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LEGAL FRAMEWORK FOR NIGERIA'S INVESTORS PROTECTION FUND*

Abstract

The activities of capital market operators sometimes endanger the interests of investors. False trading, market manipulation, misrepresentation and negligence by dealers in companies' securities often occasion loss to investors. Investors are sometimes induced to purchase shares of ailing and failing companies through manipulations and misrepresentations by dealers in companies' securities. Many have also lost their investments to negligence of dealing firms. Often, the pecuniary loss investors suffer in the event of corporate fraud or collapse is hardly redressed under the traditional remedies afforded by law of contract, law of tort or criminal law. At such times, they are disoriented, and their confidence in the capital market diminishes greatly. In an attempt to respond to the activities in the capital market which potentially or actually challenge the legitimate interests of investors, the Investments and Securities Act provides, inter alia, for the establishment of an Investors Protection Fund. This paper examines the statutory provisions regulating the establishment and operations of the Fund with a view to determining the extent of protection it affords an investor. It expresses some concerns over the workability of the Fund as presently constituted and proffers suggestions calculated to make it an effective restorative scheme.

1. Introduction

The instrumentality of a company as a vehicle for economic enhancement of persons who invest their funds in return for dividends without necessarily being encumbered with the responsibility of managing the affairs of the company has made companies attractive. When the going is good, the investor receives his dividends as and when due, and not much attention is given to whether or not those entrusted with the investor's funds have operated within the ambit of the law. However, when the going gets rough, and desired returns on investment are not obtained, or in the worst case, the company becomes insolvent, then the activities of those charged with the affairs of the affected

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company become subjected to probe in order to determine what went wrong and who is to be held responsible. At this point, the aggrieved investor looks to the law for remedy, and the relevant companies' statutes in Nigeria are replete with provisions which are intended to protect investors against corporate irregularities, maladministration and fraud.¹ However, especially as it relates to capital market investments, a most significant statutory scheme intended to serve as buffer to investors who suffer pecuniary loss is the investor protection fund ("the Fund").

The Fund originated as part of the recommendations of the Panel on the Review of the Nigerian Capital Market.² The Panel was established to review the operations of the capital market, restructure it, remove systemic bottlenecks to investments and make it attractive to investors. It recommended, *inter alia*, the repeal of the Securities and Exchange (SEC) Act of 1988,³ the establishment of a new apex regulatory agency to be known as the Investment and Securities Commission to replace SEC,⁴ the promulgation of an all embracing Investment Services Decree and the establishment of an investor protection fund.⁵ The Panel submitted its report in 1986 with a draft Investment Services Decree modeled on the U. K's Financial Services Act of 1986. Most of the Panel's recommendations, including that on investors protection fund, were adopted by the federal government in formulating the provisions of the Investment and Securities Act (ISA) No. 45 of 1999.⁶ Although, it has always been the custom of

¹ For the examples of provisions on investor protection, see Companies and Allied Matters Act (CAMA), Cap. C20, Laws of the Federation of Nigeria (LFN) 2004 – ss. 142 (right of a shareholder to apply to the court for cancellation of variation of class right); ss. 300–313 (minority protection); ss. 314–315 (investigative powers of the Corporate Affairs Commission); s. 408e) (winding up of a company on the ground that it is just and equitable). See also the Investments and Securities Act (ISA) 2007 – ss. 67–96 (regulations on prospectuses); ss. 105–110 (prohibition of false trading and market manipulation); ss. 111–116 (prohibition of insider trading); ss. 130 and 150 (rights of a dissenting shareholder or dissenting offeree in a merger or take-over activity, as the case may be); s. 198 (investor protection fund).

² The panel is popularly referred to as the "Odife Panel", after the name of its chairman, Dennis Odife.

³ See Executive Summary of the Report of the Panel on the Review of the Nigerian Capital Market, p. 5.

⁴ *Ibid.*, at p. 13.

⁵ *Ibid.*, at p. 12.

⁶ Now repealed by s. 314 (1) Investments and Securities Act (ISA), 2007.

stock exchanges to maintain compensation scheme to serve the interests of investors who suffer loss as a result of default of a member, making its establishment a legal requirement is laudable. There is now a sound legal basis for its maintenance with the investor having a legal right to make claims from it.

2. Establishment of an Investors Protection Fund

A Securities Exchange or Capital Trade Point is obligated to establish and maintain an investor's protection fund,⁷ which shall be administered by a board of trustees under the supervision of the SEC.⁸ The board of trustees holds all the assets of the fund, and shall apply same for the purposes of the Act.⁹ The repealed ISA of 1999 made provision for a governing board, which was not a board of trustees; and the assets of the fund were regarded as the property of the Securities Exchange or Capital Trade Point to be held in trust for the purposes of the Act. The difference in the above provisions is that in the latter, the board merely administered the fund without any right of legal ownership, whereas in the former the board of trustees has radical (not beneficial) ownership of the assets of the fund and the responsibility to administer the fund.

Membership of the board of trustees comprises a maximum of nine persons drawn from dealing member firms, securities exchange or capital trade point, Central Securities Clearing System Limited, SEC, institutional investors, Association of Capital Market Registrars, a person with proven integrity and knowledgeable in the capital market matters, registered shareholders association, and a person who shall be a legal practitioner knowledgeable in capital market matters.¹⁰ The composition of the board is a good mix of stakeholders, but the requirement of 'a maximum of nine persons' suggests that there could be less than that number, in which case a constituency which ought to be represented pursuant to section 199 (1) might be dropped. The criteria that would be applied by the board of a securities exchange or capital trade point¹¹ where it decides to constitute a board of trustees of less than 9 members is not clear

⁷ *Ibid.*, s. 197 (1).

⁸ *Ibid.*, s. 197 (2).

⁹ S. 197 (3).

¹⁰ S. 199 (1).

¹¹ It is the board of a securities exchange or capital trade point that is charged with the responsibility of appointing a trustee on the recommendation of the body he represents, see s. 199 (2).

under the Act. It would be preferable for the Act to drop the word 'maximum', and just state that the board shall consist of nine members.¹²

3. Objectives of the Fund

Generally, the Fund is meant to compensate investors who suffer pecuniary loss resulting from:

- a. the insolvency, bankruptcy or negligence of a dealing firm of a securities exchange or capital trade point; and
- b. defalcation committed by a dealing member firm or any of its directors, officers, employees or representatives in relation to securities, money or any property entrusted to, or received or deemed received by the dealing member firm in the course of its business as a capital market operator.¹³

In order to recover from the Fund, one has to be an investor in securities and must have suffered pecuniary loss. Unfortunately, the Investment and Securities Act has neither defined "investor" nor "investment", especially as it relates to the Investor Protection Fund. Considering that the Act was enacted to regulate all aspects of investment and securities business; and the many interpretations to which the term "investor" is open, it is essential that some sort of definition be provided by the Act as to the nature of the investment it seeks to regulate at each material point.

For our purposes, however, an investor will refer to a person who has interests in the acquisition or disposition of securities traded on a stock exchange from which earnings or profit is expected. These securities include: shares, stocks, debentures, government bonds, commodity futures, options and other derivatives.¹⁴ Let us also look at the definition of a "dealing member". It means a body corporate which is a member of a recognized securities exchange and is licensed to deal in securities on that exchange.¹⁵ Thus, a dealing member includes any person who makes or offers to make, induces or attempts to induce any person to enter into any agreement for or with a view to acquiring, disposing or subscribing for securities.¹⁶

¹² This style would be consistent with the composition of the Commission in s. 3 (1), ISA, 2007.

¹³ S. 198.

¹⁴ See s. 314.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Pursuant to section 198 (a), compensation shall be paid to investors who suffer pecuniary loss arising from the insolvency, bankruptcy and negligence of a dealing member firm of a securities exchange or capital trade point. This particular paragraph was not reflected in the equivalent provision in the repealed ISA 1999.¹⁷ It meant that under the former regime such losses arising from insolvency, bankruptcy and negligence were not covered. The present regime reflects the position in the U.K.¹⁸ The rate of corporate collapse in recent times, particularly of financial institutions, shows that the provision of section 198 (a) is quite apt. Investors in insolvent member companies of a securities exchange are assured of relief for pecuniary loss suffered from the insolvency. In addition, compensation is payable for negligence¹⁹ of a dealing member. This would engender due diligence and best practices, and capital market operators who, in an attempt to make quick business, make representations carelessly or recklessly, would likely desist from such practices.²⁰

Furthermore, compensation can be claimed for pecuniary loss arising from defalcation²¹ committed by a dealing member firm or any of its directors, officers or employees. Acts of embezzlement and misappropriation of funds are prevalent in the

¹⁷ See s. 159 (1) ISA 1999.

¹⁸ See s. 53 Financial Services Act, 1986 on which ISA 1999 was modelled.

¹⁹ It is our view that the negligence referred to in this case should comprise those acts or omissions which will sustain an action for negligence under the law of tort. In other words, in each case, where negligence is implicated, the claimant must prove that a dealing firm has a legal duty to exercise reasonable care regarding foreseeable risks of harm that may rise from the dealer's conduct. See the case of *Universal Trust Bank of Nigeria v Fidelia Ozoemena* [2007] 3 NWLR (Pt.1022) 448. The claimant must also show that his loss resulted from the failure a dealing firm to act carefully. See *Agbonmagbe Bank Ltd v. CFAO* (1966) 1 All NLR 140. Also, cases of economic loss caused by negligent misrepresentation would also be covered here. *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] A.C. 465. See also *Smith New Court Securities Ltd v Scrimgeour Vickers* [1996] UKHL 3; [1997] AC 254; [1996] 4 All ER 769; [1996] 3 WLR 1051.

²⁰ We believe that the provision would give rise to that effect because although compensation is paid out of the Fund, the board of trustees of the Fund becomes subrogated to any right the investor may have against the erring dealing member; see s. 218 ISA 2007.

²¹ S. 315 of the Act defines defalcation as a default, act of embezzling, failure to meet an obligation, misappropriation of trust funds or money held in any fiduciary capacity and failure to properly account for such funds.

capital market,²² and providing for compensation upon its occurrence is fitting, more so as it covers the acts of the directors, officers, employees and representatives of the dealing member firm. The acts of these persons in the course of the business of the dealing firm are rightly attributed to the dealing member.

Whereas the Act provides for the two situations mentioned above as the objectives of the Fund,²³ the section dealing on application of fund adds a third purpose.²⁴ It provides that the funds of an investor protection fund shall be applied for compensating persons who suffer pecuniary loss from the revocation or cancellation of the registration of a capital market operator pursuant to the Act. Section 38 provides the grounds for revocation or cancellation of a capital market operator's licence. It follows that where such a cancellation occasions a pecuniary loss to an investor, he may claim compensation from the Fund. It is not clear why the draftsman chose to be repetitive in enunciating the aim of the Fund and labeling the provisions as "Objectives of an investor protection fund", and "Application of the investor protection fund".²⁵ These marginal notes give the impression that the sections deal with different matters whereas the main gist is the same. Having earlier reproduced section 198, our discussion would be facilitated if section 212 is equally reproduced. It provides thus:

The funds of an investor protection fund shall be held and applied for the purpose of-

- (a) compensating persons who suffer pecuniary loss from the revocation or cancellation of the registration of a capital market operator pursuant to the provisions of section 38 of the Act;
- (b) the insolvency, bankruptcy or negligence of a dealing member firm of a securities exchange or capital trade point; and
- (c) any defalcation committed by a member company or any of its directors or employees in relation to any money or other property which, was entrusted or received or deemed received by a member company or any of its directors or employees whether before or after commencement of this Act in the course of or in connection with the

²² See, for instance, *Boat Nigeria Limited v. Nigerian Stock Exchange & Securities Exchange Commission*, unreported suit No. IST/OA/03/07 of 11/05/07; *Central Securities Clearing System Limited & Anor. v. Bonkolans Investments Limited & Ors*, (2007) 2 NISLR 93.

²³ S. 198 (a) and (b).

²⁴ S. 212 (1) (a).

²⁵ See the marginal notes to s. 198 and 212 respectively.

business of that company or any other occurrence in respect of which the claim arose.²⁶

Section 198 begins thus: “The **objectives**²⁷ of an investor protection fund shall be to compensate...”, and section 212 (1) provides that - “The funds of an investor protection shall be held and applied for the **purpose**²⁸ of: (a) compensating...” ‘Objective’ and ‘purpose’ have the same dictionary meaning, which is, “something toward which effort is directed, an aim, or a goal”.²⁹ It would be better to merge sections 198 and 212 by adding to the former the provision on compensation for pecuniary loss suffered from the revocation and cancellation of the registration of a capital market operator, and expunging section 212 entirely. This approach will address the inelegant drafting of section 212. An examination of the provisions of section 212 shows that the section seems to limit the issue of compensation to persons who have suffered pecuniary loss as a result of the revocation or cancellation of the registration of a capital market operator pursuant to the provisions of section 38 of the Act.³⁰ Paragraphs (b) and (c) of section 212 (1) do not specify in what way the fund is to be applied in the case of the insolvency, bankruptcy, negligence or defalcation of a dealing member firm. This has the potential of creating interpretational difficulties. This becomes more obvious when regard is had to provisions of section 213 (1) which provides that “...every person who suffers pecuniary loss as provided in section 212 of this Act shall be entitled to claim compensation...” Section 212 as we have observed above, only provides for compensation in the event that the claims of the investor relates to the circumstances stipulated in paragraph (a). This may likely implicate the interpretative rule of *expressiouniusestexclussioalterius*, namely; “the express mention of one thing is the exclusion of another”. Where an enactment enumerates the things upon which to operate, everything else (not enumerated) must necessarily and by implication be excluded

²⁶ S. 212 (1).

²⁷ Emphasis added.

²⁸ Emphasis added.

²⁹ See Merriam Webster Dictionary.

³⁰ See s. 212 (1) (a).

from its operation and effect.³¹ Thus, it can be argued that the compensation of victims who base their claims on paragraphs (b) and (c) of section 212 is not within the contemplation of the Act.³² Although, such an argument defeats the intendment of the provision, yet it is a possible submission. It is settled that once the meaning of a statute is clear, the courts are to give effect to it.³³ However, where there is a lacuna, the courts are not expected to fill such gaps in statutes, neither are they permitted to invite the lawmakers to explain what the provisions of any law mean. The court must find the intention of the lawmakers through the medium of the words used.

Section 212 raises yet a further difficulty. Section 212 (1) (a) provides that the funds in an investor protection fund shall be held and applied for the purpose of compensating persons who suffer pecuniary loss ...” It is foreseeable that persons other than investors in secondary market securities may suffer pecuniary loss as a result of the default of a dealing firm. The question then arises as to whether such persons can lawfully claim compensation by virtue of this section. There is need for the legislative draftsman here to specifically exclude the possibility of satisfying claims, which would otherwise be considered too remote for the purposes of compensation under the Fund.

3. Sources of Funds

It is pertinent at this juncture to look at the sources of money for the Fund. The Act provides that the Fund shall consist of:

- (a) all monies paid to the board of trustees by dealing members of the securities exchange or capital trade point in respect of which an

³¹ See the case of *Attorney General of Bendel State v. Aideyan* [1989] 4 NWLR (Pt. 188) 646

³² Cf. S. 198. Note, also, how s. 198 clearly omits the circumstance of an investor suffering pecuniary loss as a consequence of the revocation or cancellation of the registration of a capital market operator, as contained in s. 212 (1) (a). Also, in its judgment delivered on 26 September 2007, the Investment and Securities Tribunal held that the fact that a claimant’s (Boat Nigeria Limited’s) shares were sold without authorisation by Jenkins Investment (a dealing firm) was enough fact to establish that “defalcation” as defined by the ISA had, indeed, occurred; and the applicant was entitled to be compensated from the IPF. See Oluokun Ayorinde, “Fund of Controversy”. *TheNews* February 20, 2008. <http://thenewsng.com/business/>, last accessed on 19 September, 2009.

³³ See *Ojukwu v. Obasanjo* (2004) All FWLR (Pt. 222) 166.

- investor protection fund has been established as may be prescribed by the securities exchange or capital trade point from time to time;
- (b) the interest and profits, from time to time, accruing from the investment of an investor protection fund;
 - (c) all monies paid to an investor protection fund by a securities exchange or capital trade point in accordance with the provisions of this part of this Act;
 - (d) all monies recovered by or on behalf of the board in the exercise of any right of action conferred by this part of this Act;
 - (e) all monies paid by an insurer pursuant to any contract of insurance or indemnity entered into by a dealing member or the board of trustees;
 - (f) all monies held by any investor protection fund or by whatever name so called, established by a securities exchange or capital trade point prior to the coming into force of this Act; and
 - (g) all other monies lawfully paid into an investor protection fund.³⁴

It can be gleaned from the above provisions that dealing members of a securities exchange or capital trade point as well as the securities exchange or capital trade point contribute money to the Fund as may be prescribed. Also, interest and profits realised from investments of the Fund are paid into the account. An instance of monies lawfully paid into an investor protection fund, pursuant to paragraph (g) above, would be found in rule 203 (4) of the Securities and Exchange Commission Rules and Regulations which requires that all unclaimed return monies, being surplus monies due to subscribers or purchasers of securities shall after 6 months be transferred by the Registrar into an investors protection fund.

The statutory minimum amount that must be paid to the credit of an investor protection fund on the establishment of a securities exchange or capital trade point shall be approved by SEC from time to time.³⁵ Conversely, the board of trustees shall have the discretion to determine the amount or minimum amounts to be contributed by each dealing member firm to the Fund, subject to the approval of the securities exchange or capital trade point.³⁶ In the United Kingdom, for instance, the Financial

³⁴ S. 202.

³⁵ S. 207 (1).

³⁶ S. 207 (2). See Art. 70 of the Rules and Regulations of the Nigerian Stock Exchange Governing Dealing Members which provides that “each dealing member upon admission to Membership of the Exchange shall pay a non-

Services Authority (FSA)³⁷ provides a benchmark—levies imposed must reflect, so far as practicable, the amount of claims made, or likely to be made in respect of that exchange or trade point. A similar benchmark in our laws is desirable to check the incidence of misappropriation and abuse of the fund. The arrangement in UK permits the imposition of two distinct kinds of levies, namely: a management expenses levy and a compensation costs levy.³⁸ The compensation costs levy may include anticipated compensation costs for the next 12 months.³⁹ Both levies relate to actual costs incurred or costs anticipated to be incurred during the next financial year, and accordingly there is no substantial standing fund.

There are safeguards for the maintenance of the fund. First, all monies which form a part of the fund are required to be paid or transferred into a separate bank account in Nigeria pending the investment or application of such monies in accordance with the Act.⁴⁰ This would ensure that the monies are not tampered with or channelled to other purposes. Secondly, proper books of accounts relating to the fund shall be kept, and income and expenditure account as well as the balance sheet for the year must be prepared not later than three months following the end of the financial year.⁴¹ The accounts shall be audited by an auditor appointed by the securities exchange or capital trade point on the recommendation of the board of trustees.⁴² While the provisions are meant to ensure accountability and transparency, the mode of the appointment of the auditor may not guarantee the independence of the auditor. Since the board of trustees manages the fund, it should be excluded from the process of appointment of an auditor so as to avoid any complicity.

Thirdly, the fund should not fall below the minimum amount approved for a securities exchange or capital trade point. Where it does, the board of trustees is required to take steps to

refundable sum of ₦1,000,000 as initial contribution to the fund or such other amount as may be determined by Council.”

³⁷ The Financial Services Authority regulates the whole of the UK financial services sector which include investment business, banking and insurance – see the Financial Services and Markets Act (FSMA), 2000.

³⁸ See the FSA Handbook COMP 13.2.2.

³⁹ *Ibid.*, COMP 13.2.3.

⁴⁰ S. 203.

⁴¹ S. 205 (1).

⁴² S. 205 (2).

make up the deficiency.⁴³ It could direct that an amount equal to the deficiency be transferred from other funds to the investor protection fund, or determine the amount to be contributed by each dealing member if there are insufficient funds to be transferred to the fund.⁴⁴ Fourthly, a securities exchange or capital trade point may, from time to time, from its general funds give or advance, any sums of money to an investor protection fund on such terms and conditions as it may deem fit.⁴⁵

Finally, the Act stipulates the items to which the monies of the fund may be applied by the board of trustees.⁴⁶ This provision, we believe, is intended to guide the board of trustees in the exercise of its discretion, thus avoiding arbitrary exercise of discretionary power. Monies in the fund which are not immediately required for its purposes may be invested by the board of trustees in any manner in which the trustees are for the time being authorised by the Trustee Investment Act to invest trust Funds.⁴⁷ Such investment is likely to yield dividends which consequently would increase the volume of the fund.

4. Claims Procedure

Persons who have suffered pecuniary loss, in connection with any of the purposes for which the fund is established as set out in section 212 of the Act, shall be entitled to claim compensation from the fund established for the securities exchange or capital trade point to which the defaulting member belongs.⁴⁸ Such claims may be determined, from time to time and as the case may be, by a securities exchange, capital trade point, SEC or the Investment and Securities Tribunal. The board of trustees may, after such determination, appropriately settle the claims from the fund.⁴⁹ The independence and impartiality of the arbiter is crucial here.

⁴³ S. 208 ISA.

⁴⁴ *Ibid.*

⁴⁵ S. 210.

⁴⁶ They include claims arising from insolvency, bankruptcy or negligence of a failed dealing member firm; claims arising from defalcation; compensation ordered by SEC or the Investments and Securities Tribunal (IST); legal, professional and other expenses incurred in investigating or defending claims or in relation to the fund etc.; insurance premiums; wages and salaries of staff of the board of trustees – see s. 204.

⁴⁷ S. 211.

⁴⁸ S. 213 (1).

⁴⁹ S. 215.

In keeping with the fundamental principle of fair hearing, section 36(1) Constitution of the Federal Republic of Nigeria, 1999⁵⁰ provides that in the determination of an individual's civil rights and obligations, he shall be entitled to fair hearing within a reasonable time by an independent and impartial court or other tribunal established by law. This right to a fair hearing is better explained in the two traditional maxims, i.e.

- (a) *audi alteram partem* (the other party must be heard); and
- (b) *nemo iudex in causa sua* (a person shall not be a judge in his own case); in which case, there must be freedom from bias.⁵¹

In determining whether or not there is likelihood of bias, it has been laid down that the test is that of a right thinking member of the society. If the circumstances are such that a right thinking member will go away saying that the judge is biased then he should not sit; if he does, the decision cannot be upheld although in fact, he is not biased.⁵² Accordingly, the constitution of the determining body – a securities exchange, capital trade point, SEC, or the IST, as the case may be, must be such as to secure the impartiality of the tribunal. This will go a long way in restoring investors' confidence in the process.

An aggrieved investor is required to make a claim for compensation in the first instance to a securities exchange or capital trade point. The claim shall be verified within 30 days by the securities exchange or capital trade point which will also determine the amount or extent, if any, to which the claim shall be allowed.⁵³ A verified claim shall be paid from the fund to an aggrieved investor within 14 days of such verification by the securities exchange or capital trade point.⁵⁴ The statutory periods allowed for verification of claims and payment of verified claims

⁵⁰ Cap. C23 L.F.N. 2004.

⁵¹ *Garba & Ors. v. The University of Maiduguri* (1986) 2 S.C. 128.

⁵² *Adio v. Attorney-General of Oyo State & Ors* [1990] 7 NWLR (Pt. 163) 448.

⁵³ *Ibid.*, s. 213 (2). This is an important improvement on the ISA, 1999, which is silent as to the time within which a claim may be verified. As we shall observe later in this work, in the absence of a stipulated time limit, a claiming investor may suffer unnecessary adversity. Especially, bearing in mind that what is required at this stage are preliminary investigations to ascertain that a claimant has suffered pecuniary loss arising from any of the circumstances mentioned in s. 212 ISA 2007.

⁵⁴ S. 213 (3).

are commendable and, if complied with, are capable of advancing the legitimate interests of investors.

Where the claimant is dissatisfied with the determination made by the securities exchange or capital trade point, the jurisdiction of the Investment and Securities Tribunal (IST) becomes due and unquestionable. Its original jurisdiction in this regard is exclusive.⁵⁵ An aggrieved investor may also explore the option of taking his grievance directly to the Administrative Proceedings Committee of SEC on the failure of the securities exchange or capital trade point to provide suitable redress.

Where defalcation is in issue, a claim for compensation shall be made in writing to the board of trustees within 6 months after the claimant became aware of the defalcation, and any claim which is not so made becomes barred unless the Commission determines otherwise.⁵⁶ It should be noted that no such claim shall lie if prior to the defalcation, the money or other property concerned had ceased to be under the control of the director or directors of the affected dealing firm.⁵⁷ The arrangement of the above provisions on claims for defalcation in separate sections is clumsy. It would be tidy if the aspect which is under the provisions on publication of notice of claims⁵⁸ is expunged and transferred to section 213 which deals generally with claims against an investor protection fund.⁵⁹

SEC, a securities exchange or capital trade point may publish a notice in any two national daily newspapers circulating in Nigeria calling for claims for compensation from the fund. The notice shall specify the date, not being earlier than one month after the said publication, on which the claims may be made.⁶⁰

5. Amount of Compensation Payable

Pursuant to section 213 (6), the amount payable as compensation to a claimant is subject to any limit that may be determined by the securities exchange or capital trade point and approved by the Commission from time to time.⁶¹ Also, a claimant shall only be entitled to the amount of the actual pecuniary loss suffered by him

⁵⁵ See S. 284 (1) (a) (iii), ISA 2007.

⁵⁶ S. 214 (2).

⁵⁷ S. 213 (5).

⁵⁸ See s. 214 (2).

⁵⁹ That provision should actually precede subsection 5 of s. 213 because the main provision should normally come before any exception or proviso.

⁶⁰ S. 214 (1.)

⁶¹ *Ibid*

(including the reasonable cost of disbursement incidental to the making and proving of his claim) less any amount or value of all monies or other benefits **received or receivable by him from any source other than the fund in reduction of the loss.**⁶² The word “receivable” may be defined to mean “suitable to be received, especially as payment”.⁶³ Thus, where an investor is compensated or is to be compensated for his loss under any other arrangement other than the fund, e.g. an insurance scheme, he shall be indemnified under section 213 (6) only to the extent that his loss is not covered under such a scheme. This seems to be the import of the words “received or receivable” used by the Act in relation to the deductions to be made in settling a claiming investor. It is, therefore, of no consequence that the claimant, in this case, is not eventually indemnified by the source other than the fund. Where the possibility of receiving compensation from another source is ascertained, he will be paid less than that amount. This raises some concerns for an investor who has a similar claim, in this instance, against an insurance company or such other body, and the concerned body, justly or unjustly refuses to make good its obligations. Would such a claimant still be deprived of his claim against the fund to the amount or value of all monies or other benefits receivable by him from the alternative source? This would appear to be the express will of the legislature, by virtue of Section 213 (6) of the Act; or is this another instance of clumsy draftsmanship?

Let us repeat that in determining the amount payable to an aggrieved investor, regard would be had to the limits fixed by the securities exchange or capital trade point and approved by the Commission. Thus, if the amount claimed by the investor is less than the set limit, then he shall recover, in full, his claims against the fund. However, where it exceeds the limit, the claimant will only be compensated to the extent that his claims fall within the set limit. In both cases, the amount to be disbursed in his favour shall be less any amount or value of all monies or other benefits received or receivable by him from any source other than the fund in reduction of the loss. In UK, the maximum amount of compensation in respect of designated investment business is 100 per cent of the first of the first €30,000 and 90 per cent of the next €20, 000, producing a maximum payment of €48, 000.⁶⁴ In

⁶² Emphasis added.

⁶³ See Microsoft Encarta® 2007. © 1993-2006 Microsoft Corporation.

⁶⁴ See COMP 10.2.3.

Nigeria, following an order given by the Investments and Securities Tribunal in *Ezemgbe v. Nigerian Stock Exchange & Anor.*,⁶⁵ SEC hurriedly came up with the Investors Protection Rules 2007 which provides that the rate of compensation and the maximum compensation payable to an investor who has suffered a loss shall be ₦200,000, or where the loss is less than ₦200,000, the investor shall be paid the full amount of the loss. It, also, provides that the amount shall be reviewed from time to time. We wish to point out that the prescribed compensation is too small as to mitigate the loss of heavy investors. For instance, where an investor has lost investments valued at ₦3.7 million it is ridiculous to issue him a cheque of ₦200,000 as compensation.⁶⁶ Compensation must be such as to restore the aggrieved to his former position or to a position so near it. It is expedient that the maximum amount payable be raised be raised so as to raise investors confidence in the capital market.

The claimant shall be entitled to interest on the amount of the compensation, less any amount attributable to costs and disbursements, at the rate of five per cent per annum calculated from the day upon which a claim arose and continuing until the day upon which the claim is satisfied.⁶⁷ This is particularly beneficial to an investor whose compensation is being delayed.

In anticipation of situations where available money in the Fund will be insufficient in meeting the liabilities of a dealing member firm, the Act provides that a securities exchange or capital trade point may, on the recommendation of the board of trustees, impose on any or every dealing member firm a levy of such amount as it thinks fit to remedy the deficiency.⁶⁸ The levy

⁶⁵ Unreported Suit No. IST/OA/06/06 decided by the Investments and Securities Tribunal on 13th December, 2006.

⁶⁶ This was exactly what happened in *Ezemgbe v. Nigerian Stock Exchange & Anor.*, (*supra*), where the applicant whose investments valued at ₦3.7 million was lost through Apex Securities Limited claimed compensation out of the investors protection fund, and NSE issued a cheque of only ₦200,000 as compensation.

⁶⁷ S. 213 (7).

⁶⁸ S. 209 (3). Similarly, in UK, the scheme manager may, however, impose a levy at any time if it has reasonable grounds to believe that the funds available to meet relevant expenses are, or will be, insufficient. The maximum amount of a compensation costs levy on the designated investment business sub-scheme in any one financial year is €400 million, see COMP 13.4.7.

shall be paid within the time and in a manner prescribed by the board of trustees.⁶⁹

Furthermore, where the amount available in the fund is insufficient to settle all the claims against it, then the amount at the credit of the fund shall be apportioned between the claimants in such manner as the board of trustees thinks equitable.⁷⁰ We are of the opinion that equity will be better done and be seen to be done if the Act prescribes the manner of apportionment instead of leaving the task with the board of trustees. If the board thinks it is equitable to settle one claimant only with what is available, then other claimants have to wait until more money is received into the Fund. We submit that equity would demand that in such a situation, the claims should abate in equal proportion.⁷¹ This will ensure that every claimant receives some compensation. Whatever that remains unpaid will then be charged against future receipts of the fund.⁷²

7. Some Relevant Concerns

It has been rightly observed that: “A capital market is not created and sustained by passing the necessary laws. Laws if not properly understood by regulators and operators, once adopted may even negatively affect the development of the market.”⁷³ Although, the ISA contains notable provisions on the investor protection fund, we wish to express the following concerns over their workability.

a. Availability of information to Investors

We observed that the Act does not compel the securities exchange and capital trade points to provide adequate, relevant and effective information to current or prospective investors, in connection with the availability and workings of the compensation scheme. The only provision on information is section 214 (1) on publication of notice calling for claims against the fund. Even that section is not couched in an obligatory manner. It States that the SEC, a securities exchange or capital trade point “**may**”⁷⁴ cause to be

⁶⁹ S. 209 (3).

⁷⁰ S. 209 (2).

⁷¹ See s. 494 (4) (a) CAMA, for a similar treatment of preferential debts in the event of winding up and the assets of the company are insufficient to meet the preferential debts.

⁷² S. 209 (2).

⁷³ T. Ogowewo, “Transposition of Securities Legislation: The Case of the US Federal Securities Law and Nigeria” (1996) *JIBL* 239.

⁷⁴ Emphasis added.

published...” In England, the scheme manager is obliged to publish information for claimants and potential claimants on the operation of the scheme. A similar provision should be inserted in the Act.

Also, the regulatory authorities i.e. the Nigerian Stock Exchange and SEC have displayed some form of ignorance or apathy towards the operations of the Fund. A good example is *Boat's case*⁷⁵ where SEC advised the applicant to seek redress from the EFCC against an errant dealer instead of pointing him to the compensation scheme. SEC and NSE have been criticized for lack of awareness about the existence of the Fund.⁷⁶ There is the impression that the concerned authorities are careful that important information relating to the Fund be concealed from investors. It is curious that the Nigerian Stock Exchange has not at any time published details of the funds in the account.⁷⁷ Consequently, the fund has remained redundant for a long time. The law will always recognize the right of investors to material information affecting their investment. In this case, especially, there is the need to officially create a legal obligation requiring securities exchanges to regularly enlighten investors on the protection fund.

However, we quickly point out here, that a balance must be maintained between the need to effectively inform investors on the scheme, and the advantage of preventing adverse repercussions on the stability of the capital market.

b. Accessibility and Reliability of the Compensation Scheme

The procedure for claiming compensation against the Fund as prescribed under the Act is relatively simple and uncomplicated. However, this simplicity does not, in reality, guarantee any successful claim. On the contrary, compensation under the fund has been likened to the biblical camel trying to pass through the eye of a needle.⁷⁸

The few instances of efforts to make claims from the Fund are quite illustrative. In *Boat Nigeria Limited v. Nigerian*

⁷⁵ *Supra*. The facts of the case are discussed extensively below.

⁷⁶ The News, “NSE Not Transparent with IPF” <http://thenewsng.com/business/nse-not-transparent-with-ipf/2008/02>, February 20, 2008, last accessed on 5 September, 2009.

⁷⁷ *Ibid*.

⁷⁸ The News ‘Fund of Controversy’ <http://thenewsng.com/business/fund-of-controversy/2008/02>, February 20, 2008, last accessed on 5 September, 2009

Stock Exchange & Securities Exchange Commission,⁷⁹ Boat Nigeria Limited (“the applicant”); one of the companies defrauded in the famous case against Jenkins Investment Limited attempted to claim from the investors protection fund. The applicant, sometime in January 2006, bought four million shares of First City Monument Bank, FCMB which it subsequently deposited in the Central Securities Clearing System, CSCS, through its stockbrokers, Jenkins Investment Limited. It requested for, and was issued a verification slip indicating its stock position in October 2006.

However, the claimant was to discover during a routine check on CSCS on 24 January 2007 that Jenkins had disposed of the shares without its mandate. Furthermore, the stock position slip earlier given it by Jenkins was discovered to have been forged. The Lagos office of Jenkins was also found to be under lock. The Nigerian Stock Exchange disclosed that Jenkins had indeed been suspended as a result of its fraudulent activities. It wrote the 2nd respondent i.e. SEC, which advised the claimant to seek redress at the Economic and Financial Crimes Commission, EFCC.⁸⁰

In any case, the claimant’s lawyers wrote authorities of the NSE and SEC demanding compensation under the Fund. But in its reply, the NSE claimed it was still investigating the fraudulent activities of Jenkins Investment.⁸¹ Boat Nigeria Limited, subsequently, took its case to the Investment and Securities Tribunal. In an Originating Application filed by its lawyer on 11 May 2007 against the NSE and SEC as the first and second respondents, the claimant asked the Tribunal to make a declaration that it was entitled to be compensated under the investors protection fund and issue an order directing the respondents to compensate it for its entire lost investments being

⁷⁹ Unreported Suit No. IST/OA/03/07.

⁸⁰ The issue raised here, is whether in the face of the express provisions of the ISA, 2007, it was the lawful obligation of SEC to incline victims to pursue their remedies under the criminal justice system; rather than advise them on their rights to be compensated from the fund. It shows obvious ignorance, on the part of the regulatory body, of the compensation scheme in which it plays a major role.

⁸¹ It is for this reason that we have earlier commended the 30 days limit required for investigations by virtue of s. of s. 213 (2) of the 2007 Act. There was no similar provision in the 1997 Act, which was the applicable law at the time of this incidence.

4,000,000 units of FCMB Plc shares at the prevailing rate at the time of judgment and 10 per cent interest rate until total liquidation.

Boat Nigeria, through its counsel, submitted that “a close perusal of sections 151, 156, 160, 161, 162 and 163 of the Investment and Securities Act 1999 showed that an investor could make a claim from the Investors Protection Fund once it is established that defalcation had occurred and the applicant made a demand against the NSE within a period of six months.”⁸² It, therefore, argued that defalcation had occurred and it was entitled to be compensated from the Fund. It, also, argued it was entitled to be compensated to the tune of N71.2 billion which was the financial value of the four million FCMB shares as at the time of the institution of the case, in accordance with the provisions of sections 165 of ISA.

But in its defence, the NSE asked the IST to dismiss the suit with substantial cost as the Jenkins matter was then still under investigation. On its part, SEC argued it should be excused from the suit as it is not a custodian of the Fund. The Tribunal, however, ruled that SEC, as the apex regulatory authority of the capital market and the responsibilities entrusted upon it for the management and disbursement of funds from the investors protection fund, is both a desirable and necessary party to the suit. In its judgment delivered on 26 September 2007, the Tribunal held that the fact that the NSE-owned CSCS itself confirmed that the claimant’s shares were sold without authorisation by Jenkins Investment was enough fact to establish that “defalcation” as defined by the ISA had, indeed, occurred and the applicant was entitled to be compensated from the Fund. Consequently, the Tribunal ordered the NSE to pay Boat Nigeria Limited from the Fund the sum of ₦21.6 million, being the market value of the four million shares as at 24 January 2007 when the fraud was discovered. In addition, the NSE was ordered to pay the claimant five per cent interest from the date the fraud was uncovered till the satisfaction of the claim.

The NSE filed an application for stay of execution of the judgment on 29 October 2007. The grounds of appeal were that if it were to pay the total amount ordered by the Tribunal to Boat Nigeria Limited as a compensation, there would not be enough left in the purse of the Fund to pay the other claimants. The NSE,

⁸² *Boat Nigeria Limited v. Nigerian Stock Exchange & Securities Exchange Commission (supra)* at p. 3.

also, said through its motion on notice that various claims arising from the defalcation by Jenkins Investment alone were about N400 million and arguing it had a duty to apportion available funds among claimants in an equitable manner to meet the competing claims of investors in cases where defalcation has been established.

Counsel to the NSE backed up the claim with a statement of account of the IPF domiciled with Stock Exchange House branch of First Bank of Nigeria plc. According to the statement, the amount standing to the four accounts of the Fund in the bank as at 30 June 2007 are: A/C 2444020002226 containing ₦25,998,761.01; 2444020002233, ₦37,769,332.61; 2444020002066, ₦151,249,684 and 2444020002189, ₦228,478,518.69. The NSE filed an appeal which is yet to be determined.

In another case, *Livinus Ezemegbe v. Nigerian Stock Exchange & Anor.*,⁸³ Chief Ezemegbe whose investments valued at ₦3.7 million was lost through Apex Securities Limited, brought an action at the IST against the NSE and SEC demanding compensation out of IPF. However, the NSE and SEC contended at the IST that the investor protection fund was not operational and the applicant cannot benefit from the fund since the guidelines from drawing from it were not yet in place. There is no doubt that this sort of answer could only indicate that the authorities concerned here lack the required level of commitment to perform their existing obligations under the Act. It also clearly reflects a disconnection from global best practices.

Nevertheless, in its judgment delivered on 13 December 2006, the IST rightly rejected this argument. It ruled that it was the responsibility of the NSE and SEC to put in place guidelines for benefiting from the funds. Consequently, it ordered that the applicant be compensated from the investor protection fund and that the NSE, in collaboration with SEC, should draw up and make public within 90 days necessary guidelines for the implementation of the Fund in line with the provisions of the ISA.

Consequently, the SEC came up with what it tagged Investors Protection Rules 2007 in which it pegged the maximum amount payable to investors who suffered any form of defalcation to ₦200,000. As stated in the rules, “the rate of compensation and the maximum compensation payable to an investor who has suffered a loss shall be ₦200,000, or where the loss is less than

⁸³ *Supra.*

₦200,000, the investor shall be paid the full amount of the loss.” It was also indicated, though, that the amount be reviewed from time to time.

Based on the new rules, the NSE issued a cheque of only ₦200,000 to Ezemegbe. But the investor refused to accept the grossly reduced compensation. Ezemegbe’s lawyer also pointed out that the cheque for the ₦200,000 was raised on Union Bank, whereas the NSE never indicated in the appeal it filed against the judgment of Jenkins Investment that there was an account of the investor protection fund domiciled with Union Bank. This would seem to raise issues of integrity in the administration of the Fund.

The biggest claim so far from the fund could have been the ₦726 million claimed in *Ogunlesi A. Johnbosco v. NSE & SEC*.⁸⁴ The investor was claiming the sum of ₦726 million with interest at 19 per cent per annum to be paid from the Fund as compensation for the unauthorised sale of his shares also by Jenkins Investment Ltd. The suit was struck out on 23rd October, 2008 following an application for an order that the suit be withdrawn. One wondered if the ₦200,000 prescribed by the Investors Protection Rules in this circumstance could have engender the confidence of an investor.

Also, it is a thing of concern that, to date, records of the account of the Investor Protection Fund have been kept away from the knowledge of the investing public.

c. Limit of Compensation and SEC’s Role

We observed that the Investors Protection Rules which begged the maximum compensation payable to an aggrieved investor was made by SEC. This is contrary to the provisions of the Act. Section 213 (6) ISA, 2007 provides that:

Subject to this part of this Act and any limit that may be determined by the securities exchange or capital trade point and approved by the Commission from time to time, the amount which any claimant shall be entitled to claim as compensation from an investor protection fund shall be the amount of the actual pecuniary loss suffered by him ...

This section plainly casts the responsibility of fixing compensatory limits on the relevant securities exchange or capital trade point, even though it is still made subject to the approval of the SEC. It will be stretching the point to argue that by virtue of its approving role, the SEC has a concurrent power to set a limit

⁸⁴ Case No. IST/OA/08/07.

as to what claimants against the fund are entitled. Moreover, the Section 213 (6) provisions seek to limit or modify proprietary rights vested in a person. It is settled law that such statutes which encroach on a person's proprietary rights must be construed *fortissime contra preferentes*, which is strictly against the acquiring authority but in favour of the citizen whose property rights are being deprived. Consequently, as against the acquiring authority, there must be a strict adherence to the formalities prescribed for the acquisition.⁸⁵ In the making of that limit, there has been no such adherence. Thus, the validity of the rules purportedly made pursuant to the Act is questionable.

There is no gain saying that the sum of ₦200,000 fixed as the maximum amount of compensation payable is ridiculous. It can hardly make for the pecuniary loss suffered by big time investors. On the other hand, there is a view among some securities regulation scholars that compensating victims of secondary market securities fraud or negligence is inefficient. As the theory goes, diversified investors are as likely to be on the gaining side of a transaction tainted by fraud as the losing side. Therefore, such investors should have no expected net losses from fraud because their expected losses will be matched by expected gains.⁸⁶ Undoubtedly, this view is flawed; the increasing vulnerability of even the most circumspect capital market investor to extensive financial adversity resulting from corporate fraud and mismanagement presents a compelling case for compensation. And such compensation should be commensurate with the pecuniary loss suffered in order to engender confidence in the capital market.

8. Conclusion

We have attempted in this article to explore the operations of the investor protection fund under the Investment and Securities Act, 2007. We have observed that an investor protection fund is the

⁸⁵ See *Obikoya v. Governor of Lagos State* [1987] 1 NWLR (Pt. 50) 385; *LSDPC v. Foreign Finance Corporation* [1987] 1 NWLR (Pt. 50) 413; *Attorney-General Bendel State v. P.L.A Aideyan* [1989] 4 NWLR (Pt. 118) 646; *Din v. Attorney-General of the Federation* [1988] 4 NWLR (Pt. 87) 147 at page 184; (it is also reported in (1988) 9 SCNJ 14); *Walsh v. Secretary of State for India* (1863) 10 H.L.C. 367; *Belfast Corporation v. O.D. Cars Ltd.* [1960] A.C. 490; *Osadebay v. A. G., Bendel State* [1991] 1 NWLR (Pt. 169) 525.

⁸⁶ Alicia Davis Evans, "The Investor Compensation Fund" *Journal of Corporation Law*, Vol. 33, No. 1, 2007; U of Michigan Law & Economics, Olin Working Paper No. 07-020.

fund set up by a security exchange or capital trade point to meet the legitimate investment claims of the clients of the defaulting members. We have, also, ascertained that these claims are pecuniary, and not speculative in nature. In the course of our discussion, we raised certain concerns and also, made suggestions which we believe would make the investor compensation scheme more effective.

We can safely conclude that the investor protection fund is only a factor in a larger regulatory scheme to recognize and protect investor interests, while ensuring that the realities of commercial life are not eclipsed. The scheme is a function of a variety of substantive, procedural and institutional aspects of our commercial practice, and this should be borne in mind while determining the rights and obligations of investors. Finally, it is a commendable thing that the Nigerian government subscribes to the expediency of an investor protection fund, and has also endeavoured to statutorily authenticate same. The interest in compensation, however, would be served better by an improved framework than is currently in place. Thus, a loss of faith in the capital market would tend to prevail if nothing is done about the limitations in the system as it is.