# Legal aspects of current regulatory exercise of CBN

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**T**HE regulatory exercise recently carried out by the Central Bank of Nigeria (CBN) resulting in the sack of the board of eight major banks in the country has created a lot of furore naturally, within the banking industry and in the general public and private sector, especially among the customers of the affected banks. The statement by the Governor of the CBN, Sanusi Lamido Sanusi, in the print and electronic media that the exercise is a continuous one and that indeed other banks may be affected, has led to panic within the banking sector. It has also naturally weakened the confidence of investors and depositors. The exercise itself has led to the institution of civil and criminal proceedings by the executives of the affected banks and the Economic and Financial Crimes Commission (EFCC).

It might be presumptuous to state that the institution of criminal proceedings in the circumstances is pre-mature but the benefit of the doubt must be given to the officials of the EFCC, trusting that a thorough investigation of the alleged crimes have been carried out before the charges were proffered. It is important that the point be made that simultaneous civil and criminal proceedings arising directly or robustly out of the same subject matter is often cumbersome for the parties affected and that there is a tendency for issues to be blurred and lost in translation in both proceedings .

The focus of this article is to look broadly at the legal issues that are likely to arise from the actions of the CBN. In doing this, however, I will take a broad robust approach. The question, therefore, will be - what are the alleged breaches of the executives of these banks that necessitated the wielding of the big stick by the CBN? The banks' executives are said to be involved in 'insider abuse', 'disregard for internal corporate governance', a total disregard for the CBN prudential guidelines and mismanagement of assets? The banks involved are adjudged to be in a grave situation in the sense that they are technically insolvent. These alleged breaches are grave and fundamental and call for inquiry.

Statutory duties and obligations

The Central Bank of Nigeria (CBN) is a public body or authority created by the National Assembly with general and specific powers under a statutory duty to carry out the functions in accordance with the provisions of its enabling statutes and other related statutes. It is fundamentally under a duty in carrying out these functions to adhere to the provisions of the 1999 Constitution. The Central Bank is central to the nation's monetary policy objectives and direction and also the regulation of financial institutions within the country. It is clear that a breach of the statutory duty imposed on the apex body by legislation will amount to a failure to carry out its duties and fulfill the obligations imposed by legislation. In Tochgelly Iron and Coal Company v McMillan (1934) A.C., the British House of Lords now Supreme Court took the view that a breach of statutory duty is analogous to negligence.

In Anambra State Environmental Sanitation Authority & Ors v Ekwenem (2009) 6 - 7 S.C. part II page 5 at 36 - 37, the Nigerian Supreme Court held that a government agency set up for a particular purpose must carry out its statutory duties. In the United Kingdom, the Financial Services Authority by virtue of Section 71 of the Financial Services and Market Act (2000) has statutory immunity from a claim for breach of statutory duty. The effect of a ruling that a regulatory body has breached its statutory duty and the exposure of such a body to actions for negligence is such that public policy requires that it should have immunity. Section 52(1) & (2) of the CBN Act has a similar immunity clause.

The Central Bank of Nigeria was originally established in 1958. It is presently a statutory body established by the Central Bank of Nigeria (Establishment Act) Chapter C4, 2007. That Act repealed the Central Bank Act 1991. Section 1(3) of the Act provides that the CBN is established "in order to facilitate the achievement of this Act and the Banks and other Financial Institutions Act, and in line with the objective of promoting stability and continuity in economic management". Section 2(d) of the Act provides among other things, the principle objects set out in Section 2 that the bank shall promote a sound financial system in Nigeria".

Section 39 provides that the "bank may act as banker to states and local councils and to fund institutions or corporations established by federal, state and local councils." Section 41 provides that "the bank shall act as banker to other banks in Nigeria and may also provide bank services to banks outside Nigeria.

Section 42 dealing with co-operation with banks in Nigeria provides broadly that "The bank shall wherever necessary seek the co-operation of and co-operate with other banks in Nigeria:

- promote and maintain adequate and reasonable financial service for the public;
- ensure high standards of conduct and management throughout the banking system; and
- further such policies not inconsistent with this Act as shall in the opinion of the bank be in the national interest.

  Section 42(2) contains a proviso thus: notwithstanding the provision of sections 29(1) (c) and 34 (d) of this Act, the bank may grant loans and other accommodation facilities at such rate of interest and on such terms as the bank may determine to any bank which may be having liquidity problems.

  The Central Bank also has powers under the Banks and other Financial Institutions Act Chapter B (3), Laws of the Federation 2004. This Act is an Act enacted to regulate Banking and other Financial Institutions. Section 57(1) of the Act gives the Governor of the Central Bank powers to make regulations to give full effect regulating the objects and objectives of the Act. Section 57(2) gives the Governor powers to make "rules and regulations for the operations and control of

all institutions under the supervision of the bank." Section 61 of the Act deals with supervisory power of the bank, it is important to state here that 'bank' as interpreted in Section 66 of the Act means the Central Bank of Nigeria. Section 61(1) (a) provides that "The bank shall have power to (a) supervise and regulate the activities of other financial institutions and specialised banks". Section 61(2) provides that "The bank may appoint examiners and any other person to carry out regular or routine examination of the books and affairs of other financial institutions". Section 61 (3) provides that "where the governor is satisfied that it is in the public interest so to do, he may, in addition to the routine or regular examination, order a special examination or investigation of the books and affairs of any other financial institution and for that purpose, the governor shall have power to appoint one or more qualified persons other than the officers of the bank to conduct special examination or investigation, under conditions of confidentiality, of the books and affairs of such other financial institution".

Sections 32, 33, 34, 35, 36 and 38 deal broadly and specifically with powers of the bank to appoint examiners, the control of the failing banks and management of failing banks. Section 3(1) (a-e) dealing with special examination provides thus: "The governor shall have power to order a special examination or investigation of the books and affairs of a bank where he is satisfied that (a) it is in the public interest so to do; or (b) the bank has been carrying on its business in a manner detrimental to the interest of its depositors and creditors; or (c) the bank has "insufficient" assets to cover its liabilities to the public; or (d) the bank has been contravening the provisions of this Act; or (e) an application is made therefore by - (i) a director shareholder of the bank; or (ii) a depositor or creditor of the bank: provided that in the case of paragraph (e) of this subsection, the governor may not order a special examination or investigation of the books and affairs of a bank if he is satisfied that it is not necessary to do so".

The community reading of the provisions of the Central Bank Act and the Bank and other Financial Institutions Act show clearly that the Central Bank has the powers to carry out regulatory functions of financial institutions within Nigeria. The question, however, is under which particular provisions did the apex authority exercise these powers. The answer to this is very important in the sense that the sanctions, consequences and punishments depend very much on the exact breaches. With regard to the process, the CBN through its Head of Corporate Affairs said the 24 banks would be subject to special examination. "Their criteria were liquidity, capital adequacy and corporate governance". (See THISDAY October 6, 2009).

The constitutionality of the actions

In the civil actions filed so far, it is claimed by the executives of the affected banks that they were not given the opportunity to respond to the claims of the CBN. They accept (I stand corrected) that the Governor of the Central Bank sent in examiners to examine their books but they state that they were unable to

respond to the claims within the period. It has also been questioned whether indeed the Governor of the Central Bank of Nigeria and/or the Central Bank have legal powers or authority to sack the board of the affected banks and appoint new boards in their place. The general principles of constitutional and administrative law are relevant and vital to the discourse of these issues.

The main thrust of the constitutional challenge is likely to be centered on the fair hearing provisions contained in the fundamental Human Rights Provisions of the 1999 Nigeria Constitution. The fundamental human rights provisions are contained in Sections 33 - 46 of the 1999 Constitution. The provision of Section 36(1) is particularly relevant to this discourse. The section provides: "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality".

This section entrenches the right to fair hearing in the 1999 Constitution. The notes on this particular section in the juriscope series 1st Edition explaining the 1999 Constitution (at page 77) repays reproduction. "The right to fair hearing is entrenched in the Constitution. A breach thereof has its implication on the entire proceeding. A fair hearing connotes or involves a fair trial and a fair trial of a case consists of the whole hearing. There is no difference between the two; the right to counsel is at the root of fair hearing and its necessary foundation. By virtue of this section, in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person is entitled to fair hearing within reasonable time by a tribunal established by law and constituted in such a manner as to secure its independence and impartiality. It is a principle, not by any means to be whittled down, that citizen's recourse to the court for the determination of his rights is not to be excluded except by clear words. In Nigeria, any person's recourse to the court is a constitutional right guaranteed by this section. In the determination of his civil rights and obligations, a person is entitled to a fair hearing within a reasonable time by a court or other tribunal established by law."

In Olley v The WAEC Suite No. M/280/99, the Lagos State High Court, Rhodes-Vivour J. (as he then was) held that: "A body (domestic or administrative tribunal) established by law may have the power to decide its own procedure and lay down rules for the conduct of inquiries regarding discipline. However, the requirement is that such inquiry must be conducted in accordance with the rules of natural justice which are embodied in the twin pillars; - (a) that no one should be a judge in his own cause; and (b) that the other party should be heard. These rules are embodied in section 36(1) of the 1999 Constitution". In Ndukauba v Kolomo (2005) 1 S.C. part 1 page 80 at page 95, the Nigeria Supreme Court dealing with the principle of fair hearing stated thus: The principle of fair hearing is not only a Common Law right but also a constitutional right guaranteed under

Section 33(1) of the 1979 Constitution and now under Section 36(1) of the 1999 Constitution. Fair hearing within the meaning of Section 36(1) means nothing less than a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties. It envisages the age-long accepted principle of compliance with the principle of natural justice in its narrow technical sense of the twin pillars - namely audi alteram partem and memo judex in causa sua." Their Lordships also said that: "An important essence of the right to fair hearing is that a party should not be denied the opportunity of not only fully presenting his case but must be afforded full opportunity to present his defence to the case being put up against him. The law attaches great importance to the rule of fair hearing. It follows, therefore, that the effect of a breach of the rule of audi alteram partem or of fair hearing is to render the hearing liable to be set aside or declared invalid by the court. The court will treat the situation as if such a hearing never in fact, took place."

The fair hearing provision of the constitution is quite clear and straightforward and perhaps does not admit of any foray into principles of interpretation in order to give it any other meaning other than its clear and literal connotation. The question that will invariably arise in civil actions between the various banks' executives and the CBN will be whether in the process of carrying out its statutory special examinations or examination vide the provisions of the Bank and other Financial Institution Act Cap - 2004, the CBN acted in accordance with the constitutional fair hearing provisions and in accordance with public law principles of fair hearing and natural justice. The answer to this cannot be simple, the answer in my view must admit of the special circumstances of the function of the Central Bank of Nigeria in making sure the economy is kept on a sound footing. The Nigerian courts have taken a strict and unequivocal approach to the interpretation of Section 36(1) of the 1999 Constitution. The fundamental right provisions of the constitution are generally not absolute and may admit of limitations as provided for in the constitution itself but the proviso to section 36 with regard to presentational and representational value does not seem to have any limitation. In effect, a person must be given the opportunity of presenting his or their side of the case and be heard in the process. In AG Bendel State v Attorney-General of the Federation and 22 Others (1982) 3 NCLR page 1 at 78 paragraphs 1 - 8, the Nigerian Supreme Court, per Obaseki JSC outlined the principles of interpretation as it pertains to the constitution, they said: "In the interpretation and construction of our 1979 Constitution, I must bear the following principles of interpretation in mind: Effect should be given to every word... the language of the constitution where clear and unambiguous must be given its plain evident meaning".

It can, therefore, be argued that in carrying out its constitutional duties, the bank must adhere strictly to the provision of Section 36(1) and must give the banks and their executives involved in this special examination exercise the opportunity of being heard and the opportunity to present their case before the administrative panel which to all intents and purposes may be termed a quasi-judicial panel or perhaps the exercise which is being carried out should be referred to as quasi-

judicial. In that sense, therefore, the panel must carry out their functions in accordance with the principles of natural justice which is enshrined in the 1999 Constitution. However, the principles of interpretation have an elasticity and fluidity which is practical especially in the interpretation of a Written Constitution, which all constitutional lawyers are ad idem in concluding that the framers could not possibly legislate for all possible consequences. In A.G. Bendel State v AGF (supra), the Supreme Court also stated with regard to the principles of interpretation that "the principles upon which the constitution was established rather than the direct operation or literal meaning of the words used should be used to measure the purpose and scope of its provisions." The court also stated that "the words of the constitution are, therefore, not to be read with stultifying narrowness".

It is my respectful view that there is no reason why these principles of interpretation should not be applied in the interpretation of Section 36(1) of the 1999 Constitution save that it must be done with extreme caution. In doing this, the function of the Central Bank of Nigeria as provided for in the relevant statutes must be taken into consideration. The special circumstance of his role as the Chief Financial Regulator is vital in this exercise, importantly the fact that the unpredictability of the multiplier effect of the consequences of not acting with cautionary haste to stabilise the economy will open a floodgate of financial economic chaos are factors which will take the exercise of the special examination outside the strict literal approach. It can, therefore, be argued that once the facts are presented and a prima facie case is made by the examiners against the banks and their executives, in the light of the global economic crises, it cannot be argued that the banks affected and their executives should have the luxury of making a long drawn out defence. The balance of convenience is one of the factors considered in granting interim or interlocutory injunctions. Apart from being a technical legal tool in this regard, the concept can be transposed for all practical purposes to achieve a legitimate result by applying it to the current banking crisis. The question, therefore, will be between the Central Bank and the affected bank and its executives where lies the balance of convenience. If the Central Bank in its perhaps (I assume) cautionary haste to sack the board of the banks, turns out to have been wrong in this exercise, the banks and its executives will have a cause of action in restitution and damages among other claims and CBN should be able to meet this claim. However, if the CBN having looked at what the examiners found out in their special examination and considers that the effect of inaction will be a systemic collapse of the banks and the banking industry, it will be failing in its statutory duty and the effect of inaction will be colossal. The question any court will face is whether the CBN in the exercise of its functions pursuant to the relevant statutory provisions applied the principles of natural justice striking the right balance having regard to its central role in managing the economy and regulating financial institutions and specifically taking into consideration the current global economic crises.

Although the problems of banks such as Northern Rock in the United Kingdom and Lehman brothers in the United States are much wider, it can be argued that if the Bank of England had intervened earlier, Northern Rock would perhaps not have reached the precipice and that if the Federal Reserve had intervened in Lehman Brothers, the financial institutions would not have gone over the cliff.

It must be noted, however, that no one seriously argues that the CBN should not have intervened. It is how they have intervened that is being questioned. In Fawehinmi v IGP (2002) 7 NWLR Pt 767 page 606 at 679, the Supreme Court per Uwaifo JSC held thus "The courts will give especially broad, liberal construction to those constitutional provisions designed to safeguard fundamental rights. I think this approach should normally be at the background so as to be able to accommodate the social changes which advancement and the passage of time have brought in their trial. This does not mean changing the words used by the framers of the constitution, but coming to terms with changing times even upon a literal interpretation of clear and unambiguous words". In effect, the economic situation must be taken into consideration in the determination of the effect of Section 36(1) of 1999 Constitution in the exercise of the CBN's statutory functions. It is important to note that Section 36(1) does not specify any length of time that constitutes fair hearing. Indeed, the specific circumstance of the case must be taken into consideration.

The fluidity of this approach is evident in the decision of the Privy Council in Procurator Fiscal v Watson (2002) 4 All ER page 1 at page 5. The interpretation of Article 6(1) of the European Convention for the protection of Human Rights and Fundamental Freedoms 1950 (as set out in schedule 1 to the Human Rights Act 1998) was put before the Privy Council. The article provides: "In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Lord Bingham at page 5 paragraphs A-B, said: "These appeals turn on the fair words which I have emphasised, to which I shall refer in the context of Article 6(1) as 'the reasonable time requirement'. His Lordship at paragraphs 53-55 deals with the court's approach to the 'fair hearing within a reasonable time issue'.

His Lordships said: "The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system, it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant

cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities". It is important to stress that the cases before the Privy Council were cases dealing with facts arising from criminal matters. The fair hearing requirement and time constraint in criminal matters is normally more stringent but as their Lordships in the Privy Council said, the approach can be relative depending on the facts of the case among other factors. It is my humble view that the exposition of these principles in the Procurator Fiscal v Watson (supra) is very instructive and throws light on how it could possibly be applied in civil proceedings. In effect, identifying the three areas of inquiry referred to by Lord Bingham, it will be necessary with regard to the banking matter discussed to take into consideration the manner in which the special examination has been dealt with by the body appointed by the CBN (in this case the administrative authority) and consider the complexity of the issues at stake. If this is properly done, it will be difficult for the affected banks and their executives to make a claim for breach of fair hearing.

Administrative action

The Central Bank of Nigeria is a public body. It is a body set up by statute with its powers and functions contained therein. Its role as a financial regulator as provided for in the Central Bank Act. Chapter C4 (2007) and the Banks and other Financial Institution Act involve the exercise of administrative powers and functions which can rightly be said to take the form of a quasi-judicial setting. Certainly in the exercise of its functions in examining the books of financial institutions, it is carrying out an administrative/quasi-judicial function. Its actions are, therefore, subject to judicial review by the courts. In a country like Nigeria with a Written Constitution, the force of judicial review of administrative action is less pronounced but clearly the principles are reflected even in the interpretation of constitutional provisions. In Abdulkarim v Incar Nigeria Limited (1992) 7 NWLR part 251 page 1 at pages 17 - 18 paragraph H-B, the Supreme Court stated thus: "In Nigeria, which has a written presidential Constitution, judicial review entails three different processes, namely: the Courts, particularly the Supreme Court, ensuring that every arm of government plays its role in the true spirit of the principle of separation of powers as provided for in the Constitution; that every public functionary performs his functions according to law, including the Constitution, and for the Supreme Court that it reviews Court decision including its own when the need arises in order to ensure that the country does not suffer under the regime of obsolete or wrong decisions."

Judicial review of administrative actions is a procedure whereby an application is made to the High Court for orders of mandamus, prohibition, certiorari, or a declaration or injunction restraining a person acting in a public office from so doing if the proper procedure for so acting has not been followed. By this

procedure, the High Court exercises supervisory jurisdiction over inferior courts, tribunals, public bodies and persons. It is important to make it clear that judicial review deals not with the correctness of the findings of a tribunal, public body, minister, among others, as the case may be but with the legality of the process. They are normally laid down procedures which must be adhered to. Any departure from these procedures, however, slightly may render the decision of the tribunal, public body or minister a nullity. See R v Chief Constable of North Wales Police Ex-parte Evans 1982 A.C. There is a procedure for the application for judicial review in the Civil Procedure Rules of all the High Courts of the Nigeria Federation. Order 42 of the High Court of the Federal Capital Territory, Abuja Civil Procedure Rules 2004 contains generally the procedure for the application for judicial review. The actions of a statutory body such as the CBN can be reviewed via this process. In W.A.E.C. v Mbamalu (1992) 3 NWLR part 230 page 481 at 494 paragraphs A-B, the Nigeria Court of Appeal (Enugu Division) held that: "In an inquiry by an Administrative or a Domestic Tribunal or by a person or body exercising quasi-judicial function, the hearing can be on oral evidence or on written representations made by the parties. Thus a hearing of parties to a dispute need not be oral. It could be on written documents whether by way of accusation or explanation, so long as the decision is based on evidence available. However, both sides must be given the same mode of hearing".

The court at page 494 paragraphs D-E also stated that: "In the true sense, it cannot be regarded as a trial by a court of law if such quasi-judicial or administrative body proceeds to decide an issue in dispute. It decides on information brought before it. There may be no cause to conduct oral examination. But once a fair opportunity has been given to the parties to correct or contradict any information upon which a decision may be reached, and this is done in good faith, that ought to be the end of the matter".

If the examination of the affected banks has been done under the Special Examination Procedure of the Banks and other Financial Institutions Act Cap B3, Laws of the Federation 2004, it means, therefore, that the conduct was done under Section 33(1). A-D of the Act provides: "The governor shall have power to order a special examination or investigation of the books and affairs of a bank where he is satisfied that -

- it is in the public interest so to do; or
- the bank has been carrying on its business in a manner detrimental to the interest of its depositors and creditors; or
- the bank has "insufficient" assets to cover its liabilities to the public; or
- the bank has been contravening the provisions of this Act".

It is difficult to ascertain from the facts put out by the CBN whether Section 33(1)d is engaged in any manner because that section is relevant when a director or shareholder of the bank or a depositor or creditor of the bank files a complaint.

However, it seems that the examination was triggered by the financial day to day dealings of the bank. The CBN said the special execution was conducted with officials of the National Deposit Insurance Commission (NDIC). This particular function would be in accordance with Section 33(2) of the Act.

In the exercise of this power under Section 33(1), it is clear that the body would be engaged in an administrative exercise and the investigative role given means that any such body would be acting in a quasi-judicial manner. The body will have to follow meticulously the provisions of Section 33(1) a-e. It is important to stress here that items a-d are disjunctive, not conjunctive. It is possible, therefore, for the body to act only if it is in the public interest so to do as provided in Section 33(1)a or if the bank has been carrying on its business in a manner detrimental to the interest of its depositors as provided in Section 33(1)b. It is also possible reading Sections 33(1) a-e conjunctively for the CBN to act if all the infractions contained therein are engaged. In carrying out this exercise, the CBN must follow the principles of natural justice as stated by the Nigeria Supreme Court in AG Bendel v AGF (supra) and the Nigeria Court of Appeal (Enugu Division) in WAEC v Mbamalu (supra). The affected banks and their executives must be given an opportunity to respond. They must be heard and given a fair opportunity to correct or contradict any information upon which a decision may be reached. It is imperative in this exercise that all parties, both the CBN and the affected banks, realise that the circumstances of the inquiry are such that the time within which a decision is made and a response is required is extremely fluid. In this particular case which can precipitate on economic crises, the parameters must be different.

In A.L.A. Schechter Poultry Corporation v United States SC No. 854 decided in May 1935, the United States Supreme Court held that "extraordinary conditions such as an economic crises, may call for extraordinary remedies but they cannot create or enlarge constitutional power". It is my view that in the exercise of its power, the CBN must confine itself to its statutory and constitutional base but must have latitude in the approach to the fair hearing requirement. As stated earlier, there is no time limit provided in the Constitution for a fair hearing, the Section 36(1) of the 1999 Constitution provides that "a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law". The test to apply must be the objective test for practical reasons and also because that is what the section actually provides for. It cannot be right and indeed plausible for a time period to be fixed. Applying the principle laid down by the Nigeria Court of Appeal in WAEC v Mbamalu (supra), the question will then be whether during the special examination exercise, the affected banks and their executives were given a fair opportunity to correct or contradict any information regarding infractions of Sections 33(1) a-e of the Banks and other Financial Institutions Act, Chapter B3, Laws of the Federation 2004, and whether

the CBN has acted bona fide in carrying out its investigative role. What must not be lost on any court making this determination is that the haste or perhaps cautionary haste with which the CBN may have acted must have been influenced by its role as the Chief Financial Regulator and the attendant economic crises.

The common law

The special genius of the Common Law approach to decision making is the flexibility it gives to judges to decide cases on their specific facts while also applying precedent in a disciplined manner. That flexibility takes into account the ever changing times and situations that courts are faced with. With particular reference to the topic under review, it is clear that it presents a supreme opportunity to any court to look at the specific facts of the case, applying first principles of fair hearing and natural justice in a broad manner. It is my humble view that in doing this, a court is likely to reach a fair and just decision on the facts. In Jain v Trent Strategic Health Authority (2009) 1 AC, the House of Lords was invited to decide whether a local authority in making an application to a Magistrate's Court to cancel the licence of the operators of a care home in the manner in which they did, were in breach of tortuous duty owed to Mr. and Mrs. Jain under domestic Law (Mr. and Mrs. Jain being the owners/operators of the home).

The crucial fact in this particular litigation before the House of Lords is that the facts upon which the cancellation order was made were flawed and indeed wrong. This order led to the closure of the business. In the words of Lord Scott at page 860 paragraph 9 of the judgment, "The upshot of this sad story is that Mr. and Mrs. Jain's nursing home business had been ruined and serious economic harm had been inflicted on them by an ex-parte without notice application that ought never to have been made". In order for the Jains to recover, they had to show that the authority owed them a duty of care in preparing and making a statutory application to close down their business.

Lord Scott held at page 863 paragraph 20 thus: "My Lords, I am of the opinion, in agreement with the majority in Court of Appeal, and substantially for the reasons they have given, that an authority making an application to a magistrate under section 30 for the cancellation of the registration of a nursing home, or, for that matter, under section 11 for the cancellation of the registration of a residential care home, does not owe a Common Law duty of care to the proprietors of the home.

In making the application the authority is exercising a statutory power. The purpose of the power is the protection of the residents in the home in question. It might be fair and reasonable to conclude that the authority did owe a Common Law duty of care to the residents of a nursing home or a care home if conditions at the home warranting the exercise of the authority's statutory powers had come to the authority's attention but nothing had been done. But to conclude that an

authority exercising, or deciding whether to exercise, its statutory powers owed a duty of care also to the proprietors of the home seems to me much more difficult".

His Lordship at pages 865 to 866 paragraph 28 said that: "The reason is that the imposition of such a duty would or might inhibit the exercise of the statutory powers and be potentially adverse to the interests of the class of persons the powers were designed to benefit or protect, thereby putting at risk the achievement of their statutory purpose".

The other Law Lords concurred in this opinion. The point of this authority is that, it will be ordinarily a case where the courts would have held that a duty of care is owed because the facts presented satisfy the principles upon which the tort of negligence will ordinarily be engaged but for policy reasons. However, the court decided otherwise. Indeed, Baroness Hale of Richmond at page 870 paragraph 42 of her speech, said: "It is with the greatest of regret that we have all reached the conclusion that the Common Law of negligence does not supply one".

Lord Carswell in his speech on page 872 paragraph 51, said: "It is likely to be a very rare case where an order has to be made without giving the owners an opportunity to state their case". The case of the affected banks and their executives is not as strong as the case of Mr. and Mrs. Jain. It is also clear that the CBN has a statutory duty to embark on the special examination exercise, as a body carrying out similar functions as the Financial Services Authority in the United Kingdom. It should have statutory immunity similar to that contained in Section 71 of the Financial Services and Markets Act (2000). Section 52(1) & (2) of the Central Bank of Nigeria (Establishment) Act Chapter C4, 2007 No 63 as repeated provides thus: "(1) Neither the Federal Government nor the bank nor any officer of that government or bank shall be subject to any action, claim or demand by or liability to any person in respect of anything done or omitted to be done in good faith in pursuance or in execution of, or in connection with the execution or intended execution of any power conferred upon that government, the bank or such officer, by this Act.

For the purpose of this section, the minister or any officer duly acting on his behalf shall be deemed to be an officer of the Federal Government and the governor, any deputy governor or the bank or other employee shall be deemed to be an officer of the bank".

My interpretation of this section is that it provides immunity for actions done in good faith. Indeed, the banks and their executives were given adequate notice and time to respond (I assume).

However, the courts faced with a question on the fair hearing requirement must take the Common Law approach which is to apply it to the specific facts of the banking crises cautiously having regard to the fact that only in rare cases will this approach be resorted to. In the Jain case, the House of Lords per Lord Scott at

page 865 paragraph 28 said that "where action is taken by a state authority under statutory powers designed for the benefit or protection of a particular class of persons, a tortuous duty of care will not be held to be owed by the state authority to others whose interests may be adversely affected by an exercise of the statutory power".

The case of the CBN is much stronger because under Section 52(1) & (2) of the CBN Act 2007 Chapter C4, it can plead some sort of immunity subject of course to whether in fact, it acted bona fide. However, there is no doubt that in the exercise of its powers under Section 33 of the Banks and other Financial Institutions Act, its functions under Section 2 of the CBN Act 2007 was foremost in the thought process and if this was the case, the approach to the fair hearing requirement must be elastic. The elastic or broad approach is applicable because a reading of section 36(1) of the 1999 Constitution allows for it and public policy argument provides impetus for a Common Law approach.

Conclusion

It is important in any democracy that all persons, individual and corporate live up to their legal responsibilities. That is one of the essences of the Rule of Law. Statutory bodies like the Central Bank of Nigeria and the Nigerian Deposit Insurance Commission are extremely vital to the economy. Making sure the economy is on a sound footing is a role which they must take seriously. In doing this, however ,they must act in line with the vires given to them by their enabling statutes and the constitution.

According to Edmund Conway, the Economics Editor of the Telegraph Newspapers of the United Kingdom, in his article of July 20,2009, titled: "Does the Bank of England really want these power?", he said very poignantly that "with power comes responsibility". Indeed, the powers of the Central Bank of Nigeria to regulate financial institutions within the country are enormous and can have sweeping consequences; that the exercise itself can lead to a huge crisis of confidence in the investment sector if not properly exercised. The negative effect on the Nigeria Stock Market is a case in point. The price of the stocks of the affected banks on the announcement of the removal of the bank executives went into a tailspin heading south and the general banking sector of the Stock Market followed in a domino manner.

It follows, therefore, that in the exercise of these powers, the governor and his officials must be circumspect following the constitutional fair hearing provisions, having regard to the fact that they are dealing with a lot of documentation. The banks and their executives must also realise that they have responsibilities imposed on them under the Banking Acts and CBN Regulations, which they should continuously appraise. The banking supervision exercise is not an exercise that happens overnight, it is an on-going process. Any bank affected, would in the normal cause of events, have shown some signs of distress at some point in time.

In an interview granted the CNBC Network by the Governor of the Central Bank soon after the actions of the CBN, he said a certain bank had visited the CBN open discount window several times within a very short space of time. This in fact, suggested that this particular bank was having serious liquidity problems. These special and complex factors are those to be taken into consideration in making a fair hearing determination as it affects the affected banks and their executives. This will be the fair, just and reasonable cause to follow.

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