Securities Litigation 2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Securities Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor Jason M Halper of Cadwalader, Wickersham & Taft LLP, for their continued assistance with this volume.

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GENERAL FRAMEWORK

General climate

1 | Describe the nature and extent of securities litigation in your jurisdiction.

Securities litigation in Nigeria generally entails disputes between capital market operators (any individual or corporate duly registered by the Commission to perform specific functions in the capital market), investors, securities exchanges, the issuers of securities and clearing agencies, and the Securities and Exchange Commission (SEC) arising from the administration, management and operation of investment schemes relating to securities transactions.

When a party files a complaint with the SEC (a federal government agency and apex regulator of the capital market in Nigeria) against an operator of any securities transaction, the complaint is referred to the SEC's Administrative Proceedings Committee (APC) for determination. The decision of the APC is appealable to the Investment and Securities Tribunal (IST). Parties may also commence an action directly with the IST. The Investment and Securities Act 2007 prescribes that all actions by the IST must be concluded within three months. The IST has exclusive jurisdiction to hear and determine:

- any questions of law or disputes involving a decision or determination of the SEC involving in the operation of the 2007 Act;
  disputes between:
  - capital market operators;
  - capital market operators and their clients, investors and securities exchanges, capital trade points, or clearing and settlement agencies;
  - capital market operators and the SEC;
  - the SEC and self-regulatory organisations;
  - the SEC and investors or issuers; and
- disputes arising from the administration, management and operation of collective investment schemes.

The decisions of the IST are appealable to the Court of Appeal and subsequently to the Supreme Court.

However, section 251 of the Constitution vests jurisdiction relating to companies' management and operations with the Federal High Court. Some disputes relating to company securities are filed at the Federal High Court under a fundamental rights enforcement procedure and supervisory jurisdiction by prerogative writs, such as *mandamus* and *certiorari*. There is conflicting jurisprudence as the Federal High Court, in some cases, will seek to exercise supervisory jurisdiction over the SEC without deferring to the IST.

Courts and time frames

2 | What experience do the courts in your jurisdiction have with securities litigation? Are there specialist courts for securities disputes? What is the typical time frame for securities litigation in your jurisdiction?

There are tribunals exclusively for security disputes in Nigeria. The IST has the exclusive jurisdiction to determine securities litigation under the Investment and Securities Act 2007. The 2007 Act prescribes that all actions by the IST must be concluded within three months. By virtue of section 289(5) of the 2007 Act, the IST is expected to avoid undue delays and deliver judgments within three months from the date a substantive action hearing commences. Some of the important factors that may affect scheduling include a party exercising its constitutional right to change counsel, which may require more time as the new counsel would need to review the already filed process and make amendments; the unavailability of a witness or substitution of witnesses due to their exit from employment; or the reconstitution of the panel, stalling proceedings.

Government regulation and enforcement

3 | What is the relationship between private securities litigation and government regulation and enforcement in your jurisdiction?

There is no specific statutory provision that distinguishes the matters that may be addressed in private litigation and the matters that the government may address.

However, private securities litigation usually involve disputes arising from the management and operation of a securities transaction, and the Investment and Securities Act 2007 empowers an aggrieved private party to institute private civil litigation with the IST or the SEC's Administrative Proceedings Committee (APC). Private litigation usually begins at the APC. If a party is not satisfied with the APC's decision it may appeal to the IST. Private securities litigation may also be commenced at the Federal High Court under various statutes and devices, including the Companies and Allied Matters Act 2020.

On the other hand, the SEC is the apex regulator of Nigeria's capital market, empowered by section 13 of the Investment and Securities Act 2007 to protect the integrity of the securities market against all forms of capital market abuses, including insider trading. The SEC can levy penalties and administrative costs on any person for breaches of the 2007 Act's provisions relating to investments and securities business, and intervene in the management and control of capital market operators that the SEC considers to have failed, to be failing or otherwise in crisis, including by entering premises and doing whatsoever it deems necessary for the protection of the investors. The law does not expressly distinguish between matters that may be addressed in private litigation from matters that the government may address, thus creating room

for overlap in responsibilities. However, in practice, disputes arising from management are typically addressed by private litigation, and the government typically addresses disputes arising from gross abuses of the market.

CLAIMS AND DEFENCES

Available claims

4 | What types of securities claim are available to investors?

Securities claims available to investors in Nigeria can be categorised as statutory or common law claims. For instance, where an investor believes that losses arising out of his or her securities transaction were because of the operator's negligence, the investor is entitled under the law to seek claims against the operator based on the alleged negligence. However, the burden of proof lies with the investor, therefore they must prove to the Investment and Securities Tribunal (IST) that the operator was negligent in handling the transaction.

Other types of claims available to the investor include:

- misappropriation of clients' funds by a stockbroker;
- non-remittance of issue proceeds by an issuing house to the issuer or company;
- non-remittance of dividends by a registrar, public company or stockbroker;
- late transfer or registration of shares or stocks by a stockbroker;
- disputes or claims arising from misrepresentations; and
- false statements in offer documents or in securities transactions.

Some of the areas that commonly give rise to litigation include negligence, misstatement of facts, abuse of the securities market, interpretation of the statutory powers of the Securities and Exchange Commission (SEC) and insider trading. The IST exercises jurisdiction over such areas and any other matters that are prescribed by an Act of the National Assembly. The Investment and Securities Act 2007 is the principal legislation governing securities litigation and applicable to all the states in the country. Any claim outside of this principal legislation may rob the IST of its jurisdiction to determine the matter as securities litigation under the 2007 Act.

Recently, the SEC has made efforts to combat Ponzi schemes in line with SEC's mandate under the 2007 Act to protect the integrity of the securities market against all forms of abuses. In one such case, the SEC appointed administrators sanctioned by a court to take over the assets of a Ponzi scheme's promoters to realise the assets and return investors' monies to them. The SEC has powers to investigate such schemes and refer any criminal elements to criminal prosecuting authorities, such as the Economic and Financial Crimes Commission or the Federal Attorney General, for further investigation and prosecution.

Offerings versus secondary-market purchases

5 | How do claims (or defences to claims) arising out of securities offerings differ from those based on secondary-market purchases of securities?

There is no specific statutory provision or case law that creates a difference in relation to claims or defences arising out of securities offerings from those of security market purchases. However, claims arising out of securities offerings primarily relate to the misrepresentation in an offering document, while claims regarding secondary market purchases generally feature breach of disclosure obligations, negligence, false trading, market manipulation and minority protection actions against the company.

Public versus private securities

6 | Are there differences in the claims or defences available for publicly traded securities and for privately issued securities?

There are differences in the claims available for public and private securities. For instance, the SEC and the Nigerian Stock Exchange (NSE) can sanction the issuer or capital market operators of publicly traded securities for negligent conduct but have no jurisdiction over privately issued securities. However, the standard of proof to obtain damages or to defend such claims is the same: on the balance of probabilities.

There are also differences in the claims or defences available to public and private companies. For private companies, majority rule and corporate democracy are given prominence. Minority holders use the provisions of the Companies and Allied Matters Act 2020 (CAMA 2020) and contractual terms in shareholder agreements to protect themselves. For public companies, regulatory compliance is paramount and additional compliance obligations are imposed by the Investment and Securities Act 2007 and various corporate governance codes.

Primary elements of claim

7 | What are the elements of the main types of securities claim?

The claims are either statutory claims or common law claims and they do not differ between jurisdictions, as the Investment and Securities Act 2007 is applicable to all states in Nigeria. For statutory claims, liability exists for untrue statements in a prospectus. Section 85(1) of the 2007 Act provides that where a prospectus invites persons to subscribe for shares in a company, all persons who subscribe for shares or debentures are entitled to compensation for the loss or damage they suffer by reason of their reliance on any untrue statement or misstatement included in the prospectus.

The elements of a common-law claim for negligent misrepresentation are as follows:

- there was a duty of care based on a 'special relationship' between the representor and the representee;
- the representation was false or misleading;
- the representee reasonably relied upon the misrepresentation;
- the representor acted negligently in making the misrepresentation; and
- the reliance was detrimental to the representee, in the sense that harm resulted.

Primary defences

8 | What are the most commonly asserted defences? Which are typically successful?

Defences available to the defendant depend on the claim. For instance, in market information-based claims, if it is established that at the time when the defendant recorded or stored the information, he or she had no reasonable grounds to expect that the information would be available to any other person, he or she may escape liability. (Sections 107-108 of the Investment and Securities Act 2007.)

The defendant may also not be liable if it can be shown that the prospectus was issued without the defendant's knowledge or consent, and, on becoming aware of the prospectus being issued, the defendant provided reasonable notice of this to the public; or upon becoming aware of the misstatement after the prospectus was issued, the defendant withdrew his or her consent in writing before allotment was complete. (Section 85 of the 2007 Act.)

Some of the commonly asserted defences to common law claims hinge on the discharge of the duty of care owed to the claimant. The IST determines such issues on the evidence provided by the parties, following the 'balance of probabilities' standard of the burden of proof. If

a defendant raises technical objections (eg, a statute of limitation being applicable; there are condition precedents that must be fulfilled before the suit commences; or *locus standi)* the IST will resolve the case in favour of the defendant where such grounds have merit.

Materiality

9 What is the standard for determining whether the misstated or omitted information is of sufficient importance to be actionable?

The standard for determining whether the misstated or omitted information are actionable in Nigeria is whether the statements in the offering documents or contracts the investor relied on are untrue, false and misleading. However, an expert is exempted from both civil and criminal liabilities for misstatements in offering documents not attributed to them as an expert during the preparation of such documents. For claims emanating from common law, the onus is on the applicant to prove that the representation was misleading and inaccurate. The standard of proof is based on the preponderance of evidence and on the balance of probabilities. If the misrepresentation shows criminal liabilities, it may be referred to the Attorney General of the Federation for criminal action to be instituted against the defendants, or to the Economic and Financial Crimes Commission for prosecution under section 304 of the Investment and Securities Act 2007.

The standard of proof for a criminal action is 'beyond a reasonable doubt'. In a recent criminal action filed by the Economic and Financial Crimes Commission, the defendants were arraigned on an amended 15-count charge for conspiracy and obtaining with intent in order to defraud the sum of 855 million nairas under the false pretence that a company was carrying out profit-making manufacturing and trading activities and the money was to fund the purchase of shares under a private placement. The court convicted and sentenced most of the defendants to five years imprisonment. The fourth defendant was acquitted, as he gave evidence that the fraud had begun at least two years before he had joined the financial institution.

Scienter

10 What is the standard for determining whether a defendant has a culpable state of mind to support liability? What types of allegation or evidence are typically advanced to support or defeat state-of-mind requirements?

The requirement for determining whether the defendant has a culpable state of mind would generally depend on the claim's nature. For instance, where the claim involves false trading and market rigging transactions, the applicant must show that the defendant knowingly, recklessly or negligently disseminated false information likely to induce the sale or purchase of securities or that was likely to have the effect of raising, lowering, maintaining or establishing the market price of securities. On the other hand, where the claim relates to misstatements in a prospectus, the applicant should be able to prove that the defendant's principal officers, employees who participated in the production of the prospectus, issuing house, etc, omitted to state material facts in order to make the prospectus misleading.

In negligence cases, a breach of a duty of care is sufficient grounds for liability. In *Union Bank of Nigeria Plc (Registrar's Dept) v Securities & Exchange Commission* Appeal No. IST/APP/03/2003 the court held that the registrar, as custodian of shares, owed shareholders and other market operators a duty of care and due diligence and was therefore liable to restore the shareholders' original position in the event of wrongful transfers. Failure to reverify dematerialised certificates sent back from the Central Securities Clearing System was held to be a breach of statutory duty to investors and other capital market operators which relied on information from the registrar. The registrar's failure to perform their duty made it culpable and liable to pay compensation for damages.

Reliance

11 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Under section 94 of the Investment and Securities Act 2007, proof of reliance is not required for an applicant to bring an action for rescission of all allotments against the defendant if the prospectus contained a material statement, promise or forecast that was false or misleading. All the applicant is obligated to show is that the prospectus contained deceptive statement(s).

However, while section 85(1) of the 2007 Act does not require the applicant to show that he or she relied on the untrue statement or misstatement to institute the action, defendants are only liable to pay compensation to persons who relied on the prospectus and incurred loss or damages because of the untrue statement. In *Dr Sunday Folorunso Kuku & 2 Ors v Geoff Ohen Ltd & 2 Ors,* in Suit No Federal High Court/L/CP/25/12 delivered on 7 May 2018, the Federal High Court found that one of the applicants and the third defendant participated in the production of a false document and held that the applicant could not have benefitted from the transaction. This matter is currently on appeal.

Causation

12 Is proof of causation required? How is causation established? How is causation rebutted?

Section 85(1) of the Investment and Securities Act 2007 requires that the negligence or breach of duty that led to misstatements be the direct cause of the loss or damages suffered. The applicant must show that the defendant was reckless or negligent in managing the investment or in disseminating false information. Causation may, however, be rebutted by the defendant by showing that it acted in good faith and they had followed best practices.

Other elements of claim

13 What elements or defences present special issues in the securities litigation context?

There is no specific statutory provision or case law deemed to be a special issue in securities litigation.

One element that used to be a challenge was the overlapping jurisdiction between the IST and the Federal High Court regarding the jurisdiction of securities litigation involving the SEC. However, in *Itsueli v SEC* (2016) *LPELR-40654 (SC)* the Supreme Court resolved the matter in favour of the IST. However, many litigants still file securities litigation cases with the Federal High Court under many guises, such as enforcing fundamental human rights and issuing prerogative writs, such as *mandamus* and *certiorari*.

Limitation period

14 What is the relevant period of limitation or repose? When does it begin to run? Can it be extended or shortened?

The relevant limitation period in Nigeria is three years if the action is on the grounds of a tort (eg, a misleading statement, an untrue statement, or misrepresentation in a prospectus). Where the action is based on breach of contract it is six years. Time begins to run from the date the misrepresentation is discovered and cannot be extended after the relevant limitation period.

REMEDIES, PLEADING AND EVIDENCE

Remedies

15 What remedies are available? Do any defences present special issues in the context of securities litigation? What is the measure of damages and how are damages proven?

Some of the available remedies, depending on the nature of the claim, may include damages or declaratory reliefs against the defendant. There are no specific statutory provisions nor any case law that present special issues in securities litigation.

The Investment and Securities Act 2007, however, provides for an exemption from liability for directors, employees, issuing houses and their principal officers, if such persons withdrew their consent in writing before the prospectus was issued, stating that the prospectus would therefore be issued without their authority, knowledge or consent, and, on becoming aware that it had been issued, they immediately gave reasonable public notice that it had been issued without their authority, knowledge or consent.

Defendants may also limit liability by showing contributory negligence on the part of the investor and may avoid liability entirely if they can show the loss resulted from a market collapse, not their negligence.

Pleading requirements

16 What is required to plead the claim adequately and proceed past the initial pleading?

The applicant is required to file an originating application. An 'originating application' is a statement that sets out the necessary facts that support the claim. The applicant is also required to attach the documents it intends to rely upon and necessary witness statements. The applicant must show that he or she has a reasonable cause of action against the defendant, and that his or her rights have been breached by the defendant's actions.

There is no difference in pleading standards as the Investment and Securities Act 2007 is a federal law that applies to all states.

Procedural defence mechanisms

17 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

The Investment and Securities Tribunal Rules (IST Rules) provide that even where the defendant has a preliminary objection that may dispose of the claim, it would only be entertained by the IST at the stage of adoption of the final arguments (ie, after the parties' evidence has been given). In essence, the IST does not entertain applications by the defendant to terminate a claim at an early stage of proceedings. However, if the IST views that the grounds of a preliminary objection will most likely terminate the suit, it would entertain the preliminary objection by the defendant. In Suit No. IST/LA/05/18 *Mr Benson Onokurhefe v Lead Capital Plc & Anor*, the IST entertained the preliminary objection at the preliminary stage on the grounds that the action was *res judicata* and the suit was struck out during an early stage of proceedings.

The IST Rules allows the IST to promote reconciliation amongst the parties to an action to encourage and facilitate the amicable settlement of a dispute. The IST may, with the consent of the parties, refer a dispute to its Alternative Dispute Resolution Centre. A decision reached by the ADR Centre arising from a voluntary application filed by walk-in by parties, may, by leave of the IST, be made a judgment or order of the IST and enforced in the same manner.

The IST Rules do not set out any conditions that must be satisfied for a resolution to be achieved through the ADR Centre. They merely allow the IST to promote reconciliation through the ADR Centre, which means if, in the IST's opinion, a dispute can be settled without going to a full trial, it will refer the matter to the ADR Centre.

Evidence

18 How is evidence collected and submitted to the court to support securities claims and defences in your jurisdiction? What rules and common practices apply to the introduction of expert evidence and how receptive are courts to such evidence?

The applicant is required to file an 'originating application' – a statement setting out the necessary facts supporting the claim. The applicant is also required to attach all the documents it intends to rely upon to support its claim. Rule 2 of the IST Rules provides that upon being served with the originating application, the defendant must indicate any objection or otherwise to the admissibility of the documents. The grounds of objection would be argued over by the parties at the hearing. The documents to which the defendant does not object form the 'Agreed Bundle of Exhibit' and are accordingly marked for hearing. The defendant is also expected to file its defence to the substantive claim, provide a summary of any witnesses to be called, and attach all documents it will use in support of its defence.

Rule 10 of the IST Rules provides that a party may call an expert as a witness or submit an expert's report as evidence. If a party calls an expert as a witness or puts an expert's report in evidence, the party shall identify the subject in which the expert will provide evidence, and, where practical, identify the expert in that subject whose evidence the party seeks to rely upon.

Where parties wishing to submit expert evidence cannot agree on who should be the expert, the IST may select the expert from a list prepared by the parties or direct which expert is to be selected, as it deems appropriate. If the IST views that a technical question has arisen, for which it is desirable to have the assistance of an expert, it may arrange for a person having the appropriate qualifications to issue a report on the matter and require that the expert to be present at the hearing to answer questions from the parties.

LIABILITY

Primary liability

19 Who may be primarily liable for securities law violations in your jurisdiction?

Where a claim relates to misstatements in a prospectus, the principal officers, employees who participated in the production of the prospectus, the issuing house and its principal officers, etc, may be held liable. Section 86(1) of the Investment and Securities Act 2007 provides that any director or officer who authorised the issue of the prospectus commits an offence. Where the statement in lieu of a prospectus contains violations, any person who authorised the delivery of the statement in lieu of a prospectus for registration commits an offence.

In a recent criminal action filed by the Economic and Financial Crimes Commission, the defendants were arraigned on an amended 15-count charge for conspiracy and obtaining with intent in order to defraud the sum of 855 million nairas under the false pretence that a company was carrying out profit-making manufacturing and trading activities and the money was to fund the purchase of shares under a private placement. The court convicted and sentenced most of the defendants to five years imprisonment. The fourth defendant was acquitted, as he gave evidence that the fraud had begun at least two years before he had joined the financial institution.

Although the Investment and Securities Act 2007 does not define who the 'maker' of a statement is, the Evidence Act (section 83(4)), which is applicable to how evidence is tendered in securities litigation, provides that a statement shall not be deemed to have been made by a person unless the document or the material part of the statement was written, made or produced by the person by his or her own hand, or was signed or initialled by him or her, or is otherwise recognised, in writing, by him or her, as being a statement for the accuracy of which he or she is responsible and would thus be deemed to have been made by the person.

Secondary liability

20 | Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

The concept of vicarious liability is available against a company under common law and specific statutory provisions, where it can be established, or it is acknowledged, that an officer acted on behalf of their company.

The concept of 'controlling person' liability is recognised mainly with respect to prospectus liability. The liability extends to persons who were not directly involved in the preparation of the prospectus but were in positions to exert control over, the misleading or untrue prospectus. Furthermore, section 305 of the Investment and Securities Act 2007 provides that where the SEC is satisfied that a person (corporate or individual) took, or refrained from taking, any action to encourage another person to take action in violation of the Act, the SEC may impose a penalty of such an amount, or of such a nature, that it considers appropriate.

There are also statutes that have created personal criminal liability for officers of companies involved in securities transactions. For example, in the wake of the 2009 financial banking crisis in Nigeria, many of the directors and top managers of the country's banks, the shares of which were quoted and traded on the Nigerian Stock Exchange, were charged with criminal offences in relation to securities pricing manipulation, cheating and share buybacks under general and specialised statutes, such as the Criminal Code, the Investment and Securities Act 2007 and the Banks & Other Financial Institutions Act.

Claims against directors

21 | What are the special issues in your jurisdiction with respect to securities claims against directors?

There are ongoing cases in court against directors for negligence and fraud with respect to securities transactions. Section 308 of the Companies and Allied Matters Act placed a duty of care and skill on directors so that directors are required to exercise a reasonable degree of care, diligence and skill while carrying out the functions of the office. Subsection 3 of the above provision makes every director of a board individually and collectively liable for actions of the board, save for when the director can, for example, justify his or her absence at a board meeting at which the alleged decision was reached. Further, by virtue of section 85 (3) of the ISA, a director shall also not be liable where he can show that a decision was made without his authority, consent or knowledge and upon becoming aware, he immediately gave public notice that it was issued without his knowledge or consent.

From the above, there need not be an actual intention to issue a misleading prospectus in civil cases. However, the intention to commit fraud is a major element of criminal liability.

Claims against underwriters

22 | What are the special issues in your jurisdiction with respect to securities claims against underwriters?

One of the special issues with respect to securities claims against underwriters is the refusal of the underwriters to pay claims; however, they risk losing statutory deposits to the National Insurance Commission if they do so. The National Insurance Commission has also passed a resolution to dismiss the managing directors of underwriting companies to serve as a deterrent to other underwriters.

Claims against auditors

23 | What are the special issues in your jurisdiction with respect to securities claims against auditors?

Auditors are bound in performance of their duties to exercise all such care, diligence and skill as is reasonably necessary for each particular circumstance. Thus, where a company suffers loss or damages as a result of the auditor's failure to discharge his or her fiduciary duty, the auditor may be liable for negligence and the directors may institute an action against him or her. Section 415 Also, Companies and Allied Matters Act 2020 allows any member of a company to institute such an action against an auditor, after providing the company with 30 days' notice of his or her intention to do so, should the directors fail to do so.

Furthermore, section 185 of the Investment and Securities Act 2007 provides that the SEC may sanction an auditor for failing to report a material significance of financial impact which is likely to cause, or has already caused, a financial loss to any investor or creditor. In *Re: The matter of the Misstatements in the published accounts of Cadbury (Nig) Plc (2002-2005)* the Administrative Proceedings Committee of the SEC ordered the auditor to pay a fine of 20 million nairas within 21 days for its failure to handle the accounts of the company with the high level of professional diligence, failing which its registration with the SEC would be cancelled.

COLLECTIVE PROCEEDINGS

Availability

24 | In what circumstances does your jurisdiction allow collective proceedings?

The circumstances that allow for collective proceedings in Nigeria are as follows:

- interested persons, class or some members of the class cannot be ascertained or cannot readily be ascertained;
- interested persons, class or some members of the class, if ascertained, cannot be found;
- although the persons, class or the members of the class can be ascertained and found, it is expedient for the purpose of efficient procedure that one or more persons be appointed to represent the persons, class or member of the class (the judge may make the appointment during the proceedings and the decision is binding); and
- the necessary permission of the court is obtained or a direction is given.

The Investment and Securities Act 2007 and the Securities and Exchange Commission's Rules do not provide for any specific claims that may be brought under class actions. However, order 4 rule 8 of the IST Rules 2014 provides for the case management powers of the Investment and Securities Tribunal (IST) and states that parties or persons having the same interest in a subject matter may apply to the IST for direction on how to proceed with their claims.

Reliance, causation and damages

25 | Can reliance, causation and damages be determined on a class-wide basis, or must they be assessed individually?

Generally, damages are assessed individually. However, the nature of the class action's injuries will determine the nature of the assessment. There is no specific rule or procedure for this assessment in Nigeria. However, order 4 rule 15 of the IST Rules 2014 provide that where there are a wide class of matters touching on related issues of fact and law, the IST may order a Group Proceedings Direction and where a decision is given, the decision would be binding on all the other matters as to the extent to which the Tribunal shall direct.

Court involvement and procedure

26 | What is the involvement of the court in collective proceedings and what procedures must be followed to achieve collective treatment of claims? What is the procedure for settling collective proceedings and what is the extent of the court's involvement in settlement?

The IST entertains applications for group proceedings. An application for group proceedings must be accompanied by the summary of the nature of the action, the number of parties likely to be involved, and the common issues of fact and law that are likely to arise in the proceedings. Upon submission, a group register shall be established, in which the applications to be managed under the register are entered.

There are no specific statutory provisions on the procedure for settling collective proceedings. The parties may therefore inform the IST of their intention to explore a settlement and request for time to report the outcome of the settlement discussion. A court may also advise parties to explore a settlement, but the parties may choose to proceed with the hearing of the case if the settlement discussion proves abortive.

The IST Rules allows the IST to promote reconciliation among the parties to an action, to encourage and facilitate the amicable settlement of the dispute. The IST may, with the consent of the parties, refer a dispute to its Alternative Dispute Resolution Centre. A decision reached at the ADR Centre arising from a voluntary application filed by parties involved in a walk-in, may, by leave of the IST, be made the judgment or order of the IST and enforced in the same manner.

Opt-in/opt-out

27 | In collective proceedings, are claims opt-in or opt-out?

Nigerian law stipulates that in any class proceedings a person, company registered in Nigeria, class or some members of the class may apply to the court or a judge in chambers to opt-in or opt-out of the class action. A court or judge in chambers may, on good and justifiable cause, permit any person, class or members of the class represented in a class action to opt-in or opt-out.

Regulator and third-party involvement

28 | What role do regulators, professional bodies and other third parties play in collective proceedings?

Regulators (eg, the SEC), self-regulatory organisations (eg, the Nigerian Stock Exchange) and professional bodies (eg, the Capital Market Solicitors Association of Nigeria) also play important roles in collective proceedings. For instance, in ordinary schemes of arrangement, the SEC is expected to provide the Court with an independent report on the fairness of a scheme. As a regulator, it has the power to intervene and also to:

- initiate various types of collective proceedings;
- initiate winding-up procedures and schemes of arrangements;
- approve M&A schemes to be sanctioned by the court;
- regulate and examine investment schemes;
- appoint trustees over Ponzi schemes issues; and
- procure the intervention of the court to empower these trustees to resolve Ponzi scheme issues.

The Nigerian Stock Exchange, other professional bodies and third parties may also be called upon by a court, directly or at the request of stakeholders in a collective proceeding, to provide information or expert opinion, or to advise the court, or may be appointed by the court to undertake certain assignments for the purpose efficiently resolving a collective proceeding.

Generally, the Nigerian Stock Exchange and the Capital Market Solicitors Association of Nigeria are active in terms of providing input to courts in relation to securities issues and the regulation of collective schemes.

FUNDING AND COSTS

Claim funding

29 | What options are available for plaintiffs to obtain funding for their claims? What are the pros and cons of each option, including any ethical issues relating to litigation funding?

In Nigeria, third-party funding of litigation is frowned upon by the courts, based on the common law principles of champerty and maintenance, which prohibit a third party from funding litigation between disputants in which the funder has no legitimate interest, and renders an agreement to provide such funds illegal and void, on the ground of public policy.

Rule 50(4) of the Rules of Professional Conduct for Legal Practitioners states a lawyer may not enter into a contingency fee arrangement without first informing the client of the potential effects. A contingency fee arrangement is only permissible in the following circumstances, where:

- it is a civil matter, whether contentious or non-contentious;
- the contract is reasonable in the circumstances of the case, including risk and uncertainty of compensation;
- the contract is not vitiated by either fraud, mistake or undue influence; and
- the contract is not contrary to public policy.

Costs

30 | Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

The general rule is that costs will follow the event. Therefore, the winning party's expenses are not always repaid or compensated. Costs are usually at the discretion of the court. The successful party may be asked to pay costs if he or she conducted him or herself in an improper manner that caused a delay, if the other party was successful on part of his or her claim, or if an action was filed or an omission was improperly made to the detriment of another party. Some of the factors the court considers in awarding costs include the cost of legal representation and assistance of a successful party, travel and other expenses of the parties and witnesses, and other such expenses that the judge determines ought to be recovered.

Costs are usually determined by the judge. However, where the judge cannot determine the quantum, it will be referred to a taxation officer. Where the court awards costs, further proceedings may be stayed until payment is made. There exists a right of appeal against costs, but such an appeal can only be made with the leave of the court.

Privilege

31 What types of legal privilege exist between litigation funders and litigants?

In Nigeria, third-party funding is generally not acceptable by the courts, based on the common law principles of champerty and maintenance that prohibit a third party from funding litigation between disputants in which the funder has no legitimate interest and renders an agreement to provide such funds illegal and void, on the ground of public policy. In *Kessington Egbor v Ogbebor* (2015) LPELR–24902, the Court held that where a person elects to maintain and bear costs of action for another person in order to share the proceeds of the action of the suit, such action is champertous.

INVESTMENT FUNDS AND STRUCTURED FINANCE

Interests in investment funds

32 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

The most-used forms of investment funds in Nigeria are unit trusts, venture capital funds, open-ended investment companies, real estate investment schemes and specialised funds. The volume of litigation involving investment funds in Nigeria is relatively low. The most notable type of claim relates to breaches of fiduciary duty by funds' investment managers.

There are special issues involving intermediated securities and assets or funds belonging to the investors, beneficial owners or account holders, held in or by a trust or held by funds or firms which the Investment and Securities Act 2007 generically describes as 'capital market operators'.

The 2007 Act provides rules of bookkeeping and segregation of those assets and fiduciary obligations of capital market operators *vis a vis* the investors, clients or account holders. The 2007 Act also provides for a special Investors Protection Fund. (Sections 39-42 and sections 197-198 of Part XIV of the 2007 Act).

In the event of the insolvency of these intermediaries, special issues regarding the prioritising or ranking of claims arise that are in derogation of general ranking and *pari passu* insolvency rules. The 2007 Act provides for a court's consideration for special treatment of securities, funds or assets held by third parties (capital market operators), but that are beneficially owned by the investors, such that investors are accorded superior priority in collective proceedings for assets held in trust by the insolvent firm. These issues are also paramount to the SEC as a regulator and would usually lead to it initiating a collective proceeding.

Structured finance vehicles

33 Are there special issues in your country in the structured finance context?

The most common types of structured finance vehicles in Nigeria are mortgage-backed securities, asset-backed securities and credit risk. Two major issues with structured finance vehicles in Nigeria are the high rate of interest and the costs of securitisation. This problem arises due to the low percentage of vehicles in Nigeria that are assigned investment-grade credit rankings.

Another issue is a systemic bias towards lower-quality loans among securitised loans. Underwriting, credit rating and investor due diligence are not properly performed in Nigeria. There are, however, ongoing attempts by the credit reporting agencies to entrench due diligence in credit reporting, and there are calls for improvements to be made in the area of credit ratings.

CROSS-BORDER ISSUES

Foreign claimants and securities

34 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

Prior to the enactment of the Companies and Allied Matters Act 2020 (CAMA 2020), a foreign company was empowered to sue and be sued in Nigeria, irrespective of the party's incorporation status. However, by virtue of section 78 of CAMA 2020, a foreign company that intends to carry on business in Nigeria may not do so or exercise any of the powers of a registered company until it is incorporated in Nigeria. Thus, if a foreign holder of securities wishes to exercise any of the powers of a registered company, it must take all necessary steps to obtain incorporation as an entity in Nigeria for that purpose. These requirements do not affect foreign companies that are exempt under any treaty to which Nigeria is a party, or foreign companies granted exemptions from the provisions of section 78 of CAMA 2020.

Foreign defendants and issuers

35 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

In Nigeria, there is a general presumption against the applicability of a law that gives rise to a claim, if the claim originates from transactions outside Nigeria. However, if it can be shown that there is legislative intent that such a law is applicable to extraterritorial conduct, the presumption becomes rebuttable. Upon fulfilling the conditions negating the presumption, Nigerian courts can entertain such matters where the transaction had substantial effects in their jurisdiction.

Where a foreign defendant is in Nigeria, a claim based on extraterritoriality of a law will be possible. However, where the foreign defendant is not within the geographical territory of Nigeria, the claim may be subject to the principles of conflict of laws.

Multiple cross-border claims

36 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

Whenever there are identical claims between the same parties in a foreign jurisdiction, the court may stay the proceedings if there is an existing treaty between the countries; otherwise, the Nigerian court will proceed with the matter. The court may also entertain matters on behalf of purchasers from other jurisdictions when the claims had been dismissed in proceedings outside Nigeria.

However, if a judgment has been obtained in the foreign jurisdiction and the court is informed of the development, the claim in Nigeria may not continue so far as the foreign judgment falls under the ambit of the Foreign Judgment (Reciprocal Enforcement) Act.

Enforcement of foreign judgments

37 What are the requirements in your jurisdiction to enforce foreign court judgments relating to securities transactions?

Nigeria is yet to adopt an international instrument facilitating the enforcement of foreign judgments, unlike its position on the enforcement of foreign arbitral awards.

Foreign judgments can be recognised and enforced in Nigeria, either by an action at common law or statutorily based on reciprocity or reciprocal enforcement agreements.

Enforcement via common law

For enforcement by action at common law, the element of reciprocity is not expressly required, although, in practice, it is easier to scale the recognition aspect rather than the enforcement aspect. Often, the enforcement proceedings are fraught with technicalities, such as non-submission to the foreign court or substantive issues of differences of law and policy. Usually, these proceedings are started by way of an originating summons by the foreign judgment creditor on the basis that the facts are not disputed or via a summary judgment procedure. Thus, there is no need in such a case for a lengthy trial. They feature declaratory (recognition) and enforcement reliefs as prayers to the court.

Also, having regard to the fact that foreigners have full access to justice in Nigeria, they sometimes file a fresh suit in Nigeria, which is strengthened by the evidence of the foreign judgment and may usually be disposed of in less time. The key aspect is that such a foreign judgment may be enforced in Nigeria under common law, irrespective of whether or not the foreign court would have reciprocally enforced judgments of Nigeria's courts. This distinguishes it from the other method of enforcing foreign judgments in Nigeria, namely through the requirements outlined under the Nigerian statute of Foreign Judgments (Reciprocal Enforcement) Act (Cap F35, LFN, 2004). A second major distinguishing difference is that the nature of such a foreign judgment is not limited to monetary judgments.

Enforcement via statute

Provided the statutory requirements for validity and enforcement of such judgments are satisfied, a foreign judgment creditor may commence an action in a high court in Nigeria, using the foreign judgment and reliefs they obtained as the basis of his or her enforcement action and appropriate reliefs.

The statute-based option of foreign judgments is regulated by two statutes: the Reciprocal Enforcement of Judgment Ordinance of 1922 (the Ordinance) and the Foreign Judgments (Reciprocal Enforcement) Act.

The Ordinance, which is built upon the historical heritage of the Commonwealth, extends recognition and enforcement through the registration of foreign judgment to the United Kingdom and several former colonies and protectorates of Her Majesty, the Queen of England, including:

- Barbados;
- Bermuda;
- British Guiana;
- Gibraltar;
- Grenada;
- Jamaica;
- Leeward Island;
- Saint Lucia;
- Saint Vincent and the Grenadines;
- Sierra Leone; and
- Trinidad and Tobago.

The judgments of the Supreme Court of Ghana, the Supreme Court of the Gambia and the Supreme Court of the State of Victoria, Australia, are also recognised and enforced by Nigeria's courts.

The Foreign Judgments (Reciprocal Enforcement) Act extends recognition to other countries to be listed in an order made by the Minister of Justice pursuant to sections 3 and 10 of the Act. However, as the minister's order has not yet been made, this Act is essentially inchoate.

Requirements for recognition and enforcement

The governing statutes have similar requirements for recognition, save for the timelines for applying for recognition. These requirements include:

- the judgment must have been pronounced by a superior court of the country of the original court, with competent jurisdiction to determine the action;
- the judgment debtors must have participated or submitted to the jurisdiction of the original court, with requisite notice of the pendency of the action;
- the judgment must be a money judgment for a certain sum, excluding tax or penalty;
- the judgment must final and conclusive between parties – there must be no pending appeal; and
- the original court affords reciprocal enforcement to judgments of Nigerian courts.

With respect to the timeline, the Ordinance provides for a 12-month window from the day of judgment or some other period as may be extended by the registering court. The Foreign Judgments (Reciprocal Enforcement) Act prescribes a six-year period with no possibility of an extension. However, in the event that an appeal is lodged against the judgment, time does not begin to run until the determination of all appeals against the judgment.

The grounds for setting aside registered judgments are further guides for the requirements to register. These include:

- where the original court lacked jurisdiction to entertain the action;
- where the judgment was obtained by fraud;
- where enforcement would be contrary to public policy in Nigeria;
- where the applicant is not the person vested with rights under the judgment;
- where the matter had been decided by some other competent court and the matter was *res judicata*; and
- that the judgment, as at the date of application, is not executable in the country of the original court.

ALTERNATIVE DISPUTE RESOLUTION

Options, advantages and disadvantages

38 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

The major alternatives to litigation for the redress of losses on securities transactions are arbitration, mediation and conciliation, collectively referred to as alternative dispute resolution (ADR). The Nigerian Stock Exchange also maintains an Investors Protection Fund which was set up to compensate investors with genuine claims of pecuniary losses against dealing member firms in various securities transactions.

The Investment and Securities Tribunal (IST) has an ADR Centre. The primary aim of the ADR Centre is to provide opportunities for parties to mutually settle disputes that will thereafter be reduced into a written document, signed by the parties and entered as a judgment of the IST. The various techniques adopted at the ADR Centre involve mediation, neutral fact finding, early neutral evaluation, conciliation, judicial appraisal and negotiation. These techniques are used to assist the parties, depending on the peculiarities of each case.

Exploring ADR is usually difficult if one of the parties is the Securities and Exchange Commission (SEC), due to the existing framework of the ADR Centre. Generally, the type of parties will determine the nature and process of ADR proceedings. So far, the ADR Centre is the common venue used by parties involved in a securities dispute. Despite having the option of resorting to the ADR Centre, where losses incurred against a dealing member firm are eligible under sections 198 and 212 of the 2007 Act, upon compliance with the due process for making

claims, an investor may be paid compensation from the Investors Protection Fund. If a claim is rejected, the Nigerian Stock Exchange will forward a letter to such investor communicating the rejection and the reasons for same.

A major advantage of using arbitration over litigation in a securities dispute in Nigeria is the speedy resolution of such disputes. However, the 2007 Act stipulates that every dispute at the IST must be disposed of within 90 days; so when disputes are at the IST, they are quickly dispensed with. Upon a dissatisfied party's appeal of an IST decision to the Court of Appeal, this advantage of speedy resolution through arbitration comes into play because matters at the Court of Appeal can be protracted over years, as can disputes litigated upon in the Federal High Court.

Another advantage is the availability of experts in arbitration proceedings: parties usually appoint arbitrators who are professionals in the securities industry and have a greater level of expertise than a trial judge. The nature of securities disputes requires a requisite level of knowledge about the industry, hence the need for experts. Again, arbitration is final and binding on parties, whereas in litigation, an aggrieved party may continue to appeal the decision of the courts up to the Supreme Court.

In practice, the cost is a disadvantage of arbitration in securities disputes. Arbitration is usually expensive as it involves the appointment of private persons who are usually experts on securities transactions as arbitrators. The parties have to bear the arbitrators' fees and other administrative expenses that would have been otherwise incurred by the state in litigation with minimal filing fees being paid by the parties.

UPDATE AND TRENDS

Key developments of the past year

39 What are the most significant recent legal developments in securities litigation in your jurisdiction? What are the current issues of note and trends relating to securities litigation in your jurisdiction? What issues do you foresee arising in the next few years?

One of the most recent legal development is the enactment of the Federal Competition and Consumer Protection Act (FCCPA) which repealed sections 118-128 of the Investment and Securities Act 2007 that deal with mergers and acquisitions. The new act has established the Federal Competition and Consumer Protection Council (FCCPC) as the administering regulator for this new legislation and invests the Investment and Securities Tribunal (IST) with the jurisdiction to determine disputes bordering on mergers and acquisitions and competition issues.

The Securities and Exchange Commission (SEC) retains control of the regulation of securities transactions. The only thing transferred to the FCCPC is merger control issues regarding a merger's effect on competition. The general fairness of a merger among the shareholders, as distinct from the market impact, remains within the SEC's purview and is not in the FCCPC's. To that extent, the repeal of the provisions of the 2007 Act on mergers and acquisitions, and on mergers and acquisition that need to be court-sanctioned and so rely on an SEC's report on the fairness of the deal, maybe an area of future litigation or engagement between the two regulators to clarify the scope of their respective mandates.

There was also a recent decision by the Court of Appeal in Appeal No: CA/743/15-SEDC *West Multipurpose Co. Society v SEC* delivered on 24 June 2019. The court held that the SEC owed a statutory duty of care to the appellant in ensuring that the statutory ratio of allotment based on its publications was followed and that the SEC had failed to discharge this duty of care. The Court further held that it this a statutory duty of care and not a shared duty, so the appellant had no part to play and therefore awarded the sum of 1,118,481,000 nairas in favour of the appellant. The SEC was not represented by counsel at the Court of Appeal and has appealed against the judgment to the Supreme Court. However, subject to the Supreme Court's proceedings, the implication of the Court of Appeal's judgment is that a statutory duty under the 2007 Act is not a shared duty, even in relation to offerings, and the SEC can be held liable for any statutory negligence if it failed to provide the required duty of care towards the claimant.

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Coronavirus

40 What emergency legislation, relief programmes and other initiatives specific to your practice area has your jurisdiction implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No specific emergency legislation was enacted to address the pandemic in relation to securities litigation. However, an Emergency Economic Stimulus Bill 2020 was passed by the House of Representatives on 24 March 2020 and is awaiting concurrence of the Senate and presidential assent. The Bill was passed at the onset of a lockdown in Nigeria to provide a broader framework for the government's intervention and management of financial distress caused by COVID-19.

The Bill sought to provide relief in the following ways:

- relief from corporate tax liability;
- a three-month waiver/suspension of import duties on medical equipment, medicines and personal protective equipment as required by the Ministry of Health to treat and manage a response to COVID-19;
- an extendable deferral of residential mortgage obligations to the Federal Mortgage Bank of Nigeria for a fixed term, to protect jobs and alleviate the financial burden on citizens; and
- protection of jobs through a 50 per cent income tax rebate on the total actual amount due or paid as pay-as-you-earn (PAYE) tax for Nigerian companies that retain all their employees from 1 March 2020 to 31 December 2020.

However, this initiative appears to have been suspended since the lock-down's easing from July 2020.

In the absence of a legislative basis for the 50 per cent PAYE income tax rebate referred to above, the government has recently introduced some additional employee-specific measures through tax reliefs and incentives. Consequently, on 31 December 2020, President Muhammadu Buhari signed the 2021 Appropriation Bill and the Finance Act 2020 into law.

The Finance Act 2020 amends portions of various extant tax legislations, including that of the Personal Income Tax Act 2007 (as amended). The amendments re-introduce:

- life assurance premium tax relief and redefines what constitutes gross income for PAYE in order to prevent the consideration of non-taxable income in the computation of applicable consolidated relief allowance;
- recognition of pension, provident and retirement benefits funds;
- exemption of minimum wage earners from tax liabilities; and
- redefines the purport of exemption of compensation for loss of office from capital gains tax.

The Chief Justice of Nigeria and Chairman, National Judicial Council, Justice I T Muhammad, CFR issued a circular referenced NJC/CIR/HOC/II/631 of 24 March 2020, directing the immediate suspension of court sittings, except for urgent, essential or time-bound matters for an initial period of two weeks. However, the IST (being the judicial body with primary jurisdiction on securities litigation) has resumed sitting and ensures parties comply with the COVID-19 guidelines. Order 5 of the IST Rules provide that the IST may allow witnesses to give evidence by telephone, video link or any other electronic means of direct oral communication provided that the IST is satisfied that this would not prejudice the administration of justice. In view of the worldwide pandemic, parties are advised to adopt the rule on providing evidence by video link or other means as provided in the IST Rules , in accordance with international best practice.

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