.

141 Section 947C (3) of the Corporations Act.

142 See s 941B (1) of the Corporations Act.

143 Australian Securities and Investments Commission "Report 42 – Insurance Broker Remuneration Arrangements" (2005) 12 https://download.asic.gov.au/media/1338452/IBRA_report_2005.pdf (accessed 12-07-2021).

144 For example, s 179 of the Crimes Act 1958 (Vic); s 249D of the Crimes Act 1900 (NSW).

145 See s 912A (1) (a) and (aa) of the Corporations Act.

146 See s 947C (6) of the Corporations Act.

147 See also Insurance Intermediaries Act 1994, ss 4 and 6(1) (New Zealand). The view of the Australian Law Reform Commission is premised *inter alia* on the fact that the insurers generally acquiesce in the practice under which premiums are paid to brokers for transmission to insurers; that it is the insurer, and not the insured, which agrees with the broker on credit terms and acquiesces in a broker's temporary treatment of premium money as his own and that the insurer, not the insured, is in the better position to know the overall payment performance of a broker and to become aware of his impending insolvency. It is further noted that if the convenience of accounting between insurer and broker should dictate the adoption of other procedures, it is the insurer, not the insured, which should be exposed to the additional risk: Australian Law Reform Commission "Insurance Agents and Brokers Report No 16 (AGPS 1980)" (1980) 27 and 31 http://www.austlii.edu.au/au/other/lawreform/ALRC/1980/16.html (accessed 10- 09-2021) [hereinafter referred to as ALRC Report No 16 (1980)].

148 See s 985B (4) Corporations Act.

placed on the insurer rather than the policyholder.

In light of the foregoing salutary statutory measures in the regulation of insurance intermediaries in these other common law countries, some reform proposals for addressing the identified lacunae in Nigerian law are provided hereunder.

7 CONCLUSION

The crucial role which insurance intermediaries play in the mediation of insurance contracts in particular, and in the insurance business in general, can hardly be over-emphasised. In light of the identified defects in the current law, the regulation of the business of insurance intermediaries in Nigeria needs to be reviewed to make it attuned with the current global best practices. In this respect, it is desirable for Nigerian policymakers to take a cue from the reform measures in other common-law jurisdictions, including the United Kingdom and Australia, especially as it relates to the status and liability of an agent who assists a proposer to complete the proposal form, remuneration of brokers and liability of brokers in respect of premiums as contained in section 54(1) of the Nigerian MIA 1961.

First, the provisions of section 54 of the Nigerian Insurance Act on the status of an agent who assists the proposer to complete a proposal form ought to be revisited. The idea of relieving the insurer from liability for any act or omission of its agent who has assisted a proposer to complete a proposal form is not *in tandem* with the reality and should be jettisoned in the interest of justice to the insured, who cannot be expected to know the extent or limit of an agent's authority. Given the high level of illiteracy in Nigeria, it is expedient that the maxim, *Qui facit per alium facit per se*: (He who does something through another person does it himself), be fully enforced where the insured is found to have acted honestly and the principle laid down in the *Newsholme Bros v Road Transport and General Insurance Co Ltd*,[149] which the Nigerian courts have consistently applied in similar cases be discarded. Also, notwithstanding the general rule that brokers are agents of the proposer/insured in the placement of insurance, in appropriate cases where an insurance broker is found to have actually simultaneously acted as the agent of both the insured and the insurer in the same transaction, disclosures to such broker should be taken as disclosures to the insurer.[150] In the same vein, it is desirable that the broker discloses specifically and in good time on whose behalf it is acting when advising clients on insurance products.

Secondly, an examination of the UK and Australian laws on disclosure of remuneration to clients by brokers clearly reveals that it is not enough to put a ceiling on the commission receivable by the broker as it is available under Nigerian law but, more importantly, disclosure of commission earned or to be earned by the broker is expedient to further promote transparency and informed decision making by the insured. It is submitted that the rate of commission payable by the insurer to the intermediary should be left to mutual agreement between the parties as the prescribed percentages of 10 per cent or 20 per cent so contained in section 53 of the Insurance Act could be rather high in some circumstances. Nevertheless, as a means of reducing the potential conflicts between interest and duty that could arise from commission payable as remuneration, brokers should be required to disclose to their clients the amount of such commission.[151] It is

149 *Newsholme Bros v Road Transport and General Insurance* 356.

150 *Woolcott v Excess Insurance Co* 231.

151 It has been rightly noted in some quarters that disclosure of the amount actually received by the broker would, *inter alia*, provide a client with the information to assess the reasonableness or otherwise of the remuneration, encourage and promote informed assessment and, perhaps, questioning by the client of the cost of the services of a broker, enable the client to compare the cost-competitiveness of different brokers, as well as to consider a number of positive ways in which to reduce the cost of the insurance: ALRC Report No 16 (1980) 51 para 82.

also imperative to mandate insurance brokers to have conflict management policies within their respective organisations for management of potential conflicts of interest that could emanate from remuneration.[152]

The provisions of section 54(1) of the MIA 1961 should be repealed and a provision made to the effect that, unless it is otherwise agreed, the broker is not primarily liable to the insurer for the premium. This reform measure would not only bring the marine insurance law in line with the general law as it is applicable to non-marine insurance policies, but would also bring the law in tandem with the agency law that an agent is not personally liable on a contract effected for his/her principal. The reform would also ensure fairness in the whole transaction since the insured is the one that would eventually claim the insured sum on the happening of the insured event. Thus, the insurer could always proceed against the insured to recover the premium due. Moreover, with the statutory duty imposed on brokers under section 40 of the Insurance Act to establish and maintain the client's account into which all monies including premiums received are to be paid, the insured could, in the event of the broker's insolvency, trace such payment and be able to recover and pay it over to the insurer. Meanwhile, it should be statutorily required of brokers, who have not received the premium payable in respect of a contract of insurance within a stipulated period from the time the cover takes effect, to give notice to that effect to the insurer involved in the transaction.[153] This, hopefully, would enable the insurer to take appropriate action in the circumstance, such as cancellation of the policy. Also, if an adequate supervisory measure is put in place by the regulatory authorities to ensure that brokers duly comply with the duty to remit premiums collected within 30 days to the insurer, the loss that might be suffered by the insured in this circumstance would have been greatly minimised.

Furthermore, while the requirement of professional indemnity cover is laudable as a means of ensuring that brokers are able to indemnify the insured for losses suffered as a result of professional negligence, a broker should still, in appropriate cases where the facts and circumstances of the case demand, be held to be the agent of the insurer. This approach would give further protection to the insured, especially where the indemnity cover of the broker cannot adequately compensate the insured for the loss occasioned by the negligence of the broker.

In general, there is a need for the Nigerian regulatory authorities to continually monitor the activities of insurance intermediaries in order to ensure that a service-oriented approach is maintained at all times in the interest of the insuring public at large. In addition to the duties imposed by the common law on intermediaries, it is expedient that specific statutory provisions requiring intermediaries to, at all times, act in the best interest of the insured be enacted as it is available in some other jurisdictions.[154] In the same vein, adequate regulatory measures to enhance transparency in the remuneration of brokers and better product information to the insured are equally germane to increasing the level of confidence of the insuring public and the credibility of the insurance industry in Nigeria.

152 FCA ICOBS s 2 3 1.

153 See e.g., s 8 of the Insurance Intermediaries Act 1994 (New Zealand).

154 See s 961B (1) of the Corporations Act 2001 (Australia).