

Examination of The Legal and Human Rights Effect of Dishonouring Customers' Cheque and Banker's Drafts

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Abstract

The receipt of money from and on account of a bank customer by a bank constitutes the banker a debtor of the customer and the banker undertakes to pay monies due from him to the customer on the written orders of the customer. The research examined the legal effect of dishonouring a customers' cheque vis-à-vis banker's draft. The research also examined the legal effect of the presentment of a cheque vis-à-vis banker's draft; the legal relationship between a banker and its customer and the legal and institutional framework on the administration of banks and other financial institutions. This research adopted the doctrinal research methodology. It was found among other things that a bank is duty bound to honour a cheque issued by its customer if the customer has enough funds to satisfy the amount payable on the cheque in respect of the relevant account. Refusal to honour a customer's cheque will amount to a breach of contract which would render the banker liable in damages. Also, while a banker is duty bound to honour a customer's cheque, it is a criminal offence to issue a dud cheque. The research recommended that the statutory definition of a cheque should include a debit card and every other digital means by which a customer can validly issue instruction for the withdrawal, payment or transfer of money available in his bank account. The research concludes that the relationship between a banker and its customer places on the parties some duties, rights and obligations.

Keywords: International, Legal Framework, Protection, Migrants, Refugees

Introduction

Negotiable instrument is defined as financial instruments which the full legal title is transferable by mere delivery or by endorsement and delivery with the effect that its complete ownership and legal interest pass to the transferee who shall be capable of having the legal interest of the transferor provided he takes the instrument complete and regular on the face of it in good faith and for value. It is important to state that negotiable instrument like cheques and bank drafts are choses in action. A chose in action is a right which is legal. That is, a right that is enforced through legal action rather than a physical thing. Cheques and banker's draft are the most widely use of negotiable instruments.

A cheque is defined as an unconditional order in writing addressed by one person to another, who must be a banker and signed by the person giving it, requiring the banker to pay on demand a sum certain in money to or to the order of a specified person or to bearer. On the other hand, a bank or banker's draft is a written order addressed by a bank to itself or another branch requiring the branch to which it is addressed to pay on demand a sum certain in amount to the person named or to his order.

The legal relationship between a bank and a customer based on contract is that of creditor and debtor, or principal and agent. The creditor/principal being the customer and debtor/agent being the bank. The contractual relationship imposes a duty of care on the bank, the breach of which will impose on the bank a liability for negligence. The role of bankers and their predominant business is the receipt of monies on current or deposit account and the payment of cheques drawn by as well as the collection of cheques paid by a customer.

The receipt of money from and on account of its customer by a bank constitutes the banker a debtor of the customer and the banker undertakes to pay monies due from him to the customer on the written orders of the customer. In other words, money deposited with a banker by his customer in the ordinary way, is money lent to the banker with a superadded obligation on the part of the banker to honour the customer's cheque so long as there are assets of his in the banker's hands.

Cheques and banker's draft is often the most widely used of negotiable instruments for effecting payments with respect to business and commercial transactions. The multifold use of cheques and banker's draft in modern day business and commercial transactions spans from its guaranteed payment security as against other means of payment. The sole aim of this study therefore is to examine the legal effect of dishonouring a cheque vis-à-vis banker's draft. From the above aim, this long essay embodies the following thoughtful objectives. To wit:

- To identify the legal effect of the presentment of a cheque vis-à-vis banker's draft.
- To examine the legal relationship between a banker and its customer.
- To examine the legal effect of dishonouring a cheque vis-à-vis banker's draft.
- To examine the legal and institutional framework on the administration of banks and financial institutions.
- To proffer unique approaches and solutions to the effective administration of banking laws.

On a comprehensive scale, this long essay is concerned with Banking Law which is a branch of Business Law. It also bothers on the legal status of banker/customer relationship. The research is however particularly streamlined to the examination of the legal effect of dishonouring a cheque vis-à-vis banker's draft in Nigeria. Consequently, this research will be concerned with identifying the banking laws, regulations and procedures in place to remedy the wrong done to a customer where the customer's cheque or bank draft is wrongfully dishonoured. For the purposes of this long essay, the research will encompass the Central Bank of Nigeria regulations on banking services, international financial institutions and organizations regulations and guidelines on banking services. The research will also examine relevant laws and regulatory authorities on banking in Nigeria.

Conceptual Framework

According to Stephanopoulos, concepts are the building blocks of legal doctrine. All legal rules and standards, in fact, are formed by the combination of concepts in different ways. Conceptual framework thus; entails definition of terminologies that would enhance the understanding and development of this work: Also, there shall be an appraisal of a detailed theoretical framework that reveals the theories of law that establishes the study in Nigerian legal jurisprudence. The summary of literature appraises the opinions of jurists on the subject matter and the gap in knowledge that has formed the basis for this legal research. The concepts affecting the subject matter of this research are hereunder distilled:

Bank and Banking

A bank or banker is a quasi-public institution, for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts and issuance of its own promissory notes (cheques) payable to bearer, as currency, or for the exercise of one or more of these functions, not always necessarily chartered but sometimes so, created to serve the public ends. It is a financial institution regulated by law. A bank is wholly the creation of statute to do business (for profit) by legislative grace, and the right to carry on a banking business through the agency of a corporation is a franchise which is depended on a grant of corporate powers by the State.

Statutorily, the word 'bank or banker' has been defined by the Banks and Other Financial Institutions Act to mean a bank licensed under the Act. Banking business means the business of receiving deposits on current account, savings deposit account or other similar account, paying or collecting cheques, drawn by or paid in by customers; provision of finance consultancy and advisory services relating to corporate and investment matters, making or managing investments on behalf of any person whether such businesses are conducted digitally, virtually or electronically only or such other business as the Governor may, by order published in the Gazette, designate as banking business. By section 2 of the Banks and Other Financial Institutions Act, no person shall carry on any banking business in Nigeria except it is a company duly incorporated in Nigeria and holds a valid banking license issued under this Act.

Bank Customers

Customers in relation to banking; is any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying on account with another bank. In other words, a person becomes a bank customer either when the banker opens an account in his name, or when the banker accepts his instruction to open an account and receives a deposit to be credited to it. However, the mere fact that a banker habitually performs a casual service for a person, for instance, cashes over the counter cheques obtained by that person from third parties does not render that person a customer. Duration of banking services, is thus, not the essence of the relationship of banker and customer. The relationship of banker and customer comes into existence only if both parties have an intention that it be established. Usually, this intention is expressly manifested when the

account is opened at the customer's request. So, when a banker opens an account for the customer the relationship established is one of debtor and creditor. When the account is in credit, the customer is the creditor and the banker the debtor. The position is reversed when the account is overdrawn.

Banker Drafts

A bank or banker's draft is a written order addressed by a bank to itself or another branch requiring the branch to which it is addressed to pay on demand a sum certain in amount to the person named or to his order. Bank draft also commonly called manager's cheque is usually employed in Nigeria for financing payment transaction when the payee wishes to ensure that the promise to pay shall be honored. The bank draft affords an additional assurance when the debtor's personal cheque may be dishonored. It is plausible to state that while a bank may refuse to honor an ordinary cheque on grounds of insufficient funds, a bank draft is payable at sight irrespective of whether the customer has sufficient fund or not. A bank draft is usually payable to order and cannot be drawn to bearer due to its nature. It is usually crossed and marked "not negotiable or account payee only" to avoid fraud.

The purpose of a bank draft is to take the fund covered by it outside the control of the customer buying it and bank insuring it. It is almost as good as cash in terms of certainty of payment. A bank can issue a draft to its customer or a person who is not a customer. Where the purchaser of the draft is a customer, he accompanies his application for the draft with a cheque drawn in favour of the bank for the sum plus the usual commission. The bank can honor his cheque only where he has sufficient fund in his account or he is provided with overdraft facility to meet the draft. Where the purchaser is not a customer of the bank, he is requested to pay to the bank the sum he wants on the draft coupled with a sum by way of commission. In both cases, the payee is assured that the cheque cannot be dishonored for insufficient fund to meet the cheque and the purchaser of the draft cannot countermand payment except in certain cases.

Cheque

A cheque is defined by section 73 of the Bills of Exchange Act as 'a bill of exchange drawn on a banker and payable on demand. In *Massken Nig. Ltd & Ors v. Amaka & Anor.* the Supreme Court defined a cheque to mean an unconditional order in writing addressed by one person to another, who must be a banker and signed by the person giving it, requiring the banker to pay on demand a sum certain in money to or to the order of a specified person or to bearer. Put differently, a cheque is a written order to a bank to pay a certain sum of money from one's bank account to oneself or to another person. It is for all intents and purpose an instrument for payment. Parties to a Cheque:

- The Drawer: the drawer is the account holder who issues the instruction to his banker to pay the face value of the cheque out of the money he has in his account.
- The Drawee: the drawee is the banker in which the order to pay is directed. It is the paying banker who is in custody of the customer's money.
- The Payee: this is the person to whom a cheque is issued to. That is, the beneficiary.

- It is important to state that the holder of a cheque if not the owner, has no right of action against the bank should the cheque be dishonored. His right of action lies against the drawer of the cheque.

Dishonored cheque

The duty to honor a customer's cheque is the most fundamental duty or obligation of a bank to its customer provided that the cheque is regularly drawn, the bank must honour the cheque as presented in so far as there is sufficient funds on the customer's account. A dishonored cheque refers to a cheque which when presented to the bank, the bank refuses to pay on demand either because of insufficient fund or the cheque was not properly drawn.

Dud Cheque

Dud cheque simply means a cheque issued by a customer to his banker when his account is in debit or whose credit balance is lower than the amount stated in the cheque. In *National Bank of Nigeria v. Opeola Niki Tobi JCA* (as he then was) defined a Dud Cheque as 'an empty cheque, empty in the sense that it has no monetary value as no money can pass through it.' Additionally, By section 1(a) and (b) of the Dishonored Cheques Offences Act, it is an offense to issue a dud cheque. The section provides as follows: "(1) Any person who: (a) Obtains or induces the delivery of anything capable of being stolen either to himself or to any other person; or (b) Obtains credit for himself or any other person, by means of a cheque that, when presented for payment not later than three months after the date of the cheque, is dishonored on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn, shall be guilty of an offense and on conviction shall: (i) in the case of an individual be sentenced to imprisonment for two years, without the option of a fine; and (ii) in the case of a body corporate, be sentenced to a fine of not less than N5,000.

National Legal Framework

(a) Constitution of Federal Republic of Nigeria 1999 (as amended)

The Constitution of any country is the embodiment of what the people desires to be their guiding light in governance, their supreme law, the grundnorm of all their laws. All actions of the government and institutions in Nigeria whether banks, financial institutions or otherwise are governed by the Constitution. The Constitution creates the various arms, tiers and apparatus of government. In *Imonike v. AG Bendel State* the Supreme Court stated that the Constitution is the organic law, a systematic body of fundamental principle according to which a nation, state, body or organization is constituted and governed. The fundamental reason of including the supremacy clause in the constitution in the constitution lies in the fundamental nature of the constitution itself. It contains the terms and conditions under which the society and citizens agreed to be governed, a prescribed structure of government. It also imposes limits on the exercise of power by government and presents a particular relationship between the branches of government and the scope of inalienable rights guaranteed to the individual.

Pursuant to section 1(1) of the Constitution, the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. It supersedes any law or statute or enactment. All other legislations in the land take their hierarchy from the provisions of the Constitution. And by virtue of section 1(3) of the Constitution, if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law or statute shall to the extent of its inconsistency be void. This implies that the Constitution provides the most fundamental principles and guidelines upon which the State and institutions (including banks and other financial institutions) operates.

(b) Banks and Other Financial Institutions Act 2020

The Banks and other Financial Institutions Act 2020 (BOFIA 2020) is an Act which confers on the Central Bank of Nigeria (CBN) the power to regulate banks and other financial institutions and for matters connected therewith which includes but not limited to licensing, examination (on-site and off-site), supervision, take over and control of management of distressed banks, prescription of capital requirement, revocation of licences, and general control over banks and other financial institutions operating in Nigeria. The Act was first enacted into Law in 1991 as a Decree of the then Federal Military Government. The Act at its inception was a fundamentally flawed legislation owing to a number of deficiencies which it failed to cure within the banking sector. The decree was amended in 1997 and again in 1988. However, these series of amendment failed to cure the problem in the banking sector. In 1999, following the ushering in of a civilian administration, the decree was re-enacted as an Act of the National Assembly with more amendments introduced. The Act was again amended in 2002 by the Banks and other Financial Institutions (Amendment) Act 2002. By this, the Banks and other Financial Institutions Act Incorporates the Principal Acts of 1991, 1998, 1999 and 2002 amendments.

On 13th November, 2020 the Banks and Other Financial Institutions Act 2020 was signed into law by President Muhammadu Buhari. The Act repeals the extant BOFIA 1991 (as-amended in 1997, 1998, 1999 and 2002). The Act covers more grounds than its 2004 predecessor with an expansion of the Central Bank of Nigeria (CBN) 's regulatory oversight and discretionary powers over the financial services industry. Other significant changes introduced by the Act include measures for managing failing banks and a new tribunal for the enforcement and recovery of bad bank loans. Overall, BOFIA 2020 seeks to promote a stronger, more transparent and efficient financial system in Nigeria.

(c) Companies and Allied Matters Act 2020

The Companies and Allied Matters Act 2020 ("CAMA 2020") was signed into Law by President Muhammadu Buhari on the 7th day of August, 2020. The Act is the principal legislation on the incorporation of companies and registration of businesses in Nigeria and also provides a regulatory framework on how businesses should be carried out in the country. The CAMA 2020 repealed the CAMA 1990. CAMA 2020 provides a robust framework for reforming identified onerous legal, regulatory and administrative

bottlenecks which, for three decades, have made doing business in Nigeria substantially difficult and impeded investments into Nigeria: The CAMA 2020 is therefore the principal legislation for the incorporation and regulation of companies, including banks and other financial institutions.

(d) Dishonoured Cheques (Offences) Act Cap Dli LFN 2004

The Dishonoured Cheques (Offences) Act is a four (4) sections legislation which makes it an offence for any person anywhere in Nigeria to induce the delivery of any property or to purport to settle a lawful obligation by means of a cheque which when presented within a reasonable time is dishonoured on the grounds that no funds or insufficient funds were standing to the credit of the drawer of the cheque, and for matters connected therewith. By the operation of the Act therefore, it is a criminal offence to issue a dud cheque.

(e) Nigeria Deposit Insurance Corporation Act 2006

Nigeria Deposit Insurance Corporation (NDIC) Act 2006 is an Act which establishes the Nigeria Deposit Insurance Corporation (NDIC) for the purpose of insuring all deposit liabilities of licensed banks and other financial institutions operating in Nigeria, providing assistance in the interest of depositors in case of imminent or actual financial difficulties; and other financial institutions; guaranteeing payments to depositors in case of imminent suspension of payments by insured banks and other financial institutions and assisting the authorities in the formulation and implementation of banking policy. The sixty (60) sections enactment prescribes the functions of the Nigeria Deposit Insurance Corporation, its method of operations, and the administrative and management structure of the institution.

(f) Central Bank of Nigeria Act 2007

The Central Bank of Nigeria Act 2007 is the enabling Act establishing the Central Bank of Nigeria and prescribing its objectives, functions, mode of operation and powers. The Act granted full autonomy to the Central Bank of Nigeria. Under the Act, the Monetary Policy Committee (MPC) was created with the CBN Governor as Chairman. The MPC has full responsibility for formulating monetary and credit policy for the country. Section 1 (3) of the Central Bank of Nigeria Act specifically states that, “In order to facilitate the achievement of its mandate under the Act and the Banks and Other Financial Institutions Act (BOFIA), and in line with the objectives of promoting stability and continuity in economic management, the Bank shall be an independent body in the discharge of its function”.

The Legal Effects of Dishonouring Bankers’ Draft

A bank or banker’s draft is a written order addressed by a bank to itself or another branch requiring the branch to which it is addressed to pay on demand a sum certain in amount to the person named or to his order. Bank draft also commonly called manager’s cheque is usually employed in Nigeria for financing payment transaction when the payee wishes to ensure that the promise to pay shall be honoured. The bank draft affords an additional assurance when the debtor’s personal cheque may be dishonoured. It is plausible to state

that while a bank may refuse to honour an ordinary cheque on grounds of insufficient funds, a bank draft is payable at sight irrespective of whether the customer has sufficient fund or not. The purpose of a bank draft is to take the fund covered by it outside the control of the customer buying it and bank insuring it. It is almost as good as cash in terms of certainty of payment. A bank can issue a draft to its customer or a person who is not a customer. Where the purchaser of the draft is a customer, he accompanies his application for the draft with a cheque drawn in favour of the bank for the sum plus the usual commission. The bank can honour his cheque only where he has sufficient fund in his account or he is provided with overdraft facility to meet the draft. Where the purchaser is not a customer of the bank, he is requested to pay to the bank the sum he wants on the draft coupled with a sum by way of commission. In both cases, the payee is assured that the cheque cannot be dishonoured for insufficient fund to meet the cheque and the purchaser of the draft cannot countermand payment except in certain cases. Once the draft is issued by the bank, the bank is legally bound to make good its undertaking once it is presented for payment. This is placed on the footing that a bank draft is payable at sight. This position was given judicial footing in the case of *UBA Ltd v Ibhaifidon* where it was stated that:

It is common knowledge that while a banker may refuse to honour an ordinary cheque on the ground that the drawer has no money in his account to cover the amount on the cheque, a bank draft on the other hand is payable at sight regardless of whether the person on whose behalf the draft was issued has money in his account at the material time or not.

In *First African Trust Bank Pie. v. Partnership Investment Company Ltd*, the Supreme Court of Nigeria held that a bank has the right to dishonour its draft on grounds of fraud. It is important to note that once the condition for obtaining a bank draft is satisfied by either the customer or purchaser as the case may be, the bank owes the customer or purchaser a duty of care to issue the draft and to honour same when presented.

The relationship between a banker and its customer is contractual in nature. It is that of a debtor and creditor or principal and agent. The relationship places on the parties some duties, rights and obligations bordering on good faith. In that regard, a bank is duty bound to honour a cheque issued by its customer if the customer has enough funds to satisfy the amount payable on the cheque in respect of the relevant account. Refusal to honour a customer's cheque will amount to a breach of contract which would render the banker liable in damages. In *Yusufv Cooperative Bank Ltd*, the position was restated thus:

For the proper appreciation of the evidence, I consider it necessary to state the elementary principles of banking law and practice. Since the celebrated case of *Foley v. Hill* (1848) 2 H.L. CAS. 28, the relationship in law between a banker and his customer has been that of debtor and creditor. When a customer whose account has money makes a demand on the bank, it must comply because it is a debtor and if the bank fails to pay, the creditor is entitled to sue for recovery of

the amount, which can be said to have arisen from the date of failure to effect payment.

The rationale behind the above principle is that when a banker credits the account of its customer with some money, the banker becomes a debtor to the customer in that sum. Similarly, in *Allied Bank (Nig) Ltd v. Akubueze*, the Supreme Court observed that ‘The first point that must be made is that a bank is bound to honour a cheque issued by its customer if the customer has enough funds to satisfy the amount payable on the cheque in respect of the relevant account. Refusal to honour the cheque will amount to a breach of contract which would render the banker liable in damages. However, the duty and authority of a banker to honour a customer’s cheque is limited or determined by:

- Countermand of payment;
- Notice of the customer’s death;
- Insufficient funds;
- Technical irregularities (like signature, date, alteration, etc.) or;
- There may be legal impediment towards payment due to bankruptcy, unsoundness of mind of the drawer or garnishee order.

By implication therefore, while a banker is bound to honour a customer’s cheque, there are factors which may limit the banker’s duty to honour a customer’s cheque. A banker will therefore be excused from liability on such grounds as are permissible in law.

Measure of Damages for Wrongful Dishonour of Customer’s Cheque

The measure of damages awarded for wrongful dishonour of cheques by virtue of section 57 of the Bills of Exchange Act is deemed to be liquidated damages which include;

- The amount of the bill
- Interest thereon from the time of presentation for payment of the bill is payable on demand and from the maturity of the bill in any other case.
- The expense of noting or when protest is necessary and the protest has been extended, the expenses of protest. The damages permissible here is therefore not in the nature of ordinary general damages but liquidated damages.

In *Balogun v NBN. Ltd.*, the Court stated that in cases of breach of contract for wrongful dishonour of cheques (which are *sui generis*) damages are said to be “at large”. A successful plaintiff is entitled to recover under several heads of damages. The mere dishonour of a cheque by a banker is injurious to a person in trade. This is the rationale of the award without proof of actual loss. Where a Banker without justification dishonours a customer’s cheque, he is liable to a customer in damages for injury to his credit and if the customer is also a trader then damages for such injury to the customer’s credit will also be at large and the court may award substantial damages there is no evidence from such a customer of any actual damage suffered by him.

Conclusion

In conclusion, the relationship between a banker and its customer is contractual in nature. It is that of a debtor and creditor or principal and agent. The relationship places on the parties some duties, rights and obligations. Thus, a bank is bound to honour a cheque issued by its customer if the customer has enough funds to satisfy the amount payable on the cheque in respect of the relevant account. Refusal to honour a customer's cheque will amount to a breach of contract which would render the banker liable in damages. However, the customer must ensure that he has sufficient funds in his account to cover the face value of the cheque. The customer must also ensure that the cheque is regularly drawn and that there exist no negligence on his part with respect to the cheque issued.

It is a criminal offence to issue a dud cheque. On the other hand, it is concluded that except in certain circumstances, a bank draft is payable at sight irrespective of whether the customer has sufficient funds in his account or not.

Recommendations

From a forensic analysis of the subject matter of this research, certain recommendations are noted by the researcher which includes the following:

- a) That the statutory definition of a cheque should be defined to include a debit card and every other digital means by which a customer can validly issue instruction for the withdrawal, payment or transfer of money in his bank account.
- b) That the Dishonoured Cheques and Offences Act should be amended to make an upward review of the minimum fine for issuance of dud cheque by corporate bodies which is pegged at N5,000 (Five Thousand Naira).
- c) That a holistic legislation should be enacted to cover the intricacies of cheques and banker's draft.
- d) That the Economic and Financial Crimes Commission should be strengthened to enhance the prosecution of cases of Issuing dud cheques which is prevalent in the business and banking sector.

That the definition of who is a bank customer should be given statutory flavour and expanded to include a purchaser of a bank draft for the purpose of determining the liability of the issuing banker and the right of action in respect of the purchaser of a bank draft.

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