

# Corporate Fraud in Nigeria and the Dialectics of Management of Evidential Burden in Litigation

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## Abstract

The principle of corporate personality is often used by agents of the company in the perpetration of fraud. The evidential burden in fraud-related litigation is cumbersome and difficult. This barrier has given culprits the opportunity to constantly enjoy the commission of corporate fraud. The paper, therefore, addressed the differences as it relates to corporate fraud, together with the dialectics of the management of the evidential burden in litigation. The doctrinaire method of research was used in the course of this paper. On the other hand, comparative analysis shall be employed. The paper posited that the standard of evidential proof required is too high and recommended amendment of the extant law to reduce the high threshold of proving evidential burden in corporate fraud.

**Keywords:** Corporate fraud, Evidential burden, Dialectics, litigation, corporate personality.

## Introduction

One offence that is commonly perpetrated against corporate entities is the crime of 'Fraud'. This is true by virtue of the fact that most companies are set up through proprietary instruments<sup>1</sup>. Investors, creditors and companies are affected by the adverse effects of corporate fraud. Particularly in Nigeria, the aftermaths of fraud and corruption has been summarised by a learned scholar<sup>2</sup> thus:

Nigeria has paid dearly for ethical lapses and competency deficiencies in public and private life. Fraud is systemic in Nigeria with the ordinary citizen being compelled to be either a liar, a cheat or an outright thief. Fraud has stultified growth and national development, subverted the nation's values and norms, generated a culture of illegality and impunity in public service and frittered away the promise of the nation's future. Today, the nation faces the trauma of a State whose date with destiny has been put on hold, for reasons that are completely self made, and completely avoidable. Any remedial measure that does not address core and ingrained character defects in leaders and followers, will not attract great success. What is needed is a strong accountability framework, an integrity system that is efficient in design and effective in operation, and a new generation of leaders.

Considering the grave effects corporate fraud has on the economy of nations<sup>3</sup>, Nigerian law has deemed it fit to place heavy liabilities<sup>4</sup> on its perpetrators. Despite the legal framework existing in Nigeria for civil liability and criminal punishment of corporate fraud, a major drawback or challenge is the issue of proof. Proving and establishing the liability of a person or corporate entity as to whether or not such person or entity is liable is an onerous task the law<sup>5</sup> has placed on whoever asserts or alleges that a set of facts give rise to corporate fraud. However, that is not the problem or crux of this study. This work is basically concerned with the method of proving the fraud of a corporate entity in litigation as either an accused person in a criminal charge or defendant in civil trial.

This paper is concerned with how legal practitioners and the courts have over the years treated the evidential burden placed on corporate entities. Before delving into the crux of this work; it is pertinent to first consider what amount to corporate fraud.

<sup>1</sup> Proprietary Instruments in this sense includes tangible and intangible or corporeal and incorporeal properties including money, which may be the subject of interest of fraud or fraudulent conducts.

<sup>2</sup> Benjamin Chuka Osisoma, *Combating Fraud and White Collar Crimes: Lessons from Nigeria*; Paper Presented at 2nd Annual Fraud & Corruption Africa Summit, Held at Zanzibar Beach Resort, Zanzibar Republic of Tanzania.

<sup>3</sup> Quick and recent references are the Enron saga of the United States of America that occurred in 2002 and also that of Cadbury (Nig) Plc that occurred on or about the year 2009. Earlier in the 1980's and 1990's such global giants as John Mathews Bank (JMB), Bank of Credit and Commerce International (BCCI), Barring Brothers, Nomura Securities, Brex and Long Term Capital Management (LTCM) all failed as a result of fraud related factors

<sup>4</sup> Liabilities as used above implies both criminal responsibility as well as penalties arising there-from as provided for in several penal statutes and civil liabilities made pursuant to statutory provisions and common law postulations.

<sup>5</sup> See sections 131 – 135 of the Evidence Act 2011, Laws of the Federal Republic of Nigeria.

## THE CONCEPT OF CORPORATE FRAUD IN NIGERIA

Corporate fraud is a compound term that describes a set of conducts done by or on behalf of a corporate entity. In order to properly appreciate the concept of 'corporate fraud', it is pertinent to first examine the word fraud. The term 'fraud' is generically used to describe a set of conducts that may amount to a tortious wrong or criminal breach. Fraud, according to the Black's Law Dictionary is 'a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or detriment'<sup>1</sup>. Adewumi defined fraud as

... a conscious premeditated action of a person or group of persons with the intention of altering the truth and/or fact for selfish personal monetary gain<sup>2</sup>.

In recent times, the term has been given an enlarged meaning and application, possibly owing to the wide range of unconscionable conducts or dealings envisaged by equity as falling within the term<sup>3</sup>.

The Court of Appeal just recently in the case of *Solomon & Ors v. Monday & Ors*<sup>4</sup> defined the term fraud thus:

Fraud implies a wilful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to. Fraud for the purposes of civil law includes acts, omissions and concealments by which an undue and un-conscientious advantage is taken of another.<sup>5</sup>

Professor Osisioma in his paper, while referring to a case law position, said fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get any advantage over another. It includes all surprise, trick, cunning, dissembling and unfair ways by which another is deceived.<sup>6</sup> It was once the position of law that a company though a person in law, cannot be vicariously liable for the fraudulent conducts of its agents or employees, even if the company benefitted from such wrong<sup>12</sup>. This position has been reversed so that companies can now be held liable for criminal conducts arising from its activities executed through its human agents<sup>13</sup>.

Therefore, a company can be said to have committed fraud when persons whose act for and on behalf of the company and not outside the scope of their authority commits the offence of fraud<sup>7</sup>. Fraud covers a litany of corporate crimes, like *embezzlement, larceny, theft, misappropriation of assets*, and so on<sup>8</sup>. Corporate fraud has been defined to include

a wide scope of any form of human shenanigan employed by corporate officers to gain an advantage to the detriment of those with whom the corporation deals and for which the corporation is criminally liable by virtue of the legal science of the organic theory.<sup>9</sup>

The above definition of corporate fraud is susceptible to both the realms of tortious wrongs and criminal breaches. The particular set of facts will determine whether or not the corporate entity should be held liable for tort or crime. Where a company is held liable for a civil wrong (tort), damages will be awarded against the company while if criminally responsible, penal sanctions will be awarded. Whether a person will succeed against a corporate entity for civil or criminal fraud or not is an issue of evidence.

## BURDEN OF PROOF AND EVIDENTIAL BURDEN IN CORPORATE LITIGATION

Corporate litigation refers to all sets of proceedings whether civil or criminal brought against a corporate entity.

<sup>1</sup> Garner B. A. (eds.), *Black's Law Dictionary*, (8<sup>th</sup> ed.) United States: West Group Publishers, 2004 at 685. While at common law fraud implies a false statement, in equity it covers all un-conscientious dealings.

<sup>2</sup> Adewumi W., *Fraud in Banks – An Overview Fraud in Banks*, Lagos: Landmark Publications (1986); M. A. Ajayi, *Fraud in Nigeria's Financial System: Evidence from Commercial Banks*, IJBSS Vol.8 (1) & (2) 2003.

<sup>3</sup> This exposition is in line with that expressed by Ali, as it is a fact that fraud is essentially a human phenomenon that is capable of different forms and necessarily dynamic with the society. See Linus Ali, *Corporate Criminal Liability in Nigeria*, Lagos: Malthouse Publishers (2008) at 158.

<sup>4</sup> (2014) LPELR-22811 (CA).

<sup>5</sup> Also see *Otukpo v. John* (2012) LPELR-20619 (SC), where the court stated thus: Fraud is defined as an intentional perversion of truth for the purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. It is something dishonestly and morally wrong... See also *Olufumise v. Falana* (1990) 3 NWLR, Pt.136, pg.1; *UAC v. Taylor* (1936) 2 WACA pg.170; *Usenfowokan v. Idowu* (1969) NMLR, P9.77; *Ntuks vs. M.P.A* (2007) 13 NWLR, pt.1051, pg. 332.

<sup>6</sup> Benjamin Chuka Osisioma, *Combating Fraud and White Collar Crimes: Lessons from Nigeria*; Paper Presented at 2nd Annual Fraud & Corruption Africa Summit, Held at Zanzibar Beach Resort, Zanzibar Republic of Tanzania.

<sup>7</sup> Paul L. Davies, *Gower and Davies Principles of Modern Company Law*, (8<sup>th</sup> ed.) London: Sweet & Maxwell (2008) at 182.

<sup>8</sup> Penny J., *Corporate Fraud: Prevention and Detection*, London: Tolley Publishers (2002). There are many types of corporate fraud, including the following common frauds: theft of cash, physical assets or confidential information, misuse of accounts, procurement fraud, payroll fraud, financial accounting misstatements, misappropriating journal vouchers, suspense accounting fraud, fraudulent expense claims, false employment credentials, bribery and corruption. See Helenne Doody, *Corporate fraud*, Topic Gateway Series No. 57, May 2009

<sup>9</sup> See Linus Ali, *Corporate Criminal Liability in Nigeria*, Lagos: Malthouse Publishers (2008) at 158.

Though technically referred to as corporate litigation, there is no law exempting or creating a different burden or standard of proof as a defendant in a civil action or accused person in a criminal charge for a corporate entity. It is well known by legal practitioners as well as the courts that proof of one's case by way of evidence is the bedrock upon which litigation is based<sup>1</sup>. Thus it is an essential prerequisite for parties and the courts to appreciate the concepts and application of burden and standard of proof.<sup>2</sup>

#### *Burden of Proof in civil and criminal litigation*

It has often been said that in all litigation, the acid test upon which decisions are consciously or unconsciously reached on the basis of the burden of proof<sup>3</sup>. However, a major challenge associated with the burden of proof is the proper and right application of the concept. The court pointed out this position in the case of *Rhesa Shipping Co. SA v. Edmunds*<sup>4</sup>

No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of evidence or otherwise, deciding on the burden of proof is the only just course to take.

Burden of proof has been used in particularly two different respects that has to be clearly pointed out so as not to confuse the use of the term. The phrase 'burden of proof' grammatically denotes the duty in litigation to offer evidence in proof of a party's assertions or counter-assertions<sup>5</sup>. Here, the burden is never static but shifts from one party to the other, especially in civil cases. This is because burden as used in the context means 'task' or 'duty'<sup>6</sup>. On the second part, the phrase does not materially differ from the first, except that under the second meaning the burden never shifts.

This obligation of proof substantially rest on whoever asserts that a particular or given set of facts exists and are in issue. The doctrine of burden of proof is an ancient rule and has been summed up by the Nigerian Supreme Court in locating its root in the evidence Act thus:

The general rule which is enshrined in the maxim *ei qui affirmat non ei qui negat incumbit probatio* i.e 'the burden of proof lies on one who alleges, and not on him who denies' has been provided for in sections 134 to 136 of the Evidence Act.<sup>7</sup>

Though generally referred to as burden of proof<sup>8</sup>, its implications in civil and criminal proceedings differ. In civil cases, as a matter of law and practice, the burden of proof is discharged by establishing a case on the preponderance of evidence. The burden is fixed at the beginning of the trial by the state of the pleadings, as the facts so averred lies on the party who seeks to rely on them<sup>9</sup>. There are instances where on the state of the pleadings, the burden will not fall on the plaintiff but on the defendant to first introduce evidence. On the other hand, the burden of proof in criminal proceedings in an adversarial or accusatorial system like that of Nigeria is proof beyond reasonable doubt.<sup>10</sup> This position seems to have had its foundational justification in the *grundnorm* of Nigeria, which is the 1999 Constitution of the Federal Republic of Nigeria<sup>11</sup>. The effect of the above principle is the duty on the prosecution to prove that the accused person committed the offence. A learned scholar in restating the position settled by the court said:

Where the ingredients are ascertainable, the prosecution must prove beyond reasonable doubt that the accused person or persons envisaged by the law creating the offence and their acts are within the ambience of the ingredients of the offence.<sup>12</sup>

<sup>1</sup> This was also rightly asserted by a distinguished scholar in his work. Emeka Chianu, *Company Law*, Abuja: Lawlord's Publication, (2012) at 292.

<sup>2</sup> Peter Gabriel, *Burden of Proof and Standard of Proof in Civil Litigation* (2013) 25 S AcLJ at 130.

<sup>3</sup> Ibid.

<sup>4</sup> [1985] 1 WLR 948 at 955.

<sup>5</sup> Sebastine Tar Hons, *Law of Evidence in Nigeria (Based on the Nigerian Evidence Act, 2011)* Vol. 1, Port Harcourt; Pearl Publishers (2012) at 300.

<sup>6</sup> See the case of *B. O. N. Ltd v. Oniyo* (2002) FWLR (Pt. 129) 1492 CA.

<sup>7</sup> See *Osawaru v Ezeiruka* (1978) 6 – 7 SC 135, 145. The new sections are ss. 131 – 135 of the Evidence Act 2011, Laws of the Federal Republic of Nigeria.

<sup>8</sup> It is also called the 'legal burden', 'persuasive burden', 'probative burden', 'the fixed burden of proof', 'burden of persuasion' etc. See C. C. Nweze, *Contentious Issues and Responses in Contemporary Evidence Law in Nigeria*, Vol. 2, Enugu: Institute for Development Studies (2006) at 179.

<sup>9</sup> Ibid. Also see the case of *Arase v. Arase* (1981) 5 SC 33, 37.

<sup>10</sup> See sections 135, 136, 139, and 140 of the Evidence Act 2011. Proof beyond reasonable doubt do not in any way imply proof beyond all shadow of doubt. *Okere v State* (2001) 2 NWLR (Pt. 697) 397, 415 – 416.

<sup>11</sup> The import of the provision of section 36 (5) of the Constitution is that: 'Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty....' The courts have interpreted the section as imposing the burden of proving the guilt of an accused person on the prosecution; *Obiakor v. State* (2002) 10 NWLR (Pt. 776) 612.

<sup>12</sup> See C.C. Nweze, *Op Cit*, at 189; also the case of *Oladele v Nigerian Army* (2004) 6 NWLR (Pt. 868) 166.

There is no special burden of proof bestowed by law on a corporate entity either as claimant or defendant. So that the above espoused position of the law on burden of proof in evidence applies to *all cases*.

#### *Evidential burden in civil and criminal litigation*

‘Evidential burden’ is different from ‘burden of proof’ but has been misconceived by litigants, legal practitioners, and the courts alike. The term is often used in contradistinction to ‘legal burden of proof’ but is not so referred to as ‘evidential burden’ in the Nigerian Evidence Act 2011. The closest reference or provision that suits the definition of the term ‘evidential burden’ in the Evidence Act is that of section 133 (2) which states that

If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, *the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.*<sup>1</sup>

This position is supported in the case of *Britestone Pte Ltd v. Smith & Associates Far East Ltd*<sup>2</sup> the phrase ‘evidential burden’ was defined thus:

...evidential burden ... exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led.

The evidential burden is the burden placed on the party in most cases the defendant – whom *prima facie* case has been established against through evidence. This means that the first party’s case would be believed if the opposite party did not produce evidence to rebut the first party’s evidence that must have established a *prima facie* case<sup>3</sup>. This explains why the *onus of proof* rests upon the party who would fail if no evidence or no more evidence than that in the case were given on either side. Thus the burden of adducing evidence shifts constantly from one party to the other as evidence is tendered by each side.<sup>4</sup>

In civil cases, while the initial burden of proof is on the plaintiff, the proof or rebuttal of issues which arise in the course of proceedings may shift from the plaintiff to the defendant and vice-versa as the case progresses. The Supreme Court of Nigeria in *Orji v. Dorji Textile Mills (Nig.) Ltd*<sup>5</sup> clearly stated this position thus:

...if such party adduces evidence which ought reasonably to satisfy a court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all the issues in the pleadings have been dealt with....

In criminal cases, while the burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt<sup>6</sup>, the evidential burden only shifts if the evidence led by the prosecution establishes a *prima facie* case. Here, the evidential burden does not shift from time to time like it does in civil cases in accordance with the pleadings. It is only when an accused person alleges special circumstances that he is required to prove them<sup>7</sup>. In *N.A.F. v. Kamaldeen*<sup>8</sup>, the Supreme Court restated the above position that where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption to the law lies on the defendant who is raising such exception or exemption.

The difficulty in understanding the difference between legal burden of proof and evidential burden has been explained in the above case. Also, the distinction was addressed by the court in the case of *Cooperative Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v. Motorola Electronics Pte Ltd*<sup>9</sup> where it stated thus:

It is now trite law that there is a distinction between the legal burden and evidential burden of proof. This court has explained the distinction between the two concepts in *Britestone*....

Sections 103 and 105 of the Evidence Act, which place the burden of proving a fact on the

<sup>1</sup> Emphasis supplied are mine.

<sup>2</sup> [2007] 4 SLR (R) 855 at 59; also see *Cooperative Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v. Motorola Electronics Pte Ltd* [2011] 2 SLR 63.

<sup>3</sup> See Peter Gabriel, *Burden of Proof and Standard of Proof in Civil Litigation* (2013) 25 SAclJ at 155.

<sup>4</sup> See the cases of *Elemo v. Omolade* (1968) NMLR 259; *UBN Ltd v Ozigi* (1994) 3 SCNJ 43, 62; *Obijiaku v. Offiah* (1995) 7 SCNJ 142, 153.

<sup>5</sup> (2010) All FWLR (Pt. 519) 999 SC – per Tobi JSC.

<sup>6</sup> From a joint reading of section 36 (5) of the 1999 Constitution of Nigeria and section 135 of the Evidence Act 2011.

<sup>7</sup> A very instructive provision on this subject is section 139 of the Evidence Act 2011. For a further appreciation of the provision, see section 137 which places a burden lighter than that of the prosecution by the standard of proof required, which is on the balance of probabilities.

<sup>8</sup> (2007) All FWLR (Pt. 361) 1676 S.C.

<sup>9</sup> *Supra*. This case was decided by the Singaporean court based on the Evidence Act of Singapore.

party who asserts the existence of any fact in issue or relevant fact respectively, concern the legal rather than the evidential burden of proof. The evidential burden, whilst not expressly provided for in the Evidence Act, exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led....it is the latter form of burden which may shift from one party to the other.

### MANAGEMENT OF EVIDENTIAL BURDEN IN CORPORATE LITIGATION

Evidential burden as shown in this paper is usually placed on the party against whom a *prima facie* case has been made through evidence and needs to rebut such by also leading evidence to explain away the said *prima facie* case. It therefore goes further to mean that where the party on whom the evidential burden is placed is not able to discharge it by either not having evidence to rebut or mismanages available evidence, the party is likely to have judgment given against him or her. Management of evidential burden in this regard entails understanding the trial process, the mechanics of evidence adduction and the basics of the burden on a party, and an appropriate approach in leading evidence in rebuttal<sup>1</sup>. Hence, the success or otherwise of a party on whom evidential burden is placed is dependent on proper management of the burden.

It follows that in order to discharge evidential burden, a party on whom the burden is placed should, depending on the claim or charge brought against that party, field appropriate evidence to tilt the imaginary scale of justice in his favour. So that, in a claim or charge of fraud, the party on whom the evidential burden is placed should lead evidence to show that there was nothing deceptive or misrepresented by the company to warrant the claim or charge.

It is deductible from the above that corporate entities that are either sued as defendants in civil suits or charged to court as accused persons in criminal trials usually find themselves having the evidential burden placed on them. As such, evidence led by a corporate entity in this regard may be comfortably referred to as corporate evidence. Such evidence is also regulated by the relevant statutory provisions and case law on the adjectival laws on evidence.

#### *Statutory position on corporate evidence*

The Evidence Act of 2011 is the principal adjectival law in Nigeria that regulates the admissibility, weight, or otherwise of evidence in whatever form it takes to prove the existence of a set of facts in issue upon which the court relies in reaching a binding decision. The Act covers all issues of evidence in all courts in Nigeria, and there is nothing in it which restricts its applicability to only pieces of evidence led by individuals but also envisages corporate entity led pieces of evidence<sup>2</sup>. In stating the requirements and procedure for tendering, admitting, and necessary weight to be attached to evidence led in court, the Evidence Act did not provide anywhere as to how corporate entities as distinct from human persons should lead evidence.

This means that the requirements of direct evidence, hearsay, documentary evidence etc are same for a corporate entity, despite the fact that a company is a juristic person<sup>3</sup>. This appears to pose some legal challenges to legal practitioners, law makers and the courts by virtue of the doctrine of corporate personality being different from its members and employees<sup>4</sup>. This is especially so as the company can only appear in court and conduct its case through human agents. There have been several corporate litigations where corporations have had the course to lead evidence to either discharge a legal burden of proof or evidential burden.

#### *Judicial attitude to corporate evidence and discharging the evidential burden*

In the absence of a clear statutory provision on corporate entity led evidence, the courts have been confronted with the right application of the Evidence Act and the principles of evidence law to evidence produced and led by corporate entities. The set of provisions that have given some level of justification to the courts to ascribe acts of human persons to corporate entities in the Evidence Act 2011 are sections 20, 21, 24 (a), 39, and 50 respectively, on admissions. Some issues of managing corporate evidential burden identified by legal practitioners and legal scholars over the years shall form the basis of discussion on the attitude of the courts to corporate evidence. They include aspects on admissions, oral evidence in open court, statements made in anticipation of litigation etc.

##### 1. Admissions

Admission is any statement or assertion made by a party to a case and offered against that party; an

<sup>1</sup> See the abstract in Peter Gabriel, *Burden of Proof and Standard of Proof in Civil Litigation* (2013) 25 SAclJ at 130.

<sup>2</sup> See the long title of the Evidence Act 2011, which states thus: 'An Act to repeal the Evidence Act, Cap E14, LFN, 2004 and enact a new evidence Act which shall apply to all judicial proceedings in or before courts in Nigeria, and to provide for matters incidental thereto, 2011'.

<sup>3</sup> As was propounded in the cases of *Lennards Carrying Company Ltd v. Asiatic Petroleum Co. Ltd* (1915) A.C. 705; *H.L. Bolton (Engineering) Co. Ltd v. T. J. Graham & Sons Ltd* (1957) 1 QB 159.

<sup>4</sup> See the doctrine enshrined in the celebrated case of *Salomon v Salomon & Co. (1897) AC 22*.

acknowledgment that facts are true<sup>1</sup>. This definition has been extended by the Nigerian Evidence Act to include statements made by persons whose position or liability it is necessary to prove as against any party to the suit is an admission, if such statement would be relevant as against such person in relation to such position or liability in a suit brought against him, and if such statement was made whilst the person making it occupies such position or is subject to such liability<sup>2</sup>. By the implication of giving a community reading to all the afore-cited provisions of the Evidence Act, the conclusion that the case law principle that, the company acts through its agents, can be argued to have gained statutory support. By the above argument that companies always act through agents, it becomes certain that admissions must of necessity be made by its agents and employees.<sup>3</sup>

The challenge bedevilling the courts and legal practitioners in this aspect has been succinctly captured by a learned scholar when he said, 'the question has arisen as to the status of a company's officer or employee whose admission would be binding on it'. In *Burr v. Ware Rural District Council*<sup>4</sup> the English Court of Appeal disallowed admissions made by a driver as being admissions of the company when it was raised at the time the defendant was to discharge its evidential burden. The position of the law was set in Nigeria in the case of *Bosah v. British American Ins. Co (Nig.) Ltd*<sup>5</sup> where in the bid to evade liability, the company argued that an admission made by the managing director to an employee on conditions of employment did not bind the company. The court held inter alia thus:

...I will have no difficulty in holding that subject to relevancy and weight to be subsequently attached to it, the evidence of the plaintiff as to what the managing director told him about his new conditions of service is admissible in evidence.

It appears from the perspective of the court as expressed above that an admission that can be credited to the corporate entity can only be made by certain persons that can comfortably be referred to as the mind of the corporation<sup>6</sup>. This position is what some scholars have strongly disagreed with as not being a true reflection of the law.<sup>7</sup>

## 2. Oral evidence in open court

Closely connected to extra-judicial admissions is that of oral evidence of a company in court which is also done through its agents or employees. Whoever the company, in the bid to discharge its evidential burden, fields in the witness box is of no issue with regard to admissibility of evidence given by such person as agent of the company. The challenge of evidential burden management in this aspect for corporations is on the weight to be attached to a piece of evidence. It is therefore wise management of evidential burden for a company to call only 'officers whose job description relates to the issue in litigation'<sup>8</sup>.

The courts have, in a litany of case law authorities, settled the above position. In *Ogugua v. Armels Transport Ltd*<sup>9</sup> the plaintiff brought an action against the defendant company for failure to repair his car. The company called its business manager to testify and his testimony was not given any weight due to the fact that he is not a mechanical engineer to be able to testify on expertise of the subject matter<sup>10</sup>

## 3. Statements made in anticipation of litigation

In contemporary times, it is a known fact that companies operate and do their businesses by keeping records or doing a lot of communication on paper. Some of such writings are customary to the formal business world of companies so that the courts have been faced with the challenge of admitting or rejecting documents made when litigation is looming. In *Highgrade Maritime Service Ltd v. First Bank*

<sup>1</sup> Garner B. A., (ed.) *Black's Law Dictionary*, (8<sup>th</sup> ed.) United States: West Group Publishers (2004); also compare with section 20 of the Evidence Act 2011 which provides thus: 'An admission is a statement, oral or documentary, or conduct which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances, hereafter mentioned in this Act'.

<sup>2</sup> See section 22 of the Evidence Act 2011; also see Sebastine Tar Hons, *Law of Evidence in Nigeria (Based on the Nigerian Evidence Act, 2011)* Vol. 1, Port Harcourt; Pearl Publishers (2012) at 186.

<sup>3</sup> See Emeka Chianu, Op Cit, at 292.

<sup>4</sup> [1939] 2 All ER 688.

<sup>5</sup> [1972] NMLR 298.

<sup>6</sup> See *Tesco Supermarket Ltd. v. Nattrass (1972) A.C. 153 (HL)*; *Lennards Carrying Company Ltd v. Asiatic Petroleum Co. Ltd (1915) A.C. 705*; *H.L. Bolton (Engineering) Co. Ltd v. T. J. Graham & Sons Ltd (1957) 1 QB 159*.

<sup>7</sup> Compare the position of the court in the above case and section 27 of the Evidence Act 2011. See further the position expressed by Prof. Emeka Chianu in his work earlier cited in note 44 above.

<sup>8</sup> Ibid.

<sup>9</sup> (1974) 4 ECCLR 43, 45; also see *Ado v. Nigerian General Insurance Co. Ltd [1980] 4-6 CCHCJ 27*.

<sup>10</sup> See the case of *Jallco Ltd v. Owoniboy Technical Service Ltd [1995] 4 NWLR (Pt. 391) 534*.

of *Nigeria Ltd*<sup>1</sup>, upon suspicion on a transaction involving a crossed cheque, the defendant bank had some written communication via letters with other of its branches. When this matter was instituted and the defendant bank had to discharge its evidential burden, some of such letters were to be tendered in evidence. The Supreme Court on their admissibility said thus:

The nature of the disqualifying interest will depend upon the nature of duty undertaken by the servant. Where from the nature of the duty he can be relied upon to speak the truth, and that he will not be adversely affected thereby, the document has always been admitted in evidence.... of course, before there will exist a disqualifying interest, or a person will be regarded as "a person interested" there must exist a real likelihood of bias. Hence where an official is discharging a ministerial duty which does not involve any personal opinion, the question of bias will not be in issue.

Also in the case of *A. A. Chanchangi & Sons Ltd v Nigerian Roads Ltd*<sup>2</sup>, the Court of Appeal held admissible a list prepared by a firm of engineers owing to an accident that occurred and that it does not fall into statements or documents prepared in anticipation of litigation.

#### 4. Hearsay evidence

Under evidence law in Nigeria, hearsay evidence has been held as inadmissible<sup>3</sup>. That is to say, it is only direct evidence of facts seen, heard, felt, or perceived that can be given and admitted in evidence. A company by virtue of its fictional status poses a problem of right application of this principle to its evidence in courts. The courts have however been able to find a way round it so that in *Kate Enterprises Ltd v Daewoo Nigeria Ltd*<sup>4</sup>, the respondent's appeal was upheld when the trial court dismissed the evidence of its employee who was employed long after the particular contractual transaction had been concluded. The Court of Appeal held that the employee's testimony was both relevant and admissible as it was based on the personal knowledge of the witness which he acquired in the course of his employment that he testified.<sup>5</sup>

#### 5. Computer-generated evidence

Most corporate entities have also advanced in approach by adopting electronic business methods. It implies therefore that, where a dispute emanates from a transaction conducted by a corporate entity, the discharge of burden of proof or evidential burden as the case may be is likely to involve proof through electronic means. Proof through electronic evidence in Nigeria is relatively new and has very few case law authorities on it. The very instructive provision of section 84 of the Evidence Act 2011 states the requirements to be satisfied in order to tender and admit electronically generated evidence.

And the Supreme Court of recent in the case of *Kubor v Dickson*<sup>6</sup> settled the law on admissibility of electronic evidence. Flowing from the organic theory of a company and the fact that any of the company staff can testify on its behalf, what seem to be the issue is the English law position which Nigerian law is likely to follow soon. A distinguished scholar in analysis of the Supreme Court position in the above case pointed out that 'the issue central was always whether the persons through whom the various computer-generated documents were tendered were competent to tender such evidence...'<sup>7</sup> The English court in *DPP v Jones*<sup>8</sup> summed up the law thus:

The second question is whether, given Dr. Williams' lack of expertise in electronics, his expert evidence was admissible on the question of reliability of the device.

It is in regard to this dictum that the organic theory may be watered down by the testimony of any of the company officials. This is particularly so, where the subject of litigation involves electronic evidence, such pieces of evidence can only be admissible if the officer is an expert in electronics or computer.

## DIALECTICS OF EVIDENTIAL BURDEN IN CORPORATE FRAUD

The basics of evidential burden and management in all cases of corporate fraud. In order to prove corporate fraud,

<sup>1</sup> [1991] 1 NWLR (Pt. 167) 290.

<sup>2</sup> [1996] 5 NWLR (Pt. 446) 46.

<sup>3</sup> See section 37 of the Evidence Act 2011 which defines hearsay; also see T. A. Aguda, *The Law of Evidence*, (4<sup>th</sup> ed.) Ibadan: Spectrum Books Ltd (1999) at 69.

<sup>4</sup> [1985] 2 NSCC 942.

<sup>5</sup> Also see *Comets Shipping Agencies (Nig) Ltd v Babbit (Nig) Ltd* [2001] 7 NWLR (Pt. 712) 442; *Ishola v Societe Generale Bank (Nig.) Ltd* [1997] 2 NWLR (Pt. 483) 405.

<sup>6</sup> (2013) 4 NWLR (Pt. 1345) 534.

<sup>7</sup> See S. T. Hons, *Op Cit*, at chapter 7.

<sup>8</sup> (1997) 1 All ER 737.

a plaintiff or complainant has to prove by any of the required standards of proof as provided by law. In *Odunsi v The State*<sup>1</sup>, the appellant was charged with fraudulent accounting and stealing under section 435 (2) (a) & (c) and section 390 (7) of the Criminal Code. The trial court found the appellant guilty which necessitated the appeal to the Supreme Court, wherein the court held that

- i. To establish a case of fraudulent false accounting, it is not enough for the prosecution to prove that the total amount made up by adding figures together is wrong. It must be shown that it was not merely a clerical or arithmetical error but that it was done with intent to defraud.
- ii. In the instant case as the trial judge did not accept evidence relating to stealing, and the prosecution did not prove material shortage, it was certainly wrong for the trial judge to find there was intent to defraud or that the appellant was trying to cover up the shortage.<sup>2</sup>

Such other offences envisaged and provided for in the criminal code include fraudulent false accounting<sup>3</sup>, false statements by officials of companies<sup>4</sup>, etc. Also, in order to establish a civil claim of fraud the courts have stated the following elements:

- a. False representation of a present or past fact made by defendant,
- b. Action in reliance thereupon by plaintiff, and
- c. Damage resulting to plaintiff from such misrepresentation.<sup>5</sup>

Where a corporate entity is brought to court for civil or criminal fraud, the plaintiff or complainant as the case may be is placed with the legal burden of establishing the above ingredients. It is only when these have been discharged that the company as a matter of law is expected to also discharge its evidential burden to explain away any evidence led that is suggestive of the fact that it is liable or guilty as charged. As earlier stated, the corporate entity at this point is placed with a burden which will be discharged on a balance of probabilities. The corporate entity will be said to have discharged this burden where it is able to lead evidence in civil cases to debunk the existence of one of the itemised elements. In criminal cases, the prosecution must prove his case beyond reasonable doubt.

## CHALLENGES OF MANAGEMENT OF EVIDENCE BURDEN IN CORPORATE FRAUD LITIGATION

Some of the challenges of managing evidential burden in Nigeria are highlighted as follows:

1. A major challenge that evidential burden management poses on corporate litigants is, not knowing when the evidential burden can be said with certainty to have shifted. A party may not know whether or the evidential burden placed on him has been discharged or not. This is because, it is the place of the court to weigh the evidence led and same is determined in accordance with laid down legal principles when the burden shifted and whether it has been discharged by a litigant. The observation of the judge would not be known to the parties<sup>6</sup>.
2. A second challenge is the creation of a single standard of proof whenever a case of fraud is instituted. As it appears, through our case law authorities, all cases of fraud have been given a single standard of proof which is similar to that for criminal prosecutions. The standard of proof for fraud cases is 'proof beyond reasonable doubt', whether the case of fraud is one brought as a criminal charge or as a civil tortious claim. The Supreme Court just of recent stated this position in *Yakubu v. Jauroyel & Ors*<sup>7</sup>

Allegation of fraud must be proved beyond reasonable doubt. Such must not leave room for speculation. It is proof in the realm of probability and not fantastic possibility that is required. See: *Nwobodo v. Onoh* (1984) 1 SCNLR 1 at 27-28; *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108; Section 138 of Evidence Act, Cap 112 LFN, 1990. Standard of proof for commission of crime in civil cases as alleged herein is the same as in criminal cases. See: *Famuroti v. Agbeka* (1991) 5 NWLR (Pt. 189) 1 at 13 where this court held that where the plaintiff alleged that the thumb impression on Exhibit A, the basis of the case was forged, same must be proved beyond reasonable doubt. See also *Jules v. Ajani* (1980) 5-7

<sup>1</sup> [1969] NSCC 418 SC; also see *The Queen v Osoba* [1961] NSCC 5 SC.

<sup>2</sup> A. M. Adebayo, *Criminal Code Act and other Related Acts Annotated with Cases*, Lagos: Princeton Publishing Co. (2012).

<sup>3</sup> See section 438 of the Criminal Code Act. Also see the case of *Olusebi & Anor. v The State* [1970] NSCC 199; *DPP v Akozor* [1962] NSCC 163.

<sup>4</sup> See section 436 of the Criminal Code Act.

<sup>5</sup> *Bessoy Limited v. Honey Legon (Nig) Limited* (2008) LPELR-8329 (CA); *Ntuks v. NPA* (2007) 13 NWLR (Pt. 1051) 392.

<sup>6</sup> See Peter Gabriel, *Burden of Proof and Standard of Proof in Civil Litigation* (2013) 25 SAclJ at 155. Also see the case of *Wee Yue Chew v. Su Sh-Hsyu* [2008] 3 SLR (R) 212 at 7.

<sup>7</sup> (2014) LPELR-22732 (SC).

SC 96 at 116. I have said it before but I wish to further reiterate it that fraud requires a higher degree of probability in its proof. It must be pleaded with particulars adequately supplied. See: *George v. Dominion Flour Mills Ltd.* (1963) All NLR 70 at 77; *Aina v. Jinadu* (1992) 4 NWLR (Pt. 233) 91 at 106. A party alleging fraud must discharge the onus of proof to the satisfaction of the court.

This seems to be creating a double standard for litigants and legal practitioners in civil cases involving fraud. This is because 'fraud' when being prosecuted as a tortious wrong does not come within the functionality of criminal law.

3. A third challenge faced by the court and litigants is that of inability to bridge the gap on standard of proof in fraud litigation as regards discharging the evidential burden. There are instances when a corporate entity may resort to a defence of 'fraud' to discharge its evidential burden as to why it cannot be held liable for a particular claim. The question then will be 'in the light of the aforementioned challenge, what standard of proof is the entity expected to have in order to discharge its burden? This is posing a lot of problem due to the fact that the standard of proof provided for by statute in discharging an evidential burden is 'balance of probabilities'<sup>1</sup>. On the other hand, the courts have extended the provisions of section 135 of the Evidence Act by raising the standard of proof through case law to 'proof beyond reasonable doubt' irrespective of the kind of burden placed on the litigant<sup>2</sup>. Whereas from the foregoing, 'fraud' has been seen and held as a criminal allegation – whether in civil or quasi-criminal suits – the law has also been stated clearly as to the standard of proof for evidential burden.<sup>3</sup>
4. A fourth challenge facing litigants in the management of evidential burden is that of the court descending into the arena. This is a practical experience faced by litigants and legal practitioners when the court for one reason or the other would not allow parties conduct their cases the way that best suits them. The court is expected to be an unbiased umpire and should not descend into the arena of conflict by asking questions that will decide the case one way or the other<sup>4</sup>. The court in *Akinfe v. The State*<sup>5</sup> said that:

...Party other than party who calls the witness herein must be the adversary, certainly not the court for the court is never a party to a case. Of course, once a judge descends into the arena the aura of impartiality ceases.

5. Another challenge faced by litigants on proper management of evidential burden is that of discharging evidential burden via computer-generated evidence. Flowing from the position of the Supreme Court in the case of *Kubor v. Dickson*<sup>6</sup> as to the requirements for the admissibility of computer-generated evidence juxtaposed with the recent English authority of *DPP v. Jones*<sup>7</sup>, the earlier position of a corporate entity being entitled to testify in court through any of its human agencies, irrespective of whether the person participated in the transaction or not, is seriously threatened.
6. Finally, it is the challenge of proving criminal intention.

## POSITION IN OTHER JURISDICTIONS

In the United States of America, by virtue of section 307 of the Sarbanes-Oxley Act 2002, professionals like retained attorneys have the obligation to disclose any irregularity or fraud noticed by them in the process of discharging their duty to the company.

Also in United States, consumer liability for authorised electronic money transfers on debit card is covered by Regulation of the Federal Deposit Insurance Corporation. The extent of consumer liability, as retailed in section 2056 is determined by the speed with which the consumer notifies the bank. If the bank is notified within 2 business days, the consumer is liable for \$50. Over two business days the customer is liable for \$500 and over 60 business days the consumer liability is unlimited. In contract, all major credit card companies have a zero liability policy, effectively eliminating consumer liability in cases of fraud.

Under article 64 of the Company Law of China, 2005, the owner of a one-man company has the evidential burden of proving that his property is different from that of the company. Where the issue of corporate fraud arises, the fraud of one-man owner is deemed to be the fraud of the company, once proved.

In Scotland (United Kingdom) the burden lies on the issuer of a shares certificate to prove that he has the

<sup>1</sup> See the provisions of section 137 of the Evidence Act 2011.

<sup>2</sup> Whether it is legal burden proof or evidential burden of proof. Also see *Yakubu v. Jauroyel & Ors supra*.

<sup>3</sup> See section 137 of the Evidence Act 2011 which provides that 'Where in any criminal proceedings the burden of proving the existence of any facts or matter has been placed upon a defendant by virtue of the provisions of any law, the burden shall be discharged on the balance of probabilities'.

<sup>4</sup> A. F. Afolayan, *Criminal Litigation in Nigeria*, Enugu: Chenglo Limited, (2010) at 191 – 192.

<sup>5</sup> (1988) 3 NWLR (Pt. 85) 729.

<sup>6</sup> *Supra*.

<sup>7</sup> *Supra*.

authority to make such issue<sup>1</sup>. A claimant may by reference to 781(2) assert that the issuer made such document fraudulently, with knowledge of his lack of authority. Thus, failure of the issuer to prove his authority makes him liable, and it renders the affected company vicariously liable where the issuer is director or staff.

## RECOMMENDATIONS

From the challenges highlighted, this paper most humbly proposes the following as recommendations,

- a. The Supreme Court should restate the law properly on the standard of proof applicable to a party with evidential burden irrespective of what the party asserts in defence. It appears very clear and literal to this paper that section 137 of the Evidence Act 2011 in all ramifications envisages ‘balance of probabilities’ as the standard of proof expected to be satisfied by a litigant who bears evidential burden.
- b. Also, the Nigerian courts should avert the difficulty placed on a party who asserts the existence of ‘fraud’ by proving same beyond reasonable doubt. This is because fraud is susceptible to both civil and criminal proceeding, so that placing the same burden on both realms will not do any good to our litigation jurisprudence with regard to fraud. This should be done by placing a burden of ‘balance of probabilities’ in civil cases and ‘proof beyond reasonable doubt’ for criminal cases.
- c. Considering the illusive nature of evidential burden shift in which litigants and their counsel in most cases are not able to identify, the practice of ‘no case submission’ and its incidents in criminal proceedings should be made applicable to the fraud in civil cases. By adoption of this practice, litigants and their counsel will be able to know after close of plaintiff’s case, whether a prima facie case does exist for the defence to have on it the evidential burden.
- d. The organic theory that has formed the basis of corporate citizenship should be extended to the leading of pieces of evidence that are Computer-generated for corporate entities. So that a company must not be restricted to getting experts in its employment or seek those that have left their employment over a Computer-generated piece of evidence. Any employee or agent should be allowed to tender such, rather like the court has been doing, it should only determine the weight to be attached to a piece of evidence tendered by an employee or agent of a company that did not take part in a transaction or is not an expert on electronics.
- e. Staff of anti-graft agencies and allied tribunals should be trained and re-trained so as to be knowledgeable of the provision of the law. This will also help them prepare good charge and lead evidence to support the said charge.
- f. It is suggested that the principle of plea bargain should not be encouraged and applied in corporate fraud in order to deter offenders

## CONCLUSION

A clear distinction between legal burden of proof and evidential burden has been established. In combing through the Nigerian Evidence Act 2011, the paper pointed out some specific aspects of evidence that affects corporate litigations and the impediments they pose to corporate led pieces of evidence. With these areas of difficulties in the Evidence Act of 2011 and the specific challenges they pose as shown through the cases, the paper finally proposes suggestions for amended and proper management of evidential burden. The present corporate fraud situation in Nigeria would be greatly improved if the recommendations in this paper are adopted.

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<sup>1</sup> Sec section 781(2) United Kingdom company Act 2006

<sup>2</sup> supra

<sup>3</sup> sec section 775 (3) United Kingdom company Act 2006

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