EDITOR'S NOTE

Welcome to the first E-news publication of the quarter and year 2015. We are almost at the end of the first quarter and we at FC are embracing the new year with gusto amidst the dropping oil prices, many predictions of economic difficulty and the forthcoming national elections. Articles in this edition deal with Port Regulation, Concurrent Writ in In-rem actions and Pre-action Notice.

We welcome comments or enquiries regarding the contents of this E-news. Kindly address these to the Editor at foundationchambers@yahoo.com

Kashimana Tsumba
Editor

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The Nigerian Shippers Council: Due process or acting in excess?

By Kashimana Tsumba

This paper is a sequel to the article, "The Nigerian Shippers' Council, a Stakeholder, a Regulator or both?" published in our Issue I Vol. I April 2014 of FC E-news. In that article we assessed the legality of the Nigerian Shippers' Council (NSC) being christened the Economic Regulator of the Ports via a Presidential directive.

Hot on the heels of the debate concerning the legality or otherwise of the directive the NSC reeled out new Shipping and Port Charges and it became inevitable that the constitutionality of the Presidential directive had to be tested before the Courts.

The Nigerian Shippers' Council issued a directive introducing Shipping charges on Shipping companies, Agents of Shipping Lines and Terminal operators. The charges were with regard to Shipping Line Agency Charge, Container Deposit, Container Cleaning and Maintenance Charge and Container Demurrage. Two similar cases were instituted by both the Shipping Lines and the Terminal operators respectively. The Plaintiffs in the first case which consists of thirteen shipping lines filed an Originating Summons seeking to determine the question whether based on Section 3(f) of the NSC Act the Defendant (NSC) had the power to unilaterally introduce local shipping charges without negotiating and agreeing same with the Shipping Lines/Agencies.

Section 3(f) of the Nigerian Shippers Council Act, Cap. N133 Laws of the Federation of Nigeria 2004 states that the NSC shall negotiate and enter into agreements with conference Lines and non Conference Lines, shipowners, the Nigerian Ports Authority and any other bodies on matters affecting the interests of Shippers before introducing and publishing revised rates periodically.

Paragraph 2(1) of the Nigerian Shippers Council (Local Shipping Charges on Imports and Exports) Regulations specifically require the Defendant to negotiate all reviews, modifications or increases of local shipping charges and enter into any agreement on the nature or type of charges payable by importers and the sum so payable.

While there was some form of preliminary negotiation, there was no agreement before the Defendant amended the said charges and published them on October 23, 2014 in the National Dailies.

The Plaintiffs in the second case, the Terminal operators hinged their Originating summons on the fact that they were governed by terms of a subsisting lease (concession) agreement between themselves and the Federal Government of Nigeria acting through the Nigerian Ports Authority and the Bureau of Public Enterprises. These lease agreements were made pursuant to the NPA Act and the Public Enterprises (Commercialization and Privatization) Act and they argued that any amendments thereto should have emanated from a statutory review of these Acts.

In response to both suits the Defendant submitted that the Presidential and Ministerial directive of the Honourable Minister of Transport was enough to empower them to effect changes unilaterally in their new capacity as Economic regulators of the Port.

In deciding both cases the Federal High Court noted that at present there is no law appointing an Economic Regulator of the Ports and proceeded to hold that in the circumstances the Presidency can by executive fiat substitute or replace an Act of National Assembly and as such the Defendant could change local shipping charges. Both Plaintiffs have appealed the decisions and the cases are currently before the Court of Appeal.

Conclusion

The crux of the matter is whether a Presidential directive can amend an Act of National assembly and retroactively modify an existing contract?

There is no provision in the Nigerian Constitution that gives the President a fiat to execute legislative functions or otherwise. Section 4(1) of the 1999 Constitution puts the legislative powers to make law squarely within the purview of the Senate or House of Representatives.

Section 5(1) (a) respectively of the 1999 Constitution states that "Subject to the provisions of the Constitution the executive powers of the Federation shall be vested in the President and may subject to the provisions of any law made by the National Assembly , be exercised by him either directly or through the Vice President and Ministers of the Government of the Federation or officers in the Public service of the Federation ".We observe from Section 5(1)(a) that the executive powers of the President can only be exercised subject to the law made by the legislative and do not override the legislative power of the lawmakers.

Also in the case of the Terminal Operators were there were concession agreements and specific parties thereto it is unconscionable and a breach of contract for the Defendant to review concession agreements since they were not parties to the initial agreement.

Furthermore it is argued that the NSC cannot be recognised as Regulator until there is a change in law appointing them as Regulator. This is the question which the lower Court failed to pronounce on. This point remains critical to the appeal now filed by the Plaintiffs. It is worth noting that arriving on the right Judgment in such a case is not just a game of legal gymnastics but touches on policy and economic issues like the viability and certainty of investing in the Maritime industry in Nigeria which happens to be a major revenue hub for the nation. Both matters remains subjudice as appeals have been lodged at the Court of Appeal by the Shipping Lines and the Terminal Operators against the Judgments of the Federal High Court which challenges the role of the NSC as Regulator. There are also applications for Stay of execution pending appeal for hearing in both appeals. For now we wait to see what Judgment the Appellate Court will arrive at.

Issuance and Service of a Concurrent Writ of Summons in an action in rem –A Misnomer?

By Chidi Ilogu SAN

Issuance of a concurrent writ of summons to be served outside jurisdiction in an admiralty action in rem is rather contradictory to the age-long common law tradition of the in rem procedure. The fact that other parties are named in the in rem processes along with the named vessel does not make it incumbent on the claimant to take out a concurrent writ of summons (in personam) to be served outside jurisdiction on the named person or other parties listed on the processes.

In an action in rem court processes are addressed to and served traditionally on the vessel and master within jurisdiction as agent of the vessel owner who is usually not physically within jurisdiction but abroad whether his address is disclosed or not. Where the Owner wishes to defend the action he enters an appearance usually through counsel and files a **statement of defence** to the action. By so doing he is **deemed to have submitted to jurisdiction** and the case can then proceed both as an action in rem (against the vessel) and in personam (against the owner). Where the owner fails or refuses to appear the action remains purely an action in rem against the vessel. Where security is provided for release of vessel the action remains an action in rem to be realised or settled against the bond posted for its release. The primary aim or objective of the action in rem is to obtain **pre-judgment security** for a maritime claim.

In England, the traditional position as established by several authorities was that there was a distinction between an action in rem and action in personam. Thus in ***The Burns*** Collins MR stated that "There is a real and not a mere technical distinction between an action in rem and an action in personam". In the same case, Fletcher Moulton LJ said,

"An action in rem is an action against the ship itself. it is an action in which the owners may take part if they think proper in defence of their property but whether or not they will do so is a matter for them to decide and if they do not decide to make themselves parties to the suit in order to defend their property no personal liability can be established against them in that action".

In the light of this age-long tradition, the decision of the Nigerian Court of Appeal in the ***MV Western Star & 2 Ors v B. L. Lizard Shipping Co Ltd*** (2013) Law Pavillion Electronic Law Reports - 21470 (CA) and such cases as have followed this precedent are rather controversial and negate the universal age-long in rem procedure in admiralty practice. They introduce an anomaly and practical irregularity by requiring the leave of Court for the issuance and service of a concurrent writ in personam on the named persons on the writ in rem merely because they are identified to have foreign address. This approach tends to defeat the practical expediency of the In Rem procedure which in most cases is undertaken with a view to arresting a vessel within jurisdiction and obtaining pre-judgment security for a maritime claim.

In ***MV Western Star & 2 Ors v. B .L. Lizard Shipping Co Ltd,*** the Appellants contended that the Respondent failed to seek and obtain prior leave of the trial court to issue the writ of summons in this case meant for service on the 2nd Appellant who was resident outside the jurisdiction of the court, and mark the writ as a concurrent writ for service outside the jurisdiction contrary to the provision of the Sheriffs and Civil Process Act. Appellant Counsel submitted that by virtue of Order 6 Rule 12 (1) of the Federal High Court (Civil Procedure) Rules 2000 which is now in pari materia with Order 6 Rules 14 (1) (2) and Rules 15 of the Federal High Court (Civil Procedure) Rules 2009 the 2nd and 3rd Appellants were resident outside the jurisdiction although the 1st and 3rd Appellants were within jurisdiction when the 1st Appellant was arrested. He submitted that the address for service on the 2nd Appellant was Ukraine but nevertheless the Respondent purportedly served it through the 3rd Appellant (Master of the vessel). Appellant Counsel submitted that the originating process meant for service on one defendant cannot be served on another. He relied on the case of ***Management Enterprises v Otusanya (1987) 2 NWLR Pt 55 at 180***

The Respondent contended that the present action is an admiralty action in rem and not in personam and that by virtue of section 7(1) of the Admiralty Jurisdiction Act 1991 a writ in an action in rem can be served on a ship and such service of a writ on a ship in an action in rem is proper service. Section 7(1) of the Admiralty Jurisdiction Act 1991 states that "A writ in a proceeding commenced as an action in rem in the Court may be served on a ship or other property".

This well-founded argument notwith-standing, the Court maintained that it was clear from the parties endorsed in the writ of summons and statement of claim that this was not purely an action in rem as there are two other defendants sued alongside the vessel. It therefore held that the action was an action in personam. It further stated that based on Order 2 Rule 3(3) of the Admiralty Jurisdiction Procedure Rules an action in personam shall not be commenced by the same initiating process by which a proceeding is commenced as an action in rem. It consequently held that by virtue of the provisions of Order 6 Rule 12(1) of the applicable Federal High Court Civil Procedure Rules 2000, prior leave of the trial Court ought to have been obtained to issue and serve a concurrent writ of summons in this case on the 2nd Appellant who resides outside the jurisdiction of the Federal High Court.

It is instructive to set out some pronouncements of Judges in similar English cases which point to and preserve the essence of the In Rem action.

Lord Steyn stated in the **Indian Grace (No 2)[1998]** 1 **Lloyd's Rep** 1, as follows:

"... since The Dictator, the law has been that once the owners enter an appearance or acknowledge issue of the writ there are two parallel actions ; the action in personam and the action in rem . From that moment the owners are defendants in the action in personam".

Lord Brandon in ***The August 8 [1983]1 Lloyd's Report 351, p 355***

".... once a defendant in an admiralty action in rem has entered an appearance in such an action , he has submitted himself personally to the jurisdiction of the court and the result

of that is that from then on the action continues against him not only as an action in rem but also as an acton in personam ...".

In ***The Tatry [1916] Lloyds Report P.64*** the Court of Appeal held that:

"*After acknowledgement of service in an Admiralty action the action does not lose its in rem character but proceeds as a kind of hybrid being both in rem and in personam even though the res may have been released by the Court*".

Conclusion

It is respectfully submitted therefore, that endorsing of parties other than the vessel on the in rem writ of summons and statement of claim should not be taken as converting an in rem action into an action in personam. That is what gives the in rem action its unique feature which should not be eroded or confused with the ordinary mode of service in Civil proceedings. It is hoped that the Supreme Court will come to the rescue in restoring the integrity of the in rem procedure in Nigerian Admiralty practice when the further appeal in the MV Western Star is heard.

CONSTITUTIONALITY OF PRE-ACTION NOTICE

By Callistus Ojukwu

Introduction

The Constitution of the Federal Republic of Nigeria, 1999 (the Constitution) empowers Courts to exercise judicial powers over matters brought before them by individuals, bodies corporate, Governments etc (1). Therefore, a person can conveniently seek redress in a Court of law over legal injuries perpetrated by another.

What is Pre-Action Notice?

Pre-Action Notice (PAN) is a legal requirement usually contained in the Statute creating a Public Body (Statutory Corporation), for the service of notice on the Statutory Corporation of any impending legal action against it stating the details of the intended action. The Notice so issued is to lapse after a specified period usually one month and until then a prospective litigant cannot validly commence any litigation against the Statutory Corporation.

Juxtaposing a prospective litigant's constitutional right of access to Court to seek redress for any breach on the one side with the requirement of PAN on the other, one is minded to consider the constitutionality or otherwise of Pre-Action Notice. This I have done, using Nigeria as case study.

Is Pre-Action Notice Constitutional?

The Court of Appeal in **Gov., Imo State v. Amuzie** (2) per Eko, J.C.A. considering the constitutionality of Pre-Action Notice held: "*The requirement of pre-action notice, if it negates the principle of direct and easy accessibility to the Court, and constitutes a road block, or an impediment thereto, may be unconstitutional. Thus, section 17(2)(e) of the 1999 Constitution and the requirement of pre-action notice by State laws by persons with ripe causes of action and locus standi to prosecute the same are not mutually complementary*".

For ease of reference, **S. 17. (2) (e)** – provides "*In furtherance of the social order; the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.*"

However, it should be noted that Section 17(2) (e) of the Constitution, forming part of Chapter II (Sections 13 – 24) relates to Fundamental Objectives and Directives Principles of State Policy and accordingly non-justiciable by virtue of S.6 (6)(c) of the Constitution.

Once it is shown that there has been a breach of service of PAN, the Court is bound to hold that the Plaintiff has not fulfilled a pre-condition for instituting his action and that the action is incompetent. Non service of notice gives the Defendant the right to insist on such notice before the Plaintiff may approach the Court. In effect, non-service of a PAN does not deprive a litigant of his constitutional right to institute an action but merely puts the jurisdiction of a Court on hold pending compliance with the pre-condition as held by the Supreme Court per Akintan J.S.C in **Nnonye v. Anyichie**(3)

"The aim of Pre-Action Notice is to enable the Statutory Corporation concerned determine whether it should make reparation to the Plaintiff" **F & F. Farms (Nig.) Ltd. v. NNPC** (4) per Oguntade J.S.C. See also Mobil Producing Nig Unlimited v. Lagos State Environmental Protection Agency & Ors

Conclusion

S. 1(1) & (3) of the Constitution provide for the supremacy of the Constitution such that any law/Statute that is inconsistent with the provisions of the Constitution, shall to the extent of such inconsistency, be void. In the circumstances what should agitate our minds is whether the principle of PAN is inconsistent with any provision of the Constitution such that PAN becomes void to the extent of its inconsistency with the constitutional provision? There is no such provision in the Constitution. S. 17(2) (e) the only relevant provision of the Constitution referred to above is not enforceable by the Courts but merely a principle of fundamental guidelines for governance and application by the State in framing/passing its laws. Pre-Action Notice to this end does not offend any provision of the constitution.

It is worthy of note that some Rules of Court have now adopted a similar procedure to PAN which is referred to as Pre-Action Protocol as a condition precedent for instituting an action. Here a prospective litigant is mandated to fill a Pre-Action Protocol Form as provided in Order 3 Rule 2(1) of Lagos State (Civil Procedure) Rules 2012 aimed at showing the steps that were taken to resolve the issue(s) with the defendant before instituting the action. It is expected that more States Courts and Federal Courts in Nigeria will adopt this procedure in their respective Court Rules as this will help decongest the Court of matters that can be easily settled without undue litigation.

Currently, Nigeria is gearing up for the National forthcoming elections slated for March 28 and April 11, 2015. The Presidential race seems quite competitive and close to call. The social media and the dailies are abuzz with campaign advertorials, permutations and polls by pundits and the uninitiated alike!!

We wish our great nation a peaceful and flawless Electoral season. Of course lots of our Colleagues are looking forward to the windfall of Election Petition briefs. No doubt, one man's grievance creates another man's legal fees.

TIT-BIT

Two Boys' Fathers

Having just moved to a new home, a young boy meets the boy next door.

"Hi, my name is Billy," he says, "what's yours?"
"Tommy," replied the other.
"My daddy's an accountant," says Billy.
"What does your daddy do?"
"He's a lawyer," Tommy answers.
"Honest?" says Billy.
"No, just the regular kind". Tommy replied

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