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EDITOR'S NOTE

Welcome to the 2nd Edition of FC E-News. We thank our colleagues and clients who have complimented and encouraged us on this initiative. We assure you all that we shall "keep it up".

This volume of the Newsletter features mainly 'food for thought' touching on Nigerian Criminal Jurisprudence, Civil Procedure and Corporate Governance. It is hoped that this discuss will spur Practitioners towards advancing more innovative ways of tackling and resolving industry challenges.

Any reactions or enquiries regarding any content of this E-News may be addressed to the Editor.

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DANA AIR CRASH: A CASE FOR CORPORATE CRIMINALITY

By Tyorumun Joel Gaadi

This article takes a closer look at the current state of Nigerian law with regards to the issue of holding corporate organisations criminally liable for negligent or reckless acts and omissions in the conduct of their businesses. It focuses on civil recompense in the event of tragedies such as the unfortunate crash of the Dana aircraft in Lagos. Without prejudice to the on-going investigations into the incident, it addresses the gravity of the consequences of negligence, management, systemic failures, and recklessness of corporations.

The recent crash of Dana Air flight *9J 992* from Abuja to Lagos on June 3rd, 2012, killing all 153 passengers on board and an unspecified number of persons on the ground has brought to the fore, the moot issue of corporate criminality for reckless or negligent acts and omissions. Nigerian criminal jurisprudence recognises the offence of involuntary manslaughter which may result from an unlawful act (constructive) manslaughter, or gross negligence manslaughter which results from a breach of a duty of care. Criminal liability for the former involves an unlawful act in itself which results in death, while liability for the latter arises where the defendant's conduct though lawful, is carried out in such a way that it is regarded as grossly negligent and therefore a crime. It is this second aspect of involuntary manslaughter that companies are often liable for, that raises concerns.

In circumstances where a company's conduct could be regarded as grossly negligent and therefore a crime, the present law in Nigeria requires the invocation of the provisions of the general criminal law so as to prove either the offence of manslaughter(under the Criminal Procedure Act) or homicide (under the Criminal Procedure Code).

However, corporate criminal liability intersects both company law and criminal law, and problems have traditionally arisen in imposing liability on an artificial legal construct such as a company. Mainly, the challenge is that legal concepts such as *actus reus*, *mens rea* and causation, designed with natural actors in mind, do not easily lend themselves to inanimate entities such as companies. Under the current law therefore, the task for the prosecution pursuing a possible charge of corporate manslaughter or homicide is twofold: they must prove the *actus reus* of gross negligence on the part of the business, second, and more challenging, they must prove *mens rea*, and in this regard, they must show that the act of an individual or group of individuals is attributable to the business, for the latter to be held criminally responsible. These burdens are difficult to discharge.

The Law in some jurisdictions has since moved towards finding a solution to these challenges. Parliament in the UK has hastened to enact a stand-alone offence under the Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007 which is aimed at holding companies and businesses liable for gross negligence manslaughter.
The UK CMCHA 2007 seeks to provide for the prosecution of companies and other organisations where there has been a gross failure, throughout the organisation especially in the management of health and safety with fatal consequences. An organisation whose gross negligence leads to death will face criminal prosecution for manslaughter. In particular, this law enacts an offence where an organisation by the way in which its activities are managed or organised either (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

A brilliant novelty of the CMCHA is the introduction of the 'Senior Management Test' as a rule of attribution under the Act. Under this model, an organisation is guilty of an offence if the way in which its activities are managed or organised by its senior management is reckless or negligent as defined under the Act. This approach ameliorates the burden of ascertaining the guilty mind of a corporate body and, it is humbly submitted, will go a long way in promoting a culture of self-regulation, and corporate social responsibility in respect of systems and operational safety.
It is therefore noteworthy that criminal manslaughter charges are being considered against Air France officials in relation to the crash of Airbus 330 in 2009 killing 228 persons.

It is perhaps time to introduce corporate criminal responsibility into the Nigerian criminal jurisprudence following such tragic events, as the Bellview Air crash in October 2005, the Sosoliso Air crash of December 2005, the ADC Air crash of October 2006, and most recently, the Dana Air crash on 3rd June, 2012 all of which seriously question the corporate integrity of the aviation sector.

It is desirable to create a framework where legal entities, their sponsors and controlling agents are held accountable for, recklessness and negligence in the conduct of their businesses.

CHALLENGES OF CORPORATE GOVERNANCE

By Oluwakemi Okunowo

This article seeks to critically evaluate directors' fiduciary duties in the light of the rather lamentable developments in the Banking sector in Nigeria and internationally.

Good corporate governance appears to be facing a crisis the world over. Stakeholders and regulatory bodies have incessantly had cause to question the role of directors and due observance of the rules of corporate governance.

In 2009, the Central Bank of Nigeria (CBN) probed the activities of Nigerian banks to ascertain their level of compliance with banking regulations and good corporate governance. This led to the indictment of the Chief Executive Officers/Managing Directors of some banks on alleged incidences of negligence, reckless granting of credit facilities and mismanagement of company funds. Some of the affected banks were Intercontinental Bank Plc, Oceanic Bank Plc, and Union Bank Nig Plc.

The former Managing Director of one of these banks has pleaded guilty before the Federal High Court to charges by the Economic and Financial Crimes Commission (EFCC) of granting credit facilities of USD 20 million above credit approval limit to a company, reckless approval of a N2 billion credit facility to another company without adequate security as laid down in the Bank's regulations and failure to ensure the accuracy of the Bank's returns filed with CBN.

The Court imposed a term of imprisonment and also ordered forfeiture of about 199 assets, mostly real property. This was a clear case of breach of fiduciary duty to act in the Bank's corporate best interest.

Advancing credit facilities without the requisite due diligence no doubt put the bank and its shareholders in a precarious situation.

Needless to say, breach of directors' fiduciary duties is not peculiar to Nigerian banks. The International community awoke recently to the news of the "interest rate-fixing" scandal involving Barclays Bank. Although the details are still emerging and events unfolding, it is noteworthy that the Chairman and Chief Executive having "accepted responsibility" for the scandal have resigned. It is important to mention that Barclays Bank is highly regarded and as recently as July 2, 2012, it was rated as the 15th largest bank in the world, Britain's second most profitable bank, and the 18th most profitable in the world in the Banker magazine.

The bank admitted that some of its trading desks deliberately under-reported its LIBOR interest rates. It was alleged that Barclays and other banks inflated and under reported the lending rate so as to increase profitability and promote financial stability in light of the prevailing economic depression and harsh global economic realities.
The bank was fined over $450 million by British and American regulators for rate-fixing while seven other banks including Deutsche Bank, Citigroup and JPMorgan Chase are said to be under investigation for the same malpractice.

It could be argued that the directors in the Barclay's case were acting in the interest of the company to enhance profitability given the global economic distress. Clearly, whatever gains their conduct attracted to the bank pale in light of the fine imposed on them. On the other hand, it may be argued that the directors were not motivated by the best interests of the bank but by their desire to keep their jobs and get handsome bonuses for making profit for the bank. These developments underscore the need for accountability and transparency in the discharge of directors' duties.

It is rather curious that whilst the global Banking industry was still grappling with the interest rate-fixing scandal, the unfolding HSBC money laundering saga compounds the situation. It was reported that HSBC facilitated the movement of illicit funds from various countries such as Mexico, Iran, the Cayman Islands and Syria. Though investigations are still ongoing, HSBC's Head of Compliance Division, David Bagley has resigned his appointment.

The pertinent question is whether the regulatory agencies were aware of the major lapses in the banking industry and approved of them or whether the banks single handedly

violated the rules of corporate governance so as to survive the global financial distress.

In Nigeria the Code of Corporate Governance for Banks and other Financial Institutions was introduced in 2003 to stem the abuse of directors' fiduciary duties. The Code stipulates that directors should avoid conflict of interests, maintain the integrity of the institution's accounting and financial reporting system. It also provides that they uphold ethical standards, ensure compliance with applicable laws and exercise a high degree of accountability to shareholders and stakeholders.

Conclusion

Regrettably, recent developments in the banking industry in Nigeria and internationally point to an almost total disregard for sound corporate governance.

Primarily, the success of every company lies in the hands of Management and its Board of directors. It is therefore imperative that at all times, directors' should appreciate the enormity of the trust and responsibilities they have undertaken. Such duties must be carried out with utmost good faith, diligence and honesty which must not be sacrificed at the altar of personal interests.

REVISITING THE CONCEPT OF '*DE NOVO*': FERIKSON SURA & CO. (NIG.) LTD & ANOR V. DANISH CAR CARRIERS & ANOR SUIT NO. FHC/L/CS/135/03 & APPEAL NO. CA/L/922M/2008

By Kashimana Tsumba

This article reassesses the mode of handling part heard matters where the Judge has been transferred, retires, or is deceased.

Ferikson Sura .v. Danish Car Carriers was a Court of Appeal decision touching on the issue of *de novo*. This was a cargo claim in which the Plaintiffs sued the Carrier for two undelivered cars which had apparently been loaded by the Shipper in Germany. The trial Judge after hearing evidence of the two witnesses and taking written addresses of Counsel went on retirement without delivering Judgment in the suit. The matter was transferred to another Judge who invited Counsel to re-adopt their written addresses and thereafter delivered Judgment in favour of the Plaintiffs.

The Defendants appealed. On appeal the Defendants contended that the learned trial Judge had erred in law by continuing and concluding a suit

that had already been part heard by a retired Judge. The Court of Appeal held that the case should be remitted to the trial Court for retrial by a different Judge. The reason as stated by the Court of Appeal was that it was wrong for another Judge other than the trial Judge who heard the evidence to deliver Judgment in the Suit. The suit ought to have been commenced *de novo*. The trial and appeal in the suit took nine years. This case is now awaiting retrial at the Federal High Court.

The Latin term *de novo* means to start ''afresh''. The Federal High Court (Civil procedure) Rules and the various State High Court Civil Procedure rules across the Federation provide for instances where the Courts must hear a matter afresh.

Order 49 Rules 4 of the Federal High Court (Civil procedure) Rules state that: *"Where a Judge retires or is transferred to another division and having part heard a cause or matter* ***which is being re heard de novo*** *by another judge, the evidence already given before the retired Judge or the Judge transferred out of the division can be read at the* ***re-hearing*** *without the witness who had given it being recalled".*

This order suggests that when a Judge is transferred to another division or retires while a matter remains part heard; it may be commenced *de novo* without all witnesses being recalled.

However, the Courts remain of the view that the Judge who gives Judgment in a case needs to observe the demeanor of the witnesses during the Trial. However in practice this tends to work hardship on the litigant. There are cases that have continued for several years and towards the end of the case the litigant is obliged to commence his case afresh simply because the Judge has retired, been transferred to another judicial division or is deceased. Such is the fate of the *Ferikson case* which commenced in 2003 and is yet to be concluded. In that case parties relied essentially on documentary evidence such as bills of lading, Customs Duty receipts, and commercial invoices.

Also cases bordering on issues of Public policy have suffered similar fate. *See Federal Republic of Nigeria .v. Fani Kayode FHC/L/523C/08* where the case commenced in 2008 and involved admissibility of computer generated bank statements. The Judge at the trial Court has now been transferred whilst the interlocutory appeal is proceeding to the Supreme Court on the issue. The matter is to commence *de novo* before another Court in October 2012.

It is observed that in some jurisdictions, e.g. Delaware in the USA, substitution of Judges does not

necessitate re-trial in both criminal and civil actions. It is discretionary and depends on the circumstances of each case.

In the last eight years or so, trial Courts and Appellate Courts in Nigeria have embraced the concept of frontloading. The thrust of this concept has been to expedite proceedings. Cases are often decided based on frontloaded evidence (mostly documentary), and the contents of the written addresses of Counsel to the parties. Oral evidence is now reduced to the barest minimum.

Consequently, it is practicable for a new Judge to decide a matter that has gone to trial and has been duly recorded before a previous Judge. Usually the records of the Court remain available and it is suggested that that the new Judge should in the interest of justice and expedience simply carry on from where the previous Judge left off.

There are instances where for cogent reasons the Evidence Act allows evidence to be taken without the presence of the Witness or the demeanour of the Witness being examined. In fact permitting a new Judge to continue from trial to Judgment in a matter handled by a previous Judge can be accommodated under *Section 39 (d) of the Evidence Act,* which deals with Statements made by Persons who cannot be called as Witnesses. It states as follows:

39. Statements, whether written or oral of facts in issue or r*elevant facts made by a person (d) Whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appear to the Court unreasonable are admissible under Section 40 to 50.*

Section 39 clearly refers to where a Party's attendance to give evidence would occasion **unreasonable expense** or **delay** and *de novo* proceedings appear to bring to the fore both ingredients of Section 39. It is therefore submitted that "de novo" proceedings be dispensed with and a provision be included allowing evidence from the Courts records to be admissible so as to continue and conclude the trial up to the point of Judgment.

Section 83 (2) (a) is another instance where the Nigerian Evidence Act accepts documentary evidence of witnesses without hearing them orally. This section permits the Court to admit documentary evidence without calling the maker as a witness. Section 128 (1) of the Evidence Act also allows the Court to exclude oral evidence by documentary evidence.

On the strength of these two provisions and the practice of frontloading now prevalent in most jurisdictions it would appear that the records of the Court and pleadings on Oath are sufficient documentary evidence that may ground a good Judgment by a subsequent presiding Judge.

CONCLUSION

In the light of the foregoing observations, it is contended that matters which have been heard up to Address stage should be concluded by a substituted Judge, especially where the evidence is documentary, without having to commence the action de novo. After all Justice delayed is justice denied.

PUBLIC HEARING ON THE PROPOSED AMENDMENTS TO THE CABOTAGE ACT 2003

By Chidi Ilogu and Tyorumun Joel Gaadi

This article cursorily highlights the proposed amendments to the Cabotage Act 2003 and takes a close look at some of the proposals.

A public hearing was held on Monday 25, June 2012, on a Bill to amend the Nigerian Coastal and Inland Shipping (Cabotage) Act 2003, by the House of Representatives' Joint Committee on Marine Transport and Justice. Memoranda were presented by a number of stakeholders in the maritime industry including the Nigerian Chamber of Shipping, and Foundation Chambers which was represented by Principal Counsel L. Chidi Ilogu. The amendment Bill is proposed by the Nigerian Maritime Administration and Safety Agency ***(***NIMASA). The Bill is a result of the Agency's perceived challenges stemming from about nine years of implementing the regime. There have also been uncertainties arising from judicial interpretations of some provisions of the Act.

Proposed Amendment to Section 2(a)

The Bill proposes to amend the definition of Cabotage under this paragraph by including the term "*persons*" to the paragraph and impliedly restricts the definition to where "... the carriage of the *persons* or goods is in relation to the exploration and or exploitation of the mineral or non-living resources in or under Nigerian waters."

Foundation Chambers' reaction at the hearing was that the proposed amendment would imply that the Cabotage regime is restricted to activities involving the exploration or exploitation of the mineral resources in or under Nigerian waters. We therefore submitted that the existing definition be retained.

Second, it was our submission that the proposed deletion of the requirement under section 2(a) which includes any carriage from one place in Nigeria to another "*either directly or via a place outside Nigeria*" may defeat the purpose of the legislation and is not in line with international Cabotage regimes as is evident for instance under § 55102 (b) of the United States Cabotage Law (46 USC Chapter 551 - Coastwise Trade).

Proposed Amendments to Section 2 (b) and Section 2 (c)

The Bill further proposes an amendment to section 2(b) and (c) to include the term "*persons*" in the definition of Cabotage activities in those paragraphs.

Foundation Chambers' view, which was that this proposed amendment would be unnecessary if the term "*passenger*" is defined in the interpretation section of the Act to include *"persons".* We suggested that the term *"passenger"* be defined as:

"…*any person carried on a ship, other than-a person employed or engaged in any capacity on board the ship on the business of the ship,*

This is consistent with the definition of *"passenger"* under section 444 of the Merchant Shipping Act, 2007.

Proposed Amendment to Section 2(d)

The Bill proposed to delete the word "transportation" from this paragraph. The intention here is to reflect the understanding that Cabotage covers every form of *marine activity* and is not restricted to marine transportation as the provision presently suggests.

Proposed Amendment to the Definition of *"In Transit Call"* Under Section 2

The Bill proposes to amend the definition of this term to include the term *"persons"* and to read that *"in transit call"* means where a "... *vessel leaves that place or through land to another location to re- load the same vessel and include cargo not discharged at the transit call.*"

In this respect, *Foundation Chambers'* reaction is that the proposed amendment would become unnecessary where the definition of *"passenger"* (as proposed above) is inserted in the interpretation clause as it addresses the concern of NIMASA as to *"persons"* not transported for hire or value. Furthermore, the last part of the *"in transit call"* covers "cargo not discharged at the transit call" thus making the inclusion of goods otiose.

Proposed Amendments to Definition of *"Place Above Nigerian Waters"* and *"Vessel"* Under Section 2

The Bill proposes to expand under the definition of "place above Nigerian waters" and "vessel" respectively to include *"... rigs, floating, production, storage and offloading platforms (FPSO), floating, storage and offloading Platforms (FSO)"* and a consequential addition of paragraphs m, n, and o to section 22 (5) of the Cabotage Act.

The judicial antecedent to this proposal is the decision in *Nobel Drilling (Nigeria) Limited v Nigerian Maritime Administration and Safety Agency and the Minister of Transportation (Suit No. FHC/L/CS/78/2008)* where the Federal High Court held that drilling rigs did not fall within the definition of the word *"vessel"* and that the Court should give the words contained in the Act their natural and ordinary meaning.
Foundation Chambers agrees that the proposed amendment is necessary for clarity and that it brings the Cabotage Act in conformity with section 26 and 444 of the Merchant Shipping Act 2007.

The definition of similar terms in other jurisdictions such as the United States and Scotland as evidenced in the ongoing *Gulf of Mexico case (the Deepwater Horizon Explosion at the Transocean/BP Maconda oil field)* and the Scottish Courts' decision in *Global Marine Drilling & Co v Triton Holdings Ltd (The Sovereign Explorer) [2001] 1 Lloyds Rep at 60* indicate that oil rigs, floating, production, storage and offloading platforms, *(FPSO),* floating, storage and offloading Platforms *(FSO)* are vessels.

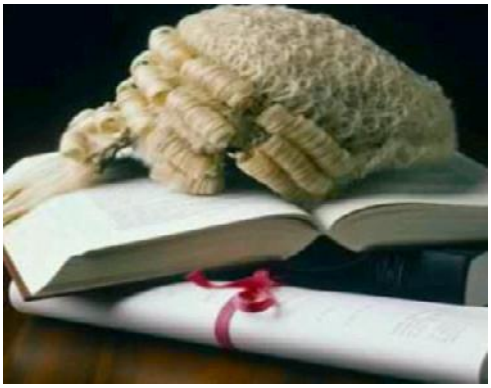
Conclusion
Two key submissions must be made in relation to the implementation of the Cabotage regime and the suggested amendments to the Cabotage Act 2003. First, it should be appreciated at all times that the spirit and intendment of the Cabotage Act is to promote the progressively exclusive conduct of maritime activities within the Nigerian Coastal waters by Nigerian Operators. As such Judges, lawyers and maritime practitioners should in interpreting and implementing the provisions of the Act, take cognisance of the intendment of the Act.

There is also every need to reconcile the revised Cabotage Act with the Nigerian Oil and Gas Industry Content Development Act (Local Content Act) and to be mindful of the upcoming Petroleum Industry Bill (PIB) which has now been presented to the President of the Federal Republic by the Honourable Minister for Petroleum Resources and will shortly proceed to the National Assembly as an Executive Bill. This will prevent legislating at cross purposes.

L. CHIDI ILOGU, SAN!!!

It is indeed heartwarming that just as we were prepared to go to press the news came on Thursday 12 July 2012 that our Principal Counsel has been elevated to the rank of **Senior Advocate of Nigeria (SAN),** the Nigerian equivalent of the Queens Counsel (QC) in the UK**.** He is now a *learned silk* and a member of the *Inner Bar*.

Foundation Chambers has been inundated with congratulatory messages from Colleagues, Clients and well-wishers!!! ''More grease to his elbows'' as the saying goes!!



While on the topic of congratulatory messages we also seize this opportunity to congratulate, *CHINA OFFSHORE OIL (SINGAPORE) INTERNATIONAL PTE LIMITED* for getting off the ''hook'' in the Judgment delivered recently in *GREAT ELEPHANT CORPORATION v TRAFIGURA BEHEER BV [2012] EWCH 1745 (Comm)* . Our Mr. Chidi Ilogu was privileged to be one of the three (3) Nigerian Solicitors who gave Expert Evidence in this matter at the Queen's Bench, Commercial Court in London UK.

Mr. Justice Teare in dismissing the claim against *CHINA OFFSHORE OIL (SINGAPORE) INTERNATIONAL PTE LIMITED* as the 5th party had this to say:

"*Of the expert witnesses who gave oral evidence I found Mr. Ilogu the most reliable, though I was not able to accept all that he said. He was a careful witness who recognized the limits of his expertise as a lawyer and that much depended upon the facts. When faced with points against his opinion he fairly recognized them".*

- - Good testimony of our SAN. Our best wishes to him for the challenges ahead!!

TIT-BITS

You've changed my mind

Lawyer: "Now that you have been acquitted, will you tell me truly? Did you steal the car?"

Client: "After hearing your amazing argument in court this morning, I'm beginning to think I didn't."

I just managed to settle an account!

A young attorney who had taken over his father's practice rushed home elated one night.

"Dad, listen," he shouted, "I've finally settled that old McKinney suit."

"Settled it!" cried his astonished father. "Why, you bumbling idiot! We have been living off that case for the past five years!"

Fees

Q: How do you get a group of lawyers to smile for a photo?
A: Ask them to say "Fees!"

The Diner

Two lawyers entered the diner and ordered a couple of drinks. They then took out sandwiches from their briefcases and began to eat.

Seeing this, the angry owner went over to them and said, "Excuse me, but you cannot eat your own sandwiches in here!"

Shrugging their shoulders the lawyers exchanged sandwiches.

FOUNDATION CHAMBERS is a specialized firm committed to high ethical standards in the provision of integrated legal services mainly to the maritime, aviation and oil & gas industries.

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