

## **eServices, Consumer Protection, Nigeria's Banking and Telecommunications Industries: Putting New Wine in Old Skin**

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### ***Abstract***

*Technological advancement and its incorporation into the process of service provision of banking and telecommunications in Nigeria have given birth to issues which service providers, industry regulators and consumers are currently grappling with because the framework which regulates the relationship between interfacing consumers and service providers is not at par with technological advances. This article attempts bringing consumers of these services delivered via technology driven media within the rubric of the concept and jurisprudence of consumer protection in Nigeria and reveals that there is need for legislation and formulation of legal principles on such services.*

### **1. Introduction**

The origin of the concept of consumer protection is traceable to multiple sources. The Bible<sup>1</sup> and the Quran<sup>2</sup> contain portions, which are consumer oriented, while modern economic thought traces it to Adam Smith's 1779 treatise.<sup>3</sup> With reference to

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<sup>1</sup> See Deuteronomy 22:8, Holy Bible.

<sup>2</sup> See Quran 17:35; 83:1-3.

<sup>3</sup> See A Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations* (1779). Available at <http://www2.hn.psu.edu/faculty/jmanis/adam-smith/wealth-nations.pdf>., visited 23/03/2013.

Nigeria, the origin of the concept of consumer protection can be traced to the ceding of Lagos to the British in 1861 and the promulgation of the Supreme Court Ordinance 1876.<sup>4</sup> This is not to say that the various communities in existence prior to this time did not have consumer-oriented rules that are indigenous to them. These communities had defined *modus operandi* with regards to protecting consumers of goods and services in a form referred to as customary law.<sup>5</sup>

With advances in Information and Communications Technology (ICT), new paradigms have emerged. Businesses, service providers and consumers are changing. Electronic services (eServices or E-services), products and consumers are the current trend. It is against this background, that this article is set. It examines the status of consumers of electronic banking and telecommunications services in Nigeria with a view at extending the gamut of consumer protection jurisprudence to the issues arising from consumption of the eServices provided by the industries.

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<sup>4</sup> Section 14 of the Ordinance provides that the common law, the doctrine of equity and the statutes of general application which were in force in England on 24<sup>th</sup> July 1874 were to be in force within the jurisdiction of the court in Lagos and by extension, Nigeria.

<sup>5</sup> This is a mirror of accepted usage that has been accepted by the members (indigenes) of a community as binding on them. See the Supreme Court decisions in *Zaidan v Mohassen* [1973] 1 All NLR (Pt. 11) 86; *Owonyin v Omotosho* (1961) 1 All NLR 804, 809 (per Bairamaan FJ) and *Ibrahim v Barde* (1997) 43 LRCN 1919 (per Ogundare, JSC (dissenting)). This reference is also the basis of a somewhat derogatory treatment being accorded these laws when an opportunity for comparison with other sources of Nigerian law presents itself in the form of the necessity of proof and the application of the validity tests before the enforcement of the law. See A.O. Obilade, *The Nigerian Legal System* (Nigeria: Spectrum Books, 1979) 55 -100.

## 2. Who is a Consumer

There is no empirical answer to the question: who is a consumer? A 'consumer' can be defined from three perspectives; to wit: that which sees a consumer as a natural person; that which sees it as any person - inclusive of non-natural persons - and that which places premium on the use to which the goods or services bought or purchased is to be put. The major determinant from the third perspective is that of whether the goods bought or purchased is to be used for further production or is to be re-sold. This multiplicity of perspectives can bring about uncertainty and it does not make for uniformity of thought; hence the inability to have an empirical definition of who a consumer is.

The complexity which the above scenario births is manifest in different jurisdictions. In Nigeria, consumer is statutorily defined in a manner that does not place premium on whether the consumer is a natural or artificial person. By virtue of section 32, Consumer Protection Council (CPC) Act 1992,<sup>6</sup> a consumer is one who purchases, uses, maintain or disposes of products or services. This assertion with reference to the CPC Act is further buttressed by the provisions of section 6(1) which provides that:<sup>7</sup>

A consumer or community that has *suffered a loss, injury or damage* as a result of the use or impact of any goods, product or services may make complaint in writing to or seek redress through a state committee.

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<sup>6</sup> Cap. C25, Laws of the Federation of Nigeria (LFN) 2004. It established the Consumer Protection Council and vests in it the responsibility of providing speedy redress to consumers' complaints through negotiation, mediation and conciliation. See section 4 CPC Act.

<sup>7</sup> Italics mine for emphasis.

The Nigerian Communications Act (NCA) 2003<sup>8</sup> defines ‘consumer’ as any person who subscribes to and uses a communication service<sup>9</sup> without reference to whether they are natural persons or not. The Consumer Code of Practice Regulation<sup>10</sup> made pursuant to the NCA<sup>11</sup> also does not improve on the situation.<sup>12</sup>

A definition of consumer is not restricted to a party to a contract<sup>13</sup> to the exclusion of the ultimate user. This assertion

<sup>8</sup> Cap. N33, LFN 2004, hereafter referred to as NCA. It repealed and replaced the Nigerian Communications Commission Act 1992, the Nigerian Communications Commission (Amendment) Act 1998 and the Telecommunications and Postal Offences Act 1995.

<sup>9</sup> Section 157, NCA. In the European Union (EU), the notion of consumer is similarly defined. See M Ebers, ‘Notion of “Consumer”’ *Consumer Law Compendium Comparative Analysis* 713, available at [http://www.eu-consumer-law.org/consumerstudy\\_part3a\\_en.pdf](http://www.eu-consumer-law.org/consumerstudy_part3a_en.pdf), (accessed 29 August 2010); E Hondius, ‘The Notion of Consumer: European Union v Member States’ (2006) Vol. 28 *Sydney Law Review*, 89, available at [http://sydney.edu.au/law/slri/slri28\\_1/Hondius.pdf](http://sydney.edu.au/law/slri/slri28_1/Hondius.pdf) (accessed 29 August 2010) (where the defining element in the EU notions of consumer are examined).

<sup>10</sup> See Consumer Code of Practice Regulations 2007.

<sup>11</sup> See ss. 70 and 106, NCA.

<sup>12</sup> The objective of Regulation inter alia includes the confirmation and clarification of the procedures to be followed by holders of licence granted by NCC in preparing approved consumer codes of practice in accordance with the NCA.

<sup>13</sup> Party to the contract is here used with reference to the doctrine of privity of contract which is the basis for the party to contract fallacy. The latter has the effect of making it impossible for a person who was not a party to a contract to maintain an action for damages suffered as a result of mis-performance or non performance of the contract for the law sees him/ her as lacking locus standi. This rule is at the core of the caveat emptor doctrine which vests the consumer of goods and services with the burden of examining the goods or to obtain some sort of impartial advice to aid in making the purchase, and that failure to so do constitute an assumption of the risks of deception and injury. See *Amadi v Essien* [1994] 7 NWLR 91, 116 – 117; *Abusomwan v*

finds support in *Amadi v Essien*,<sup>14</sup> where the court held that notwithstanding the fact that a person was not a party to a contract, some rights enure in his favour if as a result of the fact that as a third party to the contract he is reasonably proximate and has suffered injury, damages or loss, consequent to the conduct of one of the parties to the contract.<sup>15</sup> This is the current orientation as it relates to who is a consumer. Its origin is traceable to the decision in *Donoghue v Stevenson*<sup>16</sup> where the House of Lord formulated the neighbourhood principle and pointed out the scope of the protection which the law accords a consumer.<sup>17</sup>

### **i. Consumers' Rights**

The rapid industrial development of the 19<sup>th</sup> century set the stage for the orientation that consumers have rights. Consumer rights include but is not limited to the right to choose, the right to safety, the right to information, the right to be heard, the right to redress, the right to environmental health, the right to service and the right to consumer education.<sup>18</sup> Within the context of this discourse, the right to safety, the right to information, the right to be heard and the right to consumer education will be examined.

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*Mercantile Bank Ltd* [1987] 3 NWLR (Pt. 60) 196 and J.B. Cooper, *Consumer Protection via the Doctrine of Strict Product Liability* (1972), 7 (Unpublished), (MBA thesis, Marketing submitted to the Graduate Faculty, Texas Tech University). Available at <http://etd.lib.ttu.edu/theses/available/etd-12212009-31295004272042/unrestricted/31295004272042.pdf> (accessed August 10, 2010).

<sup>14</sup> [1994] 7 NWLR 91.

<sup>15</sup> *Ibid*, 124.

<sup>16</sup> (1932) AC 562.

<sup>17</sup> *Ibid*, 599.

<sup>18</sup> See 'Consumer Rights', available at <http://www.consumersinternational.org/who-we-are/consumer-rights> (accessed 14 March 2012).

## ii. Right to Safety

It encompasses the right to be protected against the marketing of goods and services, which are hazardous to health, life and property. It also places the burden on the manufacturer/ producer of ensuring that the purchased goods and services not only meet the immediate needs of the consumer but also fulfil long term interests. This is because the law presumes that as a result of the advance in the science and technology of production and manufacturing, there is a high propensity that the consumer lacks the capacity of understanding the intricacies of manufacturing or service provision.

No law in Nigeria expressly provides for the foregoing in relation to operators in Nigeria's banking and telecommunications industries. However, there are decisions upon which its existence can be premised and on the authority of which service providers can be liable for any injury which a consumer suffers or for conduct that jeopardises or infracts on his/her right to safety in the course of consumption. It is one of the rationales for the decision in *Grant v Australia Knitting Mills Ltd.*<sup>19</sup> where the court held the defendant liable for the affliction suffered by the plaintiff (consumer) subsequent to the use of the defendant's product. In *Donoghue v Stevenson*<sup>20</sup> the plaintiff suffered gastro enteritis and nervous shock after ingesting a ginger beer purchased from the defendant which contained the remains of a decomposed snail. The court held that the drink was not safe for consumption and gave judgment in favour of the consumer/plaintiff. The decision amounts to holding that the consumer's right to safety has been breached since the drink was prepared, packaged and/ or stored for the purpose of sale in an unsafe condition. This reasoning was applied in the case of

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<sup>19</sup> (1936) AC 85.

<sup>20</sup> *Ibid.*

*Osemobor v Niger Biscuit Co. Ltd*<sup>21</sup> and *Nigerian Bottling Company Ltd v Constance Ngonadi*.<sup>22</sup> In the former case, the plaintiff purchased at a supermarket a packet of biscuit manufactured and packaged by the defendant. While consuming the biscuit, the plaintiff felt something in her mouth, which turned out to be a decayed tooth. As a result, she became ill and was given medical attention. Holding the defendant liable, the court held that it is the duty of the defendant to produce safe products for consumers. In the latter case, the respondent/plaintiff was injured when a product purchased from the appellant/ defendant exploded in the course of use. As a result of this, the former filed an action in negligence against the defendant which succeeded. In reaching its decision, the court held that it is the duty of the producers or manufacturers of goods to ensure that the goods are fit, not defective and safe for consumption by the consumer. From the foregoing, the conclusion is that courts - both in Nigeria and in the United Kingdom - are favourably disposed to upholding consumers' right to goods and services that are not hazardous to their health and/or life and by extension, upholding consumers' right to safety.

### **iii. Right to Information**

This relates to the consumer's right to being informed as to the get-up, nature and composition of the goods and services produced and offered to the consumer. It encompasses the right to be informed about the quality, quantity, potency, purity, standard and price of goods so as to protect the consumer and make available to him necessary information needed to reach an informed decision as to whether or not he will consume the product or service. The right to information is provided for

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<sup>21</sup> [1973] 7 CCHCJ 71.

<sup>22</sup> [1985] 1 NWLR (Pt 4)739.

within the rubric of the common law and statutes in Nigeria. With reference to the latter, under the Hire Purchase Act<sup>23</sup> the owner of the goods sought to be hired must state in writing to the prospective hirer the cash price at which the goods are valued before any hire purchase agreement is entered into in respect of the goods.<sup>24</sup> Also, a statement as to the purchase price, the deposit made as well as the rate of interest must be contained in a Hire Purchase Agreement for it to qualify to be properly so called.<sup>25</sup> Section 11, CPC Act, penalises the giving of false information about a product by a manufacturer. It provides that:

Any persons who issues or aids in issuing any wrong advertisement about a consumer item, is guilty of an offence and liable on conviction to a fine of N 50, 000 or to imprisonment for a term of five years or to both such fine and imprisonment.

It is submitted that the foregoing provision is also applicable to the activities of providers of eServices; and premised on it, providers of eServices are liable for giving false information about their product either by advertisement or any other form.

#### **iv. Right to be Heard**

Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999<sup>26</sup> provides:

In the determination of his civil rights and obligations, including any question or determination by or against

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<sup>23</sup> Cap. H4, LFN, 2004. Hereafter referred to as HPA.

<sup>24</sup> Section 2, as above.

<sup>25</sup> Section 1, HPA.

<sup>26</sup> Constitution of the Federal Republic of Nigeria, 1999 in this article is the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and is hereafter referred to as CFRN 1999.

any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

The consequence of this vis-a-vis this discourse is that the eConsumer is entitled to be heard before any action capable of touching on his civil rights and obligations is taken by a eService provider. Thus eService providers are obligated to put in place or patronise structures that allow eConsumers to be heard. Consequently, barring force majeure, traffic congestion on the telephone lines of help/customer care desk of eService providers, etc, the inability of eConsumers to reach the eService providers can be interpreted as an infraction of and/or a disregard of the eConsumers' right to be heard.

Also, the combined effect of sections 6 and 8, CPC Act is that an aggrieved consumer - whether a natural individual, non-natural person or a community - has a right to seek redress. Section 6 (1) specifically provides:

A consumer or community that has suffered a loss, injury or damage as a result of the use or impact of any goods, product or services may *make complaint in writing to or seek redress through a state committee.*<sup>27</sup>

While section 8 states that:

Whereupon an investigation by the Council or State Council or State Committee of a complaint by a consumer, it is proved that:

- (a) The consumer's right has been violated; or
- (b) That a wrong has been committed by way of trade, provision of services, supply of information or

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<sup>27</sup> Italics mine for emphasis.

advertisement, thereby causing injury or loss to the consumer;

the consumer shall, in addition to the redress which the State Committee, subject to the approval of the Council, may impose, have a right to civil action for compensation or restitution in any competent court.

Consequently, the deduction is that a consumer's right to be heard as provided under the CFRN 1999 and the CPC Act is coterminous with the right to seek redress. It should be noted that the right to be heard cannot be limited or obviated in any manner.

#### **v. Right to Education**

Consumer education involves educating the consumers as to price, where, when and how to use what they have bought. It puts in the hands of the consumer the tools to make an informed decision. The United Nations (UN) recognises this right vide the UN Guidelines on Consumer Protection which provides that:<sup>28</sup>

Consumer education should, where appropriate, become an integral part of the basic curriculum of the educational system, preferably as a component of existing subjects.

The Guidelines provides that consumer education programmes should cover amongst other things, issues relating to product hazards, product labelling, relevant legislation, how to obtain redress, etc.<sup>29</sup> The advantages of education to eConsumers include:

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<sup>28</sup> Paragraph 36, UN Guidelines for Consumer Protection (NY: UN, 2003), available online at [http://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf) (accessed 29 August 2010).

<sup>29</sup> *Ibid.*, Paragraph 37.

1. It affords them the ability to determine and make choice of products intelligently.
2. It makes them alert, well informed and vigilant against corrupt practices.
3. It makes known to the consumer the kind of action to be taken in the event of a problem arising and propels them towards taking appropriate action.
4. It empowers them to be able to demand safe, reliable and good quality goods as well as services at reasonable price.<sup>30</sup>

Right to education differs from the right to information and this right is that the latter pertains to the development of the consumer by the provision/creation of opportunities for the latter to acquire knowledge and skills relating to the goods and services it desires to consume as well as the existence of his rights and how to act on them.<sup>31</sup>

#### **vi. Consumer Issues**

From the perspective of the consumer, the best of markets is a competitive market and it is characterised by:

- a. Free entry and exit of all the actors acting rationally in their own interest.
- b. Availability of good and full information.
- c. Free transferability of goods, services and resources in the market.
- d. No distribution of wealth and resources in a manner that unfairly impacts on the competitive nature of the market.<sup>32</sup>

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<sup>30</sup> See 'Consumer Education', available at <http://nos.org/321course/L-2%20CONSUMER%20EDUCATION.pdf> (accessed 28 August 2010).

<sup>31</sup> See 'Consumer Rights', available at <http://www.consumersinternational.org/who-we-are/consumer-rights> (accessed 14 March 2012).

<sup>32</sup> R. P. Malloy, *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning* (UK: CUP, 2004) 27.

However, Nigeria's banking and telecommunications industries (markets) are not good examples of the foregoing. One reason for this is that it does not provide the consumer with the opportunity of having good and full information. This is the case with eServices. Another reason is the existence of issues which have the effect of reducing the benefits available to eConsumers. The focus hereafter is an examination of some of these issues.

### **1. Exclusion and Limitation Clauses**

It is usual to find in documents evidencing contract between an eConsumer and a service provider, clauses which excludes or limits the liability of the latter. They are usually found in pro-forma or standard form contracts. With reference to banking and telecommunication services, they are typically located at the back or end of account opening forms or service purchase forms in small prints.

With exclusion and limitation clauses, eServices providers unilaterally modify strictures of the relationship without recourse to consumers. For example, in the product brochure of most satellite television providers in Nigeria, it is included that the service provider has the right to change the stations available to viewers without notice. This is without a thought to consumers' preference, the effect of the removal on the latter or its satisfaction. The insertion of these clauses ought to be after parties to a contract have reached *consensus ad idem* as per the clauses. However this is not the case with the clauses inserted in contracts with eConsumers. Such, it is submitted, amounts to an infraction upon consumers' right to information, right to be heard as well as his right to consumer education.

What is the fate of the eConsumer in the face of such clauses where he is totally unaware of it and they are not brought to the knowledge of the eConsumer before signing? It is believed that these clauses ought to be unenforceable for a number of reasons. The law makes it the responsibility of the service

provider to bring to the notice of the consumer the existence of such clauses at the earliest opportunity and before the signing of the contract.<sup>33</sup> On the authority of *Parker v South Eastern Railway*<sup>34</sup> and *Thompson v LMS Railway*,<sup>35</sup> it is submitted that:

- a. If an eConsumer receives a receipt for a service and does not see or know that there are such clauses on it, he is not bound by them.
- b. If he knew of the clauses, then he is bound by them.

## **2. Unequal Bargaining Power**

The relationship between a consumer and banking and telecommunication service providers in Nigeria is characterised by a power balance that is not in favour of the former. The provision of eServices by Nigerian banks and telecommunication service providers to consumers who have limited or no knowledge of the conditions for the provision of the service; the inability of the eConsumer to enforce a right or successfully seek redress for injury/loss suffered are manifestations of the unequal bargaining power of the parties. At common law, there is no relief from contractual obligations on the grounds of inequality of bargaining power as it is the position at common law that “the court mends no man’s bargain”.<sup>36</sup> In *Emmanuel Olamide Larmie v Data Processing Maintenance and Services (DPMS) Ltd*,<sup>37</sup> it was held that:

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<sup>33</sup> See *Olley v Marlborough Court Ltd.* (1949) 1 KB 532. It should be noted that where the eConsumer signs a contract without reading it, he is bound by the terms in the document insofar as there is no vitiating circumstance like fraud, misrepresentation, duress etc. See *L'Estrange v f. Graucob Ltd* (1934) 2 KB 394.

<sup>34</sup> (1877) 2 CPD 416.

<sup>35</sup> (1930) 1 KB 41.

<sup>36</sup> *Maynard v Mosele* (1818) 3 Swans 651.

<sup>37</sup> [2005] 18 NWLR (Pt. 958) 438, 467 – 468, *per* Niki Tobi, JSC.

The duty of a judge is to interpret the contract entered between the parties in the light of their clear intention as conveyed by the language.

However, with equity, consumer's fortunes are better. This change has resulted in the location of a point of compromise between the principle of freedom to contract and the desirability of protecting the weak, the foolish and the thoughtless from oppression, unfairness, duress<sup>38</sup> or undue influence.<sup>39</sup> Today, the court refuses to enforce contractual obligations which would bring about any of the foregoing. In *Lloyds Bank v Bundy*<sup>40</sup> the court refused to enforce the contract between the parties because of inequality of bargaining power between them and the vulnerability of the weaker party. Also in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti*<sup>41</sup> the court held that a plea of coercion (duress) would be available where a person was forced to enter into a contract under an imminent threat of having his house burnt down. Currently, in a move that is accentuated and a product of the unequal bargaining power between consumers and the operators in the banking industry, some Nigerian banks now charge fees for withdrawal below a certain level over the counter. This leaves consumers of the service with the option of either paying for such withdrawal or making use of Automated Teller Machines (ATMs) facilities which they (the consumer) most times did not apply for. This amounts to coercion/compulsion. In relation to internet services, limiting

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<sup>38</sup> Duress at common law means actual violence or threat of violence to the person, or to his personal freedom, i.e., threats calculated to produce fear of loss of life or bodily harm or fear of imprisonment. See I. Sagay, *Nigerian Law of Contract* (2<sup>nd</sup> ed) (Nigeria: Spectrum Books, 2000) 340.

<sup>39</sup> This is a creation of equity to take care of cases that do not come within the narrow confines of duress. Sagay, *id*, at p. 344.

<sup>40</sup> [1974] 3 All ER 757.

<sup>41</sup> [1976] 1 Lloyds LR 293.

service to particular time bands (either weekly or thirty days periods) compels most consumers to make use of the internet facility according to a time table that oftentimes is not convenient so as to prevent a loss on their part.

### **3. Duty of Secrecy and Invasion of Privacy**

Advances in ICT have made storage and archival of information easy and cheap. Today records and databases are kept in cyberspace. The same advance has also brought about some negatives for the eConsumers. It is now almost impossible to keep electronic transactions secret. There is now the possibility of unauthorised access of record kept of the consumption pattern, trend and particulars of eConsumers by service providers by third parties coupled with the invasion of the privacy of the eConsumer to whom the information relates. What is the fate of the service provider and the eConsumer in view of the constitutional guarantee of privacy to the latter? Can it be said that a digital service provider has breached the duty of secrecy owed bank customers where there is unauthorised access of the records of an eConsumer?

The law as it relates to duty of secrecy and invasion of privacy with respect to traditional banking is founded on the CFRN 1999 and the law as espoused in *Tournier v National Provincial & Union Bank of England*.<sup>42</sup> Section 37, CFRN 1999, guarantees Nigerians, subject to the provisions of section 45, the right to private and family life. The Constitution is the grundnorm; every other thing within the polity is subject to it. Banks registered and incorporated in Nigeria are subject to the provisions of the Constitution. In the earlier mentioned case, the court held that a bank is duty-bound to keep secret and not disclose the state of a customer's account, except under

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<sup>42</sup> (1924) 1 KB 461.

compulsion of law;<sup>43</sup> or where there is a public duty to disclose; or where it is in the bank's interest to disclose; or where the disclosure is sequel to the customer's consent.<sup>44</sup>

It is submitted that the position of the law as espoused above is applicable in a situation where an eConsumer's right to privacy has been breached or where the provider of the service has breached his duty of secrecy to the eConsumer. With specific reference to the consumption of telecommunications services, it is submitted that the exposition above and now after applies *mutatis mutandi*. Consequently, except the circumstances of the disclosure is as highlighted,<sup>45</sup> where there has been a breach of this duty, the service provider is open to either an action in damages for infringement of a customer's fundamental right;<sup>46</sup> or

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<sup>43</sup> This is either by order of court or in compliance with the directives of legislation. In *Onagoruwa v IGP* [1991] 5 NWLR (Pt. 193) 593 the Court of Appeal, *per* Tobi, JCA, held that a bank could be compelled to disclose the state of customer's account to a third party – in this case, the police. But that on the basis of the law providing for this exception to the duty of secrecy, the account cannot be frozen. See also *Williams v Summerfield* (1972) 3 WLR 131 where a Magistrate's order compelling a bank to disclose the content of a customer's account to the police was upheld. With reference to disclosure pursuant to legislation, see sections 314 and 317, Companies and Allied Matters Act, Cap. 59 Laws of the Federation of Nigeria 2004 (relating to investigation of a company and production of documents to inspectors) and section 2, Money Laundering Act, Cap. M18, LFN 2004 which obligates bankers to report the transfer to or from a foreign country of funds or securities in excess of stated sum. See also section 97 (1), Evidence Act, 2011.

<sup>44</sup> The duty of secrecy flowing from the right to privacy under the Constitution and judge-made law is not absolute but subject to limitations that are similar. See section 45, CFRN 1999.

<sup>45</sup> See *Tournier v National Provincial & Union Bank of England*, as above.

<sup>46</sup> This is usually brought pursuant to the provisions of Fundamental Rights (Enforcement Procedure) Rules 2009.

an action for breach of an implied term of the contract between it and the eConsumer.

It should be noted that where there has been an invasion of privacy not traceable to the act of the service provider, the injured eConsumer cannot enforce his constitutional right against the former. This is because the invasion is not directly or remotely the act of the service provider as keeper/holder of the information and as such cannot be held liable. The claim for invasion of privacy can only be brought against the invading third party and it succeeds where the third party's identity is known. However, in the current circumstances, the eConsumer can successfully maintain an action in negligence against the service provider as keeper/holder of the information. This is because with negligence, all that is needed for success by a claimant is proof that he suffered damage as a result of the breach of duty of care owed it by the service provider as keeper/holder of the information. Where the breach of privacy is sequel to access to the information by a third party without the eConsumer's approval, the service provider (the repository of the information) is liable to the latter for breach of the duty of secrecy owed same.

The submission is similar where a third party (e.g. a hacker) gains access to consumers' information with a bank. This is because banks owe a fiduciary duty to their customer.<sup>47</sup> This because the eConsumers' fear of a breach of the duty of secrecy and invasion of privacy is not merely illusory but a reality. There is also the possibility of the eServices providers giving out eConsumers personal information without their approval. This writer and associates have repeatedly received messages that purport to have been sent by agents of the London Metropolitan

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<sup>47</sup> See the section on *Action in Tort* for further exposition on the application of the concept of negligence, duty of care to the banker-customer relationship.

University in Nigeria. How did they get the telephone numbers? There is the possibility that these persons got the numbers from our service provider! Also, the services and products made available further fuels this fear. For example, with the use of products like *Video Monitor*,<sup>48</sup> the privacy of unsuspecting individuals is under attack. There is nothing stopping it from being adapted to uses, which are outside the ken of the product designer.<sup>49</sup>

#### 4. Issues of Evidence/Procedure

In the course of the provision and consumption of eServices, evidence is generated and/or stored electronically. For brevity sake, such evidence will hereafter be referred to as eEvidence. Before 2011, advances in ICT had brought about a debate as to the admissibility, nature of eEvidence, as well as other pertinent evidentiary issues. Pertaining to admissibility, eEvidence was not admissible under the repealed Evidence Act.<sup>50</sup> Under the extant

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<sup>48</sup> Video Monitor is a product being sold by MTN Nigeria, with which activities within a premises can be monitored from anywhere. This is possible via the use of a mobile phone that browses the internet, a mobile phone line that has been configured for international roaming and a Video Monitor. See 'Can You Trust Your Baby to Your House Help', *Morezine!* Vol. 1, August 8, 2008.

<sup>49</sup> At this juncture it will not be out of place to stop and think of what would happen if this product gets into the hands of voyeurs and persons of similar disposition.

<sup>50</sup> Cap. E14, LFN, 2004. This was repealed by section 257, Evidence Act 2011. Under the repealed evidentiary regime eEvidence was not admissible in proof of a fact in issue. See *Nuba Commercial Farms Ltd v NAL Merchant Bank Ltd* (2003) FWLR (Pt. 145) 661 and *Yesufu v ACB* (1976) ANLR (Pt. 1) 328 where it was held that eEvidence in the form of computer print outs are inadmissible. However, in that era, another school of thought was that eEvidence was admissible insofar as it is relevant. See O. Omiunu, & I.A. Aniyie, 'Information and Communications Technology and the Nigerian Rules of Evidence' (2008) 11 (1&2) *University of Benin*

evidentiary regime, every form of eEvidence is admissible. This is so by virtue of the provisions of section 84 which expressly makes admissible, statements in documents produced by computers and section 258 which defines computer as any device for storing and processing information and document as including any device in which data is stored and/or is capable of being reproduced from.

The nature of electronically generated/stored evidence was also in issue before the enactment of the Evidence Act 2011. One school was of the opinion that the definition of document under the erstwhile evidentiary regime did not encompass eEvidence, electronically created and/or stored in diskettes, tapes, microfilms or in the form of print outs.<sup>51</sup> This was because

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*Law Journal* 85 – 87. The decisions in *Dr. Tobi v Chief Ukpabi* [1984] SCNLR, 214; *B.O.N. v Saleh* [1999] 9 NWLR (Pt. 618) 331, 344; *Igbinova v The State* (1981) 2 SC 5 all support the assertion that relevancy is the basis of admissibility of eEvidence. See also, *Candide – John v Edigin* [1990] 1 NWLR (Pt. 129) 659, 672, where the court in espousing the nature of irrelevant evidence, held that irrelevant evidence is inadmissible evidence, thus giving credence to the assertion that barring the circumstances as evinced in section 1 of repealed Act which excludes the admissibility of certain evidence, eEvidence is admissible and the fact that it was electronically generated or stored is of no moment. Also this assertion finds support in the opinion espoused in T. Osipitan, ‘Why Computerised Statement of Account is Admissible as Evidence in Nigerian Courts’, available at <http://nigerianlawguru.com/articles/practice%20and%20procedure/why%20computerised%20statement%20of%20account%20is%20admissible%20as%20evidence%20in%20nigerian%20court.pdf> (accessed 26 September 2010).

<sup>51</sup> O. Oyewo, ‘Legal Implication of Electronic Banking in Nigeria,’ *Modern Practice Journal of Finance and Investment Law* (2003) Vol. 7 Nos. 1-2, 160 at p. 174.

the repealed Act defined a document in terms of legibility.<sup>52</sup> The opposing opinion which is considered better view was that by virtue of the use of the word ‘includes’ in the definition of document in section 2(1) of the repealed Act the categories of what can come within the ambit of the Act is not limited to those specified therein.<sup>53</sup> However, this issue has been settled by the provisions of section 84 and 258 Evidence Act 2011; electronically generated/stored evidence are documents by virtue of the extant rules of evidence.

Another issue is that of discovery/disclosure. The rule relating to discovery/disclosure is meant to:

- a. Assist the parties to get evidence material to proving their case.
- b. Accord the parties the opportunity to adequately prepare for trial.
- c. Narrow down the issues, save cost and time as well as enable cases to proceed efficiently.
- d. Avoid surprises, ambushing, and fencing and as well as ensure fair settlement of disputes.<sup>54</sup>

In today’s world where the consumption of eServices is burgeoning, the issue of the discovery/disclosure of eEvidence will come to a head soon. But before then, it is submitted that

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<sup>52</sup> Y. Osinbanjo, ‘Electronically Generated Evidence’ in A. Babalola, (ed.), *Law and Practice of Evidence in Nigeria* (Ibadan: Sibbon Books Ltd., 2001) 243, 257.

<sup>53</sup> See T. Osipitan, ‘Admissibility of Computer Printout under Nigerian Law of Evidence’ Vol. 2 Nos. 2 *Lawyers’ Bi-Annual* 236, 239 where a similar opinion was canvassed. See also, *Anyeabosi v R. T. Briscoe (Nig.) Ltd.* [1987] 3 NWLR (Pt. 59) 84 where on the basis of a similar reasoning, the Supreme Court admitted the print out of the appellant’s statement of account that had been electronically stored as documentary evidence.

<sup>54</sup> See generally, E. Ojukwu & C.N. Ojukwu, *Introduction to Civil Procedure* (Nigeria: Helen-Roberts, 2002), 207 for a discourse on the discovery of documents.

there can be discovery of eEvidence - such is termed electronic discovery/disclosure<sup>55</sup> - in the same vein as there is of paper documents. It is the next step in an evolutionary process and should be seen as such for there to be justice and to prevent deformity in the growth of law.<sup>56</sup> This assertion is underscored by:

- a. The decision in *Tewogbade v. Agbabiaka*,<sup>57</sup> where it was held that discovery is one of the methods fashioned out to ensure transparency in the conduct of cases preventing one side from over reaching the other and enabling the court to decide the case on the full facts that are possibly available.
- b. The fact that discovery/ disclosure is provided for by the Rules of Courts in Nigeria<sup>58</sup> and the Evidence Act.
- c. The fact that it pertains to documents which by virtue of sections section 84 and 258 of the Evidence Act include eEvidence.
- d. The decision of the Supreme Court in *Esso West Africa Inc v Oyegbola*<sup>59</sup> where it held that the law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.

## 5. Jurisdiction and Private International Law Considerations

The utilisation of ICT as the pedestal for the provision of goods and services has the consequence of effacing borders, bringing

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<sup>55</sup> Electronic discovery/disclosure refers to the process in which electronic data and documents are sought, located, secured and searched with the intent of using them as evidence in an action. See O. Omiunu & I.A. Aniyie, above note 50.

<sup>56</sup> *Ibid.*

<sup>57</sup> [2001] 5 NWLR (Pt. 705) 38, 51 A – B.

<sup>58</sup> See Order 32, Bendel State High Court (Civil Procedure) Rules, 1988 (applicable in Edo State); Order 30, High Court of the Federal Capital Territory (Civil Procedure) Rules 2004.

<sup>59</sup> (1969) NMLR 194.

consumers and service providers in contact as well as further making the world a global village. Today, with Electronic Funds Transfer (EFT), payment is made and money is received over State lines. The foregoing is achieved with the assistance of telecommunications services providers like Internet Services Providers (ISP) and web-hosting companies who are often not resident within the State wherein the goods/services are consumed. This has made the shift of attention to the impact of the provision and consumption of eServices on the canons of private international law an inevitable. The questions include that of which court has jurisdiction to hear and determine a dispute arising sequel to the consumption of an eService.

The issue of jurisdiction is very fundamental in law and cannot be subjected to the sentiments of the court<sup>60</sup> or any other person. Jurisdiction is the basis of a forum's court propriety to adjudicate on a matter and it is determined by the circumstances of the matter which includes the nature of the cause of action or the residence of the plaintiff or defendant in some circumstances.<sup>61</sup> Where a court lacks jurisdiction, its decision cannot stand as the proceedings which led to the decision is null and void *ab initio*.<sup>62</sup> In relation to the provision and consumption of eService, legal benchmarks like the *lex contractus*<sup>63</sup> of a transaction are unfortunately effaced - except where expressly provided for. Where this is not spelt out, it leaves a legal mind

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<sup>60</sup> *Nika Fishing Co. Ltd v Lavina Corp.* [2008] 16 NWLR (Pt. 1114) 509, 546 *per* Niki Tobi, JSC.

<sup>61</sup> See Order 10, Bendel State High Court (Civil Procedure) Rules, 1988 (now applicable in Edo State, Nigeria) for a list of situations where the jurisdiction of the High Court of Edo State can be invoked.

<sup>62</sup> See *Madukolum v Nkemdilim* (1961) 1 SCNLR 341; *Abidoye v Odumeru* (2001) 2 WRN 39 at 58.

<sup>63</sup> This is the law of the place or forum where the contract was entered into. See *Black's Law Dictionary* (6<sup>th</sup> ed.) (St. Paul, Minn., West Publishing Co., 1990).

with the task of determining the forum where the transaction took place. This burden is further worsened where in the case of the utilisation of an ePayment service provided by a bank on a website that makes use of the '.com' or '.net' domain or other forms of Generic Top-Level Domains (gTLDs)<sup>64</sup> instead of a Country-Code Top-Level Domain (ccTLDs).<sup>65</sup> This makes it impossible to conclusively connect the website to a forum and in such a scenario, the resolution of the question of which forum's court has jurisdiction is likely to increase the cost of litigation.

Another issue may arise where a transaction was entered into by the parties in different jurisdictions by means of instantaneous communication. If, for example, the principle enunciated in *Entores Ltd. v Miles Far East Corporation*<sup>66</sup> would apply in resolving the issue; and the same can arguably be said to be applicable where emails are used in the course of the transaction.

## 6. Trust and Security

Consumers of eServices must be safe and secure when they go online for the purpose of consumption. The services provided will not be patronised if this was not the case. In the eEnvironment, 'inhabitants' (consumers and customers) are susceptible to various threats that they cannot contend with as a result of the fact that the peculiarity of the milieu provides a cloak of anonymity which can be successfully manipulated to

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<sup>64</sup> Examples of (gTLDs) are .edu, .info, .coop, .org, .gov, etc. gTLDs and ccTLDs are some of the Top Level Domain maintained by the Internet Assigned Numbers Authority (IANA) for use on the internet. See <http://en.wikipedia.org/wiki/GTLD> and <http://www.iana.org/about> (accessed 21 September 2010).

<sup>65</sup> ccTLDs are allocated based on a two letter country code. Nigeria's ccTLD is .ng.

<sup>66</sup> [1955] 2 All ER 493, 498, *per* Parker LJ.

achieve various ends. Cybercrime (eCrime) is one of such ends.<sup>67</sup> With the increase in the incidence of ATM fraud in Nigeria, eConsumers are bound to lose trust in the security of services provided by banks. The same is the case with telecommunications services. If service providers lose the ability of keeping secret and private the records of their communications, there is bound to be consumer dissatisfaction and this is bound to negatively impact on patronage.

However, addressing the issue of trust and strengthening security in the digital age is primarily the responsibility of the operators and regulators of the industries. The recognition of the foregoing is the basis for the formulation of Guidelines and issuance of Directives to operators in the industries under examination. Examples include the Central Bank of Nigeria Guidelines on the Issuance of Value/Pre-paid Cards;<sup>68</sup> the Guidelines on Electronic Banking in Nigeria 2003;<sup>69</sup> the Central Bank of Nigeria Standards and Guidelines on Automated Teller Machine Operations in Nigeria 2010;<sup>70</sup> the Regulatory

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<sup>67</sup> In a recent internet security threat report by Symantec, Nigeria was ranked 70 in the world in 2009 for malicious attacks and cybercrime. See 'EFCC, Stakeholders Move Against Cybercrime,' *Financial Standard*, Monday, June 28, 2010, 15.

<sup>68</sup> It regulates the issuance of stored value or prepaid cards and the operations of issuers. Under its purview, eConsumers are protected. For example, it stipulates that all stored value/prepaid cards shall be EMV-compliant (i.e. Chip and PIN enabled).<sup>68</sup> This places on the service provider the responsibility of ensuring that the card deployed is secure.

<sup>69</sup> This specifies the minimum requirement that has to be put in place by banking institutions which would guarantee the safety of the hardware and consumers of electronic banking service. Available at <http://www.cenbank.org/out/publications/bsd/2003/e-banking.pdf> (accessed on 4 September 2010).

<sup>70</sup> The primary purpose is to ensure efficiency of ATM services and protection of users. It mandates every ATM deploying institution to comply with the standards and guidelines set out in it with respect to

Framework for Mobile Payments Services in Nigeria, etc.<sup>71</sup> With reference to the telecommunications industry, there is the Consumer Code of Practice Regulations 2007<sup>72</sup> and the Quality of Service Regulation 2009.<sup>73</sup>

## **7. Enforcement of consumer rights**

Nigeria's eConsumers bear the burden of being afflicted with shoddy and unmerchantable goods by pretentious manufacturers, entrepreneurs, shady middlemen and unprincipled retailers whose avowed interest seem only and always, to be able to maximise their profits leaving honesty a discounted and shattered commodity.<sup>74</sup> Another reality is that more often than not eConsumers do not know which cause of action to employ in

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each ATM facilities within its dominion and control. See paragraph 2-5. Available at [http://www.cenbank.org/out/2010/circulars/bspd/atm standards 1.pdf](http://www.cenbank.org/out/2010/circulars/bspd/atm%20standards%201.pdf) (accessed on 4 September 2010).

<sup>71</sup> It amongst other things specifies the minimum technical and business requirements for participants in the M-payment services industry in Nigeria as well as their roles and responsibilities in the provision and usage of the service. Paragraph 2.1.2.4.4 states that the responsibilities of participating financial institutions include putting in place adequate measures to mitigate all the risks that could arise from the deployment and use of its mobile payment solution. Available at [http://www.cenbank.org/out/circulars/bod/2009/regulatory framework for mobile payments services in nigeria.pdf](http://www.cenbank.org/out/circulars/bod/2009/regulatory%20framework%20for%20mobile%20payments%20services%20in%20nigeria.pdf) (accessed on 4 September 2010).

<sup>72</sup> This Regulation governs the provision of services by licensed telecommunications operators in Nigeria and related consumer practices.

<sup>73</sup> This Regulation specifies amongst other things minimum quality of service standards expected of service providers.

<sup>74</sup> Per Aniagolu, JSC in *Nigerian Bottling Co. Ltd v Ngonadi*, as above not 22 at 753.

enforcing their rights.<sup>75</sup> This brings to the fore the issue of the cause of action available to Nigeria's eConsumers.

#### **a. Action in tort**

Consumer rights can be enforced by an action for the tort of negligence. In strict legal parlance it encompasses the concept of duty, breach and damage thereby suffered by the person to whom a duty is owed.<sup>76</sup> It should be noted that for an injured eConsumer to succeed in an action against a service provider, the claimant (eConsumer) must show the existence of a duty of care which was owed to him/her by the defendant (the eService provider); that there has been a breach of such duty by the latter as a result of a defect in the product or service<sup>77</sup> and that the breach resulted in damage to the claimant.<sup>78</sup> However, such damage must be within foreseeable limits. Where that is not the case, the damage suffered would be adjudged remote and the claimant would lose his claim. The elements overlap and in deciding a case, courts do not regard them as mutually exclusive

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<sup>75</sup> Several reasons account for this. Amongst them is the lack of motivation to institute action where the claim is perceived as small, the cost of seeking recompense for the injury suffered and the fact that the amount recoverable most times is not adequate recompense for the injury.

<sup>76</sup> See *Lonchgelly Iron & Coal Co. v McMullan* (1934) AC 1, 25, *per* Lord Wright.

<sup>77</sup> The fact that it has been shown that a defect in the product or service provided was the cause of the injury will suffice to impose on the manufacturer/ service provider the onus to show that he exercised proper care. He discharges this burden upon showing that he exercised reasonable care. In *Daniel v RW White & Sons and Tabard* [1938] 4 All ER 258 the plaintiffs action failed as the defendant (manufacturer) was able to prove that it had exercised reasonable care in the production of the goods that formed the basis of the action.

<sup>78</sup> *Makwe v Nwukor* [2001] FWLR (Pt. 63) 1.

conditions.<sup>79</sup> Furthermore, it should be noted that an eConsumer's action for the tort of negligence can be brought against anyone in the chain of distribution of the eServices. In *Dumuje v Nigerian Breweries Plc*<sup>80</sup> it was held that:

In *Nigerian Bottling Co. Ltd v Ngonadi* ... it was held *inter alia* that the rule in *Donoghue v Stevenson* also makes no distinction between manufacturer and distributor in the case of negligence but merely extended the limit to the manufacturer. Therefore it necessarily follows that the consumer has an option either to sue the manufacturer or anyone in the chain of distribution up to the manufacturer.

Worthy of note is the fact that there is a burden of proof on the eConsumer which almost never shifts to the service provider as defendant even where recourse is had to the doctrine of *res ipsa loquitor*.<sup>81</sup> In *NEPA v Alli & Anor.*<sup>82</sup> the Supreme Court held that for a claim founded on the doctrine of *res ipsa loquitor* to succeed, three conditions must be met. It further espoused the conditions thus:

- a. That the thing which caused the damage was under the care and control of the defendant.
- b. That the occurrence is such that it could not have happened in the absence of negligence.
- c. That there is no evidence as to how the occurrence took place.

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<sup>79</sup> J. Sarabdeen, 'E-Consumer Redress Mechanism for Negligence in Malaysia: A Survey Analysis' (2009) Vol. 4 *IBIMA Business Review* 16, available at <http://www.ibimapublishing.com/journals/IBIMABR/volume4/v4n3.pdf> (accessed 2 September 2010).

<sup>80</sup> (Unreported) Suit No. EHC/ 236/94 decided on July 7, 2001 at p. 195.

<sup>81</sup> See *Donoghue v Stevenson*, 622.

<sup>82</sup> [1992] 3 NWLR (Pt. 259) 279.

The foregoing means that the application of the doctrine is not automatic. In addition to pleading it, an eConsumer must aver and prove negligence. In *Donoghue v Stevenson*, the non applicability of the doctrine was expressed thus:

The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the circumstances are such as to cast upon the defendant a duty to take care not to injure.... There is no presumption of negligence in such a case as the present nor is there any justification for applying the maxim, *res ipsa loquitur*. Negligence must be averred and proved.<sup>83</sup>

The attitude of Nigerian courts is similar. In *Okonkwo v Guinness*<sup>84</sup> the court held with regards to the injury suffered by plaintiff after consuming defendant's product, that the required evidence was direct or circumstantial evidence pointing to the fact that the injury was caused by the defect(s) in consumed product.

The foregoing exposition applies to cases arising from the provision of service.<sup>85</sup>

In *Anyah v Imo Concorde Hotels Ltd & 2 ors*<sup>86</sup> the court held that for a defendant to be liable for negligence, there must

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<sup>83</sup> Per Macmillian, LJ, *Donoghue v Stevenson*, as above, 622. See *Okonkwo v Guinness (Nig) Ltd* (1980) 1 PLR 583 and *Ebelamu v Guinness (Nig) Ltd* (Unreported) judgment of the Federal Court of Appeal, FCA/L/101/1982 where attempts to rely on the doctrine were rejected.

<sup>84</sup> (1980) 1 PLR 583.

<sup>85</sup> A long line of cases have established this with reference to medical service. See *R .v. Bateman* (1925)94 LJK 791, *Sanyaolu v Farinbe* (1978) LRN 327, *Bernett v Chelsea and kesington Hospital Management Committee* ( 1986) 1 ALL ER 1068.

be either an admission by him or sufficient evidence adduced to support a finding of negligence on his part. It further held that until a plaintiff can prove by evidence the actual breach of the duty of care against the defendant, the action must fail. It is submitted that this foregoing applies *mutatis mutandi* to eServices in Nigeria.

The adoption of the doctrine does not automatically better the lot of the eConsumer. The doctrine temporarily shifts the burden of proof onto the defendant and a rebuttal returns the burden to the claimant.<sup>87</sup> At this point it is submitted that the position in the United Kingdom,<sup>88</sup> EU<sup>89</sup> and the United States<sup>90</sup> where liability for injury suffered by consumers are strictly that of the manufacturers or providers of the goods or service consumed is preferred and commended because it is more pro-consumer.

### **b. Action in contract**

In an action in contract, generally, after adducing the requisite evidence, the court is bound to order as prayed. However, the remedy to which an injured eConsumer is entitled is dependent on whether the terms breached is a condition<sup>91</sup> or a warranty,<sup>92</sup> an

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<sup>86</sup> [2002] 18 NWLR (Pt. 799) 377.

<sup>87</sup> See *Daniel v R W White & Sons and Tabard*, as above, where the plaintiff's action failed as the defendant proved that it had exercised reasonable care in the production of the goods that formed the basis of the action.

<sup>88</sup> See section 1(i), Consumer Protection Act 1987 (United Kingdom).

<sup>89</sup> See EU Council Directive 85/374/EEC (OJ L 210, 7.8.1985, p. 29) on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

<sup>90</sup> See section 402A, Restatement of Torts (1965).

<sup>91</sup> A condition is a term which is essential to the main purpose of the contract, non performance of it amounts to a non performance of the contract. Breach of a condition gives the injured party a right to

innominate term<sup>93</sup> or a fundamental term.<sup>94</sup> For example, where a Global System for Mobile Communications (GSM) service consumer purchases a recharge card, it is a condition that the eConsumer would have access to the network whose recharge card has been purchased for a period equal to the value of the recharge card bought. Where the contrary happens, the service provider is liable to the eConsumer for breach of contract as the breach of the condition is coterminous to a breach of contract.

A fundamental term is breached with reference to the banking industry where an ATM card holder is denied access to his funds in the bank's custody as a result of the fact that the latter is experiencing technical challenges. This is because denying the depositor access to his funds is the same as not performing the contract: a development which is different from the contemplation of the parties at the time of entering into the contract and makes the service provider (or manufacturer) liable to the customer (consumer) in damages.<sup>95</sup>

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repudiate the contract and claim for any other appropriate remedy such as a refund of the purchase price or damages for any loss suffered. See P.S. Atiyah, *et. al.*, *The Sales of Goods* (11<sup>th</sup> ed) (Great Britain: Pearson Education Ltd., 2005) 90 – 91 for a discourse on the scope, the impact cum implication of a breach of such a term.

<sup>92</sup> By virtue of the provisions of section 12 (2) Sales of Goods Act 1893, a breach of a warranty gives rise to the right to claim damages but not to a right to repudiate the contract. See Atiyah, *et. al.*, *ibid*, 97 for a discourse on the scope and the impact cum implication of a breach of such a term.

<sup>93</sup> This is a term which by nature lies between a condition or a warranty. Under this category, the courts look at the consequences of the breach in order to determine the appropriate remedy. See *Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha* [1962] 2 QB 26. See also Atiyah, *et. al.*, *ibid*, 91-97.

<sup>94</sup> A breach of a fundamental term justifies the innocent party in repudiating his own obligations under the contract, and treating it as discharged. See Atiyah, *et. al.*, *ibid*, 87-90.

<sup>95</sup> *DHL v Chidi* [1994] 2 NWLR (Pt. 329) 720, 742.

In the an action in contract and in the absence of express terms, the court is at liberty to rely on terms implied by statutes into the contract. Terms implied by statutes are creation of statutes or statutory recognition of terms implied by custom or usage. Of reference here are the Sales of Goods Act 1893 (SGA),<sup>96</sup> the CPC Act 1992 and the NCA. The SGA implies certain terms into contracts of sale. Notwithstanding the fact that analysis of these terms is not the object of this thesis, it should be noted that liability for breach is absolute whether or not the defect is latent or patent.<sup>97</sup> Of relevance to the resolution of issues between a service provider and eConsumer is the fact that in a sale by description, the sold item (goods or services) must comply with the description,<sup>98</sup> or that it is fit for purpose<sup>99</sup> and/

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<sup>96</sup> At the time of this research, a Bill to amend the SGA was on the floor of the National Assembly.

<sup>97</sup> See Brett, J in *Randall v Newson* [1876] 45 LJCB 464.

<sup>98</sup> See section 13, SGA. To rely on this, an eConsumer must show his decision to consume the eService was catalysed sequel to a description by the service provider. Thus where a service provider in its advert describes its internet connection as ultra or super fast and a consumer decides to patronise it on the basis of this, the sale would amount to a sale by description because the consumer has not seen or used the goods before. See *Varley v Whipp* [1900] 1QB 513, 516 *per* Channell, J. It should be noted that where the consumer has even had the opportunity of seeing that which he desires to contract for, it would still amount to a sale by description where it is sold as a thing corresponding to a description and not merely as a specific thing; see Lord Wright in *Grant v Australian Knitting Mills Ltd* [1936] AC 85.

<sup>99</sup> See section 14, *ibid*. It is trite that for a consumer to enjoy the benefits of this section: (a) he must make known his purpose to the seller either expressly or by implication; (b) he must rely on the seller's skill or judgment; (3) the goods must be of a description which is in the course of business of the seller to supply. Thus where an eService consumer makes known his desire to be able to access his account from a mobile unit to his banker and relies on the latter to avail him with such service in the course of the provision of banking

or is of merchantable quality. There is also the implied term that with reference to a sale by sample, the sold item will match the sample sold in all aspects.<sup>100</sup> A breach of any of the terms, (where a condition), and is not treated as a warranty by the consumer,<sup>101</sup> vests in the latter the right to treat the contract as repudiated.<sup>102</sup>

The CPC Act is replete with provisions which can be said to be the basis of implying that the providers of goods and services are bound to ensure that the consumers do not suffer injury. These provisions include that which prohibits unscrupulous practices,<sup>103</sup> that which punishes any contravention of any enactment which seeks to protect the consumer,<sup>104</sup> etc. The NCA also implies some terms which directly impact on the eServices consumers' right to secure redress for breached right(s). By virtue of the provisions of the Act, it can be implied that an eService provider is duty bound to provide services that are of the best quality or the best possible within the industry.<sup>105</sup>

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services, the consumer can rely on this provision to sue for breach of contract.

<sup>100</sup> See section 15.

<sup>101</sup> Where the consumer treats the breach of a term which ordinarily is a condition as a warranty, he is only entitled to damages. See section 11(1) (b), *ibid*. It should be noted that with reference to damages, an injured consumer will only get as damage that which will amount to *restituo integrum* – that is, that which will place him in the same position as if the contract had been performed and not accord him a windfall. See *Haway v Medicowa Nig. Ltd.* [2000] FWLR (Pt. 22) 1040.

<sup>102</sup> See section 11 (1) (b).

<sup>103</sup> See section 11, CPC Act which pertains to issuing of wrong advertisement.

<sup>104</sup> Section 12, *id*.

<sup>105</sup> For example see sections 70 and 104, NCA.

## **8. Conclusion**

This essay sought to highlight the fate of eConsumers within the precinct of Nigeria's banking and telecommunications industries. In the course of this, attempt was made to examine the mechanics of service provision within the confines of the gamut of consumer protection in Nigeria. The conclusion is that there is a gulf between what the entire jurisprudence of consumerism can provide and what is available with reference to the eConsumer. The latter is short changed. It is therefore suggested that to fill this gap, legal principles should be formulated and laws made. In relation to this, the Evidence Act 2011 is a welcome development, as it has ended the long drawn debate as to the admissibility of eEvidence in Nigeria. Legislation on data integrity and/or security, eCommerce are also needed. However, in the interim, the extant body of case laws can be put to use in closing the gap between the service provider and the eConsumer. Thus, the judiciary is enjoined to be alive to the trends in the environment and not isolate itself. Also where industry guidelines and regulations exist, they should be given legislative colouration by way of enactment, for without it, their applicability as tools for the protection of the eConsumer would be limited.

Furthermore, the service providers should be made by regulators to be more responsive to the needs and aspirations of eConsumers, recognise as well as honour the rights of the latter. To this end they should be made to divulge more information regarding eService in a language that is understandable by the generality of eConsumer, educate the eConsumer, desist from putting in place business policies that are coercive and circumscribe the rights of eConsumers in Nigeria, etc.