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COMMERCIAL LAW DEVELOPMENT SERVICES

COMMERCIAL LAW NEWSLETTER

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Dear Reader,

I welcome you all to the second edition of our Commercial Law Newsletter. Commercial Law Development Services (CLDS) has continued in its vision of equipping professionals, particularly legal counsel (in-house and private practitioners) with the skills necessary to meet the legal demands of modern commerce and to acquaint. We achieve these through our bespoke training programmes which we have received positive feedback from our participants.

This edition focuses on the Business Sector with an eye on judicial precedents on various issues in the commercial space. One of the articles contained therein examines the concepts of anti-dumping and safeguards as well as their criticisms. It further answers the question on the reasons the two trade defence measures are still in use. This edition has featured a review of the Court of Appeal's Decision in Hon. Justice Hyeladzira Ajiya Nganjiwa V Federal Republic of Nigeria. Amongst other recommendations, the review proffers that the Constitution should be amended to expressly include an ouster clause to preclude the Court from exercising jurisdiction over judicial officers, if that is what the framers of the Constitution intended. The Newsletter has also brought to the fore parties' intention to undertake a win-lose bargaining during negotiations and has shared practical strategies to negotiations as opined by experts in an executive training programme organized by CLDS.

Against this background, Commercial Law Development Services hereby presents its second edition of newsletter as a reference point on policy framework of business environment, transparency and good governance. We hope this newsletter will keep you informed as well as greatly facilitate transparency, supervision and accountability in your business activities.

Kind Regards,
Toyin Nwiido

In This Issue:

EXCLUSIVE INTERVIEW

Ogwemoh Sylva, SAN

A renowned litigator and a revered public speaker, he is a Fellow of the Chartered Institute of Arbitrators, United Kingdom (FCIArb (UK) with over 30 (Thirty) years' experience as a Legal Practitioner practicing within and outside Nigeria. Mr. Ogwemoh, SAN, an avid writer who has a rich blend of practical experience in corporate/commercial law practice shares his experience and thoughts on the Court of Appeal Judgment in the case of CBN v. Registered Trustees of the Nigerian Bar Association & Anor., especially as it relates to the issue of client/attorney privileged information vis-a-vis the fight against money laundering in Nigeria in an Exclusive Interview with the Editor, Mrs Toyin Nwiido.

What is the role of lawyers in the fight against money laundering?

The role of Legal Practitioners is not limited to any sector or any subject. It cuts across every aspect of business as far as human existence is concerned. Lawyers have a professional duty of advising their clients within the bounds of law; this duty also covers the areas of advising their clients in respect to money laundering and ensuring compliance with the extant laws in regard to the transactions of the clients' businesses. Furthermore, ensuring compliance with the extant statutes and conducting adequate due diligence are some of the integral parts of the legal business.

The Nigerian Bar Association on the other hand, has actively been involved in not only creating awareness as it relates to the fight against money laundering but, also, has been organizing conferences on fight against corruption and money laundering. One of these conferences was the NBA Anti-Corruption Conference held on 24th June, 2015.

In the light of the above question, is there a need for a reporting requirement to aid the appropriate enforcement agencies?

Financial and other Institutions including a Designated Non-Financial Institution (DNFI) have the duty of "reporting" in order to aid the appropriate enforcement of the Money Laundering (Prohibition) Act 2011, by the regulatory authorities charged with the responsibility of enforcing the Act. Although legal practitioners have been excluded from the list of DNFI, this does not mean that legal profession no longer shows concerns about the fight against money laundering but, however, legal profession has always been at the forefront of the fight against money laundering, with its members carrying out the already mentioned duties.

What are the potential effects of these reporting requirements on the legal profession?

The potential effects of these reporting requirements on legal profession will definitely expose the legal profession to the breach

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of confidentiality principle which some of our laws tend to protect including the Constitution. For instance, Section 192 (1) of the Evidence Act, 2011 protects professional communication between a client and a legal practitioner in the course of the employment of the legal practitioner by the client in that the legal practitioner is not permitted at any time to disclose any communication made to him by his client in the course of his employment. This however, goes with some exceptions.

It is worthy to note also that Rule 19 of the Rules of Professional Conduct for Legal Practitioners 2007 protects any communication between a legal practitioner and a client thereby preserving the confidence of a client. Further reference can be made to section 37 of the 1999 Constitution of the Federal Republic of Nigeria as amended which guarantees the privacy of the citizens and their family life. These laws will greatly be exposed to violations once there is a requirement of reporting on legal practitioners.

However, upholding this principle does not mean that a legal practitioner would no longer conduct his due diligence with a view to determining the kind of transaction he is being involved in. Of course, where a legal practitioner discovers that the transaction between him and his client is tainted with some elements of criminality, the legal practitioner is under obligation to withdraw from such transaction on the grounds of public policy. The legal practitioner is also mandated under these laws to disclose such intention to commit crime to the appropriate authority.

What are your comments on the subsisting laws prohibiting money laundering in Nigeria?

The purpose of the Money Laundering (Prohibition) Act 2011 (which is the extant principle legislation on money laundering in Nigeria), is to tighten the loopholes that existed in the previously enacted money laundering laws to ensure a stronger anti money laundering regime.

For instance, to address a major lacuna in section 14 of the old 2004 Act which the court in the famous case of Federal Republic of Nigeria v. James Ibori & 5 others (Charge No.: FHC/ASB/IC/09), interpreted to mean that the offence of money laundering as it were was limited to funds derivable from offences traceable to narcotic drugs and psychotropic substances, the 2011 Act in its section 15 eliminates such limitation, by making a comprehensive list of predicate offences for money laundering beyond the realms of funds derived from drugs related activities, thereby giving little or no escape route(s) for perpetrators hiding under any disguise to commit the crime. Quite commendably, with this provision, the 2011 Act is in sync with the recommendations of The Financial Action Task Force (FATF) on predicated offences for Money Laundering.

Furthermore, another commendable attribute of the extant Money Laundering Act, is the provision of its section 6 (10) which immunes directors, officers and employees of Financial Institutions and designated non-financial institutions from any civil or criminal liability in suits that might be brought against them by customers as a result of the performance of their duties under the Act, thus making it easier for such officers/persons to comply with the provisions of the law since personal risk of liability is removed. This is in addition to the duties placed by the Act on Financial Institutions as well as Designated Non-Financial Institutions (DNFI) to notify the relevant authorities of financial transactions/lodgements of certain thresholds to the relevant authorities, as well as putting in place extra measures to scrutinize transactions/financial dealings involving politically exposed persons, i.e., public office holders.

With all of these in in addition to many other salient provisions of our laws, constituting the legal regime on money laundering in Nigeria, one can safely say that the extant laws on money laundering in Nigeria are by all standards sufficient to curb (at least to a large extent) money laundering activities in Nigeria. The issue therefore is not about the sufficiency of the laws, rather, it is about implementation, which issue on its own is a discourse for another day.

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with Ogwemoh Sylvia, SAN

Who can investigate a case for money laundering?

Upon an order of Court which may be obtained by way of Ex-parte application, the Federal Ministry of Industry, Trade and Investment, the Economic and Financial Crimes Commission, the National Drug Law Enforcement Agency among other regulatory authorities have the power to investigate the case of money laundering. Although, other Financial Institutions and Designated Non-Financial Institutions have a key role to play in the investigations.

What are the effects of money laundering on the Nigerian economy?

Every social ill always has a devastating effect on the economy of the country concerned. Money laundering is a social ill and as such, has its consequence on the Nigerian economy. It is like a cancer eating deep into the Nigerian economy, damaging every organ of the economy and eventually promoting a stall state effect on the economy. Foreign investors will find it difficult to invest in Nigerian economy due to obvious reasons and this at the long run will cripple the Nigerian economy.

What are your comments on the Court of Appeal Judgment in the case of CBN v. Registered Trustees of the Nigerian Bar Association & Anor., especially as it relates to the issue of client/attorney privileged information vis-a-vis the fight against money laundering in Nigeria?

Legal Profession and the activities of Legal Practitioners in Nigeria are already regulated by some laws enacted by the National Assembly. This includes the need to protect the communications between legal practitioners and their clients. These laws regulating the legal profession have already covered the essence of sections 5 and 25 of the Money Laundering Act 2011 as it relates to legal practitioners.

Having read the judgment under reference, we hold the opinion that it is mandatory for a Legal Practitioner to open client's bank account at a bank where all monies collected for or on behalf of a client by a legal practitioner must be deposited. This means that the Act has made the legal practitioner a Trustee for the monies of the client which must not be mixed with the legal practitioner's money. This makes it easier for the Agencies and Commissions charged with the responsibility of enforcing the Money Laundering Act to gather intelligence on those client's monies in those accounts with the financial institutions. However, any legal practitioner who fails to comply with the provision of keeping of accounts and records for client's money will have to face the sanctions already in place.

Furthermore, the Money Laundering Act is in sharp conflict with the Evidence Act and Rules of Professional Conduct for Legal Practitioners made pursuant to the Legal Practitioners Act particularly as it relates to the communication made to the legal practitioner by the client. We should not also forget that the Legal Practitioners Act made specific provisions and regulations governing the legal practice in Nigeria.

In any event, the victory of the Nigerian Bar Association in this case does not in any way suggest that legal practitioners have ceased to show interest and support for the fight against money laundering in Nigeria.

In your opinion, how can the Legal Profession guard against potential encroachment on the principle of lawyer/client privilege in investigations for money laundering?

One of such ways of guarding against the encroachment on the privilege and confidence of a client was demonstrated in 2013 when the Registered Trustees of Nigerian Bar Association instituted an action against the Attorney General of the Federation and the Central Bank of Nigeria in Suit No. FHC/ABJ/CS/173/2013: Registered Trustees of Nigerian Bar Association v. Attorney General of the Federation & Anor. to challenge the applicability

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of section 5 of the Money Laundering (Protection) Act, 2011, to legal practitioners in the light of the provisions of section 192 of the Evidence Act, Rule 19 of the Rules of Professional Conduct for Legal Practitioners, which shield privileged communication between a legal practitioner and client from encroachment/ disclosure.

The Federal High Court Judgment and the subsequent decision of the Court of Appeal affirming the judgment in Appeal No.CA/A/202/2015: Central Bank of Nigeria v. Registered Trustees of Nigerian Bar Association has defined the law as it should be as at today. What this means is that lawyers are no longer regarded as a Designated Non-Financial Institution and therefore the lawyer/client dealings are no longer confined within the ambit of Money Laundering Act.

The Rules of Professional Conduct for Legal Practitioners 2007 and the Evidence Act 2011 provide for specific deviations to rules, particularly the Client/Attorney confidentiality principle, when there is an overriding public policy. In your opinion, do you think these provisions are being implemented by Legal Practitioners?

Yes, it is correct the position the Evidence Act and the Rules of Professional Conduct for Legal Practitioners, (particularly Section 192 and Rule 19 respectively) allow legal practitioners to deviate from the rule of Client/Attorney confidentiality in certain circumstances in the overriding interest of the public. Hence, leveraging on this exceptions, a legal practitioner can disclose to the relevant law enforcement authorities, communications from his client revealing any illegal purpose or the client's intention to commit a crime and the information necessary to prevent the crime.

On the extent of the utilization of these exceptions by legal practitioners, to disclose the criminal intentions of their clients, I would say that to an extent, it has been on the positive side, bearing in mind the slim line of symmetry existing between client/ attorney confidentiality and the exceptions.

What are the potential obstacles in litigating anti-money laundering cases with specific reference to the need for private investigators, bribery with top government officials and the nature of our judicial system?

What has been observed over time in investigation of some cases of money laundering is that the investigating authority does not conduct a well detailed and painstaking investigation even though this takes time.

The major challenge the investigation and prosecution of money laundering cases in Nigeria will depend on whether the investigating officers will remain uncompromised all through the investigation process. This phenomenon therefore makes private investigators desirable in the investigation and prosecution process. Although, the chances that private investigators will compromise is not completely ruled out but it is reduced at the barest minimum. The issue of bribery and "familiarity" will also be eliminated to a reasonable extent. The issue of the weight to be attached to such report from private investigators may trigger some questions before our Courts unless due process is followed in obtaining the report by the private investigators.

What preventive steps should be established to counteract the widespread money laundering activities in Nigeria?

There should be an establishment of an independent institution which will be charged with the responsibility of intelligence gathering on suspicious transactions in Nigeria for the purposes of proper investigation rather than relying on reporting as required by the Money Laundering Act to the appropriate authorities. More so, the Central Bank of Nigeria should ensure strict compliance with its Regulations in combating money laundering in Nigeria.

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with Ogwemoh Sylvia, SAN

What procedural safeguards are necessary if lawyers are to maintain a high level of professional responsibility towards the fight against money laundering while continuing to provide effective representation?

Lawyers should ensure that they always conduct due diligence on the nature of transactions they are involved in on their client's behalf. This is to avoid being used as a conduit pipe in perpetrating the offence of money laundering. On the other hand, the laws regulating the legal profession have already set down these procedural safeguards necessary for lawyers to maintain a high level of professional responsibility toward the fight against corruption. For instance, sections 20 and 21 of the Legal Practitioners Act; Rule 23 of the Rules of Professional Conduct for Legal Practitioners provide for keeping accounts and records of the client's moneys and of the client's account with the bank.

COMMERCIAL CASE REVIEW ON CONTRACT AND LABOUR LAW

John Oforishe V. Nigerian Gas Company Ltd (2018) 2 Nwlr 35 S.c.

CONTRACT - AGREEMENT:

Whether parties are bound by the terms of their agreement "Parties are bound by the agreement they freely entered into." Per GALINJE, J.S.C. (P. 26, Para. A) - read in context (2017) LPELR-42766(SC) 6.

LABOUR LAW - CONTRACT OF SERVICE/CONTRACT OF EMPLOYMENT:

Distinction between contracts with statutory flavor and contracts of master and servant without statutory flavor "A contract of master and servant may be either subject to statutory or common law rules. Contracts with statutory flavor are contracts where the employer is created by statute. Such contracts are governed by the statute which creates the employer. e.g In Olaniyan v. University of Lagos (1985) 2 NWLR (Pt. 9) p. 599, Act No. 3 of 1967 creates the University of Lagos. It is that statute that governs employer employee contract.

A contract is one with statutory flavor where the conditions for appointment and bringing the contract to an end are governed by an enabling statute. It follows naturally that a valid appointment or determination of the contract must satisfy provisions in the statute. On the other hand contracts of master and servant without statutory flavor are classified as ordinary contract of service. Such contracts are governed by an employee Handbook where the conditions of service are spelt out. The master can terminate the service of the employee with, or without reasons, intention and motive for termination of employment is never considered by the Courts. They are irrelevant.

Termination of employment would be lawful if the terms of the contract of service between the employer and the employee are complied with. In contracts with statutory flavor where the termination of employment of an employee is found to be wrong, the Court may order specific performance of the contract, injunction or reinstatement. These are not available to employees whose appointments are terminated in simple contracts of master and servant. The remedy for unlawful termination of employment is to sue for damages and the employee must mitigate those damages. See Olatunbosun v NISER Council (1988) 19 NSCC (Pt. 1) p. 1025." Per RHODES-VIVOUR, J.S.C. (Pp. 10-12, Paras. E-A) - read in context (2017) LPELR-42766(SC) 7.

LABOUR LAW - CONTRACT OF SERVICE/CONTRACT OF EMPLOYMENT:

Position of the law where a contract of service gives a party a right of termination of the contract "The position of the law is that where a contract of service gives a party a right of termination of the contract by either party, the party seeking to put an end to the contract must pay to the other party the salary in lieu of notice at the time of termination of the contract. Where this is not done the termination of the appellant's employment would be unlawful. See Chukwumah v. Shell (1993) 4 NWLR (Pt. 289) p. 152." Per RHODES-VIVOUR, J.S.C. (P. 14, Paras. B-D) - read in context 8.

LABOUR LAW - TERMINATION OF EMPLOYMENT:

Whether an employer has the right to terminate the contract

of employment of his employee without reason "In an ordinary contract of master and servant, i.e a contract without statutory flavor a master can terminate the appointment of the servant without giving any reasons and his motive is an irrelevant consideration." Per RHODESVIVOUR, J.S.C. (P. 21, Paras. E-F) - read in context 9.

LABOUR LAW - EMPLOYMENT WITH STATUTORY FLAVOUR:

When will a condition of service be regarded to have statutory flavour "Conditions of service are said to have statutory flavour, where they are expressly set out by statute or statutory regulations made under a subsidiary regulation, such as Civil Service Rules which must be enacted by the parliament or any law making body as a schedule to an Act or law or as a subsidiary legislation in the instant case, the conditions under which the Appellant was employed are contained in the junior Staff Handbook, Exhibit N which were drawn up by the Board of Director of NNPC. They therefore have no statutory flavour. This being so, the Appellant's employment falls within the common law principle of master and servants. See Idoniboyeobu v NNPC (2003) 2 NWLR (Pt. 805) 589: Fakuade v OAUTH Comp. Mangt. Board (1993) 5 NWLR (Pt. 291) 47." Per GALINJE, J.S.C. (Pp. 23-24, Paras. E-B) - read in context (2017) LPELR-42766(SC) 10.

LABOUR LAW - WRONGFUL TERMINATION OF EMPLOYMENT:

Position of law on wrongful termination of employment and available remedy "In case of a breach of the terms of the employment, the employee's remedy lies in damages calculated on the basis of what he would have earned for the period of notice agreed for ending the employment. See Commissioner of Works, Benue State v. Devcon Ltd (1988) 3 NWLR (Pt. 83) 407; WNDC v. Abimbola (1966) 1 All NLR 159; Nigerian Produce Marketing Board v. Adewunmi (1972) 11 SC 111; Chukwuma v Shell Petroleum Dev. Co. of Nigeria Ltd (1993) 4 NWLR (Pt. 298) 512. Where an employee complains that his employment has been wrongfully terminated, he has the onus to prove the wrong by- (a) Placing before the Court the terms and conditions of the contract of employment; and (b) Proving in what manner the said terms were breached by the employer. The terms of contract of service are the bedrock of any case where the issue of wrongful termination of employment calls for determination. Even at this, as I have stated elsewhere, the remedy available for breach lies in damages only. This is so because a private limited liability company or any employer of labour like the Respondent in the instant appeal does not have any obligation to retain the Services of any unwanted employee and may terminate the appointment of the employee without any reason." Per GALINJE, J.S.C. (Pp. 24-25, Paras. D-D) - read in context

LABOUR LAW - TERMINATION OF EMPLOYMENT:

Whether an employer has the right to terminate the contract of employment of his employee without reason "Under the common law an employer is entitled to bring the appointment of his employee to an end for any reason of no reason at all. So long as the employer acts within the terms of the employment, his motive for doing so is irrelevant." Per GALINJE, J.S.C. (P. 24, Paras. C-D) - read in context

NEWS

LEGAL EXECUTIVE PROGRAMME

Experts Identify "Negotiation" As A Problem To Be Solved Rather Than A Battle To Be Won

Clare Omatseye (4th from the left,) HRH Oba Aderemi (5th from the Left) and other participants at the training programme

In a bid to enter into negotiation, parties often undertake a win-lose bargaining but often times the end result is a conflict situation where long-term relationships are damaged. To address this issue, experts converged at a one-day training programme on 'Strategic Negotiations and Persuasion Skills' organised by Commercial Law Development Services on April 25, 2018 to discuss practical strategies to negotiations. Professor Fabian Ajogwu, SAN shed more light on who a negotiator is; he opined that a good negotiator must be resourceful, patient, firm and have emotional intelligence. He further called on all stakeholders to adopt a positive approach: Problem Solving as you may still need to work or live with the other party in the future.

Also speaking at the seminar, Clare Omatseye Managing Director/CEO addressed the need to adopt the "Win-Win Approach to Negotiation"; this helps parties to focus on maintaining the relationship, focus on interests not positions, generate a variety of options that offer gains to both parties before deciding what to do and also to aim for the result to be based on an objective standard. In considering the role of power in negotiation, Mr Nicholas Okafor, Partner, Udo Udoma & Belo Osagie hinged on the importance of recognising the right time to close a deal or to stop conceding. Once you have done this, you need to stop haggling and get the deal done as quickly as possible as situations can change very quickly.

COMMERCIAL LAW DEVELOPMENT SERVICES

Executives Programmes

3rd Quarter

Commercial Law Development Services invites you to register for "Legal Executives Programmes" scheduled as follows:

July 2018		August 2018		September 2018	
18	**25**	**8**		**5**	**26**
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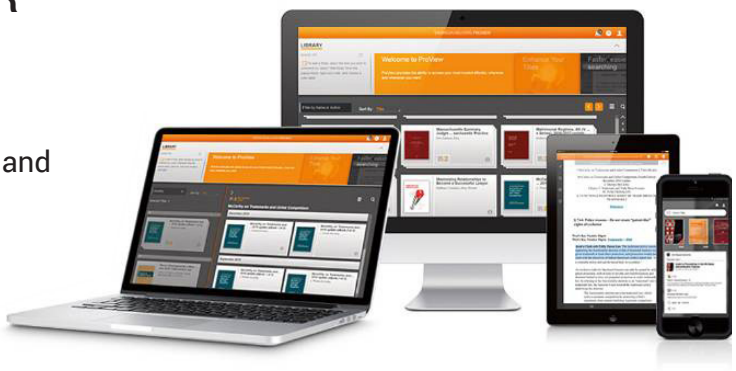

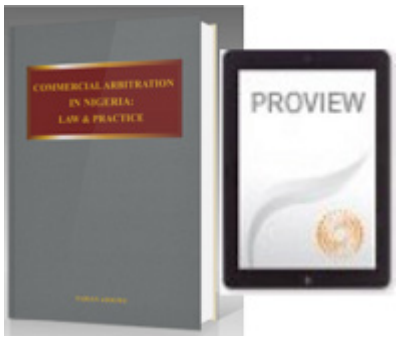

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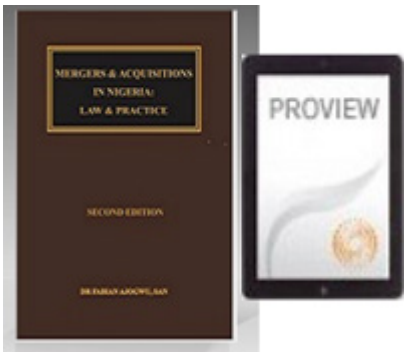

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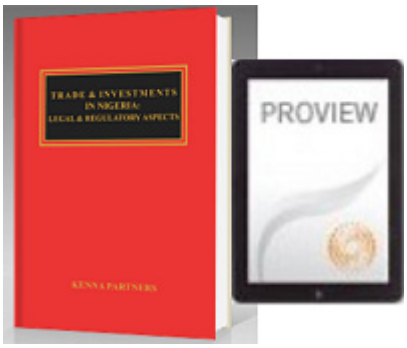

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