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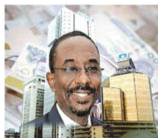
The audit profession in Nigeria has continued to receive the flaks following CBN's Special Examination of banks. CBN's report on the audit of the banks suggests that the concerned banks' financial statements may not have exactly represented the reality. This is notwithstanding the fact the financial statements passed through auditor scrutiny.



A financial statement is supposed to reflect a company's true financial position and provides shareholders and creditors a means of ascertaining a company's financial position at any given time. It also enables them to make informed decisions on their investments. It is in furtherance of this objective that a company's financial statement is required by both the Companies and Allied Matters Act 1990 (CAMA) and the Banks and other Financial Institutions Act 1991 (BOFIA) to be signed off by auditors as representing a true and fair view of a company's affairs for the year ended, and also whether they have been properly prepared in accordance with the law, and to report to the members where, in the auditor's opinion, proper accounting records have not been kept.

The external auditor of one of the banks which were recently bailed out was reported to have asserted thus:

"we have audited the accompanying consolidated financial statements of "the Bank" and its subsidiaries (together "the Group") which comprises the consolidated cash balance sheet as at 31 December, 2008 and the consolidated profit and loss account and consolidated cash flow statements for the period then ended and a statement of significant accounting policies and other explanatory notes. In our opinion, the financial statement gives a true and fair view of the state of the financial affairs of the banks and group as at 31 December, 2008 and of their profits and cash flows for the period then ended in accordance with the Nigerian Statement of Accounting Standards, the Companies and Allied Matters Act 1990 and the Banks and Other Financial Institutions Act 1991."

CBN's findings on these banks appear to give the lie to the above assertion and raise questions on the credibility of the auditors especially on the disclosures of debt exposures. It is understandable therefore why stakeholders are asking questions about the auditors' competence and integrity, while not a few affected investors are exploring options open to them to seek redress against the auditors. This piece considers the scope of the duties of the auditor and examines the civil regime for auditor liability under the CAMA, the BOFIA, the Investments and Securities Act (2007) (ISA), and at common law. I should mention at this point that this contribution is in no way assuming the guilt or complicity of the bailed out banks' auditors in the travails of the banks.

Duties of the Auditor

The auditor has a duty to provide a professional opinion on the relationship between the assertions in the financial statements and those embodied by the statement of accounting principles (Cowperthwaite Mehta, 1999). The auditors' job, in a nutshell is to state whether the financial statement tells it as it is. Where an auditor tells it as it is in accordance with the accounting principles as contained in CAMA, BOFIA and SAS, he has done his job and this will go a long way in safeguarding the interest of investors and create room as well for improvement

in the management of the organisation. (Bede Nwete 2006).
This duty of 'telling it as it is' is encapsulated in both the CAMA and BOFIA thus:
Under CAMA, "[The Auditors must report:]
1. Whether they have obtained all the information and explanations which to the best of their knowledge and belief were necessary for the purpose of their audit.
2. Whether in their opinion, proper books of account have been kept by the company, so far as appears from their examination of those books, and proper returns adequate for the purposes of their audit have been received from the branches not visited by them.
3(1). Whether the Company's balance sheet and … profit and loss account dealt with by the report are in agreement with the books of account and returns.
(2). Whether, in their opinion and to the best of their information and according to the explanations given them, the said statements give the information required by this act in the manner so required and give a true and fair view –
a) in the case of the balance sheet, of the state of the company's affairs as at the end of its year; and
b) in the case of the profit and loss account, of the profit and loss for its year; or as the case may be, give a true and fair view thereof subject to the non-disclosure of any matters (to be indicated in the report) which, by virtue of Part I of the Second Schedule of this Act, are not required to be disclosed." (Sixth Schedule CAMA)
And under the BOFIA, Section 29(7), an auditor must immediately report to the CBN if the auditor is satisfied that: there has been a contravention of the Act, or that an offence under any other law has been committed by the bank or any other person; or losses have been incurred by the bank which substantially reduce its capital funds; or any irregularity which jeopardizes the interest of depositors or creditors of the bank, or any other irregularity has occurred; or he is unable to confirm that the claims of depositors or creditors are covered by the assets of the bank.
Apart from the statutory duties outlined above, auditors also have common law imposed duties. The Nigerian Law Reform Commission in its 'Report on Reform of the Nigerian Company, 2008, articulates these duties as follows:
" 'Duties are imposed by the Common Law and Equity on the auditor. Auditors must inform themselves of any special duties imposed on them by the Articles (per Lindley L.J. in Re London and General Bank (No. 2) (1895) 2 Ch. 573 C.A.): they must check the cash in hand and the balance at the bank (Fox v Morrish, Grant & Co. (1918) T.L.R. 126); they must satisfy themselves that the security of the Company exists and are in safe custody (Re City Equitable Fire Ins. Co. Ltd (1925) Ch. 407) and (for the purpose of the statutory report) they must ascertain the true financial position of the company. The statement; 'auditors must be watchdogs ...' refers to the last mentioned duty. They must examine the company's books, and if there is anything to arouse their suspicion they must make full investigation. They are under no duty to take stocks nor are they concerned with the policy of the company nor whether it be well or ill managed, the duty of an auditor is not to confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but to inquire into its substantial accuracy ...' per Sterling J. in Leeds Estate Co. v. Shepherd (1887) 36 Ch. D 787 ...
'His vital task is to take care to see that errors are not made (be they errors of computation or errors of omission or commission or downright untruths); to perform this task properly, he must come to it with an inquiring mind not suspicious of dishonesty-but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has

been none' per Lord Denning, in Forment (Sterling Area) v. Selsdon Fountain Pen Co. (1958) 1 WLR 45."
It has also been held, Per Ashbury J., in Republic of Bolivia Exploration Syndicate Ltd, Re, [1914] 1 Ch. 139, that –
"When it is shown that audited balance-sheets do not show the true financial condition of the company and that damage had resulted, the onus is on the auditors to show that this is not the result of any breach of duty on their part."
To facilitate the above tasks, CAMA confers the auditor with very wide powers of investigation. It provides in its section 360, that:
"it shall be the duty of the company's auditors, in preparing their report, to carry out such investigations as may enable them to form an opinion as to the matters relating to their duties with respect to the accounting records, balance sheets and the profit and loss account where it is not consolidated".
In telling it as it is, CAMA section 358, mandates auditors to adhere to the auditing standards set by the Institute of Chartered Accountants of Nigeria (ICAN) in performing their duties. The auditor is also required to exercise a further duty of care, diligence and skill as is reasonably necessary in each particular case and circumstance. (CAMA section 368). To whom does the auditor owe these duties?Both statute and case law make provision for this. CAMA section 368 (2), provides that the auditor shall be liable for negligence where a company suffers loss or damages as a result of the failure of its auditor to exercise the duty of care, diligence and skill imposed on the auditor under section 368 (1). Where the auditor is in breach of this duties, the directors may institute an action for negligence or if they fail to do so then any member may institute the action after the expiration of 30 (thirty) days notice to the company of the member's intention to institute such action. It is submitted that this is a derivative right and such the benefits of the action would accrue to the company and not to the individual members who instituted the action.
Common law widens the category of persons to whom the auditor owes these duties to include shareholders and other third parties who suffer loss or damage as a result of the auditor's negligence. This class of persons may be able to maintain an action in negligence against the auditors in their individual capacities. (Hedley, Bryne & Co. Ltd v. Heller & Partners Ltd [1963] All E.R 575. See also the dissenting judgement of Denning LJ in the earlier case of Candler v Crane, Christmas & Co. (1951) 2 K.B. 164).
However, for an individual action to succeed, it must be proved that the auditor knew that the statement would be communicated to the person relying on it either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or a transaction of a particular kind and that the person would be very likely to rely on it for the purpose of deciding whether to enter into that transaction.
For the creditors and shareholders of the affected banks, in determining whether they could maintain an action against the auditors for negligence, the pertinent questions would be:
whether the auditors knew that the statements would be communicated to them specifically in connection with a particular transaction or a transaction of a particular kind; and
whether the auditors knew that the shareholders and creditors would be very likely to rely on it for the purpose of deciding whether to enter into that transaction. The courts in Nigeria are yet to test these provisions on auditors' liability as there are no case law authorities on this issue. It is likely that the courts in Nigeria will have to be guided by the decisions of the courts in other jurisdictions where similar events have occurred. In Hercules Management Ltd v Ernst & Young,

[1997] 2 S.C.R 165, the audit report prepared for the company and required by statute was prepared for the purpose of assisting the collectability of shareholders of the audited companies in their task of overseeing management. The shareholders relied on this report and in consequence suffered financial losses. In an action for negligence against the auditors, the court held that the auditors owed a prima facie duty of care to the appellants on the basis that the possibility that the appellants would rely on the audited financial statements in conducting their affairs and that they might suffer harm if the reports were negligently prepared must have been reasonably foreseeable to the respondent. Also, reliance on the audited statements by the appellant shareholders was reasonable given both the relationship between the parties and the nature of the statements themselves-- the respondents were also well aware of the identity of the appellants.

Nevertheless, the court stated that:

"The respondents did not prepare the audit reports in order to assist the appellants in making personal investment decisions or, indeed, for any purposes other than the standard statutory one. The only purpose for which the reports could have been used so as to give rise to a duty of care on the part of the respondents, therefore, is as a guide for the shareholders, as a group, in supervising or overseeing management". Finally, it stated that "the purpose for which the reports were used was not, in fact, consistent with the purpose for which they were prepared". The auditors were eventually held not liable.

In the earlier case of Caparo Industries Plc v Dickman, [1990] 1 All E.R. 568, the shareholders who took over a public company sued the auditors, alleging that they had relied on accounts which were negligently prepared and misleading. The House of Lords had to decide whether shareholders who bought more shares with the intention of taking over the company could sue the accountant of the company when it turned out the accounts of the company were worse than had been revealed by the directors or the auditor.

The House of Lords upheld the auditors' contention that they did not owe the plaintiffs a duty of care on the basis that

(1) Under the Company's Act, auditors only owed a duty of care towards the company and the shareholders;

(2) The audit reports are prepared to provide information to shareholders, for the limited purpose of enabling them to exercise their property rights and not for them to take investment decisions in their private individual capacity;

(3) For the auditor to owe a duty of care it must be proved that he knew that his statement would be communicated to the person relying on it either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or a transaction of a particular kind and that the person would be very likely to rely on it for the purpose of deciding whether to enter into that transaction; and

(4) The auditor of a public company owed no duty of care to a member of the public at large who relied on the account to buy shares in the company. In view of the foregoing, it is without doubt that the auditor owes a duty of care to certain third parties and may be held liable for negligence in case of any breach of the above highlighted duties. But it is also clear that for such an action to succeed, such third parties, including creditors and shareholders must be able to satisfy the conditions for doing so.

Aggrieved creditors and shareholders of the banks affected by the CBN audit must be bewildered in this realisation; but they need not be despondent. As may have been observed, the cases cited in the support of the above conclusion are all English cases, there being no

Nigerian case in this area. Nigerian courts when confronted with these issues may be propelled by a policy consideration different from that of the English. In such case scenario, who knows, the 'sins' of the auditors may yet be used in evidence against them.

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