FORUM ISSUES IN THE ENFORCEMENT OF REGULATORY OBLIGATIONS OF NIGERIAN PUBLIC COMPANIES

Olumide Famuyiwa*

ABSTRACT

Jurisdictional conflict between judicial fora is often a common issue in countries that use a mix of specialist and regular Courts to resolve civil and criminal cases. In Nigeria, owing largely to lack of clear guiding principles, this conflict reflects presently in the judicial determination of the regulatory obligations of the country's public companies.

This paper focuses on this conflict. It examines statutory and case law rules at the centre of the jurisdictional conflict between the Federal High Court and the Investment and Securities Tribunal, in relation to the enforcement of reporting obligations of Nigerian public companies. As a contribution to regulatory clarity and law reform, it proposes and discusses normative principles for the resolution of this perceived jurisdictional conflict.

Keywords: regulation, jurisdiction, banking, public companies.

1. INTRODUCTION

This paper focuses on how to resolve jurisdictional conflicts in the enforcement of regulatory obligations of Nigerian public companies.[1] Essentially it examines perceived forum questions in relation to the jurisdiction of the Nigerian Federal High Court (FHC), the Nigerian Investment and Securities Tribunal (IST) and the Administrative Proceedings of the Nigerian Securities and Exchange Commission (SEC). The forum questions relate to trial jurisdictional relations between the FHC and the IST on matters, which are first, purely within the respective remit of the CAC, CBN, and SEC; and second, on those matters, which intersect banking, corporate, securities law and general financial reporting obligations. Three decisions of the Nigerian

---

* Doctoral Candidate and College Lecturer, Faculty of Law, University of Oxford, United Kingdom. Email: olumide.famuyiwa@law.ox.ac.uk.

1 A Nigerian public company is a corporate entity that is incorporated in accordance with the provisions of the Nigerian Companies and Allied Matters Act (CAMA) and whose shares are traded on the Nigerian Stock Exchange.

Court of Appeal (*Ajayi v SEC;*[2] *Nospecto Oil & Gas Ltd v Olorunnimbe & 15 Ors;*[3] and *Okeke v SEC & 2 Ors.*[4]), which we shall discuss in this paper presently, exemplify the jurisdictional conflict and the concomitant forum questions.

This paper is divided into six sections. The first is this introduction. The second section examines the theoretical accounts of public regulation and situates this paper within the public interest theory. The third section examines forum questions implicated in jurisdictional relations between the FHC and the IST. The fourth section discusses certain normative principles to address this conflict. The fifth section applies the principles enunciated in the fourth section to *Ajayi; Nospecto;* and *Okeke.* The sixth section summarises and concludes the paper.

2. THEORIES OF CORPORATE AND SECURITIES REGULATION

There are divergent theoretical accounts on how and why corporate and securities regulation emerged; on which actors contributed to this emergence and the pattern of interactions between these actors. However, two broad categories of theories are identifiable namely: the 'public interest' and 'private interest' theories of regulation. In what follows below we would critique the two theoretical accounts and situate this paper within a public interest account.

Public Interest Theories

Public interest theories explain regulation in terms of a general societal necessity for the State's regulatory intervention to rectify perceived imperfections of the market system so as to achieve the collective public interest. The State's regulatory intervention on this view, promotes behaviours that in the absence of such intervention are believed not to occur.[5] Implicitly, regulation is mainly intended to defend the interests of the general public and thereby attain the common good; that is the society's socio-economic well being as a whole.[6]

2 [2009] 13 NWLR (Pt. 1157) 1.
3 Appeal No: CA/L/474/11.
4 Appeal No: CA/L/13/2009.
5 A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Hart Publishing, 2004) 1, 2; R. Posner, 'Theories of Economic Regulation' [1974] The Bell Journal of Economics and Management Sciences 335.
6 C. Uche, 'The Theory of Regulation: A Review Article' [2000] Journal of Financial Regulation and Compliance 68.

Applied to corporate and securities regulation, public interest theorists perceive markets as extremely fragile and prone to operate very inefficiently or inequitably if left alone.[7] Corporate and securities regulation thus takes the form of an indispensable application of communal power through government, with the purpose of overcoming possible failures of the assumptions which support the market system,[8] such as the Efficient Market Hypothesis (EMH) that we shall discuss later under private interest theories. Although the public interests theorists conceive regulation as instrumental for the correction of market failures and as a means to advance the general welfare and society's common economic interests, they do not define the common good in a restricted sense of ensuring a safe and sound financial market. Rather, they take a broader approach according to which the State's regulatory intervention is directed towards socially efficient use and allocation of scarce public resources as well as to protect vulnerable members of the society, who in the absence of regulation would be subject to social injustice.[9] The efficiency, egalitarian and humanitarian persuasions of the public interest theorists notwithstanding, their theoretical assumptions arguably provoke at least two critical questions.

First, it is debatable whether we can easily separate public interest theories of regulation from regulatory paternalism- the idea that the State as the contemporary *parens patriae* should always be ready to protect the weak and intervene on behalf of the feeble through regulatory intervention.[10] The assumption that the Sate's regulatory intervention is essential and would always be justified to protect the weak, feeble and vulnerable is not necessarily true in all cases and in some cases could even become an unreasonable paternalism. This would be the case for instance where the vulnerability of the person to be protected is self-induced, such as where an investor in disdain of obvious risk and without availing herself of professional advice invests

7 Posner (n 5) 336. For a more recent and extensive discussion of this point see generally: C. Calomiris and S. Haber, *Fragile By Design: The Political Origins of Banking Crises and Scarce Credit* (Princeton: Princeton University Press 2014).

8 R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford: OUP 1999) 19.

9 A. Ogus, 'Whither the Economic Theory of Regulation? What Economic Theory of Regulation?' in J. Jordana and D. Levi-Faur, *Handbook on the Politics of Regulation* (Cheltenham: Edward Elgar Publishing Ltd 2004) 35.

10 *Parens patriae* is the Latin for 'parent of the country.' As a legal doctrine it has its roots in English common law. In feudal times various obligations and powers, collectively referred to as the 'royal prerogative,' were reserved for the king. The king exercised these functions in his role as father of the country. In modern times, the doctrine supports the inherent power and authority of the State to protect persons who are legally unable to act on their own behalf. For more on this doctrine see resource available at: <http://legal-dictionary.thefreedictionary.com/Parens+Patriae> accessed on 2 December 2014.

in a high-risk investment scheme with the hope of reaping high short-term returns but ended up losing her investment.

Equally, the State's regulatory intervention may also engage unreasonable paternalism in situations where those to be protected - such as institutional investors- ought to be financially knowledgeable enough to look after their interests. Unreasonable paternalism is also engaged by the assumption that the State's regulatory intervention is necessary in cases where those to be protected are well able to regulate themselves such as we have in the case of self-regulatory organisations in most financial markets who thus far have satisfactorily run stock markets and commodities exchanges.

We can indeed question whether the State's regulatory intervention as argued by the public interests theorists is necessary in all cases and in all aspects of the financial markets. Assuming *arguendo* that there might be situations that require the State's regulatory intervention in the financial system, we can still question on how and to what extent is the intervention justifiable. It is argued consistently with the overall approach adopted in this research that the State's regulatory intervention in this respect ought to be justifiable on five key grounds namely: to establish the parameters of financial regulation; set up and maintain the rules and institutions essential for the implementation of regulatory objectives; to 're-balance' the foundational asymmetries of power, means and information between business organisations and their customers; to ensure that public regulation is performed accountably, efficiently and effectively; and to ensure that remedial consequences attach to losses that members of the society may suffer from the relational asymmetries in the financial services industry and from negligent performance of public regulation.

The second question relates to the implicit assumption of the public interest theorists that the State's regulatory intervention is effective and that it can be implemented without cost. Government regulation can sometimes prove to be unsuccessful in reaching its objectives and even costly. It can be unsuccessful for instance and where the administrative regulatory agencies are requested to fulfill overlapping and (or) 'underlapping' functions in a manner that distorts efficient financial regulation and the efficient functioning of the financial markets.[11] Government regulation can also be costly. This can occur for instance if effective and efficient regulation is seen mainly in terms of increase in the quantity of regulation (more rules and compliance standards) and not as an increase in the quality of regulation (focus on better regulation).

11 Posner (n 5) 339.

Increase in the quantity of regulation through the introduction of more and more rules, compliance measures and regulatory inspections without a corresponding consideration of the effect these might have on the cost of compliance for financial intermediaries can lead to burdensome compliance costs.[12]

The foregoing questions do not necessarily suggest the irrelevance of the public interests theories for this paper. Rather, they point to the need to rework their basic assumptions to address the concerns about unreasonably regulatory paternalism, regulatory accountability, regulatory overlap and 'underlap' and the cost implications of an emphasis on the quantity of regulation. A consideration of how these assumptions could and should be reworked is beyond the scope of this paper. Nonetheless, this paper situates itself within the assumptions of the public interest theorists, which we accept as a convincing background for the reform-oriented principles and strategies to be espoused subsequently in this thesis. Four key points justify our alignment with the public interest theorists. The public interest account generally speaks to what governments and administrative regulatory agencies should do; and satisfactorily explain what they actually do in the wider context of public administration.

The public interest theorists' assumptions persuasively justify contemporary manifestations of corporate and securities regulation across jurisdictions. Further, the rationale behind regulation as propounded by the public interest theorists provides a convincing theoretical basis for the comprehension of the objectives which financial regulations aims to accomplish in practice. The public interest account also supplies a basis to interrogate the relevance of the private interest theories of regulation for this paper.

Private Interest Theories

Centrally private interest theorists assume that as a consequence of the high-stakes and the interests in the outcome of policy or regulatory decisions, interest groups affected by regulation will focus their resources and energies to promote the policy outcomes they prefer. The result of interest group influence is that the positive aims of regulation are weakened and regulatory effectiveness and efficiency are compromised with the advantages of regulatory reform ending up being unequally distributed and benefitting those involved in lobbying the legislators at the expense of the society at large.[13]

12 I. Ehrlich and R. Posner, 'An Economic Analysis of Legal Rules-Making' (1974) Journal of Legal Studies 260.

13 Posner (n 5) 335; Baldwin and Cave (n 4) 21; A. Estache and D. Martimort, 'Politics, Transaction Costs, and Design of Regulatory Institutions' (1999) World Bank Policy Research Paper 2073, 9 – 10, 16 – 18.

Applied to financial regulation, private interest theorists hold that the financial services industry controls governmental institutions including particularly the administrative regulatory agencies that are responsible for supervising the economy.[14] Through such control, the industry influences the financial regulatory and supervisory processes in a manner that is exclusively to its own benefit. The influence thus exercised by the financial services industry speaks to regulatory capture. On the private interests account this occurs when regulations that are initially meant to serve the public good eventually serve that of powerful and influential private interests who are able to influence policy-makers and regulatory officials.[15]

Further, a chequered and refined adaption of the private interest theories in finance and financial regulation is the Efficient Market Hypothesis (EMH) according to which financial markets are 'informationally efficient' and work less because of law, the State's regulatory intervention or the threat of liability, but because market information are provided, collected, verified and disseminated by private reputational intermediaries (investment banks, auditors, securities analysts and credit rating agencies) who impliedly pledge their reputational capital behind their opinions and judgments.[16] Hence, these intermediaries would have little incentive to misrepresent or distort.[17] Regulatory intervention on this account is thus justified when the market is 'informationally inefficient' where intermediaries misrepresent or distort market information.

In its pristine and refined forms, the private interest account does not supply a convincing theoretical foundation for this paper on three grounds. First and in its pristine form, the private interest account is not sufficiently distinguishable from the public interest account given that both accounts base themselves on the assumption that the public interest is the basis for

14 Posner (n 5) 341.

15 J. Hertog, 'General Theories of Regulation,' (1999) 225 <www.scribd.com/doc/239491/General-Theories-of-Regulation > accessed 26 February 2015.

16 EMH's history is remarkably chequered and refined because it has been the subject of scholarly discussion since 1863 and it contemporary is inflexion arguably plays downs the undertone of financial markets regulatory manipulation that is apparent from a cursory appraisal of the private interest account. For an extensive background on EMH with its roots in the work of Jules Regnault, a French stockbroker, published in 1863 < http://en.wikipedia.org/wiki/Efficient-market_hypothesis#cite_note-desai-4 > accessed 16 November 2014.

17 For more on this point and the related Efficient Capital Market Hypothesis (ECHM) see generally: E. Fama, 'The Behaviour of Stock Market Prices' (1965) 38 Journal of Business, 35 – 105; 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) Journal of Finance 383 – 417; R. Gilson and R. Kraakman, 'The Mechanisms of Market Efficiency,' (1984) 70 *Va. L. Rev.,* 549, 619 – 21; G. Cooper, *The Origin of Financial Crises: Central Banks, Credit Bubbles and the Efficient Market Fallacy* (Petersfield: Harriman House Ltd 2008) 25 – 7.

the initiation of regulation. Second, it is unclear why and how the financial services industry is successful in subjecting administrative regulatory agencies to their interests but fail to prevent the establishment of these agencies by policy-makers in the first place. Third and in its refined formulation, investors and researchers have disputed both empirically and theoretically the validity of EMH. Theoretically, behavioural economists attribute the imperfections in financial markets to a combination of cognitive biases such as overconfidence, overreaction, representative bias, information bias and various other predictable human errors in reasoning and information processing. Psychologists have studied and confirmed the existence of these errors.[18] For instance, these errors in reasoning lead most investors to avoid value stocks and buy growth stocks at expensive prices, which allows those who reason correctly to profit from bargains in neglected value stocks and the overreacted selling of growth stocks.

Similarly while empirical evidence has been mixed, they have not generally supported EMH.[19] Notably, while a strong form of the EMH claims that market prices instantly change to reflect new public information and even hidden 'insider' information, a study of low price-earnings ratio stocks in United States found that these stocks have greater returns which are not correlated with either publicly available or insider information on their prices.[20] It is debatable also if EMH convincingly explains the workings of financial markets in developing countries which have been empirically shown to be inefficient in that they exhibit considerable serial correlation (price-trends), non-random walk and evidence of manipulation.[21]

Although the private interest theories of financial regulation do not provide a convincing foundation for this paper, private interests can still play salutary roles in the regulatory process. These roles should be objectively recognised. For instance, financial services industry lobby groups can share

18 See for instance the recent leading work in this area by D. Kahneman, *Thinking, Fast and Slow* (London: Penguin Books, 2012) 109 – 198 (Part II. Heuristics and Biases) 199 – 268 (Part III. Overconfidence) 269 – 376 (choices).

19 For empirical studies that question EMH see F. Nicholson, 'Price-Earning Ratios in Relation to Investment Results' [1968] Financial Analysts Journal 105 – 109; S. Basu, 'Investment Performance of Common Stocks in Relation to Their Price-Earnings Ratios: A Test of the Efficient Market Hypothesis' (1977) 32 Journal of Finance 663 – 682; B. Rosenberg, K. Reid, R. Lanstein, 'Persuasive Evidence of Market Inefficiency' (1985) 13 Journal of Portfolio Management 9 – 17; C. Chan, E. Gup, and M. Pan, 'International Stock Market Efficiency and Integration: A Study of Eighteen Nations' (2003) 24 (6) Journal of Business Finance & Accounting 803 – 813.

20 N. Dreman and A. Berry, 'Overreaction, Underreaction, and the Low-P/E Effect,' (1995) 51(4) Financial Analysts Journal 21–30.

21 B. Malkiel, 'Investment Opportunities in China' (2007) referenced in the EMH online resource in n 16.

their expertise with legislators and policy-makers which all else the same should allow for a more informed laws and policies to be made. It reflects indeed, best practice and a process driven financial regulation to formally consult the industry about draft regulatory measures in order to give those who fall within the scope of the planned legislation the opportunity to express their views on the proposal. What is objectionable is when financial services industry lobbyists have extensive privileged access to policy-makers and exercise unwholesome influence on the legislative process and in relation to matters that affect their collective interests.[22]

3. FORUM QUESTIONS

In this section, we shall examine forum questions, relating to the FHC and IST together with the APC.

The Federal High Court[23]

Generally, the FHC has exclusive trial jurisdiction over any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the CBN, CAC, and SEC as federal agencies.[24] Specifically, the FHC has exclusive jurisdiction in civil causes and matters arising from the operation of *BOFIA* and (or) connected with or pertaining to banking, including a banker customer dispute.[25] The court also has exclusive jurisdiction in civil causes and matters arising from the operation of *CAMA* or any other enactment regulating the operations of companies incorporated under *CAMA*.[26]

22 This phenomenon is arguably pervasive in western developed markets as evidenced by the following mass media revelations: SpinWatch, 'Doing God's Work: How Goldman Sachs Rigs the Game' March 2011 <www.spinwatch.org/-articles-by-category-main-menu-8/48-lobbying/5426-the-power-offinancial-lobbyists-must-be-curtailed> accessed 9 September 2014; A Rowell, 'The Power of Financial Lobbyists Must be Curtailed' SpinWatch 20 March 2014 <www.spinwatch.org/-articles-by-category-mainmenu-8/48-lobbying/5426-the-power-offinancial-lobbyists-must-be-curtailed > accessed 9 September 2012. In March 2011 a report by an undercover team from the UK's Sunday Times newspaper alleged that the MEPs had accepted offers of cash in exchange for influencing laws. As reported in the Sunday Times, four members of the European Parliament accepted a bribe from journalists, pretending to be lobbyists, in return for the watering down of a proposal for the reform of financial regulation.

23 The FHC was established by section 249 (1) of the Constitution of Federal Republic of Nigeria (CFRN), 1999 (formerly, section 228(1) of the Constitution of the Federal Republic of Nigeria, 1979) as the successor court to the Federal Revenue Court, established by section 1 (1) of the Federal Revenue Court Act of 1973, now restyled as the Federal High Court (FHC) Act of 1973.

24 CFRN 1999, s 251(1) (r).

25 ibid s 251(1) (d).

26 ibid s 251 (1) (e); FHC Act 1973, s 7(1) (c)(ii).

In effect, the FHC has a disjunctive exclusive jurisdiction over matters arising from *CAMA* on the one hand, and (or) matters arising from other laws (such as the *ISA*) that regulate the operations of companies.[27] *Skenconsult (Nig.) Ltd v Ukey*[28] supports this interpretation. It is a Nigerian authority for the proposition that the FHC has exclusive jurisdiction on matters arising from *CAMA*. But the case was decided when *CAMA,* then known as the *Companies Act of 1968,* was the only law regulating incorporation of companies and dealings in companies' shares. However, with the enactment of the *ISA,* and the resulting removal of dealing in securities, from *CAMA,* it is arguable if *Skenconsult* remains a strong authority for the exclusive jurisdiction of the FHC on matters, which were formerly contained in the 1968 Act. At any rate, while the FHC's exclusive jurisdiction over pure *BOFIA* related matters, is hardly disputable, the question (examined fully below) is whether with the creation of the IST the FHC's exclusive jurisdiction still extends to matters arising from the *ISA*?[29] This it is submitted, is notionally possible on three grounds: *first*, the *CFRN*, 1999, upon which the exclusive jurisdiction of the FHC is founded, overrides all other laws in Nigeria,[30] which means *prima facie* that the *ISA* cannot limit the exclusive jurisdiction of the FHC over administrative or executive actions and (or) decisions of federal agencies including SEC. A fortiori and secondly, the *ISA* is expressly made subject to the *CFRN*, 1999.[31]

In view of the foregoing, is it arguable that the FHC implicitly has exclusive jurisdiction to decide cases arising from violations of the *ISA*, including in particular, the violations of reporting obligations imposed on listed

27 This interpretation of section 251 (1) (e) of the CFRN, 1999, is consistent with section 18 (3), of the Nigerian Interpretation Act, which provides to the effect that '[t]he word "or" and the word "other" shall in any enactment, be construed disjunctively and not as implying similarity.'

28 [1981] NSCC 1. This is a leading authority on this point. On the facts, the respondent, a director of the appellant company litigated a boardroom dispute over the management of the appellant company, before the defunct Bendel State High Court (with the creation of the Edo and Delta states from the old Bendel State, now Delta state and Edo state High Courts). On a final appeal to the Supreme Court of Nigeria, Nnamani JSC, applying section 7 (1)(c)(1), of the Federal Revenue Court Act No. 13 of 1973, (the predecessor provision to section 251(1)(e) of the CFRN 1999 and section 7(1) (c)(ii) of the FHC Act) held that (at page 13 – 14) that the Federal High Court, the predecessor to the FHC, was the competent forum for the trial of the case.

29 The IST was established under Part XIV of the Investment and Securities Act (ISA) 1999 (now Part XVI of the ISA 2007) to have exclusive trial jurisdiction over matters arising from the ISA.

30 Section 1(3) of the CFRN 1999 provides that if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

31 ISA 2007, s 312 (3).

companies and their officers under the Act? There are as yet no clear answers to this question. The lack of clarity arguably arises from the fact that the IST (as shown below) is by law conferred with exclusive jurisdiction over matters arising from the *ISA, 2007,* which means that disputes arising from an action or determination of the SEC pursuant to the provisions of the *ISA* are litigable only before the IST. We shall return to these questions in greater detail later in this article.

Investments and Securities Tribunal

The Investment and Securities Tribunal (IST) is a judicial body established by section 274 of the *ISA, 2007.*[32] By law, although not constitutionally, the Tribunal has exclusive jurisdiction to hear and determine any question of law or dispute involving, (a) decision or determination of the SEC, (b) SEC and a capital market self regulatory organisation, (c) a capital operator and SEC, (d) an investor and SEC, (e) an issuer of securities and SEC, and (f) disputes arising from the administration, management and operation of collective investment schemes.[33] The IST is not expressly mentioned in the *CFRN, 1999*, unlike the FHC, but its creation arguably derives from section 6(4)(a) of the Constitution. That section empowers the National Assembly of Nigeria to establish courts other than those to which the section relates, but with subordinate jurisdiction to that of a High Court.[34]

The interpretive effect of this power can be approached from at least two interpretive perspectives, which ultimately lead to one conclusion. First, it can literally be taken to mean that the National Assembly is at liberty to create other courts, but the courts so created shall rank lower and not superior to, or equal in status to a (Federal) High Court. Second, on a purposive – advancing the constitutional object – approach, it can mean that the

32 Formerly section 224 of the ISA, 1999. The tribunal has ‘to the exclusion of any other court of law or body in Nigeria,’ jurisdiction to hear and determine any question of law or dispute involving the following (a) a decision of the SEC in the operation of and application of the ISA; (b) SEC and self regulatory organisations in the securities sector; (c) a capital market operator and SEC; (d) an investor and SEC; (e) an issuer of securities and SEC; and capital; and (f) disputes arising from the administration, management and operation of collective investment schemes.

33 ISA 2007, s 284.

34 The courts to which the section relates are enumerated in section 4(5) (a) – (k) are: the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory; a High Court of a State; the Sharia Court of Appeal of the Federal Capital Territory; a Sharia Court of Appeal of a State; a Customary Court of Appeal of a State; such other courts as may be authourised by law to exercise jurisdiction at first instance or on appeal on matters with respect to the National Assembly, or a House of Assembly of a State may make law.

Federal High Court shall be superior to any other court or tribunal that the National Assembly may create. On either interpretation, the Federal High Court prima facie, is not intended to rank equally in the judicial hierarchy with a court or tribunal such as the IST, which the National Assembly has created to resolve inter alia, disputes arising from the *ISA* and the securities regulation, including the operations of listed companies. To the extent that this is so, how can the exclusive jurisdiction of the FHC on companies' matters (discussed above) be reconciled with the equally exclusive jurisdiction of the IST,[35] to hear and determine disputes between an issuer of securities and the SEC, considering that public companies can issue securities? Assuming *arguendo* that the Constitution intends the IST to be subordinate to the FHC, why does an appeal against its decision, leapfrog the FHC to the CA?[36] Does it mean that IST's judgement takes effect as if it were a judgment of the FHC?[37] If not, does it mean that the FHC's exclusive jurisdiction over companies' matters, including those with mixed corporate law and securities regulation implications, survives the creation of the IST?

The *ISA, 2007,* and *Ajayi, prima facie* resolve the first issue in favour of the IST. Again, the *CFRN*, 1999,[38] and the *ISA, 2007*,[39] prima facie resolve the second issue in favour of the FHC. But this should be checked against the following points: First, the IST came long after the FHC and it is arguably meant to be a specialist court for the settlement of securities disputes. Second, the *ISA, 1999,* under which, the Tribunal was initially established, repealed and incorporated *Part XVII,* of *CAMA, 1990,* which formerly regulated dealing in securities. This suggests that the National Assembly, intended to 'carve out' (and assign to the IST) disputes arising from dealing in securities from the expansive corporate law jurisdiction of the FHC. Third, IST's judgment takes effect as a judgment of the FHC.[40] Fourth, *BOFIA,* and *CAMA,* are to be read in conformity with the provisions of *ISA,* with respect to capital market matters.[41] On the basis of these points, can one conclude that as between the FHC and IST, the real legislative intent of the National Assembly is that for the purposes of settling disputes arising from *BOFIA, CAMA, FRCNA* and the *ISA, 2007,* the two fora shall have coordinate and complementary jurisdiction?

35 ISA 2007, s 284 (1) (e).
36 ibid s 294(1).
37 ibid s 293(3).
38 ibid s 1 (3), 6(4)(a), 251(1) (e).
39 ibid s 313(2).
40 ibid s 293(3).
41 ibid s 312(1).

Alternatively, where a case for coordinate and complementary jurisdiction cannot be convincingly made out and in anticipation of necessary law reform in this area to magnify this intent, should it be the case that the exclusive jurisdiction of the IST ought to trump the FHC's in cases dealing purely with securities regulation and in those mixed cases initiated before the Tribunal, but which has only subsidiary implications for banking and (or) corporate regulations? We shall return to this question later in this article.

The next section explores the principles for resolving the foregoing questions, arising from the state of the law and the authorities on the jurisdiction of the FHC, and that of the IST together with the APC, in respect of matters with mixed corporate law and securities regulation flavour? Precisely, we shall look at the conflict from at least two perspectives: first, cases dealing exclusively with securities regulation for instance, the contents of a prospectus and other offer documents; second, those mixed cases dealing with banking law, securities regulation, and general financial reporting obligation.

4. NORMATIVE PRINCIPLES

This section explores normative principles for the resolution of the above discussed forum questions in relation to the FHC and IST.

We highlighted the five questions in relation to the jurisdictions of the FHC and IST, on matters, which are exclusively securities related and those with mixed implication for banking law, corporate law and securities regulation. In summary, the first question, addresses the FHC's jurisdiction to decide mixed cases. The second, relates to whether the real legislative intent of the National Assembly, is that for the purposes of resolving disputes arising from the provisions of the *BOFIA, CAMA,* and *ISA,* the FHC and IST, shall have coordinate and complementary jurisdiction. Alternatively, and as a third question, should the exclusive jurisdiction of the IST be preserved in matters dealing purely with securities regulation, and in those cases where the SEC has commenced regulatory enforcement proceedings before the Tribunal pursuant to the *ISA,* even in cases where that proceeding has implications for the enforcement remit of other regulators? The fourth, relates to the circumstances under which a challenge of an APC's proceeding on the ground of violating the rules of natural justice should be sustained.

With respect to the first question, it is considered useful to note the following facts: First, the statutory provisions that provide support for the

exclusive jurisdiction of the FHC on mixed cases, have been in existence since 1973, and before the establishment of the IST in 1999. Conceivably, at their inception, the provisions did not contemplate the establishment of the IST. Second, in 1999, the ISA No. 45 of 1999 established the IST to resolve securities disputes exclusively. Ostensibly and in furtherance of the new arrangement, section 263 (1) (d) of the Act, repealed and re-enacted Part XVII (sections 541 – 623) of *CAMA,* which regulates dealing in company securities.

Third, to qualify as a judge of the FHC, a lawyer only needs to have ten years post call experience, which the Constitution does not require to be in corporate or securities law.[42] In contrast, the IST comprises of a mix of ten judges most of whom *must* be knowledgeable in capital market matters.[43] Fourth, the IST is statutorily a civil court, whose judgement operates effectively as a judgment of the FHC.[44] In light of these facts, it is submitted that from the establishment of the IST in 1999, the National Assembly should be taken to intend that the (exclusive) jurisdiction of the FHC would not extend to securities matters, but rather remain limited to those matters that may arise from the provisions of *BOFIA,* and *CAMA*. It is submitted further and by parity of reasoning, that the National Assembly should be taken to intend that from 1999, the IST shall be a specialist tribunal for the trial of securities matters.

The foregoing submissions coalesce in an adjudicatory principle of mutually exclusive jurisdiction according to which, as between the FHC and IST, the former cannot competently adjudicate matters arising from the *ISA;* and the latter cannot do likewise for matters arising from *CAMA*. An enforcement action arising for instance from the breach of reporting obligations in the *ISA,* should only be pursued through the IST and upward to the Court of Appeal and the Supreme Court. Alternatively since the Nigerian Securities and Exchange Commission (SEC) could not lawfully enforce the provisions of the laws regulating banks and registered companies (*Banking and Other Financial Institutions Act* and *Companies and Allied Matters*

42 CFRN 1999, s 250 and 251 (1) (e); FHC Act, 1973 s 7(1) (c) (ii).

43 The composition of the Tribunal as specified in section 275 (1) of the ISA 2007, is as follows: (a) a full time chairman who shall be a legal practitioner of no less than fifteen years with cognate experience in capital market matters; (b) four other full time members, three of whom shall be legal practitioners of no less than ten years experience and one person who shall be knowledgeable in capital market matters; and (c) five other part time members who shall be person of proven ability and expertise in corporate and capital market matters.

44 ISA 2007, s 290 (3) and 293(3).

Act) disputes that may arise from its enforcement of the law regulating the capital market (*Investment and Securities Act*) ought to be resolved in accordance with the dispute resolution process contained in that law (i.e. before the IST). Similarly, since the Nigerian Corporate Affairs Commission (CAC) and the CBN could not lawfully enforce the provisions of the *ISA*, disputes that may arise from their enforcement ought to be resolved pursuant to the dispute resolution process contained in the *CAMA* and *BOFIA* (i.e. before the FHC). By implication, neither the IST, nor the FHC, is a competent forum to seek declaratory and (or) injunctive reliefs, against an enforcement action, which by law will not come before it, but before the other.

For either forum to be competent to do so, the regulator on record, should be the one, which according to the relevant law, can prosecute regulatory violations before that forum. This in effect means that, the idea that a defendant in a SEC enforcement proceeding, before the IST, which proceeding has only subsidiary or marginal implication for either banking regulation or company law, can approach the FHC for injunctive or declaratory reliefs, ostensibly to delay or frustrate the proceeding, should be resisted. This is because it is likely to result in an abuse of judicial process, in the sense of invoking the jurisdiction of one forum, to frustrate a proceeding before another. It should not also be possible for such potentially abusive resort to the FHC, to be decided on the authority of *Skenconsult,* a case, which as stated earlier in this paper, was decided before the establishment of the IST in 1999 and the resulting separation of securities dispute resolution from the jurisdiction of the FHC.

It follows from the foregoing and in response to the second question above that in mixed cases, the jurisdictions of the IST and FHC ought in principle to be coordinate and complementary, in so far as neither of the two fora, purports to decide a case which from clear indications can be said to belong to the province of the other. Even so, how do we rationalise *section 6(4)(a)* of the *CFRN, 1999,* the apparent interpretive effect of which is that the IST shall be subordinate to the FHC. It is argued consistent with the foregoing principle of mutually exclusive jurisdiction that the provision should be construed similarly in principle, as applying to a court or tribunal whose judgement, unlike that of the IST, does not operate effectively as a judgment of the FHC.

However, it should be pointed out that the enunciations here would need to be tested in court. In any event, and in response to the third question, where a case for coordinate and complementary is not supported *de lege lata,* it is submitted that it ought in principle to be the case that the

exclusive jurisdiction of the IST be preserved. First in matters dealing purely with securities regulation; and second, in those cases where SEC has initiated enforcement proceeding before the tribunal pursuant to the *ISA, 2007*. This submission finds support, in the idea that the certainty and consistency of securities disputes resolution is most likely to be enhanced, where the IST as a specialist tribunal decides such disputes.

In relation to the fourth question (natural justice challenge of an APC's proceeding) it is settled that the rules of natural justice (*audi alteram partem* and *nemo judex in causa sua*) apply whenever a tribunal, be it administrative or judicial is called upon to decide the rights and obligations of a citizen, who may be a natural person or a corporate entity.[45] Equally as a rule, only conventional courts can try a crime; and where an administrative court is confronted with a civil claim bounded up with a criminal allegation, it can decide the former, in so far as it is possible to *severe* it from the latter.[46] Applied to the APC however, it is submitted that the two rules ought to be moderated by the principles of reasonable and substantial compliance and totality of determination. Reasonable and substantial compliance means that an APC's proceeding should not be invalidated on the ground of natural justice, where there is a verifiable separation of the Committee's investigative, prosecutorial and adjudicatory roles.

Additionally, although the board of the SEC, appoints the adjudicatory panel, but so long as it is demonstrable that subsequent to their appointment, the adjudicators had free rein to decide a complaint referred to them by SEC, the resulting decision(s) ought not to be invalidated on the ground that it breaches the *nemo judex in causa sua* rule. This is because, if it were possible for every alleged instance of such breach to serve as a basis for invalidating the decision of an administrative tribunal, the policy behind the delegation of a measure of judicial power to administrative so that they can, where necessary, swiftly dispense 'regulatory justice' will be rendered almost inoperable.[47]

Further, totality of enforcement denotes that where a complaint referred to the APC, has a criminal element, it should be permissible in principle for

45 See for support, section 36(1) of the CFRN, 1999; *R v Chancellor of the University of Cambridge, ex parte Bentley* 1 Str 557, 568; 93 ER 698, 704; *Metropolitan Properties Co (FGC) Ltd v Lannon* (1969) 1 QB 577; J. Kelly, 'Audi Alteram Partem' (1964) 9 Natural Law Forum 103,109.

46 *Military Governor of Imo State v Uwauwa* (1997) 4 NWLR 675.

47 See generally for support, *Ching Wei Mang v Public Prosecutor* [2002] 2 S.L.R. (R) 566, 578 (High Court of Singapore) where Chief Justice Yong Pung How held that to establish a breach of natural justice by an administrative agency, the applicant has to prove that he had suffered substantial prejudice or injustice.

the committee to make a finding of guilt for the purposes of a disciplinary decision. The reasoning behind this view can be approached from two perspectives. First, a finding of guilt for a criminal offence by an administrative tribunal operates in reality, only as a disciplinary penalty, in that judicial power is not necessarily usurped by a finding of guilt, which does not operate as a conviction for a crime, but intended to serve as a basis for regulatory disciplinary action.

Second, where an administrative body such as the APC, is legally empowered to decide complaints relating to the rights and obligations of others, the body ought to be regarded as a tribunal established by law under section 36(1) of the *CFRN, 1999*. Implicitly, the body should be able to determine both civil and criminal cases that fall within its remit and subject to the right of the parties to appeal to higher courts or tribunals.

In the next section, we shall adopt the foregoing principles and submissions to critique decisions in *Ajayi Okeke* and *Nospecto*.

5. AJAYI, OKEKE, AND NOSPECTO

This section applies the principles and submissions above to critique *Ajayi*, *Okeke,* and *Nospecto*. As earlier mentioned, these are three conflicting decisions of the CA on basically three issues. These are: the competent adjudicatory forum for the trial of securities law matters arising from the *ISA;* the competent forum for the trial of mixed cases in which the SEC has initiated enforcement proceeding; and (in *Ajayi, and Okeke*) the extent to which an APC proceeding can be invalidated on the grounds of natural justice. This section argues, consistently with the foregoing principles and submissions, that *Ajayi* is to be preferred, while *Okeke* and *Nospecto* should be rejected, particularly as authorities on the trial jurisdiction of the FHC, in cases arising from the *ISA*. In support, the section presents four arguments, against the ratio and reasoning in *Okeke*. Similarly, three objections are argued, with respect to *Nospecto*.

Ajayi v SEC

This appeal against the order of Nyako J. of the FHC, Lagos Division was decided on two grounds, namely: whether the trial judge was right in law, to hold that the *ISA* conferred exclusive jurisdiction on the IST in respect of matters relating to the operations of the Act; and whether the trial judge should have quashed the APC's decision, on the Appellant's allegation

it violated the rules of natural justice. The CA unanimously (per Peter-Odili JCA with Adekeye and Aboki JJCA concurring) held *inter alia* that the proper forum for an appeal against and (or) challenge of a decision of the APC, is the IST and not the FHC; that the IST's statutory jurisdiction to hear such an appeal is not shared with the FHC; and that the later court correctly declined jurisdiction.[48]

The reasoning behind this judgment was that section 224(1), 234(1) and 361(1) of the *ISA, 1999,*[49] together, conferred an exclusive jurisdiction on the IST to adjudicate on matters arising from the Act and its jurisdiction, is not concurrent with the FHC.[50] The Appellant had contended that the FHC had jurisdiction to entertain an appeal from the APC, on the footing that the applicable section 236(1) of the *ISA, 1999,* states that a person who is dissatisfied with any action or decision of the Commission under the Act *may* institute an action in the Tribunal or appeal against such decision within the period stipulated under the Act. The Appellant construed this provision to suggest that an action can be filed before the IST and appeal could be lodged with the FHC. This, consistent with the thesis of this paper, was a strained interpretation, which is contrary to the statutory scheme of the *ISA, 1999* and by extension, of the *ISA, 2007,* to exclude the FHC, from the resolution of disputes arising from securities regulation. Peter-Odili JCA was therefore correct to reason that the provision cannot be interpreted to permit an appeal from a decision of SEC to go to the FHC.

Similarly, while it may be supposed and as was indeed argued for the Appellant that SEC can still be impleaded before the FHC as Federal Agency, this supposition is with respect unsustainable. This as argued above, is because the special jurisdictional clause in the *ISA,* relating to the exclusive adjudicatory remit of the IST over the decisions of SEC should, as a rule, be interpreted to derogate from the general Constitutional jurisdiction of the FHC. Even where concededly as here, the case for such derogation is 'a hard sell' because of the inconsistency rule, it is argued still that an action, which

48 *Ajayi* (n 3) 28, [D] – [E].

49 These sections provide as follows:

'241(1) There is hereby established a body to be known as the Investments and Securities Tribunal (hereinafter referred to as "The Tribunal") to exercise the jurisdiction, powers and authority conferred on it by or under this Act…

'234(1) The Tribunal shall have power to adjudicate on disputes and controversies arising under this Act and rules and regulations made thereunder…

'236(1) A person aggrieved by any action or decision of the Commission under this Act may institute an action in the Tribunal or appeal against such decision within the period stipulated under this Act.'

These provisions are now sections 274, 284(1) and 289(1) of the ISA, 2007.

50 *Ajayi* (n 3) 26, [D].

impleads the SEC before the FHC, must be shown not to have arisen from a SEC's decision based on the provisions of the *ISA*. If the contrary were to be the case (impleading SEC before the FHC for a decision arising from the *ISA)* clearly, the IST's and FHC's jurisdictions will come into direct conflict. To avoid this, it is submitted therefore that in so far as it can be shown that a regulatory decision and (or) determination of the SEC, is rooted in the *ISA,* the IST and not the FHC ought to have the trial jurisdiction over disputes resulting therefrom.

On whether the CA should have quashed the APC's decision on the ground that it violated the rules of natural justice, the Appellant contended that the purport of proceeding leading to the decision, constituted SEC, as a prosecutor and judge in its own case, and allegedly that the Appellant was not served with the notice of hearing of the allegations against him. In refutation, the Respondent case as established by evidence was to the effect that having been given reasonable opportunity to be heard and which opportunity was not utilised by the Appellant; he cannot be heard to complain of lack of fair hearing. Respondent did not argue the *nemo judex in causa sua limb* of the allegation. Peter-Odili JCA, resolved the issue, in favour of the respondent, namely that nothing from the records showed that the APC violated the rules of natural justice. Her ladyship, reasoned consistently with the judgement of the Supreme Court (per Idigbe JSC) in *Falomo v Lagos State Public Service Commission,*[51] that a duty on the part of an administrative body to act judicially in the sense of applying the rules of natural justice, may be excluded expressly or impliedly, by statute; that where a statutory provision excludes the need for prior hearing of the party whose rights are to be affected by the decision of an administrative body, and if in addition, the statute provides for an administrative appeal from, or judicial review of the body's decision: these are sufficient to negate the existence of any implied duty on the part of such a body to apply the rules, before the original decision is made.

With respect, it is submitted that consistent with enunciations (whilst discussing APC and the principles of natural justice) above that the case could have been decided alternatively, on the ground that a mere allegation of violation of natural justice will not suffice on balance, to invalidate an APC's decision. Where as here, the Committee can be shown to be independent of SEC, and that reasonable and substantial efforts were made to afford equal hearing to all parties to a complaint referred to it, allegations

51 (1977) NSCC 230.

of violation of the rules of natural justice, ought to be regarded as obfuscatory and otiose, in that it merely serves to frustrate the dispensation of 'regulatory justice.'

By and large, the judgment is to be preferred on several grounds, but four of these are considered particularly germane to the discourse here: First, it validates the statutory scheme of the *ISA* to exclude recourse to the FHC on matters arising from the Act, even where SEC is the Defendant and (or) Appellant on record. This is consistent with the principle enunciated above that as between the FHC and IST, there has been from 1999, a mutually exclusive jurisdictional relation on matters arising from *BOFIA, CAMA* and *FRCNA* on the one hand, and *ISA* on the other hand, such that the former set of laws are within FHC's remit and the *ISA,* is within IST's remit. Second, it confirms that FHC cannot competently sit on appeal on a decision of the APC. *Third,* it demonstrates albeit to a limited extent that it takes more than mere allegation of violation of the rules of natural justice, to invalidate an APC's decision. Fourth, it aligns with the principle that the jurisdictions of the FHC and IST are coordinate and complementary, in relation to the enforcement of the mixed regulatory obligations of public companies. Indeed regarding the last point, the decision can be rationalised as a useful platform for the Nigerian Supreme Court to provide a final clarity of principles on the relation between the FHC and IST and on matters which intersect the remits of the CBN, CAC, FRC, and SEC. But can the same be said about *Nospecto* and *Okeke?* How correct is the decision of a different panel of the CA in the two cases, to the effect that the FHC has exclusive jurisdiction on mixed banking corporate and securities law matters, particularly those commenced by the SEC under the *ISA?* These and other questions are examined below.

Nospecto Oil & Gas Ltd v Olorunimbe & 15 Ors

In this appeal against a ruling of the IST, the parties submitted five identical issues for determination. Two of these issues are relevant to the discussion in this paper: (a) whether the agreement between the parties is a simple or a collective investment scheme contemplated by *sections 153(1), 284(1)(f)* and *315* of the *ISA, 2007,* as to confer jurisdiction on the IST; and (b) whether the IST has the jurisdiction to hear the case. Appellant's argument on the two issues were essentially a rerun of the arguments in support of its preliminary objection before the IST. These briefly, were to the effect that the agreement was a simple contract, which should be litigated before the

competent SHC, consistent with *section 272* of the *CFRN, 1999;* and that by seeking reliefs against SEC and CBN, the 1st to 14th Appellants, cannot come before the IST. This is because *section 251(1)* of the *CFRN, 1999,* confers jurisdiction on the FHC, in a matter, such as the instant where federal agencies are impleaded for their administrative actions. These arguments are contradictory, in that the Appellant in one breadth argued for the jurisdiction for the SHC and in another, for the FHC. This arguably exemplifies the difficulty of legal reasoning where the law is uncertain.

Ideally, it should be quite easy for litigants to know the competent trial forum for a dispute arising as here, from solicitation of investment from the public, but where jurisdictional principles are not so clearly formulated, jurisdictional challenge founded often on equivocatory arguments, tend to take up the greater part of dispute resolution process to the detriment of merit of the case. The Respondents (Appellant's investors) contended that the Appellant was 'estopped' from re-characterising the agreement as a simple contract in view of the decision of the IST in *Nospecto v SEC,* to the effect that the Appellant's business was effectively a collective investment scheme – a judgment, which they argue, the Appellant did not appeal.

The CA (per Ogunwunmiju JCA, with Pemu and Danjuma JJCA concurring) resolved the first issue in favour of the Appellants, to the effect that the agreement, subject matter of the appeal, was a collective investment scheme over which the IST has trial jurisdiction. Ogunwunmiju JCA reasoned that *CAMA* does not confer any right on a company to approach the public with collective investment schemes. Consistent with the thesis of this paper, it is submitted that her ladyship was right in holding that the dispute between the parties arose from a collective investment scheme. In support, it is arguable that solicitation of investment from the public, through an agreement, as was done by the Appellant, cannot to a convincing extent, be pleaded as a simple contract. Even if it were at all, a contract, it should be seen as one with regulatory implication in securities and investment law. This in turn means that the law with the 'closest connection' to the case is *ISA, 2007,* and the trial forum should be the IST.

In relation to whether the IST could grant the reliefs sought by the 1st – 14th Respondents against the SEC and CBN, the Court of Appeal rather curiously and in spite of finding in favour of IST's trial jurisdiction over the Appellant's 'business', held that under the inconsistency rule, the validity of any Law or Act is determined by its consistency with the provisions of the Constitution. The Court also held that section 284(1) of the *ISA,* limits IST's exclusive jurisdiction to disputes over SEC powers to regulate the Nigerian

capital market. Also, that Section 284(f) of the *ISA 2007* gives the Tribunal exclusive jurisdiction to adjudicate in disputes arising from administration, management and operation of a collective investment scheme. The court in effect reasoned that if the claims by the Respondents were limited to compelling the Appellant to stop its allegedly illegal and fraudulent business and banking activities, then the Tribunal would have had exclusive jurisdiction. 'However, since the principal claims are against SEC and CBN, the Tribunal has no exclusive jurisdiction to determine them…'[52]

With respect, while her ladyship's argument is sure footed in law, this case does not necessarily require the invocation of the inconsistency rule; nor does it demand the displacement of IST's jurisdiction on the second issue. This submission is founded on three arguments. The first is to the effect that the judgment is paradoxical. This is because, the court as indicated above, found in favour of the *ISA, 2007,* and the IST's jurisdiction over the scheme operated by the Appellant. But the court declined to follow through with this preliminary finding, specifically, in relation to its implication for the second issue concerning the proper judicial forum for the reliefs sought by the 1st to 14th Respondents against the SEC and CBN. By finding in favour of the FHC on this issue, even though the reliefs were necessitated by the Appellant's fraudulent scheme, and the Appellant's case was that the SHC and not the IST, has jurisdiction, the decision starkly contradicts, the initial finding in favour of the IST. Are the reliefs on closer analysis, such that ought necessarily to be sought before the FHC? Is the court's reasoning, with respect, akin to taking the 'line of least resistance' to the issue and one that readily finds support in the inconsistency rule? The answer to these questions, it is submitted with respect, should be in the negative. The approach of the Court of Appeal here should be rejected.

An alternative approach and one that arguably avoids the paradox in the judgment, after the preliminary finding in favour of the *ISA, 2007,* and *IST,* should have been for the Court of Appeal to hold that in so far as between, SEC and CBN, only the former, can be impleaded before the IST on the facts and law of the case; the reliefs sought by the Respondents would if granted by the IST, apply only to the SEC. With this approach, the 1st – 14th Respondents can elect subsequently to proceed against the CBN before the FHC.

52 (2011) LPELR – 8 933 (CA).

Linked to the foregoing is the second argument against the judgment, according to which the CA's overall approach to this case conflates a matter arising almost exclusively from the *ISA,* with one having a mixed *BOFIA* and *ISA* implication. On the pleadings and evidence, the case for the 1st – 14th Respondents can be reduced into a simple allegation of fraudulent and unlicensed operation of a collective investment scheme, in violation of the *ISA, 2007.* Had the court, with respect, approached the matter this way, arguably much clarity would have been achieved to the effect that the connection between this case and *BOFIA,* is marginal. Put differently, the case for the 1st – 14th Respondents is substantially if not exclusively founded on Appellant's violation of the *ISA, 2007.* The 1st–14th Respondents' case as constituted here, does not rest on Appellant's breach of the *BOFIA* and therefore did not require the invocation of the inconsistency rule.

Lastly and as a third objection, the judgment with respect, fails to address an arguably central question in the case, namely, which regulator as between the SEC and CBN, has the sole judgment enforcement obligation where a violation of the *ISA, 2007,* is established by the IST? It has been argued severally in this paper and with statutory support that the enforcement of *ISA's* regulatory provisions fall exclusively within SEC's remit. In effect, where the IST holds that *ISA's* provisions have been either wholly or partly violated, the SEC has the sole responsibility to give effect to that judgment, even if the Commission is the violator. Again and with respect, had the CA considered this question further to its initial finding in favour of the *ISA,* and IST's trial jurisdiction, it would arguably have been appreciated without invoking the inconsistency rule that IST can grant the reliefs sought by the 1st–14th Respondents at least in relation to the SEC.

Okeke v SEC & 2 Ors

On the facts, the Appellant was appointed as a non-executive director of Cadbury Nigeria Plc. in June 2003. In June 2006, the Annual Report and Accounts of the company was sent to the SEC. On receiving the report, the SEC expressed concerns inter alia, on the declining profitability, and leverage ratio mis-statements in the company's accounts. In response, the Chairman of the company, appointed PWC to investigate the concerns. PWC's Report was sent to the SEC, who thereupon referred the matter to the 2nd Respondent (APC). The company, its directors and auditors, challenged the competence of the APC to investigate the matter before the FHC.

While that action was pending, the APC concluded its investigation and delivered a decision for the SEC's approval.[53] In consequence, the Appellant applied to the FHC for a judicial review of this decision and sought declaratory and injunctive reliefs, including an order of certiorari to quash the APC's decision. The FHC (coram Mustapha CJ) upheld the APC's decision, and dismissed the Appellant's action.[54] The appeal to the CA was decided substantially on, whether the FHC, was right in holding that the 2nd Respondent (APC) had jurisdiction to adjudicate over the allegations of complicity in the misstatements in the Annual Report and Accounts of Cadbury Nigeria Plc. in view of section 251 (1) (e) of the CFRN, 1999.

The CA unanimously held that Mustapha CJ wrongly upheld the jurisdiction of the APC to decide on the allegations against the Appellant. The court reasoned that the interpretive effect of *section 251 (1) (e)* of the *CFRN* is that the FHC has exclusive jurisdiction over matters arising from the reporting obligations imposed on public companies by *CAMA*.[55] Note should be taken of the fact the court relied strongly on *Skenconsult* for this reasoning and refused to follow *Ajayi*.[56] All the same, it is respectfully submitted that the CA wrongly decided *Okeke* in that the *rationes decidendi* in that case that the FHC has exclusive jurisdiction in matters with mixed securities and corporate law flavour, and that the APC cannot adjudicate a regulatory matter with criminal flavour, are arguably unsupportable on four grounds, which are discussed below.

First, the judgment incorrectly applied the *CFRN, 1999, CAMA,* and the *ISA, 2007,* to the fundamental issue in the appeal, which is whether a dispute arising from the regulation of the Nigeria Capital Market can be litigated before the FHC. This issue is clear from the allegations referred to the APC, namely that: (a) the Appellant and other persons responsible for the running of Cadbury Nigeria Plc. authorised the filing of Annual Report of the company for 2005, which SEC found to contain untrue statements in violation of *Rule 3(4)* of the *SEC Rules and Regulations 2000* (as amended);[57]

53 The decision dated 27 March 2008, disqualified the Appellant and three others from operating in the Nigerian capital market and being employed in the financial services sector, and from holding directorship positions in a public company for a period of 5 years from the date of the decision.

54 In Suit No.FHC/L/CS/483/2008*: Okeke v SEC and 2 Ors*, unreported judgment of the FHC, Lagos Judicial Division.

55 In sections 321-331, 374 – 337 and 345 – 348 of CAMA.

56 *Okeke* (n 4) 11 – 21.

57 This rule forbids the filing of a misleading or untrue document or information with the SEC. Violation of the rule is an offence and is punishable under Rules 3(4), 7 and 11 of the SEC Rules.

(b) the Appellant and other directors of Cadbury Nigeria Plc., in 2005, authorised the issuance of a Rights Circular dated 24 August 2005, containing an untrue statement in contravention of *Rule 3(4)* of the *SEC Rules;* and the Appellant and other directors of Cadbury Nigeria Plc. neglected to deliver funds for the payment of dividends declared to shareholders within seven working days after the Annual General Meeting in violation of *Rule 204* of the *SEC Rules.*[58] From these allegations, it seems incontrovertible that the fundamental issue before the Court of Appeal, turned on alleged violations of the Rules made by the SEC, pursuant to *section 13(a)* of the *ISA, 2007.* Had the appeal, been approached in this light, the CA, would indeed have appreciated that the relevant question(s) for determination could be found in the issues submitted by the Respondents. Appellant's successful invocation of *section 251 (1) (e) of the CFRN, 1999,* and reporting obligations contained in *CAMA,* is with respect, obfuscatory. It is obfuscatory because it was to all appearances, aimed at and did successfully confuse the real issue in the appeal and gave the impression that the IST and APC are judicial contrivances meant to usurp the jurisdiction of the FHC under *section 251(1) (e)* of the *CFRN, 1999.* In failing to see through this artifice, the Court of Appeal, in turn, misapplied these laws.

Consistent with the principles enunciated above, *section 251 (1) (e)* and the reporting obligations of public companies in *CAMA* should now be read as inapplicable to securities and capital market matters, which since 1999 are within the exclusive regulatory and adjudicatory remit of SEC and IST respectively. Specifically, the point (*obita*) by Saulawa JCA at (p. 19) that the exclusive jurisdiction of the FHC in *section 251 (1) (e) (r)* 'cannot be whittled down or taken away by an ordinary Act (*ISA*) of the National Assembly in the absence of any amendment to the provision' is with respect unduly formalistic, in the sense of insisting that an amendment to section 251 (1) must necessarily be contained within that section. This is just as formalistic as arguing that a court or tribunal established by the National Assembly pursuant to section 6 (4)(a) of the *CFRN, 1999,* must be reflected in the judicial hierarchy, contained in Chapter VII of the Constitution before such a court can be regarded as a superior court.

To the extent that section 6(4) (a) empowers the National Assembly to establish additional courts to adjudicate on matters on which the Assembly is competent to legislate; and where a court (such as the IST) is thus established to adjudicate on matters which were hitherto within the remit of the

58 *Okeke* (n 4) 15 – 16.

FHC and a judgment of that new court operates as a judgment of the FHC, a purposive interpretation of this change in law it is submitted, should be that the exclusive jurisdiction of the FHC is thereby 'whittled down' in relation to matters assigned to the new court.

But again this submission remains 'haunted' by the argument that section 6(4), of the *CFRN, 1999,* only empowers the National Assembly to establish courts that are subordinate to the FHC, not those of equal or coordinate jurisdiction. This means that ultimately for statutory clarity the submission requires a judicial (the Supreme Court's in the circumstance) imprimatur, so as to settle finally the status of the IST in relation to the FHC. Such imprimatur can also take the form of a legislative amendment to sections 6 (4) and 251(1) of the *CFRN, 1999,* consistent with this submission and other enunciations in the paper on the relation between the two judicial fora.[59]

Linked to the first ground of objection is the second, which is to the effect that the Court of Appeal in *Okeke,* conflated securities regulation with general corporate regulation. Arguably, the province of securities regulation in Nigeria can be approached from the long title to the *ISA, 2007,* namely, the '...regulation of the (capital) market to ensure the protection of investors, maintain fair, efficient and transparent market and reduction of systemic risk.' The remit of corporate law in Nigeria can also be approached from the long title to *CAMA,* which is to '... provide for the incorporation of companies and incidental matters of registration of business names and the incorporation of trustees of certain committees, bodies and associations.' The last remit mirrors what Armour *et al* categorised as the principal function of corporate law, which is to provide business enterprises with the legal form that possesses the five attributes of legal personality, limited liability, transferable shares, delegated management, and investor ownership.[60]

The fact that this categorisation contains 'investor ownership' shows

59 Speaking of amendment, the case of the National Industrial Court can be referenced for support in this context: Following the Supreme Court judgment in *Oloruntoba-Oju v Dopamu* (2008) 7 NWLR [Pt. 1085] *1*, the CFRN, 1999 was amended though the Constitutional of Federal Republic of Nigeria (Third Alteration) Act of 2010, to give the court, exclusive jurisdiction in civil cases and matters relating to labour, employment, trade unions, and industrial relations. This case for amendment is further supported by the dictum of Ambi-Usi Danjuma J.C.A in *Nospecto* to the effect that the National Assembly may amend section 251(1)(r), by adding the following proviso: 'without prejudice to the determination of all such causes or matters as are by any statute or Act of the National Assembly vested in any specialised court or Tribunal, the parties thereto not notwithstanding.' Indeed, his Lordship noted pointedly that '[i]t is only by a constitutional amendment that the situation can be saved: *Nospecto* (n 5).

60 J. Armour, H. Hausmann and R. Kraakman, 'What is Corporate Law?' in R. Kraakman *et al*, *The Anatomy of Corporate Law*: *A Comparative and Functional Approach* (2nd edn, Oxford: OUP 2009) 1 – 2.

that corporate and securities regulation will inevitably overlap in the area of investors' protection, and reporting (transparency) obligation of incorporated companies to investors. Yet, if one were to apply the respective remits of securities regulation and corporate law and as well the categorisation offered by Armour *et al,* to the allegations leading to the appeal in *Okeke,* it is arguable that the case falls entirely within securities regulation. This is because the key concern here relates to investors protection and capital market integrity. In fact, the document (Annual Report), which partly, formed the basis of the allegations, was filed with the SEC and not with the CAC.

Admittedly, a counterpart obligation to file the document with the CAC exists in the *CAMA,* but the allegations leading to the appeal did not arise from this obligation. It is thus submitted with respect that *Okeke* neither arose, nor fell within the province of Nigerian corporate law, anymore than it can be said that matters relating to the integrity of the Nigerian capital market can be dealt with by an agency (CAC) established to regulate incorporation of companies. The appeal, it is further submitted ought to have been decided consistently with the statutory scheme for securities dispute resolution embodied in the *ISA, 2007.*

Further and moving on to the third ground of objection, because the Court of Appeal conflated the securities regulation with corporate law, the court's interpretive analysis of the regulatory and disciplinary powers of SEC, particularly in relation to the use of the APC, is with respect incorrect. Moreover, it suppresses the statutory intendment to exclude the FHC from the resolution of disputes arising from securities regulation. The Court (at p 22 – 23) conceives the APC to be a court, the existence of which invidiously makes SEC the complainant and judge. This is unsupportable in view of sections 13 and 310 of the *ISA, 2007.* Section 13 sets out the functions of the Commission, including specifically, protecting the integrity of the securities market against all forms of abuses. *Section 310,* empowers the Commission to delegate its functions to one or more Committees, provided a decision of such Committee(s) shall be subject to the Commission's confirmation.

A logical incident of the two sections, it is submitted, is that SEC can create a committee such as the APC; to investigate and recommend sanctions for acts which have the tendency of comprising the integrity of the capital market. Where, as the case is with the APC, the proceedings of an administrative committee are quasi-judicial in nature that does not credibly mean that the committee is a court, any more than we can regard the Commission which delegates its powers to the committee as a court, had it conducted the proceedings itself. The fact that a decision of the APC, is even

subject to the Commission's confirmation shows that it (APC) is at best, an advisory disciplinary committee of the SEC and not a proper judicial forum, for the adjudication of securities disputes. Its creation does not therefore to any convincing extent, implicate a usurpation of the functions of the IST or those of the FHC. Indeed a right of appeal against the committee (as confirmed by SEC) to the IST does exist in law.[61]

The foregoing notwithstanding, the CA, would have reached the same conclusion whether it was the APC or SEC itself that exercises the administrative disciplinary power. So the argument has to be approached on the basis that SEC effectively exercises this power. Now, one question is whether SEC can be a complainant, investigator, and judge in the exercise of its administrative power.

This question was indeed raised in Appellant's fourth issue, on which to a subsidiary extent, the CA decided the appeal against the Respondents. Note should be taken of the fact that the FHC had found as a fact, on this issue that there was no evidence showing that members of SEC's in-house investigation team, also sat as members of the APC and the Appellant did not make out a case on breach of the principles of natural justice of natural justice.[62] In contrast, the CA upheld the Appellant's argument that the APC proceeding in this case violated the principles. Saulawa JCA articulated the reasoning behind this decision, to the effect that 'the interlocking relationship between the SEC and APC' and the manner in which the proceeding was conducted (i.e. that the identities of APC members were not communicated to the Appellant) amounted to a 'violation of the due process.'

With respect, this decision and the accompanying reasoning, are unconvincing in that a mere apprehension of interlocking relationship in this context, without proof on the balance that the relationship could lead to a reasonable conclusion that the independence and impartiality of APC are thus manacled, is not a sure ground to find in favour of breach of the principles of natural justice. Comparatively, the Administrative Proceedings Panel (APP) of the United States of America's Securities and Exchange Commission is interlocked with the Commission in the sense that it is effectively an in-house specialist quasi-judicial committee established by the Commission. Even so, objections to APP's proceedings are rarely founded on the violation of the principles of natural justice. Rather and as exemplified by decision in *Gupta* it is not procedural permissible for the Commission to split a prose-

61 ISA 2007, s 289(1).
62 CA/L/13/2009, 23.

cution into two, preferring to litigate one half before a conventional court and the other half before 'its home court,' the APP and thereby deprive a defendant of the benefit of jury trial that is available in conventional courts.

Specifically, a preferable approach, consistently with the enunciations in this paper, would have been for the CA to establish from the records (if at all necessary in view of FHC's finding on this point) whether the APC is structured independently from SEC, and whether the Committee reasonably accorded all parties to the proceeding leading to the appeal, equal opportunities to be heard, orally or in writing. These findings it is argued, could have led to a much more engaging analysis of the extent to which the principles were reflected in the proceeding than the inquiry into whether the names of APC members were communicated to the Appellant. Findings resulting from this analysis it is further argued, would have reflected a nuanced application of the principles to proceedings before a body such as the APC as was arguably done by the FHC, in the instant case, and the CA panel in *Ajayi*.

Equally unsupportable, as a fourth objection, is the CA's position (per Augie JCA's concurring judgment) to the effect that the APC, 'cannot adjudicate over a matter with criminal flavour.'[63] It is unsupportable because it rests on the proposition that an administrative trial of a crime must necessarily result in a conviction, which can only be pronounced by a conventional court.[64]

This proposition, with respect, is flawed, in that a finding by an administrative body such as the APC that a respondent to a complaint brought before it, is guilty of a crime, in reality, operates as a disciplinary finding before a regulatory sanction. It does not amount to usurpation of the criminal jurisdiction of the court any more than a regulatory sanction without such an administrative proceeding would have been similarly usurpatory. Moreover, where as argued above, an administrative body such as the APC is legally empowered to decide complaints relating to the rights and obligations of others, that body should be seen as a tribunal established by law under section 36(1) of the *CFRN, 1999*. This means in essence that it should be able to dispose totally the case before it, and (where as here, it is necessary) make a finding of guilt on matters falling within its remit, but without prejudice to the right a party affected by that finding to appeal to higher tribunals or courts.

63 CA/L/13/2009, 25. For this decision, Augie J.C.A., relied on the Nnaemeka-Agu J.S.C. in *Baba v N.C.A.T.C. (*1995) 5 NWLR [Pt. 192] 388.

64 ibid.

6. CONCLUSION

Overall, jurisdictional relations over the regulatory obligations of public companies in Nigeria – between two judicial fora (FHC and IST)- represents a classic regulatory conundrum. Not the least because of the lack of clarity of enabling statutory principles and inconsistent case law authorities. As a contribution, and to assist in resolving the legal uncertainty fostered by this conundrum, the paper has *inter alia*, argued for the adoption of some normative principles including that of mutually exclusive jurisdiction.

By and large, forum questions discussed in this article are subset of the perceived inadequacies of the legal and institutional architecture of corporate and financial regulation, which tends to create tensions amongst regulatory agencies and judicial. Such tensions cannot be totally eliminated in a regulatory system, but how they are managed through a continuous reappraisal of the underlying regulatory norms and principles, will to a reasonable extent impact on the effectiveness of the prevailing regulatory approach. Managing and responding to the tensions effectively, often requires statutory reform and a re-alignment of the institutional regulatory structure to achieve a much more effective regulation. This has been the approach and contribution of this article.