Right to Dishonour Bank Draft: Perspectives From Nigerian Courts

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Introduction

It is a commercial truism that a banker's draft, as distinct from a cheque, is generally treated as equivalent to cash[1] and it embodies the bank's primary and unconditional undertaking to honour its own instrument. Nevertheless, in ***First African Trust Bank Plc. vs. Partnership Investment Co. Ltd***.[2] the Supreme Court of Nigeria held that a bank has the right to dishonour its draft on grounds of fraud and want of or failure of consideration.

This article attempts to appraise how Nigerian courts have treated the issue of dishonour of bank drafts by banks with the FATB decision as the focal point.

In proceeding it should be borne in mind that Nigerian law on bills of exchange and cheques largely follow English law. Indeed Nigeria's Bills of Exchange Act[3] is based on the English Bills of Exchange Act 1882 which consolidated and codified the laws relating to Bills of Exchange, Cheques and Promissory Notes.[4] The rules of Common Law also apply to bills of exchange, promissory notes and cheques in Nigeria in so far as they are not inconsistent with the provisions of the Bills of Exchange Act.[5]

Under English law, a banker's draft is generally treated as equivalent to cash but a payee cannot be absolutely certain of payment as the bank may be able to refuse to pay in the event of insolvency.[6] Ditto if the draft was obtained by fraud[7]or the consideration given for the issue of the draft has failed.[8] It is noted however, that there are persuasive arguments to the contrary.[9]

The Position Prior to FATB

Prior to the decision in FATB, the bank draft was seen as a means of avoiding the incidence of non-payment that was common with cheques. The general notion was that funds covered by a draft are deemed to be outside the control of the bank that issued it and the customer that purchased it. Indeed in ***Enyi v. African Continental Bank Ltd***[10] it was held that "*if a bank executes a draft in favour of A at the instance of its customer, …. it is guarantee that the specified sum is available for collection by A, the holder*."

The practice has been that a customer at whose request a draft was drawn ceases to be a direct party to it. Once he has delivered the draft to the payee he cannot stop it nor can he request the bank to stop it even if the transaction leading to it proved to be a fraud.[11] The rationale for this being that the draft constitutes an independent contract embodying a payment obligation distinct from the underlying contract by virtue of which the draft was issued.[12]

Similarly, unless the draft is a forgery the bank (drawer) could not stop payment even if the account of the customer [*which ought to be debited to provide cash backing for the draft]* had insufficient fund or if it was found that the draft was procured by fraud whether contrived by the staff of the bank or the customer or both.

In ***United Bank of Africa Ltd v. Ibhafidon***[13] it was held that a bank draft is payable at sight regardless of whether the person on whose behalf the draft was issued held money in his account at the material time or not. The court held further that it is a non-issue whether the customer's account was opened with a forged draft or not. The Court took the view that the bank ought to honour its draft already issued to the payee and then proceed against the customer to recover its money.

Thus the understanding was that the bank was bound to pay its draft notwithstanding that it was obtained by fraud unless the payee had prior knowledge of the fraud.[14]

The FATB Case

Matrix Of Facts

The facts in précis are that:

- Alhaji Tijani Ladan in the presence of one Alhaji Abubakar of Damco Bureau de Change offered in the normal course of trading to sell US$500,000.00 to FATB;
- FATB issued a bank draft for N7.1million as part-payment for the foreign currency and Partnership was named as the payee of the draft;
- the transfer of the foreign currency had not been effected by Alhaji Ladan when the bank draft was presented by Partnership for payment;
- the bank stopped payment of the draft to prevent a loss of the N7.1million;
- Partnership sued FATB claiming the value of the draft (N7.1million);

Partnership's Case

It is important to note that Partnership did not deem it necessary to file a reply to FATB's defence of want of value/consideration for the draft and fraud perpetrated by Alhaji Ladan having regard to the case it presented before the Court. Partnership's understanding [*which is in line with the decisions in the cases cited earlier*] must have been that FATB having admitted issuing the draft, the instrument is equivalent to cash and embodies the bank's primary and unconditional undertaking to pay. Not being a party within immediate relationship on the draft, Partnership's reasoning was that the bank ought to pay and later pursue Alhaji Ladan to recover the value of the draft.

Though Partnership made a feeble attempt at the trial to explain that the draft was given to it by Alhaji Abubakar in part settlement of credit facilities granted to him, this fact was not pleaded and no evidence was led to prove the loan.

Judgment of the Court of Appeal

The trial Court entered judgment for Partnership in the sum of N7.1million together with interest. The Court of Appeal affirmed this decision on appeal.[15]

The Court of Appeal relied heavily on its earlier decisions, *to wit*, ***U.B.A. v Ibhafidon***[16] ***and Lagricom v U.B.N & Ors,***[17] and the Supreme Court decision in ***U.B.A v Nwoye***[18] to form the view that drafts are equivalent to and as good as cash and payable at sight.[19]

The Judgment of the Supreme Court

The Supreme Court upturned the decisions of the lower courts. In doing this, the Court reviewed the decisions of the Court of Appeal in *U.B.A. v. Ibhafidon*, *Lagricom v. U.B.N*, and *U.B.A v. Nwoye*, and concluded that the circumstances of the FATB case are different and clearly distinguishable.[20]

The conclusion of the Court[21] was that "*the common factor evident in respect of the three cases …is this: each of the accounts involved in respect of these cases had sufficient physical cash to meet the draft cheques issued by the respective banks. The orders to pay or not pay the various drafts/cheques were therefore not made simply because they were issued by the respective banks."*

Ejiwunmi, JSC allowed the appeal for the sole reason that having regard to the statement of defence and the evidence led thereon *"the bank draft cheque (sic) is obviously without any consideration, as it was not established that the respondent or any one connected with the respondent had any money of any kind in any account within the system of the appellant at any time relevant to the issuance of the bank draft."*[22]

Conceptual Misconceptions in the Decisions

A few comments need to be made on the Supreme Court's treatment of bankers' drafts and other issues relating thereto.

Treatment of 'Cheque' and 'Draft' as if Interchangeable

The parties tended to use the words 'cheque' and 'draft' interchangeably and the Learned Justices of Appeal, with respect, appeared to have done the same.

It appears the Learned Justices of Appeal treated a bank draft as any other bill of exchange and therefore were inclined to agree that want of value and fraud if proved may be a valid defence for not paying a draft.[23]

The Court however decided in favour of Partnership because FATB did not satisfactorily discharge the burden placed on it by S. 30(1)(2) of the Bills of Exchange Act to prove lack of value/consideration and fraud.

The Supreme Court fell into similar error as evidenced in the attempt to define the words 'draft' and 'cheque.'

The court defined draft as "a *nomen generale* which embraces every request by the drawer upon the drawee to pay money" and it includes a bill of exchange as well as a cheque.[24]

A cheque,[25] which is always cited as the best example of a bill of exchange, was defined as "*a bill of exchange drawn on a banker payable on demand*."[26]

It appears that the court applied in its judgment the definition of the generic word "draft" as opposed to the specific instrument "bankers' draft" which was in contest in FATB. It should be said that under English law there is a marked difference between a "draft" and a "bankers' draft."

A draft is said to be another term for a bill of exchange. A bankers' draft on the other hand is defined as *"a draft drawn by one branch of a bank on its head office or any other branch. As this is usually paid on presentation, it is acceptable as the equivalent of cash. Such a draft does not satisfy the definition of a bill of exchange because it is not drawn by one person on another*."[28]

A bill of exchange is defined as "*an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.*"[29]

The Act further provides that an instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.[30]

In *African Continental Bank Ltd. v. Alao*[31] **it was held that a bank draft in which a bank is both the drawer and drawee is not a cheque unless it is crossed or the drawee is a fictitious person or lacks capacity.**

It is curious that the Court of Appeal in ***Union Bank of Nigeria Plc v. Scpok Nigeria Ltd***[32] after holding[33] that a draft in which the drawee and drawer are the same bank does not *ex facie* conform with the definition of a bill of exchange under Section 3(1) of the Bills of Exchange Act went on to hold[34] that the draft in question is a bill of exchange.

This decision demonstrates a clear confusion of the principles relating to drafts. It is pertinent to observe that the court decided the way it did in order to vest the claimant with standing to sue on the dishonoured draft. It is submitted that a better approach is that the draft constitutes an independent contact between the bank and payee embodying a payment obligation distinct from the underlying contract between the bank and customer by virtue of which the draft was issued. [35]

It is clear from the authorities an a reading of the provisions of the Bills of Exchange Act that a Banker's draft drawn by a banker upon himself, whether payable at the head office or some other office of his bank, is neither a bill nor a cheque[36] but is in fact treated as a promissory note[37] made and issued by the bank.[38]

It is obvious that having treated the bank draft as if it were interchangeable with a cheque, the Supreme Court proceeded to determine the issues relating to the draft with the following principles relating to cheques:

- a banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose, or provided the cheques are within the limits of an agreed overdraft. See *London Joint Stock Bank v. Macmillian and Arthur,*[39] *Joachimsom v. Swiss Banks Corporation*[40] *and UBN v. Nwoye (supra).*

- there must be sufficient funds to cover the whole amount of the cheque presented, for in the absence of special arrangement, there is, as a general rule, no obligation on the banker to pay any part of a cheque for an amount exceeding the available balance. The banker only contracts with the customer to honour cheques when he has "sufficient" and "available" funds in hand. See *Carew v. Duckworth*;[41] *Joachimson v. Swiss Banks Corporation* (supra).

No Determination of How the Holder Treated the Draft

It is interesting to note that the court did not make any findings on how Partnership (the holder) treated the bank draft – whether as a bill of exchange or a promissory note. It appears that the court presumed that the draft was treated as a bill of exchange.

It is however clear from ***London City and Midland Bank Ltd v. Gordon*** that the bank [*which is both the drawer and drawee of the instrument*] is not entitled to treat the draft as a bill of exchange.
Section 5(2) of the Bills of Exchange Act provides that "*where in a bill the drawer and the drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note*."
In ***Lagricom Co. Ltd. v. United Bank for Africa Ltd***.[42] the court held that the holder/payee may cash the draft across the counter or pay it into his bank account.
Clearly, the prerogative is the holder/payees'. He may sue the bank upon the draft and treat it either as a bill of exchange or promissory note.[43]
Note further, that by virtue of section 5(2) of the Bills of Exchange Act, whether the holder elects to treat a draft as a Bill or a Note, the drawer, in the case of a Bill[44] or the maker in the case of a Note has a primary obligation to fulfil the unconditional order or promise to pay. If the holder treats the draft as a bill, he has the rights of a holder against a drawer of a bill; if he treats it as a note, he has against the drawer, the rights of a holder against a maker of a promissory note. [45]

Misconstruing Section 30(1) Bills of Exchange Act

The court held that the onus to prove value for the draft shifted to FATB by virtue of the presumption of value raised in favour of Partnership by S. 30(1) of the Bills of Exchange Act. The Section provides that:

> *"Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value."*

With respect, it would appear that the court misconstrued the purport of Section 30(1) of the Bills of Exchange Act as[46] the provision appears to protect a holder for value whose signature appears on the instrument i.e. a holder who has endorsed[47] the instrument and not a mere holder like Partnership who did not indorse the draft. The only party whose signature appeared on the bill (as required by S. 31) at all material time to this suit is the bank who is the drawer of the draft.[48]
It is instructive to note that the Court of Appeal[49] considered this point and found on the authority of ***Ayres v. Moore***[50] that Partnership being the original payee could not be heard to contend that it was a holder in due course because the draft had not been negotiated as contemplated by Section 31of the Bills of Exchange Act.[51]
It is submitted that sub section (2) and not (1) of Section 30 of the Bills of Exchange Act is relevant and applicable to this case. The Sub section provides thus:

> *"Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of a bill is affected with fraud, duress or force and fear, or illegality, the burden of proof is shifted unless and until the holder proves that subsequent to the alleged fraud, or illegality, value has in good faith been given for the bill."*

Before considering this provision it should be noted that the Act recognises three classes of holders - a mere holder, a holder for value and a holder in due course.
Mere holder: Section 2 of the Act defines 'holder' as the payee of a bill who is in possession of the bill or the bearer of the bill. The holder may therefore be an original holder of the bill or a transferee.
Holder for value: This is a creation of Section 30(1) of the Bills of Exchange Act. Every party whose signature appears on the bill is presumed to have become a party to the bill for value.
Holder in due course: A holder in due course[52] is a holder who has taken a bill, complete and regular on the face of it, under the following conditions:

a. *that he became the holder of it before it was overdue, and without notice that it had become previously dishonoured, if such was the fact: or*
b. that he took the bill in good faith and for value, and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it. [53]

Though Partnership is factually a mere holder Section 30(2) raises a presumption in its favour that it is a holder in due course. This is the beauty of a contract on a bill of exchange. In other simple contracts, the law presumes that there was no consideration until consideration is proved but in the case of contracts on bills or notes, consideration is presumed till the contrary appears, or at least appears probable.[54]
However, the section provides further that once fraud, duress or force and fear, or illegality is shown to have existed at any stage, the burden of proof is shifted to the holder to prove both that value has been given[55] and that it has been given in good faith without notice of fraud[56].

Summary & Conclusion

- Having regard to the fact that FATB is both the drawer and the drawee, the draft is not a bill of exchange but a promissory note.

- Partnership has a right of election to treat the instrument either as a bill of exchange or a promissory note.

- FATB has a general and primary duty to honour his obligations on the draft i.e. its undertaking to pay the equivalent of cash.

- FATB is not justified in refusing to pay or fulfil its undertaking unless fraud and want of consideration is clearly established.

- The only answer to the defence of fraud is for Partnership to prove by credible evidence that he is a holder in due course and subsequent to the alleged fraud value has in good faith been given for the draft.

Footnotes

1. Roy Goode, Commercial Law (Penguin Books) 3rd Edition at page 773.
2. [2004] 18 NWLR (Pt.851) (SC) 35.
3. Cap B 35 Laws of the Federation of Nigeria 2004.
4. See Halsbury's Laws of England, 4th Edition, Vol. 4@pg 130.
5. Section 98(1) of the Act.
6. LS Sealy & RJA Hooley, Commercial Text, Cases and Materials, 3r *Edition@pg* 773.
7. See *RE: Jones v Waring & Gillow Ltd* [1926] AC 670.
8. *Hasan v Wilson* [1977] 1 Lloyd's Report 431.
9. See *A Tettenborn* [1998] RLR 63 cited in Sealy & Hooley *op. cit.* at page 773.
10. (1981) 1 IMSLR per Uche J.
11. Layi Afolabi, Law and Practice of Banking (Heinemann Educational Books 1999) at page 167.
12. Goode, *op. cit.* at page 480.
13. (1994) 1 NWLR (Pt. 318) 90 at page 99 per Ejiwunmi JCA [as he then was].
14. Goode, *op. cit.* at page 480.
15. The decision of the Court of Appeal is reported in (2001) 1 NWLR (Pt.695)(CA) 517.
16. (1994) 1 NWLR (Pt. 318) 90.
17. (1996) 4 NWLR (Pt. 441) 185.
18. (1996) 3 NWLR (Pt. 435) 135 where the court held per Iguh JSC that as between the branches of the same bank who were drawer and drawee *"the draft ... was, on the evidence cash ..."*
19. *FATB v. Partnership* (SC) s*upra* at page 530B-E.
20. After reviewing the case, the Learned Justice of Appeal stated at page 64G and correctly too, that "from a careful study of the judgment in *UBN v. Nwoye* (*supra), it cannot be in doubt that the appeal was allowed because the court was satisfied that a bank draft cannot be allowed to be paid upon uncleared effects*).
21. Per Ejiwunmi JSC., who incidentally delivered the lead judgment in *Ibhafidon's case.*
22. *Ibid.,* page 65G.
23. See *FATB v. Partnership* (SC) supra., at page 530G-H where His Lordship Chukwuma – Eneh JCA stated as follows: "*I venture to say ... that a draft as any other bills of exchange payable on demand stands on the same pedestal like any other bills of exchange and in that wise the provisions of the Act (i.e. Bills of Exchange Act) applicable to bills of exchange payable on demand ought to apply to it. It follows, from that reasoning, therefore, that* ***an adverse party like the appellant in this matter alleging want of value and fraud for Exh. 'P1'*** *(i.e. the bank draft)* ***could under S. 30(1) and (2) of the Act be obliged to defend an action*** *on Exh. 'P1'* ***on those grounds*** *as is the case against any other bills of exchange*."
24. *ibid.,* page 71H citing *Hunter v. Bowyer* (1850) 15 L.T.O.S. 281 per Pollock, C.B. and *Words and Phrases Judicially Defined*, Vol. 2, Edited by Rolland Burrows at page 133.
25. The customer draws a cheque on the bank payable to a third party. See section 73 of the Bills of Exchange Act. See also Chalmers & Guest on Bills of Exchange @pg 597.
26. Commercial Banking Law by R.R. Pennington & A.H. Hudson .See Section 73 of the Bills of Exchange Act. A cheque is payable on demand and should be presented within a reasonable time, but neglect to present does not discharge the drawer from his obligations. See Halsbury's Statutes, 4th Edition, Vol. 5, 1998 Reissue @pg 456.
27. See Gerald Klein, Dictionary of Banking, 2nd Edition page 88. According to Chalmers & Guest on Bills of Exchange, Cheques and Promissory Notes; 15th Edition by A.G Guest; London Sweet & Maxwell, 1998 @ pg 19, a Bill of Exchange is sometimes called a ' draft' and when accepted, an ' acceptance'.
28. *Ibid.,* page 17. A bankers' draft is payable on demand by a banker on himself *i.e.* by a bank upon itself, or it is drawn by one bank for payment by another. Halsbury's Laws of England, Vol. 4, 4th Ed, Para 379 @pg 164, Sealy @pg 773; See Law of Bank Payments, Michael Brindle and Raymond Coxpub., by Pearson Professional Limited, 1996@ pg 386; Byles on Bills of Exchange, 26th Edition by Frank Ryder; London Sweet & Maxwell, 1998.
29. See Section 3 of the Bills of Exchange Act 1990. In the Bills of Exchange Act, the words ''negotiable instrument'' or ''instrument'' have been used to denote ''bills of exchange,'' ''cheque'' and '' promissory note'' because the provisions of the Bills of Exchange Act applicable to a bill of exchange payable on demand apply, except as otherwise provided, to cheques (Section 73) and to promissory notes (Section 91). A bill drawn by one trader on another against a

trade transaction, but not bearing a bank endorsement, is known as a 'trade bill' or 'trade draft'; when accepted, it is known as a trade acceptance' A bill bearing the endorsement of a bank is referred to as a 'bank bill' and a bill accepted by a bank as a ' bankers' acceptance.

30. Section 3(2) of the Bills of Exchange Act.

31. (1994) 7 NWLR (Pt. 358) 614 at page 629.

32. (1998) 12 NWLR (Pt. 578) 439.

33. *supra* at page 467F.

34. *supra* at page 471E-G.

35. See Roy Goode, Commercial Law, (Penguin Books, 3rd Edition 2004) at page 480.

36. See *Capital and Counties Bank v Gordon* [1903] A.C.240.

37. See Section 83(1) of the Bills of Exchange Act which defines a promissory note as "*an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of a, specified person or to bearer*."

38. See L.S. Sealy & RJA Hooley, Commercial Law: Text, Cases and Materials- 3rd *Edition@pg'*773; See also *Commercial Banking Co of Sydney v Mann* [1961] AC 107].

39. (1918) AC 777 at 789(H.L.).

40. (1921) 3 K.B. 110 at 127.

41. (1869) LR 4 Exch. 313.

42. (1996) 4 NWLR (Pt. 441) 185 at page 202.

43. See *London City and Midland Bank Ltd v. Gordon supra.* Note however that a draft drawn by one bank on another bank like foreign drafts drawn on the bank's overseas correspondent bank is a valid bill of exchange.

44. See Chalmers & Guest On Bills of Exchange, 15th Edition, London, Sweet & Maxwell, 1998.

45. Sections 55 and 88 of the Bills of Exchange Act.

46. See particularly Iguh's concurring judgement at pg 72

47. An indorsement in order to operate as a negotiation must comply with the following conditions, namely:(i) it must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words is sufficient. See Section 32 of the Bills of Exchange Act.

48. See R.M. Goode, Commercial Law, 1st edition at page 436.

49. *FATB v. Partnership Investment* (CA) *supra* per Chukwuma-Eneh JCA at page 529C.

50. (1939)4 All E.R. 351; See also *Kones v. Waring and Gillow* (1926) AC 670 at 687.

51. A bill, as in the case, a order bill, is negotiated in accordance with S. 31 of the Bills of Exchange Act when it is transferred from the holder to another person by endorsement and delivery. An endorsement to operate as a negotiation by S. 32 must be written on the bill itself and be signed by the endorser. The simple signature of the endorser on the bill without any additional words is sufficient.

52. A holder in due course denotes a *bone fide* purchaser for value without notice. He sometimes obtains an overriding title notwithstanding the *nemo dat quod non habet* rule. See Goode *op. cit.* at page 495.

53. S. 29 Bills of Exchange Act.

54. See Byles on Bills Of Exchange, 26th Edition, Sweet & Maxwell, 1988@ 243;

55. Goode *op. cit. at page 494* opines that it is not essential to a holder for value status that the holder himself has given value or that the bank/drawer shall have received value for the bill. It suffices that a party in the chain between the holder and the drawer gave value.

56. Halsbury's Statutes, 4th Edition @pg 432