ISLAMIC UNIVERSITY IN UGANDA

COMPARATIVE LAW JOURNAL

IUIUCLJ

IUIUCLJ. VOL 6, ISSUE 2, 2019

THE PROSPECTS AND TRAVAILS OF BANK LOAN REPAYMENTS: EMERGING TRENDS AND CHALLENGES IN THE NIGERIAN BANKING INDUSTRY

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Abstract
Bank lending in every country of the world has almost become inevitable for the growthof the economy and the sustained stimulation of capital flight whether in a developed or developing economy. The banks and affiliated financial institutions have glaringly held forth in this area not only in Nigeria but is indeed an economic conventional global practice. Perennial challenges that have constantly bedeviled this practice of lending is the ugly incidences of huge debt profiles that are left either unpaid or not paid as at when due. This has in some cases, led to the painful collapse of some of these financial institutions and the economy in general like in Nigeria presently. This study has takena doctrinal and intellectual exposition of many of these challenges, vis-à-vis a holistic examination of some of the legal frameworks establishing these institutions, and a careful review of the operational methodology of the legal system in general. The scopeof this research is partly limited to the various ways some loans or lendings could be assessed against the background of some of the legal and operational handicaps that often go along with such practices and the travails of repayments. Researched findings and accompanying recommendations in view of the challenges identified are equally providedfor in this work.

Introduction

The general concept of banking and lending is as old as mankind itself. The basic structures and intentions have always remained the same with certain modifications and sophistications as a result of emerging revolutionary economic trends.

Policies and commerce during the Stone Age made lending to be re-appraised relying through the means of bunches and guesses. But with the industrial revolution, it became necessary to adopt a more sophisticated approach to replace the hitherto simplistic onesin relation to lending.[1]

From the earliest simplistic trend of lending without requisite regulatory licensing as was the case in the earliest days of man, banking and lending has assumed a multi-dimensional level of global. Regulatory mechanisms have therefore come to bear in

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[1] Alo, V.O., "The Stallion" Publication of Union Bank of Nigeria Plc, Vol. 21, No. 4, Oct/Dec. 1997, pp. 17-23 at p.17

present day banking and lending. The major function of a bank is to serve as a financial intermediary for collecting money from surplus areas (depositors) and distributing it to deficit economic units in the society where it operates.

In an effort to distribute these surplus units, the issue of lending to deserving economic needs within a developing economy becomes inevitable. This is because banks have always played pivotal roles in the economic development of any nation in partnership with its numerous customers. However, in the discharge of its lending roles to the growth of the economy, certain considerations must be skillfully and professionally taken into account.

In the opinions of a learned author:[2]

If a big circle is drawn to represent the extensive term, the economy banking business will certainly be located somewhere in such a circle. Depending on the prejudice, inclination or orientation of the drawer of the hypothetical circle, banking business might be located at the very centre of the circle or in some other area thereof. One thing nevertheless stands out quiteclear, namely the economy would operate successfully but not inisolation from banking business.[3]

In view of the above obvious facts, lending has become a very important element in the strength and growth of any viable bank, if carefully and skillfully managed and implemented by tested professionals in the banking business. However, there is a great need for high skill analysis in every lending by the banks. Some of such considerations and analysis include but not limited to the following:-

(a) credit policy considerations.
(b) collateral.
(c) amount required
(d) purpose of request
(e) repayment plan
(f) character and history of customer
(g) banks position in the event of failure of repayment.
(h) debt monitoring mechanism etc.

The Concept of Loan

The Black's Law Dictionary defines "Loan" as:[4]

[2] Oche, P.N., Banking Law and Practice in Nigeria, (Jos: Heirs Great Commission, 2004) at p. 25

[3] Adeniji, O.A., "The Legal Framework for Banks and Financial Institutions" (1994*) Lawyer's Biannual Journal of Nigerian and Comparative Law*, Vol. 1, No. 2, pp. 48-61 at p. 48.

[4] 9th Edition, West Publishing Co. Texas USA at p. 1021.

"to lend especially money" it is also meant to define a "loan commitment," to mean "a lender's binding promise to a borrower to lend a specified amount of money at a certain interest rate, usually within a specified period and for a specified purpose (such as buying real estate) etc.

From the foregoing, it could be said that "loan" is a form of the provision of finance by the bank to its customers for varied economic purposes which must be paid back at an agreed period of time. Provision of finance is one of the basic elements or characteristics of banking business around the globe. This service is specifically recognized in Nigeria by virtue of section 61 of the BOFI Act, as amended. Sections 18, 20 and 43 of the above legislation equally recognizes one of the elements of banking services to include the provision of finances (loans) through advances, credit facilities, overdraft etc.[5]

In further recognition of "loans" as a major function of banking, Professor Oche also opined that:[6]

every segment of society benefits in one way or the other from the provision of finances (loan) provision of finances which stimulates and generates productivity. This is because some persons need funds which they do not have for the production of goods and services. Others have funds which they need not at least, for the time being. Banks therefore act as intermediaries between these two segments of the society by receiving from the surplus segment and making what is received available to the deficit segment (loan).

In view of what we have discussed earlier on, there are various forms of loans or lending, which a bank can offer its customers. These types of loans could be but not limited to:-

(a) overdraft.
(b) term loans (both short and long term).
(c) documentary credit facility.
(d) performance bond.
(e) customs bond.
(f) guarantees.
(g) syndication and debenture etc.

Before considering each and every one of the above forms of loans, it is pertinent to state that banks generally give out these loans on interest basis. This is because these

[5] BOFI Act LFN, 2004.
[6] Oche, P.N., *op. cit.,* at p. 123.

interests are forms of investments to the banks when such loans are fully paid back. The Court of Appeal in the case of ***Union Bank of Nigeria Ltd v. Prof. Alfred Ojo-Ozigi***[7] held *inter alia* that interest elements and other fees are considerations that follow bank loans or lendings generally. It went further to state that:

A customer may borrow from the bank by way of loan or an overdraft. A loan is a matter of a special agreement. An agreement must be supported by good considerations, that is, to pay interest on it which may be expressed or implied.[8]

The above principle of law was equally applied in the case of *Barclays Bank of Nigeria Ltd v. Abubakar.*[9] Notwithstanding that the law courts and banking practices have allowed the issuance of loans and advances to bank customers, there are however some restrictions on loans and advances from the banks in order to protect the depositors and investors of the banking industry in general. For example under section 120 of the BOFI Act (as amended) a bank shall not without the prior approval in writing of the Central Bank of Nigeria grant:

to any person any advance loan, or credit facility or give any financial guarantee or incur any other liability on behalf of anyperson so that the total value of the advance, loan, credit facility,financial guarantee or any other liability in respect of the person is at any time more than twenty percent of the shareholders fund unimpaired by losses or in the case of Merchant Bank not more than fifty percent of its shareholders fund impaired by losses, and for the purposes of this paragraph all advances, loans or credits facilities extended to any person shall be aggregated and shall include all advances, loans, or credit facilities extended to any subsidiaries or associates of a body corporate.[10]

Types of Loans

Generally, loans are granted by the banks to their customers for which a distinct loan account has to be opened and operated for that purpose. Loans of these nature are normally in the form of permanent credit that is for long, usually for the purposes of providing fix capital for the customers.[11] This method appears to be unpopular now with modern commercial banking which prefers that overdraft method of lending to its customers whereby the customer overdraws his current account, thereby allowing the account to go into debit. With the above scenario, most often, customers have confusedor failed to distinguish between a loan and an overdraft facility.

[7] (1991) 2 NWLR (Pt. 176) p. 677.
[8] See also *Flemming v. Bank of New Zealand* (1990) AC 577 (P.C).
[9] (1970) 10 SC 13.
[10] See also subsection (b) as well as section 20(2)(a)(b)(c) and (f).
[11] Oshio, P.E. et al "Legal Implications of Bank Overdrafts" Jimoh, A.A. (ed.), *Modern Practice Journal of Finance and Investment Law* (Lagos: Learned Publishment Ltd., 2002) pp. 161-182 at p. 172.

The distinction between a loan and an overdraft was considered in the case of ***Bank of the North v. Bernard***[12] by Bakare J. as follows:

my understanding of any overdraft facility is not of a loan in the sum approved which may be withdrawn at once and which is to be debited against the customer's account. Rather, it is a creditfacility to be enjoyed by the customer to the tune of the amount approved as the customer wishes.

In discussing the types of loans available within the Nigerian banking practice, we can therefore consider the following:-

Bank Overdraft

The granting of overdrafts is not an implied term or a "superadded obligation" of the contract between the bank and its customer to grant an overdraft to any customer. In order words, the customer has no legal right to overdraft and refusal by the bank to grant him overdraft is not actionable. This position of the law informed the court's decision in the case of ***Anyansina v. Co-operative Bank Ltd***.[13] The general practice therefore is that each bank authorizes and determines what conditions and terms that isapplicable to any overdraft facility and which must be agreeable to both parties. An overdraft when granted creates a fresh contract, a debt contract between the bank as creditor and the customer as debtor. An implied term of this debt contract is that the debtor will repay the loan on demand or as otherwise expressly agree by the parties.[14] The Court of Appeal applied the above principle of law in the case of ***African Continental Bank Ltd v. Egbunike***,[15] Umezinwa J. in the case of ***Co-operative Bank of Eastern Nigeria Ltd v. Eke***,[16] took a judicial notice about procedures of obtaining bank overdraft as follows:

the normal procedure adopted when a customer makes an application for overdraft facility (is as follows): the applicant fills an application form supplied to him by the bank. He states in the application form the amount of the overdraft he is asking for and securities offered to secure the bank overdraft. The application is then processed and if the bank agrees to the legal department for the preparation of a legal mortgage. Where the application is not granted, the applicant is informed and his title needs returned to him.

In the African Continental Bank Ltd. case, the plaintiff honoured the defendants cheque which was in excess of the credit balance on the latter's account. The defendant later

[12] (1967) 4 CCHCJ; See also Hulsbury's Law of England, 4th edition, Vol. 3, para. 155 at p. 115.
[13] (1994) 5 NWLR (Pt. 347) at p. 742; See also Oshio, P.E., et al *ibid* at p. 84.
[14] Oshio, P.E., et al *op. cit,* at p. 84.
[15] (1988) 4 NWLR (Pt. 88) 350; See also *Adereti & Anor v. A.G. Western Nigeria* (1965) 1 All NLR 254.
[16] (1979) 2 FNRL 190, p. 192.

resisted the claim of the bank insisting that he never applied for overdraft from the bank.It was held that a customer's cheque overdrawing his account amounted to an application for an overdraft. This being the case, the defendant could not escape liability for the overdraft, provided the cheques were genuinely drawn by him and forwarded for clearing. Also in the case of ***Delalu v. Akapo & ACB Ltd***,[17] where the first defendant issued a cheque drawn on the second defendant in excess of the credit balance in his account, and the later honoured the cheque, it was held that this amounted to an implied overdraft which was an unsecured loan by the bank to the first defendant.

There have often been the argument as to whether the taking of an overdraft from a bank is even in breach of instructions amounting to stealing or not?

Overdraft as Stealing?

It must be noted that the overdrawing of an account by a customer *per se,* does not generally amount to a criminal offence of stealing. This was the view of the court in the case of ***Adereti & Anor v. Attorney-General, Western Region***.[18] In the opinion of the court in this case, such an overdraft even if it is against instructions, is merely an acceptance of a loan by such a customer and not an offence of stealing. The above position of the law appears to be in direct conflict with the provisions of the Nigerian Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act (as amended).

Under section 19 of the Failed Banks (Recovery of Debts) and Financial Malpractices Act, there are circumstances whereby the granting of an overdraft or loan facility by a bank official would amount to a criminal offence. These circumstances include among but not limit to:

any director, officer, manager or employee of a bank who:

(a) without adequate security or collateral contrary to the accepted practice or the bank's regulations or

(b) with no security or collateral where security or collateral is normally required in accordance with the bank's regulations or with a defective security or collateral or

(c) grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility which is above his limit as laid down by the law or any regulatory authority or the bank's regulations…is guilty of an offence under this Act.[19]

[17] Oshio, P.E. et al, *op. cit*, see also *Barclays Bank of Nig. Ltd. v. Alhaji Rabin Mahmud* (1976) NNLR 53.
[18] (1967) 1 ALR Comm. 201.
[19] Cap 389 Laws of the Federation of Nigeria, 2004.

"Any other credit facility" as contained under section 19 above includes overdraft facilities. The defunct Failed Bank Tribunal in the Lagos Zone had to consider whether there was an offence committed in the granting of a loan facility in the case of ***Chief Udensi Ifegwu & Ors. v. The Federal Republic of Nigeria.***[20] The Appeal Tribunal in this case held *inter alia* that:

it is sufficient to prove that the manager or officer of the bank granted loan facility of any amount, the manager is guilty except he can prove his authority by producing evidence of the rules and regulations which empower him.[21]

It is submitted that section 19 ppears to be a strict liability provision of the law. The purpose and intent of this legislation appears to intend to arrest a situation whereby a bank officer may conspire with a customer to grant loans to the detriment of the bank and its shareholders which may lead to the collapse of the bank. The later position of the law it is submitted is more holistic in view of recent cases of failed banks and lost of depositors money. The provisions of the Failed Banks (Recovery of Debts) and Financial Malpractices Act has also been criticized by some writers. It is the opinion of J.U.K. Igwe:[22]

the Act abrogates the citizen's constitutional right of access to theregular courts in respect of matters brought or to be brought before the tribunals set up under the Act. The use of "ouster clauses" is a sad development in the history of Nigeria's constitutional law.

With the advent of democracy in Nigeria now, tribunals have been abolished and the 1999 Constitution and other enabling statutes presently govern any issue of overdraft unlike in the past.

In the case of ***Guardian Newspaper Limited & 5 Ors. v. The Attorney-General of the Federation & Inspector-General of Police***,[23] E.O. Ayoola JCA (as he then was) in condemning ouster clauses had this to say:

What gives concern is the exclusion of the jurisdiction of the courtsin cases where rights and interests may directly be affected by the exercise of powers conferred by the relevant statute but no grievance procedure is put in place for seeking protection from theremedy for abuse or wrongful use of such powers in such circumstances. In my view, the ouster clauses must be strictly

[20] (1997) 1 FBTLR 86.

[21] See also *Regina v. Grilipou Loss & Ors* (1953) 20 NLR 114.

[22] *Business-Government Relations in Nigeria 1854-2003 – Policies, Laws and Institutional Framework* (Lagos: Law Development, Research, Publications and Consultancy Ltd., 2000) pp. 663-683.

[23] (1995) 5 NWLR (Pt. 398) p. 703 CA.

construed in a manner consistent with the rule of law for where commitment to rule of law is a policy of state and has always been an operative ideal of society as in this country, it cannot be the intention of the law maker that abuse of power and arbitrariness should be sanctioned or go uncorrected.

Also of note is the provision of section 28 of the Failed Bank Act which states *inter alia* that any other law or enactment which is in consistent with the Act shall be void to the extent of such inconsistency. Even though the Special Appeal Tribunal held in the case of ***Metallo Plastica (Nigeria) Ltd. & 2 Ors. v. Nigeria Deposit Insurance Corporation***,[24] that this provision "is deliberate to enable failed banks recover their debts without hindrance". The above reasoning is respectfully submitted to be misleading, in view of the overriding supremacy of the Constitution of the country which is the *grundnorm*. What is more alarming about the above provision is its exclusion of even the Evidence Act Law.

Overdraft facilities have of recent been issues of critical examination by the apex bank of Nigeria, the Central Bank in view of some ugly discoveries from audited accounts of some of the Commercial Banks in Nigeria. As a result of this mind boggling financial mismanagement in some of these banks, the Federal Government of Nigeria through the Central Bank engaged the services of such regulatory and law enforcement agencies like the Economic and Financial Crime Commission (EFCC), Independent and Corrupt Practices Commission (ICPC), Nigerian Deposit Insurance Company (NDIC), Asset Management Company of Nigeria (AMCON) etc to recover some loan facilities including overdrafts. This action has to some extent given the impression that customers engaging overdraft and loan facilities from banks have indeed committed criminal offences in view of the use of these law enforcement agents in the recovery of these loans and overdraft facilities. The appropriateness or otherwise of this decision would be examined in subsequent subtopics of this research as we read on.

Legal Implication of Bank Overdrafts

That overdraft, is a current account with an agreed lending limit, has been and, for the most part, still is the central feature of bank lending in Nigeria.[25] Overdraft facilities are normally short termed lending which is designed to be for an agreed limited time, and are payable on demand or at a short notice. The question then arises as to what is the difference between an overdraft and a loan? An overdraft is distinct in the sense that it is mostly granted for a short period of time to meet up with specified objectives as may be agreed between the customer and his bankers. It is pertinent to note that the refusal of such facility by the bank to its customer is not actionable per se because there

[24] (1997) 1 FBTLT 171.
[25] Oche, P.N., *op. cit,* p. 48.

is no legal duty imposed on any bank to grant such requests whenever made by a customer.[26] Be it as it may that an overdraft agreement is a specific contract of its own, the bank has the final decision of granting or refusing same as the case may be. An overdraft, when granted creates a fresh contract, a debt contract, between the bank as the creditor and the customer as the debtor. An implied term of this contract is that the debtor will repay the loan on demand or as otherwise expressly agreed by the parties.[27] Granting of an overdraft could also be implied in the course of a business transaction thus entitling the customer to overdraw his current account even without any express agreement to that effect. However it must be noted that in each case of overdraft, there must be a consideration.

The interest elements to be charged to such an overdraft in most cases is an integral form of consideration even if there was no expressed form of agreement. The Nigerian Court of Appeal in the case of ***FAA GOT Instrument Ltd V. National Bank of Nigeria Ltd***,[28] the Court stated the legal position that:

"mere deposit of title deeds with a banker is not a "consideration" for the loan granted or to be granted. It is only a collateral to secure the repayment of the loan, which is aseparate transaction itself. The real "consideration" in a loan or overdraft agreement is the interest which the borrower pays to the bank…"

"Also…merely applying to a bank for a loan or overdraft in whatever amount is neither the offer nor the acceptance. It is only when the bank agrees to give the loan, and sends a letter or loan agreement forms for completion, stating the terms and conditions of the loan that an offer is made. It is when the customer agrees to the terms and signs the forms, that there is an acceptance, and the loan is given. The customer thereupon incurs a liability consideration to pay interest at the agreed rate".

The legal effect of an overdraft granted by a bank to its customer is that the bank lends the customer the surplus amount to his account.[29] The question arises at times, when a bank manager grants an overdraft that is above his authorized schedule? The basic consideration in this aspect is that of the knowledge, by the customer that the said bank manager had no such requisite authorization to grant such overdraft. This could be in a

[26] See *Union Bank of Nigeria Ltd v. Ozigi* (1991) 2 NWLR (Pt. 176) 677.
[27] Oshio, P.E., "Legal Implication of Bank Overdrafts" in Jimoh, A.A (ed.) *Modern Practice Journal of Finance and Investment Law* (Lagos: 2002, Learned Publishments Limited) pp. 83-94 at p. 84; See also *ACB Ltd v. Egbunike* (1988) 4 NWLR (Pt. 88) 350.
[28] (1993) 1 NWLR (Pt. 271) 586; See also Oshio, P.E. *op. cit,* at p. 85.
[29] Oshio, P.E., *op. cit.,* at p. 85.

case where all formalities relating to the overdraft had been concluded perhaps from the Head Office to the knowledge of both the customer and the branch manager, whereby the manager over authorizes such an overdraft. The bank in this instance cannot be liable if it refuses to pay the customer the unauthorized amount even if it is standing to his credit in his account upon the presentation of a cheque to withdraw. However, the situation may be different if both the customer and the branch manager had no fore knowledge of such non authorization.

This principle could be applicable to the maxim of delegation of duties, that is to say, that a servant cannot delegate to himself what his master did not delegate him to do. Thus in the case of ***B. Visioni Ltd V. National Bank Of Nig Ltd***,[30] the branch manager without due authorization from the Headquarters of the defendant bank, exceeded his limit of credit facility authorization to the plaintiff through an overdraft facility which was to the fore knowledge of the Managing Director of the plaintiff. The Court have held that the excess amount of money granted to the plaintiff without due authorization was not binding on the bank to pay the plaintiff. The Court held *inter alia* that:

"the salient question now is: Is the defendant bound by the act of their manager? The general principle of common law is that a master is liable for a contract entered into on his behalf by his servant if the servant had expressed, apparent or implied authority of the master to enter into such contract. Where the servant has no authority and the other contracting party is aware of that, then thecontract is not binding on the master"

The position of the law however is different where the customer is not aware of the lackof authorization on the part of the official of the bank. This was the position of the Courtin the case of ***Uzuegbu V. Progress Bank (Nig) Ltd***.[31] But situations abound whereby a customer draws a cheque on his account, which unknown to him happens to be in debit and the bank erroneously pays him. In this context such a transaction could be taken to be an implied overdraft more so when such amount is within the authorizing power of the bank official approving such payment. However, some writers have implied elements of crime in this type of transaction. The issue of crime, would not arise where the customer is truly unaware of his indebtedness, which in fact vitiates any accompanying *mens rea* on his part. The bank official could be said to have given the customer an implied overdraft even though negligently, which in effect the customer must pay back. Another common thing with overdraft and loan, is the clauses with most commercial banks. In Nigeria, there are over sweeping clauses contained in the customer's application to open accounts, and the clauses withingly are applied to the

[30] (1974) 4 UILR 437.
[31] (1988) 4 NWLR (Pt. 87) 253.

customer's and are included to make them liable even when there is a negligent conduct on the part of the bank itself.

This position of the law may appear on the face of it to have settled this controversy. But a further look at the scenario would in fact agitate more discoveries. This is because many cases abound whereby depositors' funds are criminally converted with the clear connivance of both customers and bank officials. The knowledge element as a requirement and the magnitude of the amount involved may further distinguish a clear criminal case from a mere banking liability as the case may be.

Overdraft and Payment of Interest Elements therein

Interest elements have always followed in most instances of bank overdraft even when such interest elements have not expressly been agreed upon by the parties involved. The question then arises as to whether any interest element should be paid by a customer over an overdraft where perhaps there was no expressed agreement *abinitio* to that effect. This issue was considered in the case of ***Agba Biaka V. FBN Plc***[32] where the Court held *inter alia* that:

"a bank does not give overdraft/loans free of charge, in fact interest charges is the main source of a bank's income. Generally speaking, interest is not payable or recoverable at common law on ordinary debt in the absence of a contract, expressed or implied, or some mercantile usage or provision by statute. Consequently, pre-interest must be claimed in the writ and statement of claim before it can be granted by the court".

It is trite therefore that once there is a clear evidence to show that there was an overdraft or loan that was granted to the customer, interest elements when claimed and pleaded in the writ of summons become a matter that must go along with the main overdraft or loan facilities when payment is being sought. In some cases, a period within which such overdraft and interest elements are to be paid back are specified and known to all parties involved. But there are instances whereby a specified period of time is not generally agreed upon, and in such cases, the payment for the overdraft or loan becomes payable on demand by the bank. So in the absence of any such expressed agreement, the law would imply an agreement between the parties that the overdraft and the interest element is payable on demand except it can be proved otherwise by any of the parties involved in the transaction.

One cardinal issue is that when there is an expressed agreement as to the interest element to be applied to any of such overdraft or loan, the bank cannot on its own volition change same without informing the customer involved.[33] If there is such notice

[32] (2007) 6 NWLR (Pt. 1029) 25 CA; See also *FBN Plc v. Excel Plastic Industries Ltd*. (2003) 13 NWLR (Pt. 837) 412.

[33] *Ogunlade v. F.M.B Nig. Ltd & Ors* (2007) 2 NWLR (Pt. 1017) 16 CA.

of interest variation by the bank to the customer within the agreed stipulated time, sucha customer is duty bone to pay the overdraft and the reviewed interest elements therein.The Court of Appeal in the case of ***Union Bank Of Nigeria Plc V. Ifeoluwa Nigeria Ltd***,[34] further held that where the bank like in the instance example is relying on a particular Central Bank of Nigeria guideline and policy, for such reviewed interest elements, such guideline must be proved and attached in evidence before the court canallow the bank to charge such interest element. The court in the above case posited that:

"The Central Bank of Nigeria from time to time prepares a list of charges, guidelines and policies pursuant to powers vested on it by section 15 of the Banking Act. These policy documents are commonly referred to in the banking community as "Central BankGuidelines". They are not subsidiary legislation and do not fall into the class of documents the courts must take judicial notice of.Any Central Bank Guideline relied upon, must therefore be provedin evidence by producing same in court".

The Nigeria Court of Appeal also in the case of ***Olademo V. Lagos Building Investment Co. Ltd***,[35] applied the above principle of law when it stated that it is the right of banks and money lenders to recover accumulated interest charges on debts, that:

"money lenders and banking institutions have the right to recover their accumulated interest charges as part of the debt due to them by debtors/customers, such interest rates must be publicly displayed to their customers and when the need arises, it must be proved strictly. In the instance case, the plaintiff failed to prove the total indebtedness of the defendant and the interestrate thereon, the trial court therefore erred by granting the plaintiff's claim".

Recovery of Overdraft/Loans and Limitation of Actions

Most overdraft or loan facilities are granted to be repaid back after some agreed and specified period of time by both the customer and the bank. In most cases where legal mortgages are involved, such specified periods and conditions precedent before any action for the recovery of such overdraft or loans are specifically expressed and agreed upon by both parties.

The position of the law is that no recovery of such overdraft or loan can be effected or brought to court, outside the specified period agreed upon by the parties. But one

[34] (2007) 6 NWLR (Pt. 1029) 25 CA.

question that deserves some explanation also is as to whether such recovery could be made outside the period specified in the agreement. The answer to this is in the negative.

In the case of ***A.C.B. Plc V. N.T.S. Nigeria Ltd***,[36] the court in considering the effect of the commencement of actions after a limitation period had this to say:

"Where a statute provides for the commencement of an action within a given time or period, no proceedings can be commenced after the period prescribed by the statute has elapsed. Thus any action instituted after the period is statute-barred and the right of the plaintiff to commence the action is said to be extinguished by the operation of law."

This position of the law needs to be further re-examined in view of contemporary overdraft and loan recovery cases where certain lending though unauthorized, but are given out sometimes with the connivance of bank officials. At times colossal sums of depositors' money are criminally converted to personal uses. A bank official who may be involved in any of the above scenario is likely to delay recovery processes that are expected from the bank, because he is in view, and knows that if any recovery effort is made in court, it would be statute-barred to his personal gain, and that of the customerhe may be convincing with. In further affirmation of the need to comply with necessarypre-conditions, before an action can be brought to court when there is a need for that, the Supreme Court of Nigeria in the case of ***Dingyadi V. INEC***,[37] stated that:

"where a condition for initiating a legal process is laid down, any suit instituted in contravention of the pre-condition provision is incompetent and a court of law lacks jurisdiction to entertain the same."

A court of law in this circumstance cannot enlarge such a tie to give itself jurisdiction where such an action is statute-barred. When a defendant contends that the action of the plaintiff is statute-barred, he is raising an issue of jurisdiction of the court concerned on points of law because where an action is found to be statute-barred, it means that thecourt has no jurisdiction to entertain it however meritorious the case may be. The success of that point of law takes away the right of action from the plaintiff leaving him with an empty un enforceable[38] cause of action perhaps where there is glaring evidence that the bank cannot recover such loan and any of its staff appear to be equally involved, such a bank may resort to criminal proceeding to recover same as "criminalized lendingor loan".

[36] (2007) 1 NWLR (Pt. 1016) CA.

[37] (2011) All FWLR (Pt. 581) at p. 1426.

There are provisions for example under the Companies and Allied Matters Act when a fixed charge can be realizable when such properties or security of the debtor is in jeopardy.[39] Generally, the holder of a fixed charge, according to section 208(1) CAMA may realize any security vested in him, or in any other person for his benefit in the following instances:

(a) When the charger fails to pay any sum outstanding (be it interest, principal or other agreed sum) within a month after it becomes due.
(b) When the charger fails to fulfill any obligation imposed on it by the security instrument.
(c) When circumstances occur which by the forms of the security instrument, entitle the security holder to release his security and
(d) When the company is wound up.[40]

In line with the above old principle, the Court of Appeal also reiterated same byUwaifo JCA (as he then was) where he stated that:

"It is plain from sections 166, 180 and 197(1) of the Act that the security or property of a company can be in jeopardy in certain circumstances. These are where any of the charges duly registered…if not so registered is void. But there is the result…that the money thereby secured shall immediately become payable…if not paid, the consequences are that grounds present themselves for the court to make an order appointing a receiver and manager under section 389(1)".[41]

Syndication and debentures

This is a situation whereby different banks (as lenders) agree to borrow or lend money individually to one particular borrower which normally is done through a syndicate lender. Where this is agreed upon, a lender individually agrees upon the terms and conditions of such a lending which may not necessarily be the same with the other sister lending banks. In this situation, such a lender deals with the borrower through an agreed and specified agent bank, a trustee or both as the case may be. Typically, a syndicated facility is covered by one trust deed, or agreement, whether or not the terms on which the loans are given differ from lender to lender.[42]

But this position is not obtainable in Nigeria as a result of the provisions of section 183(2) of the Companies and Allied Matters Act which provides that:

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[39] CAMA as amended section 389(1)(b); see also *FASAKIN v. FASAKIN* (1994) 4 NWLR (Pt. 340) at 597.
[40] Ajayi, O., "Lending and Security: Bull in the China Shop: A Commonwealth Charge and the Common Law" in Jimoh A., (ed.). *ibid.*
[41] See Ajayi, O., *ibid,* at p. 19.
[42] Cap C20 1990 as amended.

"no debenture trust deed shall cover more than one class of debenture, whether or not the trust deed is required by this section to be executed".[43]

Furthermore, there are similar provisions of CAMA which relate to creation of debenture whereby its classification, rights arising therein, and the corresponding powers of the trustees, and other accompanying contentious issues are normally associated with such creations.[44] It has rightly been argued that where lenders' rights are dissimilar in a syndication, whether secured or not, it should at the very worst be possible for the lending to be evidenced by a simple syndicated loan agreement (as opposed to a debenture) which in turn will be secured under a debenture trust deed. In this way it is the loan agreement that will spell out the different rights of the lenders, while the debenture (trust) deed will be silent on these.[45]

One common feature that have been adopted by lenders, under this form of borrowingis, the mechanism of ensuring that there is a greater control of the securities provided for in these lendings by the different banks, used in further securing and controlling their interests in a syndicated debenture, by the creation of what is technically called a"charge back". A charge back is an assignment whereby the creditor transfers, or creates some interest in a particular debt to be further secured in terms of the realization of thedebt in question at a future date. The concept of the charge back is in effect similar to that of a set-off in a civil suit. Unlike set-off, however where a party sets-off the claimowed to him against the claim he owes, the charge-back would involve the transfer of an interest.

In the charge-back, the borrower transfers an interest in the debt he is owed to his creditor by way of security thereby transferring, or creating a proprietary interest in the debt.[46] The concept of charge-back has also created some divergent legal opinions within different jurisdictions as to its applicability and sundry arguments. However, this concept has been in practice within the Nigerian domain even though there are no strict available statutory or judicial provisions to its existence. Charge-back therefore has become a matter of practice and convenience in the Nigerian banking sector today.

Corporate insolvency and the Role of Economic and Financial Agencies in Debt Recovery in Nigeria

The essence of security is realization, and it cannot be controverted that the most usual rationale for the taking of security is to maximize a creditor's prospects of recovery in the event of the debtor's insolvency. Realization therefore is about how a creditor may enforce his security rights and recoup his advance to the debtor depending on the kind

[43] See also Ajayi, O., *ibid,* at p. 47.
[44] e.g. section 176(1), section 183(2), section 183(6), section 177 etc.
[45] Ajayi, O., *ibid,* at p. 49.
[46] Ajayi, O., *ibid,* at p. 50.

of security granted. [47]There is no doubt that the high rate or incidences of corporate insolvency caused or occasioned by loan default by corporate customers is of great concern to lending institutions and the Nigerian Government today. Recently some operating banks have been forced by the Central of Nigeria (CBN) to categorize certain percentages of their loan portfolios as non-performing or criticized assets. Besides, corporate insolvency has adverse impact on any company's shareholders, creditors, employees and the security as a whole with an overall adverse economic consequenceon the entire citizenry.[48] It got to the extent that the CBN had to use what some refer toas the "name-and-shame tactics" of publishing the names of some biggest Nigerian financial sector debtors which surprisingly included some "movers and shatters" of the Nigerian economy. Unlike in the past when it stopped at the point of making the names public, the apex bank announced the extra-ordinary measures of shutting them out of further credit facilities, with the veiled threat of handing them over to the law enforcement agents in the event of their continued neglect to fulfill their repayment obligations to their bankers.

This action created some legal ripples in some quarters as some people were turn between a tendency to criminalize legitimate debts or borrowing which is an entirely civil obligation and debt recovery or payment as an albatross to a decaying financial system. While it is true that the processes and procedures of bank lending have grossly been abused with a lot of attendant frauds, cloned documentations, and sundry impediments, it could also be argued that there equally exist some genuine and lawful lendings within the banking system as it obtains today. Unfortunately, in the circumstance in which the banking sector found itself saddled with a staggering toxic loan portfolio of N3.4trillion,[49] it is then glaring that the use of some agencies like the Asset Management Corporation of Nigeria (AMCON), the Economic and Financial Crimes Commission (EFCC), the Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Nigerian Deposit Insurance Corporation (NDIC), among others in recovering some of these debts where they fall within the ambit of the law needs not be overemphasized.

A company can be said to be unable to pay its debts (including loans) and deemed insolvent under section 409 of the CAMA where:

(a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding ₦2000 when due, has served on the company, by leaving at its registered office, or head office, a demand under his hand, requiring the company to pay the sum

[47] Ajayi, O., ""Lending and Security: Bull in the China Shop: A Commonwealth Charge and the Common Law" in Jimoh A.A., (ed.). *Modern Practice Journal of Finance and Investment* Law (Lagos: Learned Publishments Limited, 1999) pp. 1-45 at p. 1.

[48] Okoli, H.S.N., "Corporate Insolvency – Options, and Strategies for Lending Institutions" in Jimoh A.A., (ed.). *Modern Practice Journal of Finance and Investment* Law (Lagos: Learned Publishments Limited, 1998) Vol. 2, No. 1 pp. 55- 65 at p. 55.

[49] *The Nation Newspaper,* October 2, 2012, p. 19 Published by Vintage Press Limited 27B Fatai Atere Road, Matori, Lagos Nigeria, e-mail: thenationonlineng.net.

due and the company, for three weeks thereafter neglected to pay, the sum or to secureor to compound for it, to the reasonable satisfaction of the creditor or by

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company, is returned unsatisfied in whole or in part or when

(c) the court, after taking into account any contingent or prospective liability of the company, is satisfied that the company is unable to pay its debts.

In summary, a registered company under CAMA shall be deemed to be insolvent thus unable to pay its debts if:-

(a) any creditor who the company owes any other in excess of ₦2000 has served that company a letter of demand in respect of such payment and the company neglected or refused to pay such amount (debt) within a period of three weeks. In the construction of the three weeks period, the very date of such a demand is not included, and so it must be three clear weeks after the date of such a demand,[50] or

(b) if it is proved to the satisfaction of the court that the company cannot pay its debts. The court may be satisfied by any evidence that it deems sufficient in this respect.

Having considered the basic conditions under which a registered company can be deemed to have gone insolvent, it is pertinent to note also that the circumstances under which a registered company under CAMA would be said to have gone insolvent differs substantially with that of an unregistered company under the same Act. Unregistered companies in this regard according to section 650(1) of the Act, include any partnership association or company provided that it is not

(a) an existing registered company under CAMA and

(b) a partnership, association or company which consists of less than eight members and is not foreign partnership, association or company.[51]

The indebtedness of both registered and unregistered companies cannot be discussed without taking a holistic examination of the involvement it registered members. Pursuant to section 92(1) of CAMA.[52] Prior to the winding up of a company, a memberof the company with shares shall be liable to contribute the balance, if any, of the amount payable in respect of the shares held by him in accordance with the terms of theagreement under which the shares were issued or in accordance with a call validly made by the company pursuant to its articles.

[50] Re-Lympne Inv. Ltd (1872/2 AER 385 at 389 (per Megarry J.L) the expression “three weeks” means three clear weeks from the date of the demand i.e. date of such demand is excluded. Note also that this section 409 deals with debts that are due and payable and not debts that are not yet due nor payable.

[51] Okoli, H.S.N., *ibid,* at p. 57.

[52] 2004.

From the foregoing it is trite that the financial liabilities of the company even in loan repayments follows individual members of the company even if their shares have been transferred or forfeited under a provision to that effect in the articles, but such liabilities shall cease when such a company shall have received payment in full of such money in respect of its shares.[53]

Many of the challenges confronting some banks in Nigeria in respect of debt or loan recovery is as a result of the failure to measure to what extent such companies have been financed by debts from external sources other than by shareholders equity and the retained earnings of such companies. Many borrowing banks hardly make adequate borrowing arrangements both with the bank and other lenders before analyzing the financial statements of both historical and projected lendings to some customers. In this context, the company's plan for the future both in resolving the weaknesses identified in the borrowing bank's analysis which on the whole goes to deform issues like the cashflow and other projections in support of future plans in order to assess such customer'srequest and the repayment programmes proposed by such borrowers. While a lot of weight is placed on the initial appraisal of a lending proposal, its limitations as a spot one-time assessment should not be over looked in order to arrest a high ratio of bad anddoubtful debts to the banks which presently threatens many financial institutions in Nigeria.

Although it is the intention of credit analysts to make only good loans, it is inevitable for occasional oversights to occur. Of special mention is a great effect that a favourable and conducive economic environment would have on the ability of the borrower to payor meet up with his obligations. For example, in periods of prosperity, borrowers perform well since incomes are relatively high but in periods of recession, the ability and willingness to pay are greatly reduced which invariably affects the repaying capacities of most borrowers. The degree of impact on both individuals and businessesthat reduce their ability to repay obligations depend also on the seriousness of the recession and its duration. As the recession deepens consumer purchases decline whichreduces the sales and level of the income of many business firms.

The willingness to pay back loans vary from different borrowers coupled with the prevailing economic fortunes of the country as at the time in question. Economic depressions, periods of unemployment and declining profits equally contribute to non-payment of bank loans as at when due. The complex that the lenders (banks) are shylocks seeking their pound of flesh develops during hard times and it is during such periods that the lenders in the eyes of some borrowers take on the look of a villain.[54] Some of the symptoms of bad loan to the banks from borrowers could be indicated as:-

[53] Subsection (2).
[54] Alo, V.O. *op. cit.,* p. 21.

(a) Irregular behaviour of customer leading to evasive answers.
(b) Change in auditors of such companies.
(c) Material qualification of auditors.
(d) Reluctance of the companies for the bank to meet with its auditors.
(e) Departure from normal business to new untried lives.
(f) Delay in submission of financial statements of the company.
(g) Difficulty in obtaining stock on normal terms.
(h) Utilizing short term facilities to meet long term needs.
(i) Violation of terms of loan agreements.
(j) Adverse economic conditions.
(k) Plans for constant excesses in facilities and inability to bring excesses within approved limits.
(l) Withdrawals against uncleared effect.

Handling Problem Loans and Repayments

In handling problem loans and repayment, commercial banks have two broad decisionsto take or embark upon in any meaningful realization of their borrowed funds. These two determinant choices are either to settle for a "work out" or "liquidation". It is worthy of note here to observe that each of these choices has its own consequences and the accompanying alternatives therein.

Work Out

This envisages a situation whereby the bank would set a machinery in motion with a view to practically working with such borrowers or debtors on an effective methodology of ensuring that such debts are paid fully or substantially deemed to have been paid without any resort to legal procedures and technicalities. Under the practice and procedure, the ill-feeling of public exposure of the matter is curtailed, through mental confidentiality and this boosts the moral and efforts of the borrower in making added efforts with a view to liquidating the outstanding amount. Liquidation here means subpartly "forcing" borrowers to comply with the terms of the loan contract without necessarily employing or exhausting any existing or implied legal process thatcould have been resorted to had it been resolved their arbitration or litigation as the casewould have been. In using this method of recovery, it is necessary to fully investigate and establish the borrower's honestly, integrity, general attitude towards debts repayments as well as the financial strength of such a borrower as at the time of commencing this procedure.

The time factor in such negotiation is equally necessary and the value of such borrowerto the bank and the risk of loosing such borrower through avoidable methods. But in awork out such settlement is only binding on its acceptance by the parties involved.

Liquidation

Under the methodology of liquidation, a more drastic legal method is used whereby the borrower is compelled under the enabling contract agreement and laws governing such lendings to liquidate the entire sum claimed and in some cases including all the interest elements even after there is a judicial pronouncement to such effect. Amounts to be paid including all outstanding debts may also include the cost of such litigation if thereis a court order to that effect by a court of competent jurisdiction as the case may be. Other interest elements as well as some solicitor's charges have in some cases been included in some of these instances.[55] There are numerous instances where recovery ofbank loans had to end in the law courts. Some of the processes of enforcement of such court decisions include but not limited to, garnish proceedings, outright auction sale of moveable and immovable assets and properties, attachment of judgment debtor's properties etc. All these procedures are in furtherance of the total liquidation of the debts owned the banks in every given case.

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[55] *Union Bank of Nigeria Plc v. Ifeoluwa Nigeria Enterprises Ltd., op. cit.*

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be overlooked in order to arrest a high ratio of bad and doubtful debts to the banks which presently threatens many financial institutions in Nigeria.

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Conclusion

Recent developments and statistics in many financial institutions in Nigeria indicated that there are very large debt profiles militating against the healthy growth of these institutions. The above scenario did not just happen over night but rather through a gradual accumulation of series of indebtedness to the financial institutions. Many

[58] *Union Bank of Nigeria Plc v. Ifeoluwa Nigeria Enterprises Ltd, op. cit.*

financial institutions have thrown away traditional prudential guidelines to lending within the banking sector. Realizing the importance of lending to the strength of a bankand in fulfillment of its social economic roles in both, developing and developed economies, a skilled and careful handling of the granting and approval of loans to deserving customers need not be overemphasized. Since the prime skill of a banker is that of lending from the surplus areas to the deficit economic units, it is observed that in the process of fulfilling this role, many banks have found themselves saddled with large debt profiles which to some extent has either liquidated them or seriously threatening their entire existence and expected economic roles in the society.

Many banks through porous and fraudulent lending have left many of the shareholders in serious financial distress as well as the economy in great jeopardy. Since the primarysecurity in lending is the undertaking by the borrower to the lender to pay back his indebtedness as at when due is any tangible collateral security offered, in this regard itis only an add-on meant to comfort such lenders and many at times such collaterals donot fully off set such indebtedness as some cases have shown. The challenges of large bank debts appear to be deferring both policy related regulations and in-built legal mechanisms. Even the adoption of the infamous Failed Banks (Recovery of Debts) Tribunals before the present democratic dispensation did not achieved the desired results even in the face of a specialized legislation for bank debt recoveries.

In view of this ugly trend that has bedeviled the banking sector, it is suggested that these among several other measures should be taken to either arrest or put to the barestminimum these incidences of huge bank debts and the serious issues of recovery.

(a) There is urgent need for greater and proper counseling on bank personnel on the viability of certain loan projects before the granting of any loan.
(b) After a careful analysis of the financial portfolio of some of these borrowers, the bank may advise that some firms should merge together with another firmin the case of corporation or in the case of a sole proprietorship partnership maybe suggested.
(c) Obtaining additional collateral or guarantees as the case may be.
(d) There could not be cases of debt restructuring i.e. lengthening its maturity andreducing monthly repayment or even granting moratorium on principal repayments.
(e) Increasing the loan – Though normally banks are reluctant to grant additional loans, it can be done if all the conditions made by the bank have been met andit is clear and certain that the firm can be placed on the road to total recovery of all the debts mostly when such additional loans would be the required pushfor the firm to come out of the deadwood zone.