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The Impact of Law on Marketing

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MARKETING IN NIGERIA

Experience in a Developing Economy

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One of the legal challenges of marketing is the interpretation and understanding of existing laws. In Chapter 19, Akpamgbo takes time to describe the main provisions of the Nigerian Enterprises Promotion Decree, popularly known as the ‘Indigenisation Decree’. Because of the importance of this Decree it has also been described by many as the ‘business charter in Nigeria’. It specifies business activities that may be undertaken by Nigerians and by non-Nigerians. The main aspects of this Decree are provided as Schedules I, II and III attached to Chapter 19 of this book. In his commentary, Akpamgbo explains how this Decree should be interpreted and applied, and indicates how it affects the task of the marketing executive and the marketing process in Nigeria.

17. The Impact of Law on Marketing

1. Introduction

Marketing is the practical disposal of goods and services to consumers. It is normally in a state of flux. It is subject to remarkable shifts as a result of changes in environment and time. Marketing cannot be practised in a vacuum. It functions within human societies and it is imperative that it be carried out within the confines of the law. At the same time, such laws must, of necessity, conform with the experience and the circumstances of the given society.

It must, however, be borne in mind that law, like the social sciences, is dynamic in nature, although the rate of change is painfully slow. Laws guiding the practice of marketing have developed much faster in some countries than in others. In fact, in most developing countries, of which Nigeria is one, laws regulating business activities in general and marketing in particular are yet to be developed to meet the challenges of a rapidly developing market economy.

It is obvious that marketing is experiencing momentous changes. Laws relating to marketing are catching up fast with the change. This being the case, manufacturers or producers who were once relatively well insulated from loss from actions by injured consumers who had purchased from resellers, are now vulnerable to suit from a vast number of claimants in most jurisdictions. The changing social and legal environment is gradually forcing manufacturers to take greater responsibility for the goods they produce and sell.

This paper attempts to investigate the impact on marketing of recent changes in legislation.

Experience shows that in the Nigerian situation the bulk of businessmen hardly ever stop to relate law to their activities. The need to consider the legal consequences of their engagements is either not fully appreciated or not considered necessary at all. Consequently, the law is only resorted to when a mistake in business transactions has already resulted in substantial damage. For example, a good number of traders in the markets of Onitsha, Enugu, Ibadan, Zaria and Aba etc., never consider the fact that the seller has legal obligations towards buyers. Conversely, many retailers hardly remember that they have
corresponding rights and obligations vis-à-vis their suppliers and customers.

II. Contract as it affects marketing

In the main, the law which regulates the relationship of the growing number of businessmen in the general conduct of their business activities is largely the law of contract. Marketing, being an essential arm of business, is deeply rooted in the law of contract. Consequently, the marketer must of necessity be well versed in the essential elements.

A contract is made where parties have reached agreement, or where they are deemed to have reached agreement, and the law recognises rights and obligations arising from the agreement. For a contract to be validly made, the following elements are indispensable:

(a) offer and acceptance;
(b) capacity of the parties;
(c) intention to create legal relations;
(d) consideration.

Let us look at these briefly. Offer is an undertaking by the offeror to be contractually bound in the event of a proper acceptance being made. The law requires that for any offer to be effective it must be clear, complete and final. When such an offer is made, it must be communicated to the offeree by the offeror. It is important to note that an offer may be communicated in any manner whatsoever. Express words may be used, orally or in writing or an offer may be implied from conduct. An offer may be partly implied and partly expressed. But an offer has no validity unless and until it is communicated to the offeree so as to give him the opportunity to accept or reject. Sometimes it is possible for an offer to be communicated generally to the whole world. Where an offer is made to a particular person or group of persons, no valid acceptance may be made by a person who is not an offeree. Acceptance of an offer must be unqualified and must correspond exactly with the terms of the offer. A counter-offer operates as a rejection. When an offeree makes a counter-offer, the original offer is deemed to have been rejected and cannot be subsequently accepted. Furthermore, it must be borne in mind that neither an invitation to treat nor a mere statement of price is an offer.

The law requires that parties to a contract which will be enforceable in court of law must have full capacity. In law, persons may be natural or artificial. The general rule is that all natural persons (i.e. people) have full contractual capacity, but there are exceptions in the case of infants, drunken persons, insane persons and enemy aliens. Artificial persons are corporations whose contractual capacity depends on the manner in which they were created. In order to benefit from a contractual right, or to incur a contractual obligation, a contracting party must have appropriate capacity. Right and obligations can exist only where there is capacity to support them. Incapacity may, therefore, affect the apparent rights and obligations created by a contract.

The intention to create legal relations is another essential element in contract. Where no intention to be bound can be attributed to the parties there is no contract. The test of intention is objective. The courts seek to give effect to the presumed intentions of the parties. In commercial and business agreements, there is a rebuttable presumption that the parties intend to create legal relations. The parties are not contractually bound where the agreement is expressed as binding in honour only, or where it is expressed as subject to contract. In an agreement of a social or domestic nature, there is a presumption that the parties did not intend legal relations to arise. But this presumption is also rebuttable by evidence to the contrary.

Consideration is a vital element of a valid contract. A valuable consideration ‘may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.’ In an action on a simple contract, the plaintiff must show that the defendant’s promise was part of a bargain between the parties. The plaintiff must show that he gave, or promised to give some advantage to the defendant in return for his promise. This advantage moving from the plaintiff to the defendant is known as valuable consideration.

It is a complete defence for the defendant to show that no consideration was given. A bare promise is not binding, e.g. if Agbo promises to make a gift of N10 to Bela and subsequently changes his mind, Bela cannot succeed against Agbo for breach of contract.

Even though we have discussed the essential elements of a contract briefly, it will still be necessary to analyse the term ‘warranty’ as it affects marketing.

III. Warranty: the problem of definition

Until 1893, before the Sale of Goods Act, the term ‘warranty’ was employed mainly in its ordinary sense of promise or guarantee. It could be made expressly or could be implied from the circumstances of the case. An agent ‘warranted’ his authority; the shipowner ‘warranted’ the seaworthiness of his ship and so on. The terms applied
in a contract of sale by the common law were described as warranties. The courts adopted this terminology and its meaning in the ordinary sense and so did textbook writers of the period.

If the warranty were to be broken and the party injured was making a claim to set aside the contract, he would have to prove that the fulfilment of the obligations contained in a particular warranty of the contract constituted a ‘condition precedent’ to the discharging of his own obligation under the contract. Parties to such a contract could provide that breach of a particular provision by one party would entitle the other to repudiate the contract. In a good number of cases, the issue was one of construction in which the intentions of the parties were ascertained by reference to the circumstances of the case.

In Behn v. Burness the court held that, if the plaintiff had agreed with the defendant to sing in concerts and operas in the United Kingdom for a period of three-and-a-half months from 30 March 1875, and ‘to be in London without fail at least six days before the commencement of this agreement’, a breach of which the plaintiff only reached London on 28 March. The defendant decided not to employ him in accordance with the agreement. Whether the plaintiff could recover damages depended upon whether his arriving in London six days before March 30 was a ‘condition precedent’ to the defendant’s liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for compensation in damages. It was held that, taking into account the length of the engagement, the delay in arrival at the initial rehearsals could not amount to a breach of a condition precedent to the defendant’s liability to employ the plaintiff.

In the above case, the Judges dropped the objective ‘precedent’. Rather they used condition and warranty to describe contrasting situations. The word ‘condition’ was in frequent use to denote the terms governing a transaction (an auctioneer’s ‘conditions of sale’; a carrier’s condition of carriage etc.). There was also the indirect effect of the curious rule that ‘where the property in the specific chattel has passed to the vendee ... he has no right, upon the breach of the warranty, to return the article ... unless there has been a condition in the contract authorising the return’.8

In other words, in a contract for the sale of specific goods there had to be a condition entitling the buyer to rescind if the warranty was broken because breach of the warranty could not constitute a breach of a condition precedent once property had passed. Hence, in Bannerman v. White the seller of hops had, in the court’s view, expressly warranted that no sulphur had been used in growing them; but in addi-
precedent to his own liability under the contract and that the breach in question had gone to the root of the contract. Accordingly, if one of these undertakings is broken the buyer is entitled to treat the contract as at an end.

*Stipulations as to time*

Whether time is of the essence of a contract of sale or not depends, according to section 10(1) of the Act, upon 'the terms of the contract'. But what if there is no express term in the contract? Presumably inferences can be drawn and the apparent intention of the parties can be implied into the contract. It is well established that in 'ordinary commercial contracts for the sale of goods... time is prima facie of the essence with respect to delivery'.

The position is complicated where no precise time of shipment or delivery is given, as in the familiar form of words that the ship carrying the food is 'expected ready to load' by a specific date, or during a particular period. The leading authority on the interpretation of this type of expression is Samuel Sunday & Co. v. Keighly, Maxted & Co., where the view of the Court of Appeal was that the statement must be made honestly and with reasonable grounds for such an expectation. In that case the sellers had entered into three contracts for the sale of grain which they undertook to ship from a River Plate port on a vessel 'expected ready to load late September'. The arbitration found that at the time the first two contracts were entered into the sellers still reasonable expected that the vessel would be able to load in time. By the time of the third contract, however, that expectation was no longer reasonable. In view of the length of time that elapsed before the vessel was ready to load, the arbitrator held that buyers were entitled to refuse to take delivery of the goods. This decision was upheld on appeal.

What is apparent, however, is that although there is a strong presumption that a delivery date in a commercial sale is of the essence of a contract, this is only a prima facie rule. And where the delivery date is imprecise, the question whether there has been a breach of a 'condition precedent' can only be decided by reference to the nature of the circumstance arising at the time of performance. It is certainly not true that any breach of any time clause relating to delivery ipso facto entitles the buyer to compensation or cancellation.

The Court of Appeal made comments on the condition/warranty dilemma in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. A ship was delivered under a time charterparty in an unseaworthy condition, i.e. the engine room crew were not experienced enough to deal with the sort of difficulties that were likely to arise from the age of the ship's engines. Engine trouble caused a fire and delay on the first cargo-carrying voyage to Osaka, and the ship then had to undergo extensive repairs over a period of six months before it was mechanically seaworthy. During this period, freight rates fell considerably. The charterers purported to repudiate the contract, alleging *inter alia* that the shipowners had failed to provide a seaworthy ship.

The argument that seaworthiness of the ship constituted a condition precedent to the charterer's obligation to continue to operate under the charter was rejected. Under the terms of the charterparty, the charterers were entitled to retain the use of the vessel beyond the initial term for such periods as had been lost for a variety of causes including the circumstances that had arisen. The delay had not been so excessive as to take the case out of the contemplation of that provision.

In commenting on the condition/warranty dilemma, three members of the Court of Appeal did not deny that certain terms are normally of fundamental importance, the obvious example being the time of delivery. But the warranty of seaworthiness was of such wide application that it was in no way possible to categorise its breach as being a breach of condition *ipso facto*. It is true that many contractual undertakings can give a prima facie classification as a 'condition' and sense for the parties to make their own classification by means of a cancellation clause. In a good number of situations it is surely as important to have regard to the circumstances and consequences of the breach as to the actual term broken.

**IV. Agency**

As a means of business practice, agency has been brought about as a result of the many complexities of modern business life. Nowadays, there are many advances in the fields of technology and communications. It is possible therefore for Nigerians to do business with people in distant places like Japan, America, Europe, Asia, etc. and vice versa.

Agency is a consensual relationship between the principal and the agent by which the latter is expressly or impliedly authorised to act on behalf of the principal and to bring the principal into contractual relationship with third parties. It is the power to affect the principal's contractual relations with third parties that differentiates an agent from a servant. Servants, too, are subject to the control of their
masters, but a servant has no power to bind his master by contracting with a third party.

The appointment of an agent may be oral, i.e. by word of mouth, written or implied from circumstances. Under Sections 67, 78, and 79 of the Property and Conveyance Law, 1959 of West and Mid-Western States of Nigeria as well as Section 5 of the Law Reform Act, 1961, an agent creating or dispensing of an interest in law is to be appointed in writing. Above all, it is considered sound commercial prudence that an agency agreement be made in writing, setting forth all its terms.

In the relationship between agent and principal there are duties and rights accruing therefrom. While the agent has a duty to follow and obey the instructions given by his principal, and account properly to his principal, he is also not permitted to place his interest in conflict with that of his principal. On the other hand, the principal must cooperate with his agent, pay him the right remuneration, and indemnify him against all authorised expenses.

An essential point to note is the fact that Nigerian businessmen involved in marketing nowadays continuously use the medium of agency to carry on their activities. This makes it necessary that Nigerian business law should be fashioned to articulate more clearly the principles of agency in all its ramifications to represent our own circumstances. It is an area in law the marketer will no doubt find most useful if well understood and applied in practical business dealings.

V. Law of liability in marketing

The element of liability in the field of marketing is a very crucial one indeed. As has been pointed out already, the notion of 'strict liability' has evolved over a period of years until it has been recognised, in one form or another, in the majority of jurisdictions in countries of Europe and America and also in the East European countries. Until recent years, an injured claimant found the road to recovery to be a rocky one indeed. The claimant's position truly reflected the common law maxim of caveat emptor. If the action was based on warranty, the problem of privity of contract had to be forced. If the tort claim of negligence was the basis for the action, proof of negligence was a problem. These obstacles were difficult to surmount and recovery was often denied. However, as society became less tolerant of product failure due to faulty design, poor workmanship, and the like, and more cognisant of the needs of the consumer, the courts began to find ways to circumvent these hurdles. At the same time, legislative bodies reacted by creating statutes that removed the shields that had for so long insulated the manufacturer.

As early as 1916, the courts began to recognise that the requirement for a contractual relationship (privity of contract) in a warranty action belonged to the past. In case of negligence, the question of proof became less significant as the doctrine of res ipsa loquitur (the thing speaks for itself) began to be applied. Often the proof of negligence needed to satisfy the court has seemed minimal indeed. Whether the concept of a particular court is founded on a warranty notion or in tort, it seems reasonable to anticipate broader acceptance of this concept and to expect that even stricter requirements will be imposed on sellers.

In essence, the concept of strict liability makes it possible for a seller to be held responsible for injury caused by a defective product even though due care had been exercised in its preparation and sale. As generally applied, privity of contract is not an issue; nor is proof of negligence usually held to be a material consideration. If the broad definition of strict liability is to be met, the basic requirement, in addition to proof that the product is defective, is that the product can be shown to have been defective when it left the hands of the manufacturer and that the damage was predominantly caused by the defect.18

One may well wonder why the increasing acceptance of the doctrine of strict liability in marketing. This can be attributed to the fact that society is no longer willing to endure the hazards associated with mass production to order to gain the concomitant benefits. It has become a matter of public policy in many societies to recognise the shortcomings of such producers and to hold them responsible to the members of the public which they serve. Another argument advanced in support of this trend is that the courts seem to have recognised that the manufacturer is better able to bear the risk of loss than is the injured claimant. This determination is based primarily on the reckoning that firms will be able to spread the risk of loss better than the occasional claimant.19 Justice Trayner almost 30 years ago noted: 'It should now be recognised that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.'20

Application of the doctrine of strict liability leaves the seller almost defenceless in many jurisdictions. Short of obvious misuse of the product, assumption of the risk, or contributory negligence, little is available for the seller unless he can prove that the harm is in no way related to the defect, or unless he is able to raise a defence peculiar to a
our insurance plans designed to limit the liability of producers, presumably standards and providing relief for firms that have attained those standards is another alternative. Special tax relief and distinctions related

to firm size and the nature of the business enterprise may also be considered.

Consumer protection has not previously been viewed as a highly important element in marketing strategy, for it generally has not been considered to figure strategically in the consumer's purchase decision. However, today's sophisticated consumers will not be satisfied with half-hearted efforts and promises. Unlike those in the past, they are likely to compare promise and performance critically and, if not pleased, take action accordingly. For example, many of the consumers of today, rather than complain, will respond simply by making future purchases from a competitor who does provide consumer protection and after-purchase satisfaction. Although a lot of these observations are true of developed societies, nothing says that the developing ones which are virtually copying the marketing pattern of those countries will not be faced with similar problems sometime in future. The law needs therefore to develop in full cognisance of the possibility.

VI. Conclusion

Our reflections on the foregoing areas in which the law is essential and indeed indispensable to the marketer are by no means exhaustive. However, it is clear that early business response to the current legal and consumer environment has been very limited. The explanation for this state of affairs may either be because firms have not acted or they have taken only defensive measures to protect themselves from loss. Examples of typical defensive measures are upgrading in-plant quality control, improving in-plant inspection, emphasising safety in production design, keeping accurate records, increasing insurance protection, and adding to legal capacity.

It is likely that in time to come the doctrine of strict liability will evolve into what is best described as absolute liability. Certainly not all courts will accept the concept of absolute liability without reservation. There are bound to be significant differences in application. For example, some courts may lean towards recognition of a distinction between large and small firms, while others may not see this as necessary and will continue to refine the doctrine in other ways as yet undetermined.

If the long-run attitude is one of dissatisfaction with the concept, many alternative courses of action are available. Among these are insurance plans designed to limit the liability of producers, presumably with government involvement in some way. Legislation establishing standards and providing relief for firms that have attained those standards is another alternative. Special tax relief and distinctions related

References

2. The term 'businessmen' as employed here includes traders, distributors and general contractors.
3. White v. Bluet (1853); Guthing v. Lynn (1831); Scammell v. Ouston (1941).
5. Hyde v. Wrench (1840). It must also be noted that a mere request for further information must be distinguished from a counter-offer. Such a request does not operate as a rejection of the offer; see Stevenson v. McLeon.
7. (1876), L.Q.B.D. 183.
12. And also by S. 11(1)b of ibid.
13. S. 14 of ibid.
14. S. 12(1) of ibid.