BANK CASE STUDIES: LITIGATION TIME AND COSTS: PAPER PRESENTED ON 25TH NOVEMBER, 2005 AT THE 2005 NATIONAL SEMINAR ON BANKING AND ALLIED MATTERS FOR JUDGES: HELD AT KWARA HOTELS, ILORIN: BY YUSUF O. ALI ESQ; SAN MCIArb. [xxx]

INTRODUCTION

The moment man came into society, the inevitability of conflicts and disputes became a reality. The interplay of demand and supply makes it imperative that frictions will arise between the suppliers and the buyers.

The historical development of banks and banking institutions are well too known to this audience and it will therefore be unfruitful to launch into any lengthy historical discourse about the evolution of banks.

Banks exist to serve their customers, in other words, without customers banks will not exist.[1]

At the earliest times, disputes and conflicts were settled by the use of force, but with the advent of modern societies, the use of force gave way to the use of brain in resolving conflicts. This rubbed off on commercial transactions including banking

It is important to note that there are different methods of dispute resolution that can be employed in resolving disputes between banks and their customers and generally to alternate other dispute creating situations

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1. See page 123 Pagets Lane of Banking 10th Edition by Mark Hapgood.

There is what is generally known as alternative dispute resolution mechanism which comprises of **arbitration, mediation, conciliation, good offices** and so on[2]. The most popular method of dispute resolution between bankers and their customers is litigation As we shall demonstrate in the course of this paper, litigation has become so popular in resolving bank/customer legal disputes that in the last 15 years, there have been many land mark decisions of our courts on various aspects of this relationship.

DEFINITION OF TERM

In order to avoid being misunderstood, there is the need for us to define some key words in this paper

The **Bank And Other Financial Institutions Act[3]** in Section 66 defines **bank** as "**a bank licensed under the Act**" and defines banking business as:

> "The business of receiving deposit on current account, saving account or other similar account, paying or collecting cheques, drawn by or paid in by customers, provision of finance or such other business as the Governor may, by order published in the Federal Gazette, designate as banking business."

In the **Central Bank of Nigeria Act[4]**, the word bank was defined as "a bank licensed under the Banks and Other Financial Institutions Act or under the Repealed Banking Act"

2.Arbitration and Conciliation Act 1988.

3. Cop B3 Laws of the Federation 2004.

4. Cap C4 Laws of the Federation 2004.

In the same vain, in the case of **United Dominion Trust Lid vs Kirkwood**[5], the Court of Appeal of England affirmed the view of the learned authors of Paget's Law of Banking on the three essential characteristics of banking business mainly :-

1 The conduct of current accounts,

2 The payment of cheques drawn on the bankers,

3 The collection of cheques for the customers.

Litigation on the other hand, in the words of the learned authors of **Black's Law Dictionary**[6], means:

> "a lawsuit, legal action including all proceedings therein contest in the court of law for the purpose of enforcing a right or seeking a remedy A judicial contest, a judicial controversy, a suit at law"

It is clear from the above that litigation involves the disputing parties going before a judex who has statutory power, to deal with and decide the disputes between the disputants

WHAT COURT TO APPROACH

It is inevitable that in the relationship between bankers and their customers, there are bound to be disagreement once in a while on the relationship existing between the parties Such disagreement may border on breach of contract, or in the tort of negligence, detinue or conversion. It may be on the ground of libel, misrepresentation or misstatement. It may also be on breach statutory duty or a breach of fiduciary relationship. The areas of conflict are wide and appear infinite. Whatever is the situation or cause of disagreement, if the parties want to go to court to settle their differences, then the question is, which is the court to approach.

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5. (1966) 2 QB 431 or (1966) 1 ALL ER 968.

6. Edition page 934.

In this paper, we are going to be concerned only with the superior courts of record, in order to make the paper focused and manageable In this wise, we shall be concerned with the various High Courts, the Court of Appeal and the Supreme Court.

HIGH COURTS

Before the establishment of the then Federal Revenue Court, in 1973 which on the coming into operation of the Constitution of The Federal Republic of Nigeria, 1979 was renamed as Federal High Court, all banking related cases were prosecuted before the high court of the states. After the 1 of October. 1979, the jurisdiction of the Federal High Court under section 230 remained essentially what it was when it was still known as the Federal Revenue Court. This position was judicially confirmed by the highest court of the land, the Supreme Court in the case of **Bronik Motors Ltd vs Wema Bank Limited.**[7]

The provisions of section 236(1) of the said 1979 Constitution put the jurisdiction of the state high court in the dealing with banking matters beyond any argument by conferring on that court unlimited jurisdiction in all proceedings by providing thus:

> "Subject to the provisions of this constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High court of a State shall have unlimited jurisdiction to hear and determine any avil proceedings in which the existence or extent of a legal right, power, duty. liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty. forfeiture, punishment or other liability in respect of an offence committed by any person."

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7. (1983) 1 SCNLR 296.

This position of the law appeared settled until the promulgation of Decree 107 of 1993 which introduced an amendment to section 230 of the 1979 Constitution. The said Decree which was promulgated on **17th November, 1993** made the following provisions:

Section 230(1) (d)

> "Notwithstanding anything contained in this constitution and in addition to 10 the contrary such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion to any other court in avil cause and matters arising from-
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> (d) banking, banks, other financial institutions. including any action between one bank and other, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal lender, bills of exchange, letter of credit promissory note and other fiscal measures, provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank."

The above provision created some confusion into the settled state of law as to which court to deal with bank related matters. The amended provisions of section 230 of the 1979 constitution introduced by Decree 107 of 1993 aforesaid was re-enacted in section 251 of the 1999 Constitution.

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8 . See for example the cases of

(i) **FMBN** vs **NDIC** (1999) 2 NWLR (Pt. 591) 333 at 362-363

(ii) **Trade Bank Plc** vs **Benilux** (Nig) Ltd (2003) 9 NWLR (Pt. 825) 416 at 430.

The confusion regarding which court has jurisdiction on banking matters will appear for now to have been laid to rest in the decision of the Supreme Court in the case of **NDIC** vs **Okem Ent**. **Ltd**[9] In the said case, the Supreme Court made the point that both the Federal and State High Courts have concurrent jurisdiction on banking matters involving banks/customers relationship.

It is therefore our humble submission, that all our discussions about the Federal and State High Courts will apply mutatis mutandi to the High Court of the Federal Capital Territory Abuja, with respect to banking matters that might originate in the Federal Capital Territory.

COURT OF APPEAL

By virtue of the provisions of the 1999 Constitution, appeals lie from the decisions of the various High Courts to the Court of Appeal and for our purpose, that includes appeals on all banking cases[10].

THE SUPREME COURT

Section 233 of the 1999 Constitution invests the Supreme Court with the powers of entertaining appeals on all matter from the court of appeal to that court. This will also include banking cases.

METHODS OF APPROACHING THE HIGH COURTS IN BANKING MATTERS

The various High Court Rules make elaborate provisions for the different methods by which a litigant can set the jurisdiction of the court in motion. We shall briefly touch on these methods for purposes of completeness.

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9. (2004) 10 NWLR (P1 880) 107 at 182 183 etc.

10. Section 241 Constitution of the Federal Republic of Nigeria 1999.

WRIT OF SUMMONS

This is provided for in the rules[11]." It can be called the universal method of commencement of cases before our High Courts. It appears to be the most popular of all the methods of commencement of actions in our High Courts. It is a procedure whereby the claimant in a summary form endorses his claim, which is thereafter elaborated upon in the statement of claim which is expected to be filed simultaneously with the writ of summons.

ORIGINATING SUMMONS

This is a form of commencement of action that is used where what is involved is the interpretation of a statute or agreement. It is hardly applicable in banking matters, which usually involve disputed facts[12].

ORIGINATING MOTION/ORIGINATING PETITION

These are methods of commencement of action that can hardly be applicable in banking cases. They are methods used for the enforcement of fundamental right and judicial review of administrative actions.

UNDEFENDED LIST PROCEDURE

This appears, if properly utilized, the fastest method for pursuing bank debt against recovery cases their customers. It is a form of summary procedure used in claiming liquidated money demand like debt owe by bank customer. The advantage of the procedure is that there may not be any need to call oral evidence and judgment given under the procedure is final, and cannot be set aside except on appeal[13].

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11. See Order 2 Rule 1 of the Kwara State High Court (Civil Procedure) Rules 2005

12. See (i) **Doherty** vs **Doherty** (1968) NMLR 241

(ii) **NBN** vs **Alakija** (1978) 9-10 SC 59

(iii) **UNICAL** vs **Inyang** (1993) 5 NWLR (Pt. 291) 100

13.See (i) Olubusola Stores vs Standard Bank Nigeria Ltd (1975)4 SC 5

(ii) Agromillers Ltd vs CMB (1997) 10 NWLR (Pt 525) 469.

Another procedure which is similar to the undefended list procedure is the default summons procedure, that used to feature in the repealed Lagos State High Civil Procedure Rules 1972. The provision of the said default summons was the subject of consideration by the Supreme Court in the case of **UTC Ltd** vs **Pamotey**[14].

In order to bring out the similarity between the two procedure. Yusuf Ali SAN in a published Article in the Nigerian Bar Journal's stated as follows:

> "From all that have been said so far, it is not difficult to discern areas common to the two procedures and other areas where there are clear distinctions One feature of the two procedures is that they are summary judgment procedures.
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> They are summary judgment because once the defendant fails to fulfill the minimum requirements under the rules, the plaintiff will be entitled to judgment without much ado. The use of affidavit evidence is one obvious similar area of operation of the two procedures.

When one talks of similarities and differences of the two procedures, one can hardly do better than quote in extenso what Nnaemeka-Agu **JSC** said in **UTC** Ltd vs **Pamotei** as to the main features of the undefended list procedure when he stated the position thus:

> "The procedures for the two sets of Rules are different. Under undefended list, an application is made to the court for issue of a writ of summons in respect of a claim to recover a debt or liquidated demand.

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14. (1989) 3 SCNJ 79.

15. Vol 1 No. 2 April. 2003 pg 192.

The application is supported by an affidavit, which is filed along with the writ, and which sets out the grounds of the claim and states that in the deponent's belief, the defendant has no defences to the action. Once the court is satisfied that there are grounds for believing that there is no defence thereto, it shall enter the suit for hearing under undefended list and it will be marked accordingly……

One area that the difference in the two procedures are more noticeable is the legal affect of judgments delivered under each procedure. It is the view of the courts that any judgment entered under the default summons procedure is not a final judgment and can be set aside if the defendant acting timeously and filing a ground defence on merit prays for it to be set aside.

On the other hand a judgment under the undefended list is a final judgment, which can only be set aside on appeal and not by the trial court.

That the above position on the legal effect of a judgment under the undefended list is the correct view, has been judicially affirmed with finality in the case of **Bank of The North Ltd vs Intra Bank S**. **A**. where the court said inter alia:

"We now come to consider the effect of judgment obtained under the undefended list It is clear from the rules (order 3 rules 9-14) that judgment entered under this procedure is a judgment on merit. It is not the same as, and the procedure differs from, judgment entered in default proceedings, as in order XL, rule 5 of the rules.

In the case of Leventis Motors Ltd vs G.C.S Mbonu (1962) NWLR 119. Reed J (as he then was) treated a judgment in an undefended list as a consent judgment although the defendant did not appear and give his consent. He therefore held that judgment so obtained could not be set aside by way of motion.

It can be seen that the procedure by way of the undefended list is less cumbersome than the default summons procedure but it is more advantageous in terms of the finality of the judgment obtained under it."

BANKING LITIGATION FROM 1990-2000

In order to appreciate and under score the new trend and the awareness of customers about their rights, it is necessary to have a look at some banking generated litigations between the period of 1990-2000 Our discussion here is limited to matters that got to the Court of Appeal and the Supreme Court from various High Courts.

It must be noted that the percentage of cases that get to the court of appeal from the decisions of the High Courts on banking matters is less than ten percent of the number of cases that get filed in the high.

For the purposes of this paper, we have limited our research to reported cases in the Nigerian Weekly Law Reports. It is therefore not impossible that the number of cases reported in this particular law report may also be a fraction of all the banking cases handled and decided by the court of appeal and the Supreme Court at the relevant period.

In 1990, there were 5 reported decisions of the court of appeal, but there was no reported decision of the Supreme Court on banking matter for that year There were also 5 reported decisions of the court of appeal on banking matters in 1991 and 1 Supreme Court decision for the same period. What happened in 1992 was a repeat performance of what happened in 1990 There were just 5 reported decision of the court of appeal on banking matters. For the year 1993, there were 10 reported judgments on banking matters delivered by the court of appeal There were 5 reported decisions of the Supreme in 1994 and a court of appeal judgment in the same year.

There were 8 reported cases of the court of appeal on banking matters in 1995 with 1 Supreme Court decision in the same year There were 11 reported court of appeal decision on banking related matters in 1996 and 4 Supreme Court decisions.

In 1997, the Supreme Court delivered 10 judgments in this area of the law and 54 decisions were harvested in the court of appeal. In 1998, the court of appeal had 59 reported cases as against 4 by the Supreme Court. There were 5 Supreme Court decisions in 1999 and 33 court of appeal judgments

Lastly in 2000, there were 77 court of appeal decisions as against 6 by the Supreme Court.

An analysis or over view of the reported cases in the court of appeal and the Supreme Court from the period of 1990-2000 shows that there were greater activities on banking litigation going by the number of reported cases from 1997-2000 One can safely make some assumptions that the trend is likely to be maintained for years following 2000 This up swing in banking related litigations may not be unconnected with awareness on the part of customers and the distress that the banking sector witnessed at the relevant period.

The question may now be asked, as to what is the time of the qestation of a matter commenced before the high court, it has to run it full life circle to the Supreme Court.

TIME OF LITIGATION ON BANKING MATTERS

This is an area where no one can rightly predict the number of months or years it will take to finally dispose of a matter filed on a banking dispute from the time of its filling in the High Court and the time of final resolution at the apex court, if the parties decide to pursue the matter up to that level of our judicial system.

However, if a simple debt matter is filed under the undefended list procedure and the defendant has no defence on the merit to the claim, the matter may be disposed off within 3 months. resolution of a contested bank case at the high court could take between The period of a period of one to four years, more especially if the parties decide to contest every interlocutory ruling in the court of appeal.

In some cases, the parties may even decide to test such interlocutory ruling at the Supreme Court. Examples of such interlocutory decisions are on admissibility of evidence, amendment of pleadings or even issue of adjournment. Part of the contribution to delay in the process is that the aggrieved party who is appealing may decide to ask for stay of proceedings of the substantive case until the conclusion of the appeal on the interlocutory point or issue.

In a matter, in which judgment is given on the merit in the high court, may be after 2 or 3 years of the filling of the action, an appeal to the court of appeal may take a period of between 2 and 5 years, depending on the diligence of the parties in taking all the procedural steps for the hearing of the appeal timeously. A further appeal to the Supreme Court will take another 3 years to be

disposed off, if upon the filling of a notice of appeal the parties take all necessary steps within time.

From the above, one can safely say that from the filling of a banking case at the high court, up to the disposal of the case at supreme court, if there is an appeal, it will take a minimum of 6 years.

COST OF BANKING LITIGATION

Except for government departments, all litigants in court are expected to pay filling fees and failure to pay the required filling fees have been held to deny the court of competence and jurisdiction. Filling fees is the first cost that litigants incur either as a plaintiff or a defendant.

There is also the payment of reimbursables or out of pocket expenses or running cost It addition, there may be the need to pay experts who may be required to give evidence depending on the nature of the proceedings. Finally, there is professional fees payable to counsel handling the matter The size of the professional fees will depend on the combination of on any factors, for example, the complexity of the matter, the quantum of the amount involved in the dispute, length of time for the prosecution of the matter and the status and standing of the counsel handling the matter

It is therefore hard to state in empharical manner what the cost would be for the prosecution of a banking litigation that for example involves the sum of N5M. At this stage, it must be remembered and emphasized that the instruction of a counsel and his professional fees lapse upon conclusion of the instruction in that particular court. Therefore, any instruction to proceed further to a higher court, is a fresh professional agreement with the lawyer, which entitles him to negotiate and demand a fresh professional fees.

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16. See (i) Onwugbufar va Okoye (1996) 1 NWLR (P1. 429) 252 at 292.

(ii) Osazuwa vs Ojo (1999) 13 NIFLR (Pt. 634) 286 at 290.

SUGGESTED REFORMS

It is clear from all the points made on the issue of time and cost of banking litigation above that reform in the judicial system and the banking sector is inevitable in order to generate the confidence of the litigant in their patronage of our court and banking system.

It is with this in view, that underlies the underlisted suggested reforms

1. There is the need to create special division in the various high courts that will specialise and deal with bank related cases. This will promote specialization in our high court system.

2. Intensification of continuing legal education for our judges and lawyers.

3. Closer interaction among stakeholders in the justice system which will also involve bankers and banking institutions.

4. Dynamic and progressive reformation of laws dealing with banking and the rules of court that will enhance speedy determination of banking cases.

5. There must be greater transparency in the way banks do business especially disbursement of loans and overdraft.

6. There should be intensive and continuing training for bankers on the nuances of international trade and commercial transaction.

7. The government at all levels should promptly pay their contractors most of whom rely on bank loans to execute government contracts.

8. Banks should as a matter of duty get external solicitors involved at the level of negotiation of big time loans and the drafting of legal documentation.

9. Banks should explore when entering into agreement with their customers, the invocation of alternative dispute resolution methods.

10. There should be conscious effort made by the banks to eliminate or reduce to the bearest minimum incidence of corruption in the banking sector.

CONCLUSION

We have seen from the above discussion, that litigation is not the only option open to banks in resolving disputes with their customers. The issue of which court to go in the event of litigation was touched upon. We also drew attention to bank related litigation for the period 1990-2000 The time and cost of litigation were also addressed. The uncertainty in the time frame and cost of litigating bank related matters were highlighted.

We have proffered some areas for reformation and it is our hope that if some of the suggestions are implemented, then the problem of time and cost will be greatly addressed.