

LEGAL REGIME FOR THE PROTECTION OF CONSUMERS OF FINANCIAL SERVICES IN NIGERIA.

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INTRODUCTION:

“The consumer in developing countries is sick, not necessarily in a physiological sense, but in the Legal sense of not having a formidable legal umbrella from which to repulse continuous importation of shoddy, dangerous and killer products most of which come from the developed Thus a proper regime is yet to be charted for protecting consumers in developing countries”¹

The above formulation clearly denotes the problems an average consumer in Nigeria is exposed to. The idea of consumer protectionism otherwise referred to as consumerism is historically linked with the efforts of producers and local authorities in setting standards for their transactional purposes. These were in the form of measurements and standard formulations. There is the economic context of consumerism in the spheres of demand, utility and consumer sovereignty. To the economist, consumerism is seen from the point of view of consumer behaviour in the micro and macro senses. Thus, when an economist discuss consumer, he is referring to households, firms and central units. These groups are generally seen as ‘the market’. The

¹ See Badaiki, A. D. - Towards and International Legal Regime of Consumer Protection for Developing Countries: Nigeria as a case study" (1993) Jus. Vol.6 No.4 at p.43.

enlarged theory of "the consumer" to the economist extends to the utility concept. This idea of "best value for money" is at the root of most of the legal and administrative machinery for consumer protection in modern times.

The modern day concept of consumer protection has been dwarfed by the confusion existing between economists, lawmakers and producers to the extent that the purpose and philosophy of consumerism seems blurred. The US Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury's Report made the following observations:

"It is fair to ask precisely what it is that the consumer is to be protected from. Must he be protected from his own lack of knowledge or discipline which leads him to take advantage of easy credit to buy things he does not need or cannot afford? Is he to be protected from the "fringe" operator who may take advantage of the ignorance and gullibility of the consumer to cause him to overbuy or pay too much"²

It can be appreciated from the foregoing that the need to protect the consumer is fast becoming fluid and indeterminate as the society deviates from one social value to the other³, Thus, inequality of bargaining power, protection of consumers against fraudulent, dangerous and negligent practices as well as the level of economic efficiency of a system have severally or jointly justified the judicial, institutional and legislative

² Page 9, cited In Trebilock "Consumer Protection in the affluent society" 16 McGillLJ 263.

³ For a fuller discussions on the purpose of Consumer Protection, see Iain D.C. Ramsay- "Rationales for Intervention in the Consumer Market Place" (OFT, Occasional Paper, Dec, '84)

intervention in consumer transactions⁴.

The purpose of this paper is to examine, in extenso, the adequacy of the legal regime protecting consumers of financial services in Nigeria. A lot of financial services are being offered daily to the public in Nigeria due to the overgrowing dynamics of our economy. Consumption of services are in the areas of banking, insurance, credits, securitisation, financial advisory and brokerage services. The liberalisation of the financial sector has induced an alarming increase in the bulk of transactions being offered to the consumers in the areas of marketing of funds, social security and mortgages. We shall examine the legislative, judicial and institutional framework put in place to safeguard the consumers of these services regardless of agreed contractual terms and implications.

The remedies available and the mechanisms for their pursuit shall equally be x-rayed. It is hoped that at the end of the paper, a clearer and concise feature of the legal regime in this regard would have been identified. The unfair practices of advertisers of financial services as well as solicitors, etc shall equally be examined to determine the extent to which they are protected under our laws.

THEORITICAL FOUNDATIONS

The term "consumer" has not enjoyed any definite legal meaning despite efforts by legislations and learned authors to do so. Although we shall not allow definition to detain us here, the word "consumer" for the purpose of this paper shall be taken to mean a person to whom services are supplied

⁴ See the introductory remarks of Senator Murphy, AG (Australia) in introducing the "Consumer Protection and the Trade practices Act, 1974 at 5-6 Federal L. Rev at 288.

for a considerations⁵.

Contract, and the private bargain model of both its jurisprudence and economic market theory, serves as the major plank upon which consumer transactions are initiated and concluded. In most instances, this is discernable through the application of particular contractual rules and concepts. Thus, the services rendered by a solicitor to an issuer, in a public offer of shares, binds the issuer and prospective shareholder to the extent that is permissible in contract. Under a free market enterprise, the expressed intents of the parties are found in their agreements and the Courts⁶ are too reluctant to re-order them except where cases of fraudulent misrepresentation or mis-description are disclosed. To that extent, the consumer is bound by the terms of the contract. Currently, standard form contracts account for a large proportion of contracts entered into by consumers. The predominance of standard form contracts clearly evidences its necessity due to the complexities of modern commercial activities. They are characteristics of a mass productive society and truly effectuate the construct of enforcing rules between parties.

Regardless of the regime of freedom of contract, legislations have provided for a number of prohibitive provisions⁷ that must be excluded as contractual terms.

In other cases, the legislations have imposed certain obligations on producers of services before they can be deemed to be capable of

⁵ See section 32 Consumer Protection Council Act Cap C25, LFN, 2004. Tonwe. S.O." Towards A Legal Definition of a Consumer in Nigeria". The Lawyers Digest 19904 JBLS p.9 at .12.; Blacks Law Dictionary (5th Ed.) p.286

⁶ Nimateks Associates v. Marco Construction Co. Ltd (1991) 2 NWLR (PT174) 411; Bookshop House vs. Stanley Consultants (1986) 3 NWLR (pt.26) 87.

⁷ The Hire Purchase Act, Cap. H4, LFN, 2004.

providing same for public consumptions.⁸

Judicial activism, through case law, has also been used to dilute the purity of contractual authority. This is equally the case with institutional and class arrangements which tends to protect consumers regardless of contractual stipulations. Whether these approaches are, strictly speaking, intended to protect the consumer or not shall constitute the subject of the following discussions.

LEGAL PROTECTIONISM

The efforts of legislation to protect the financial consumer is very robust in all respects. By mere legislative fiat, the consumer of financial services over the years have enjoyed adequate protection to the extent that has protected their investments and deposits in banks and other financial institutions and have largely guaranteed its requirement.⁹

Although the Consumer Protection Council Act¹⁰ clearly de-emphasized these categories of persons, several legislative efforts have consistently been geared towards their protection. The most current and outstanding in this regard is the Banking and other Financial Institutions Act¹¹ and Central Bank of Nigeria Act.¹² The object of these laws is to create a safe and sound banking and financial market in which public confidence¹³ and protection will inhere¹⁴. This can be inferred from the various provisions of

⁸ Section 29, Investments & Securities Act No.29, 2007

⁹ For a fuller discussion on who is a bank's customer, see Lord Chorley: Law of Banking (Sweet & Maxwell) 6th Edition P.35 to 38

¹⁰ Cap C25, LFN, 2004

¹¹ Cap. B3, LFN, 2004

¹² Cap. C4, LFN, 2004

¹³ G. A. Penn & others: The Law Relating to Domestic Banking ; Vol. 1 , p.3

¹⁴ See O. Ajayi: Regulation of Banks and Financial Institutions (Grey House) 1991 p.5.

these status, which intends to strengthen the disposition and authority of the Central Bank of Nigeria (CBN)¹⁵ to be able to monitor and stipulate rules which would effectively guarantee the protection of consumer's funds. Central to these effort is the promulgation, in 1991 of the Banks and Other Financial Institution Act (otherwise known as BOFIA).

The BOFIA itself seems to be a codification of the banking laws, particularly, as existing in some other jurisdictions, with the power to fill existing *lacunae* vested on the CBN. From the Licensing requirements, powers and grounds for the revocation of licenses, voting rights, capital adequacy, reserve maintenance, operational guidelines, advertisements for deposits and other services, exposure restrictions, interest charging to lending, trading and investment restrictions, the underlying philosophy is to protect the consumers of its services.

Sections 12 & 13 Of BOFIA provides as follows:

"12. The Governor may, with the approval of the President by notice published in the *Gazette*, revoke any license granted under this Act if a bank-

(a) ceases to carry on in Nigeria the type of the banking business for which the license was issued for any continuous period of 6 months or for any period aggregating 6 months during a continuous period of 12 months;

¹⁵ See Olusesan Oluyide, "A critical Appraisal of the New Banking Decree in Nigeria;" Contemporary Issue in Nigerian Law (ed. by Prof. C. O. Okonkwo SAN) p.156.

- (b) goes into liquidation or is wound up or otherwise dissolved;
- (c) fails to fulfill or comply with any condition subject to which the license was granted;
- (d) has insufficient assets to meet its liabilities;
- (e) fails to comply with any obligations imposed upon it
- (f) by or under this Decree of the Central Bank of Nigeria Act 1991."

"13. (1) A bank shall maintain, at all times, capitals funds unimpaired by losses, in such ration to all or any assets or to all or any liabilities or to both such assets or liabilities of the bank and all its offices in and outside Nigeria as may be specified by the Bank.

(2) Any bank which fails to observe any such specified ratios may be prohibited by the Bank from -

- (a) advertising for or taking new deposits;
- (b) granting credit and making investment;
- (c) paying cash dividend to shareholders.

(3) In addition, the Bank may be required to draw up within a specified time a capital reconstitution plan acceptable to the Bank."

The graver men of these provisions is that, as soon as the Bank cannot meet its obligations, its license shall be revoked by the Governor of CBN. Instances, where a Bank may not meet its obligations abound, but the most common is where the bank is unable to meet its demand to pay customers their deposited funds. Section 16 also provides that reserve fund of not less than 30% of its net profits must be kept by the bank. This fund, may in appropriate cases, be used to settle the banks obligations to its customers.

In other to ensure that the best professionals and men of integrity are employed by the banks to carry out its services, section 19 (1) (2) stipulate as follows:

- "19 (1) No bank shall -
 - (a) employ or continue the employment of any person who is or at any time has been adjudged bankrupt or has suspended payment or has compounded with his creditors or who is or has been convicted by a court for an offence involving fraud or dishonesty, or professional misconduct;
 - (b) be managed by a management agent except as may be approved by the Bank."
- (2) Except with the approval of the Bank, no bank shall have as a director any person who is director of-

- (a) any other bank;
- (b) companies which among themselves are entitled to exercise voting rights in excess of ten per cent of the total voting rights of all shareholders of the bank."

The banks are also required to display at its offices, the lending and deposit interest rates and shall render information on such rate.¹⁶ This provisions seeks to put the customer on notice with respect to the interest rates that are applicable to particular transactions and limits the points at which the customers may be exposed to uncertainties. Although, it has been suggested¹⁷ that this provision is intended to induce competition amongst banks and foster deregulation, it is submitted that the provision mainly serves the interest of the depositor or borrower ultimately. The sanctions imposed by section 23 is equally laudable.

The Bill of Exchange¹⁸ Act is one other law that has significant provisions directly protecting the interest of the consumers of financial services. The act, by virtue of section 24, lays down the general principle of law that a banker who honours a document purporting to be a cheque but on which the customer's signature as drawer has been forged is not entitled, in the absence of estoppel, to debit his customer's account with the money¹⁹, This provision clearly places on the banker the responsibility of care and

¹⁶ Section 23(1) BOFIA, 2004.

¹⁷ See G. Shoroye, The Regulatory Framework - The Rules and Functions et.al, paper delivered at a Bruce Kirchoff workshop, Otta, 1991 p.6.

¹⁸ Cap B8, LFN, 2004.

¹⁹ See Animi Pepple: Credit Transfers and Direct Debit System (MPJFIL) p.19. See also Lord Chorley: ante at page 95.

prudence in dealing with the customer's instruments particularly as it relates to strictly following the customer's mandate. The banker's right to debit the customers account is dependent upon this principles. Apart from these foregoing provisions, there are several penal provisions in the BOFIA, CBN Act and, the NDIC²⁰ Act that criminalized acts capable of undermining the customers' interests. Some of these penalised acts carry custodial and/or non-custodial sanctions. As a matter of fact, the Federal Government of Nigeria, through the use of the Failed Banks and Financial Mal-practices Tribunal,²¹ have succeeded in ensuring that the policy of protecting depositors' funds and interests are carried out. By this singular act, the public now have confidence in the banking and the financial system.²²

ii. **INSURANCE**

The Insurance industry is one which provides a lot of services to its teeming consumers. The services includes Life Assurance Policy, Marine, Motor-Vehicle and Fire and Property. It may be rendered by the Insurance company itself or through an Insurance agent otherwise known as a Broker. The legal concept of insurance was succinctly put by Lawrence J. In *Lucena v Crawford*²³.

"Insurance is a contract by which one of the contracting parties charges himself with the risk of the fortuitous accidents to which something is exposed, and obliges himself to indemnify the

²⁰ Nigerian Deposit Insurance Corporation Act, Cap N102, LFN, 2004.

²¹ Made pursuant to the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree, 1994 (as amended by Decree 18,1995)

²² See Lanre Fagbohun: "Fraud and Negligence in the Financial Sector: The Role of the Failed Banks (Recovery of Debts) and Financial Malpractices Decree" (MPJFIL) (vol.2 No.1) page 69 - 70

²³ (1808) 127 E.R 858

others from the loss which those accidents may occasion in case of their happenings, in consideration of a sum of money which the other contracting party gives as a price with which he is charged".

Apart from life assurance policies, insurance borders on contract of indemnity. Insurance is different from waging contracts because an insured must have an insurable interest²⁴ over the property or person insured. Insurance is a service within the meaning of Consumer Protection Council Decree²⁵ as the insured may petition the Council established under that Decree and seek the reliefs contained therein.

A review of Insurance law is outside the purview of this paper but the conduct of insurance business and of claims made by consumers of the services of insurers has been a subject of various criticisms and concern. Specifically, the following three matters give rise to difficulties.

(a) DUTY TO DISCLOSE:

As the insurance contract is one couched on "of the utmost good faith", it is the duty of the insured to provide adequate and complete information which are relevant to the policy to be taken²⁶, Accordingly, a learned author has concluded that the

²⁴ Macaura v. Northern Assurance Co. (1925) Ac 619.

²⁵ No.6, 1992

²⁶ Rozanes v. Bowen (1928) 32 LILR98 at 102; See also the observations of Lord Mansfield in the old case of carter vs. Boehm (1766) 3 Burr 1905.

principle of disclosure goes to the root of the contract²⁷, Sections 19 and 20 of the Marine Insurance Act²⁸ provides as follows:

"19. A contract of Marine Insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party."

"20. (1)..... The assured shall disclose to the insurer, before the contract is concluded, every material circumstances which in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosures, the insurer may avoid the contract."

These statutory provisions are declaratory of the common law position on non-disclosure and is, therefore of general application to all forms of contract of insurance.²⁹ The duty to disclose requires that the insured shall disclose all material facts even though what constitutes a material fact may be determined from surrounding circumstances.³⁰ An uncertain nature of what constitutes a material fact has been used by the insurers to abdicate

²⁷ Funmi Adeyemi: Nigerian Law of Insurance (1992) p.55

²⁸ 1961

²⁹ Wookot v. Sun Alliance & London Ins. Ltd (1978) IWLR 493

³⁰ See for instance the observations of the Court in Locker and Woolf Ltd vs. Western Australian Insurance Co, (1936) IKB 408

from their liabilities under the contract and therefore leaving the consumers without remedy. The Insurers, in practice, reserves the right to determine what a material fact is. Following the recommendations of the practitioners and the Nigerian Law Reforms Commission, a legislative intervention was introduced. Section 48(1) of the Insurance Act³¹ provides that where a proposal form that is designed by an insurer is utilised in concluding the contract, information on any matter not specifically requested in such proposal form shall be deemed to be immaterial to the contract. Section 54(2) of Insurance Act of 2003 provides that all letters on the proposal form must be of easily readable letters. It is pertinent to note that these provisions are very helpful to the consumers of insurance services to the extent that the insurer is no longer at liberty to obviate liability on grounds of non-disclosure of material facts and other flimsy grounds.

(B) WARRANTIES

The second aspect of insurance contracts which has generated serious concern to the consumers is "warranties". Warranties are the statements actually made by the insured in course of completing the proposal form which forms part of the insurance contract.³² Where any answer to a question on the proposal form is answered falsely, the insurer has the liberty to decline liability³³ at common law.

The harshness of this rule as well as its consequences to the consumers of insurance services, the Law Reforms Commission in the UK, recommended

³¹ 1991. That section has now been replaced with section 58(1) of Insurance Act, 1997.

³² See J.I.C. Taylor In Akpata VS. African Alliance Insurance Co. Ltd (1967) 3 ALR Comm. 264

³³ Dawsons Ltd (supra)

statutory reform to this common law rule. In Nigeria, section 55 of the Insurance Act³⁴ has radically modified the common law position on warranties.

The sub-section (2) provides that the breach of a policy condition or warranty is no longer a basis for the insurer to avoid liability under the policy except where such warranty is material to the risk or loss insured against. Furthermore, the sub-section (2) provides that an insurer can no longer avoid liability on the ground of breach of warranty or condition except where the breach expressly discloses fraud or a fundamental term of the policy. Although, tests in determining materiality and relevance as developed by caselaw³⁵ is still applicable, the intention of the decree is an imperative guideline.

3. SETTLEMENT OF CLAIMS

The most thorny and discouraging aspect of insurance is settlement of claims. Infact, the main factor which has consistently painted Insurance in bad light, especially in Nigeria, is the rigors and legal schedules associated with settlement of claims. Most of these complexities were introduced by common law thereby giving room to the Insured to cheat the consumer of insurance services.³⁶ The main basis for the unenforceability of insurance contracts at common law includes, for the purposes of claim, non-disclosure of material and relevant facts, misrepresentation, non-payment

³⁴ 2003

³⁵ See Supreme Court in Niger Insurance Co. Ltd vs. Abed Bras Ltd (1976) 7 SC 35

³⁶ See Funmi Adeyemi: "Reflections on Insurance Law Reforms in Nigeria Commerical Law" In Current Developments in Nigerian Commercial Law (1998) p.192-193: see also Ejiofor vs. Arrowhead Insurance Co. (Nig) Ltd (1992) INILR 57.

of premium, public policy or illegality, etc.³⁷

Policies of Insurance usually require the notification of the loss or occurrence of the insured event within a fixed period failing which the claim will fail. This, according to them, would enable them confirm the genuineness of the loss or occurrence of the event. Where this is not done, the claim will fail.³⁸ The statutory intervention of section 59 of the 2003 Act has now ameliorated the injustices of this rule. It provides that for an insurer to repudiate liability, it must be proved that the non-compliance is material and relevant to the risk or loss. Therefore, it is reasoned that delayed notification of loss or occurrence of the event insured against can never be relevant or material to the risk or loss suffered. Even where the non-notification or late notification is actually proved to have aggravated the claim, section 60(3) empowers the insurer only to reduce the amount recoverable as against complete repudiation.

FINANCIAL SERVICES PROVIDERS

Most of the financial services enjoyed by consumers are usually negotiated, brokered or facilitated by experts on whose advice the consumer, usually relies on. From the purchase and sale of shares and stocks as well as other financial derivatives to the advertising of services, the role of persons discharging professional duties are very prominent hence our effort here. Before we proceed to consider the extent of legal protection of consumers in particular cases, we shall comment on some general principles guiding the performance of professional services to its consumers.

³⁷ See Ivamy: Birds Mordern Insurance law (1982) (Sweet and Maxwell) PP171-172 cited in Prof. Taiwo Osipitan: "Settlement of Insurance Claims Under the Insurance Decree No.58, 1991" (NJ FIL) Page 106; see Shand: "Unblinding the unruly horse: Public Policy in the Law of Contract" (1972) 30 CLJ 144 at 161

³⁸ See Ejiogor (Supra); Welch vs. Royal Exchange Assurance (1937) 1 KB 294

Generally, services rendered by a professional, acting in that capacity, must not fall below the standard of expertise reasonably expected of such a person. It is therefore implied that the service must be rendered with reasonable care and skill failing which the professional is liable either in contract or in tort. This is the position of the common law. Accordingly, McNair J. observed that

“the standard of the ordinary skilled man exercising and professing to have that special skill.

It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art”³⁹.

Thus, the test is an objective one. The surrounding circumstances is primary in determining liability. The position of the law seems to indicate that professionals being sued for breach of duty of care are usually held liable in contract more than they are held liable in the tort of negligence or in breach of implied terms. It is reasoned that, what the professionals had breached is a contractual term and not otherwise hence he is liable in contract.⁴⁰ That seems to justify the holding of the Court in CLARK vs KIRBY-SMITH⁴¹, where it was held that a client's cause of action against his Solicitor was in contract and not in tort. This decision is based on the principle that the duty of care arises out of a contractual relationship.

Another issue that is relevant to this issue of liability of professional to the consumer of their services, is whether the rule of concurrent liability exists.

³⁹ In Bolam V. Frien Hospital Management Committee (1957) 2 All ER 118 at 121. This position was approved by the House of Lords in Whitehouse V. Jordan (1981) IWLR 246. See also Greaves & Co. contracts Ltd vs Baynham. Meikle & Partners (1975) 3 All ER 99 at 106.

⁴⁰ See the submissions of Counsel in Bogot vs. Scanlan & Co. Ltd. (1966) IQB 197 at 202 - 203

⁴¹ (1964) Ch. 506

Concurrent liability is the rule which allows a professional to be liable to his client in contract and tort. Oliver J, in MIDLAND BANK TRUST CO. LTD vs. HETT, STUBBS & KEMP⁴², held a firm of Solicitors liable in tort as well as in contract for neglecting to register an option to purchase a land for his client. The Privy Council,⁴³ in 1986, held that the law must disallow a party from being liable in tort when a contractual relationship existed between them. That decision has been approved in subsequent decisions.⁴⁴ These decisions provide an operative guide until subsequent decisions or legislation alter same.

Where time is not of the essence and not specifically stipulated, the professional is expected to discharge same within a reasonable time. What a reasonable time means is a question of fact to be gathered from the facts put before the court for consideration. Because of the extent of professionalism expected from the professionals in the provision of the services to the customer, several jurisdictions have clearly stipulated legislative approach geared towards ensuring optimal consumer protection. It is necessary to examine some of these measures.

In the past, most public authorities have been reluctant in controlling trade practices other than by private laws or by criminal stipulations if this would interfere with the substance of consumer protection. Apart from the issue of enforcement of such controls, the latitude of trade practices had made its control impracticable. An argument was raised to the effect that most consumers are knowledgeable enough to protect themselves and that their negotiating horizon would be reduced if restrictions are imposed in order

⁴² (1979) Ch. 384 see also Ross vs. Caunters (1980) Ch. 297

⁴³ Tai Hing Cotton Mill Ltd vs. Liu Chong Hing Bank Ltd. (1986) 1 AC 741

⁴⁴ See generally: R G Lawson: Advertising law (Macdonald & Evans) 1978

to protect the unwary minority. Secondly, it has been suggested that the provisions in law of contract, torts and negligence are inefficient for the protection of that class of consumers. However, considering the ever increasing number of complaints, a change in public policy was supported and this led to a growth of public control of trade practices.

In fact, policy makers have even been saying that public control of trade practices stimulates efficiency and removes practitioners from the market which survive only through prejudicial practices. Apart from the foregoing, it has been observed that while some professionals accept voluntary codes, others ignore them so that the overall effect has not been helpful. In terms of costs, evidence has shown that the cost of not controlling is greater than the cost of controlling.

A major aspect of control of trade practices are the professional practice Rules of these trades. They include Rules of Professional practice for lawyers, Code of Insurers, Listing and Dealing, Rules for stock brokers and Ethical Rules developed by the Advertising Council of Nigeria. Certain trade practices prejudicial to consumers have a long history while others demonstrate the extent to which businessmen and professionals abuse existing laws in order to cheat consumers. The major task of regulating trade practices has been to prevent consumers from being precipitated into transactions which they usually regret upon reflection. Thus, the law has been aimed at resisting and reducing consumer manipulation whilst ensuring that contractual obligations are not obliterated.

In pursuing this objective, certain measures may be taken to control trade malpractices amongst professionals who provide services. It is carried out

by the issuance of occupational licensing. The Idea of occupational licencing is to ensure adequate knowledge and standards on the part of those engaged in an occupation or trade by defining the conditions of admission to and contivance in them. The threat of revocation of licenses is usually employed to chesca the standards of their performance. This has been adjudged to be very useful and practical since consumers can hardly and readily identify an incompetent service provider due to the specialised knowledge that may be involved. For example, a person who goes to an Insurance broker would not know whether he is properly skilled or not. Most of these licensing authorities have avenue to which the dissatisfied consumers may petition for redress. In the law profession for instance, a consumer of legal services may report a legal practitioner to the Bar Councilor Body of Benchers who would take the matter to the Legal Practitioners Disciplinary Committee.(LPDC).

ADVERTISERS

Advertising is the most potent means of informing the public of the existence of a service.⁴⁵ The legislative intervention in the role of advertisers as regards the services advertised to the consumers is definite and clear. Section 11 of the Consumer Protection Council Act provides as follows:

"Any person who issues or aids in issuing any wrong advertisement about a consumer item, is guilty of an offence and liable on conviction to a fine of N50,000 or to imprisonment of five years or to both such five and imprisonment".

⁴⁵ See generally: R G Lawson: Advertsing law (Macdonald & Evans) 1978

The said section apart from creating the substantive offence, goes further to stipulate a punishment, which for all intents and purposes, is punitive. In the same vein, section 12 of the same Act stipulates thus:

"Any person who, in contravention of any enactment whatsoever for the protection of the consumers

(b) provides any services or proffers information or advertisement thereby causing injury or loss to a consumer, is guilty of an offence under this Decree and liable on conviction to N50,000 five or to five years imprisonment".⁴⁶

Apart from the custodial and pecuniary punishment, the offender, may in appropriate circumstances, be compelled to pay the compensation to the consumer. This shows the seriousness to which the law attaches to the deceptive advertisement of goods and services.⁴⁷

For the purpose of liability, section 20 of the Consumer protection Council Act excludes the publisher or advertiser unless they fail or refuse to furnish the council with the name and address of the manufacturer, packer, distributor, seller or advertising agency requiring him to disseminate or cause such advertisement to be made. The purpose of this section is to ensure that the actual offenders are apprehended and punished and to

⁴⁶ Section 1(1)(a) of Trade Malpractices (Miss. Offences) Decree, 1992 equally contains the same provision, see also section 52(1) of Investments and Securities Decree, 1999 which prohibits the advertisement of offer or sale of securities except in accordance with the Decree.

⁴⁷ The law of evidence generally provides that the prosecution will have to prove the commission of an offence beyond reasonable doubts. See sections 135 to 138 of the Evidence Act, (Cap 112) LFN, 1990. See also *Nwobodo vs. Onoh* (1984) 1 SCNLR 1, *Omoboriowo vs. Ajasin* (1984) ISC 206. The burden may however shift to the accused person when the prosecution discharges the onus placed on it by law: see *Auta v. State* (1975) NNLR 60 at 65.

suspend the Golden Rule of secrecy associations for the purpose of the law. Apart from the foregoing, the Council may ban the further advertisement of the service pursuant to section 3(f) of the Act. It would seem that the onus of proving that the advertisement is false, misleading or deceptive lies, in criminal proceedings, on the Council.⁴⁸ This may be very difficult hence it is being suggested that the burden of proof should be placed on the advertiser to the extent that the Council makes all information available. This would largely improve the chances of the Council in prosecuting these advertisers without being inhibited by the technicalities of the law of evidence.

An advert may be unfair but not misleading, but the law should be made to stress that an advertiser who makes a claim without having a reasonable ground to believe same to be true should equally be liable. The liability may be statutory, in tort⁴⁹ or contractual.⁵⁰

FINANCIAL ADVISERS, SOLICITORS, BROKERS ETC.

Financial advisers, Solicitors, Brokers and other financial intermediaries are central to the discharge of most financial consumer services. In effect, they render financial services to their consumers. Over the years, consumers of financial service providers have been making a lot of complaints ranging from outright cheating to refusal to carry out specific and clear instructions leading to loss of profits and other forms of damages.

In Nigeria, as in most jurisdictions, these classes of professionals are

⁴⁸ See *Limpus vs. London General Omnibus Co.* (1862) 1 H & C 526

⁴⁹ See *Aerial Advertising Co. Ltd vs. Batchelors Peas Ltd* (1938) 2 ALLER 788

⁵⁰ Investments and Securities Act.

required to be registered in accordance with special or general statutory provisions. Section 38(1)⁵¹ provides that no person dealing in securities as a broker, jobber, registrar to an issue, etc shall deal in securities however except in accordance with the terms of the Certificate issued pursuant to the Act. The section goes further to make it mandatory for all persons dealing or playing any role in the offer and sales of securities to be certificated by the Securities and Exchange Commission (SEC)⁵² and in accordance with the provisions of the Act. In investment and securities transactions, Solicitors are expected to discharge their duties with utmost sense of professionalism while ensuring that all statutory and administrative regulations are complied with by their client for the purpose of vesting or divesting title to securities being transacted. A Solicitor in this purpose, must be a person duly called to the Nigerian Bar pursuant to the provisions of the Legal Practitioners Act, 2004. The responsibilities placed on the Solicitor are enormous and the need to discharge them diligently is most important.

The extent of liability of a legal practitioner to his client is difficult to ascertain. The House of Lords in Rondel vs. Worsley⁵³ held that a barrister was not liable for negligence in the conduct of litigation or in providing advice in its connection.

This decision was based on public Policy considerations in view of the multiplicity of suits that would have been instituted by persons who lose suits in courts. It would seem that this decision equally applies to persons acting as Solicitors in Nigeria since the profession is fused in Nigeria.

⁵¹ The Securities and Exchange Commission established by Investments and Securities Decree (No.45) of 1999 S.I (1) is saddled with the responsibility of controlling and regulating Investments and securities business in Nigeria, etc.

⁵² Sections 4 and 7 of Cap LII, LFN, 2004.

⁵³ (1969) 1 AC 191

However, a person who feels seriously dissatisfied may petition the Legal Practitioners Disciplinary Committee for investigation and appropriate action. Complaints bordering on professional misconduct are not adjudicated upon by the LSPDC since the consumer's proper remedy is to seek damages through the court system. Matters relating to fees are usually resolved through the application and interpretation of the Rules on Solicitors fees.

With regards to Insurance, section 36(1)⁵⁴ clearly prohibits the carrying out of the business of brokerage without registration. Application for registration is to be made to the commission and before the commission registers any broker, it must be satisfied that the applicant has the required qualifications.⁵⁵ The need for requirement of qualification, is to ensure that the necessary knowledge, expertise and disposition is obtained before a person can render such services and also to guarantee effective professional services to the consumer. Apart from being a registered Insurance broker by the Chartered Insurance Institute brokers who deal in credit insurance, business bonds and suretyship are required to prove to the commission that it possess the relevant expertise in those areas.⁵⁶ If the commission is satisfied that a registered insurance broker has knowingly or recklessly contravened the provisions of the Decree or has made a statement which is false in any material particular for the purpose of obtaining the License or has been found guilty by any court of competent jurisdiction (including the misappropriation of Client's money) or has materially misrepresented the terms and conditions of any policy or contract of insurance which he has sold to the consumers, the commission

⁵⁴ Insurance Act, 2003

⁵⁵ Section 36(2) (3) (b) Supra.

⁵⁶ Section 36(4) supra.

shall give notice in writing of its intention to cancel the licence or to refuse its renewal.⁵⁷ In order to further protect the consumers of Insurance services, the 2003 Act now provides that an Insurance Broker is required to establish and maintain at all times a trust account into which all monies, premiums, claims and recoveries from and on behalf of clients, insurers and re-insurers shall be paid. The penalty for the contravention of this provision is a fine, upon conviction, of N250,000 or three (3) years imprisoned or both⁵⁸. This provision, no doubt, would ultimately secure the policy holders' funds by brokers. The National Insurance Commission has the powers to investigate, inspect and examine the Insurance brokers with a view to determining their compliance with the provisions of the Act.⁵⁹

ENFORCING CONSUMERS' REMEDIES

Every consumer of financial services in Nigeria has, to a large extent, the discretion as to how to enforce his statutory and common law remedies. He may even, as in most cases, decline to so enforce⁶⁰. However, the basis of liability would determine the mechanism by which the consumer may enforce his remedies. Thus, if the liability is tort or contract based or punitive or regulatory in character, then the remedy would be enforced accordingly.⁶¹

1. ADMINISTRATIVE REGULATORY

In cases where the consumer's remedy is administrative in nature, the consumer may have to file a complaint, in the prescribed manner, to the

⁵⁷ Section 37(1) (a) – (c)

⁵⁸ Section 40(1)

⁵⁹ Section 40(2)

⁶⁰ Most consumers whose rights have been breached hardly pursue their available remedies. For instance, most of the complaints lodged with the Securities and Exchange Commission's Administrative Panel of Inquiry are usually not pursued by consumer complainants.

⁶¹ See B. Kanyip - "Consumer Redress" MPJFIL Vol. 2 No.2 (1998) p.77-78

agency charged with the responsibility of administering the law for the purpose of enforcing consumer rights. For instance, the Investment and Securities Tribunal⁶² may, in adjudicating disputes between capital market operators and their clients, make any order in furtherance to their functions as a civil court. This implies that the Tribunal can make orders for compensation, restitution, refund of professional fees, etc. This is a very unique a provision as the Tribunal now has statutory powers. Under the Securities and Exchange Commission Act, 1990, there was no such statutory body, and the Administrative Panel set up thereunder never had statutory powers hence was unable to make enforceable orders. Section 291 of the same Act provides that every individual complainant has the right to a legal representation by a legal practitioner and/or be represented by a stockbroker, chartered Accountant or a banker. The law took account of the technicality of financial services in making provision for this type of additional representation. The Tribunal can make orders⁶³ imposing sanctions such as are not limited to fines, suspensions, withdrawal of licences, specific performance etc. Any person dissatisfied with the decision of the Tribunal may appeal to the Court of Appeal after giving notice in accordance with provisions of section 295(1) of the Act. Also, the Consumer Protection Council is empowered by its enabling law⁶⁴ to provide speedy redress to consumers' complaints through negotiation, mediation and conciliation, encourage trade, industry and professional associations to develop and enforce in their various fields, quality standards designed to safeguard the interest of consumers, etc.

Sections 6(1) of the Act, however, stipulates that consumer complaints

⁶² Established by section 274 of Investment and Securities Act, 2007.

⁶³ Section 293 (supra)

⁶⁴ Section 2 and 3

shall be in writing to the state committee for appropriate action. Those consumers who, as a result of illiteracy, are unable to write shall be assisted by the State committee in preparing the written complaint without any fees⁶⁵. Section 8 of the decree establishes that any consumer whose right has been violated or wrong has been committed by way of trade, provision of services, supply of information or advertisement thereby causing him injury or loss, shall in addition to the redress which the State committee, subject to the approval of the Council may impose, have a right of civil action for compensation or restitution in any court of competent jurisdiction. It is however viewed that whether this provision would amount to giving statutory support to double-jeopardy against the service provider would depend on the surrounding circumstances of every case.

Apart from these type of administrative remedial provisions, trade, industry and professional groups have their own means of taking complaints from dissatisfied consumers and dealing with them. We shall not go into specific provisions, but suffice it to say that these measures may provide for disciplinary measures for their members as well as for refund, replacement and restitution.

There is no concensus as to the efficacy of these provisions as far as the interest of the financial service consumer is concerned. What is established is that it creates the avenue for the consumers to make their complaints and obtain redress to the extent that special circumstances of the available remedies allow. One main obstacle to the maximum success of these

⁶⁵ Section 6(2) of the Act (supra).

measures is the fact that most financial service providers have the capacity to influence the decisions of these panels. The producers, may, as in most cases, use their professional or trade relationship with these panelists to introduce technicalities which may be un-known to an average financial service consumer.⁶⁶

ii CRIMINAL PROCEEDINGS

Some of the laws safeguarding the consumers of financial services contain criminal sanctions. The punishment is either in the form of fine, imprisonment or both. For example, section 108⁶⁷ prohibits any person from employing any device, scheme or artifice to defraud or make any untrue statement of material fact or omit to state any material fact necessary for the purpose of dealing with any security.

Section 87 goes further to state that any person who contravenes Part XI of the Act shall be liable, upon conviction, to a fine of not less than N500,000 or to a term of imprisonment not exceeding seven years or both fine and imprisonment. Also, the Consumer Protection Council Act⁶⁸ provides that any person who issues or aids any wrong advertisement about a consumer items, is guilty of an offence and shall be liable on conviction to a fine of N50,000 or to imprisonment of five years or both fine and imprisonment.

In cases of these nature, the consumer is procedurally not a party the proceedings. The matter is between the state and the service provider. Also the onus of proof, is beyond reasonable doubts which is very difficult

⁶⁶ See generally: Sir Gordon Borie - The Development of Consumer Protection Law and Policy (The Hamlyn lectures, 36th Series) (Stevens & Sons: London) 1984 pp.74 - 75

⁶⁷ Investment and Securities Act, 2007.

⁶⁸ Section 11

to establish in most cases. Besides, the consumer is not the beneficiary of the fine imposed by the statutes. So he has no interest in it. Although the policy on criminalisation and penal system of consumer laws allows compensation to be paid to consumers⁶⁹, the courts are not used to doing that. The Courts would prefer to make such compensatory orders in civil suits as the criminal justice systems in Nigeria is not structured to compensate the complainant but to punish the offender.⁷⁰ The point that is being stressed here is that except where a service provider is being charged under the Consumer Protection Council Act, the power of the of the court to make compensation order is non-existent. Subsection (2) of section 13 makes the payment of compensation conditioned upon the determination of the means of the respondent and not on the injury or loss suffered by the complainant. This provision allows the respondent to claim that it has no means to pay compensation and the court will be constrained heavily against making the order. The Courts, particularly the inferior ones, have statutory limitations on the amount of compensation it can be order to be paid under its criminal jurisdiction.

Another problems in criminal proceedings is the inadequacy of prosecution counsel at the Justice departments all over the federation. The justice departments, from experience, are more concerned with human right and capital offences matters and those matters to which the state has an interest rather than consumer matters. So, it will require a lot of efforts in human and material terms to persuade the State Counsel to prosecute for

⁶⁹ Section 13(1) Consumer Protection Council Act, 2004.

⁷⁰ See the provisions of Criminal Procedure Act(CPA) and Criminal Procedure Code (CPC): See also A. A. Adeyemi: Towards Victim Remedy in Criminal Justice Administration in Nigeria. Text of the paper delivered at the National Conference on "Criminal Justice: Restitution, compensation and Victims" Remedies, held in Abuja (1989).

the consumer. The police prosecutors who carry out the bulk of prosecution of cases at the Magisterial Courts, do not have the expertise and technical disposition to prosecute complex cases as in financial services. It is on this note that one can justify the general apathy in the prosecution of consumer complaints and infringements.⁷¹

iii CIVIL PROCEEDINGS

The bulk of the remedies available to the consumer are enforced in the court system. Depending on the nature of the claim, the consumer will have to file his claim either at the Magistrate Court, High Court or Federal High Court. The jurisdiction of these courts are specified in the constitution⁷² and in the Magistrates' Courts Laws⁷³ of each state of the federation. In filing the claim, the specific Rules of each court must be complied with otherwise, the claim may be struck out.⁷⁴ If an action is filed in a wrong court, the suit will be struck out. So, it is important that the consumer seeks for adequate legal advice before proceeding to enforce his rights in court. The reliefs that are usually taken to courts are those that are based on contract and tort.

The commonest remedy usually claimed are damages in torts and restitution, replacement and specific performance in contract. However, specific legal requirements must be proved before judgment is given in favour of the consumer. For instance, in an action founded in negligence,

⁷¹See Kanyip : B: "Consumer Redress" MPJFIL (Vol 2. No.2 1988). page 79 - 80.

⁷² Section 249 of the 1999 constitution established the Federal High Court and section 270 established the State High Court. The High Court of Federal Capital Territory, Abuja is established by Section 255 of the Constitution

⁷³ See for instance the Magistrates Courts Laws of Lagos State, 1994 (cap 127)

⁷⁴ Bolex Enterprises Ltd vs. Incar Nig. Plc & Ann (1997) 7SCNJ194 See also: O'dua Investment Co. Ltd vs. Talabi (1991) 1 NWLR (Pt170) 761

the consumer must establish that, in fact, a duty of care⁷⁵ existed between him and the service provider. Again, in contract, privity of contract and the existence of consideration and intention to create a legal relationship must exist and proved. Where any of these elements are not proved to exist, the success of the consumer's claim may be doubtful. Although, the legal policy of consumer protection has been used to reduce the applicability of some of these principles procedural rules still make their proof relevant and fundamental.

In pursuing the relief of damages, the consumer may sue for general, aggravated or special damages. What is, however, important to note is that the purpose of damages is to compensate the consumer to the extent of putting him in the same position as he would have been in if he had not sustained the wrong.⁷⁶ The law in Nigeria, has distinguished the various types of damages. Although, this paper is not concerned with these distinctions, it is essential for it to be pointed out that the distinction is a matter of law.⁷⁷ While, special damages must be specifically pleaded and proved⁷⁸ general damages are the loss which flows naturally from the wrong or breach of contract.⁷⁹ In awarding damages, the court will always refrain from making double compensation.⁸⁰

From which ever standpoint with which the enforcement of consumer

⁷⁵ Hedley Byrne & Co. Ltd v. Heller & Partners Ltd. (1964) AC 465

⁷⁶ See Supreme Court in M. Soetan & Anor vs. Z. A. Ogunwo (1975) 6SC 67 at 73-74. As to the position in cases of breach of contract see Supreme Court which cited Alderson B. M. Hadley vs. Baxendale (1854) 9 Exch. 341 at 352 - 355 in W. Omonuwa vs. B. A. Wahabi (1976) 4SC 37 at 41-43; For the dishonour of cheque by a nabker see: H. Balogun vs. National Bank of Nigeria Ltd (1978) 3 SC 155; For the measure of damages in negligence see Lord Wright in L. Dredger vs. Edison (1933) AC 449

⁷⁷ E. K. Odulaja vs. A. F. Haddad (1973) SC 357

⁷⁸ Oshinjinrin & Co. vs. Elias & Co. (1970) 1 ALLNLR 153 at 156

⁷⁹ Odumosu vs. ACB (1976) 11 SC 55 at 68-69

⁸⁰ See Brett JSC in Ezeani & vs. Njidike (1964) 1 ALL NLR 402 at 405.

remedies in civil action is viewed, what remains certain is that it is most available platform for the enforcement consumer remedy article Administrative and regulatory platform. However, in terms of effectiveness, the civil court system has not been very helpful due to the slow nature of administration of justice in Nigeria. Cases remain in Court for up to ten(10) years, most times, making the claim being sought almost useless and Irrelevant to the consumer claimant. This inordinate delays have, to a large extent, a discouraging effect on consumers in seeking legal redress in the court system.⁸¹ Apart from the slow nature nature of administration of justice, the uncertain nature of litigation coupled with issue of technicalities, the consumers are usually discouraged by the high cost of litigation these days. Most consumers would rather bear the breach of their rights rather than spending additional fund in pursuing cases in court whose result they cannot guarantee.

CONCLUSION

The Legal attempts to protect the consumers of financial services in Nigeria have been shown to be active and permeating. Our excursion into the various aspects of these legal protectionism have shown that apart from offering the consumers the opportunity to seek redress in Courts and Administrative panels, substantive criminal provisions are numerous in our legal books.

Nevertheless, we have noted that the legal and quasi-legal remedies not with-standing, the procedural problems and access to justice appears very unclear. In the first place, the procedural problems inhibiting and discouraging consumers from enforcing their rights must be checked

⁸¹ See the Legal reasoning of Kayode Eso in *Arioni V. Elemo* (1981) SCNLR I

through a conscious legal action. In this connection, we suggest the followings:

- i. The Federal and State legislative houses, should as a matter of fact, introduce laws establishing Consumer Courts all over the federation. Apart from being a court of special jurisdiction over consumer matters, the Court's existence would increase consumer awareness all over the federation.
- ii. A Fair Credit Practices Act should be enacted to regulate the activities of financial institutions in the areas of information on term of loan credit and facilities terms. This law should contain a section which would compel all financial institutions to include arbitration clauses in their agreements with their customers and patrons.
- iii. The Consumer Protection Council be given more powers to deal with financial services providers whenever the need arises. As it is now, the Council appears to be operationally handicapped.
- iv. The Legal Aid (Amendment) Act, No.21 of 1994 should be amended include consumer complaints. This would enable indigent persons to receive free legal aid in pursuit of their reliefs in consumer and other courts in Nigeria.e