

Modern Essays on Nigerian Law

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Edited by

Remigius N Nwabueze

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Dedicated to

James C Ezike, Esq.

A lover of integrity and justice,
and the doyen of the Nigerian Bar.

TABLE OF CONTENTS

Contributors.....	viii
Introduction	xii
Chapter One.....	1
The Principle that Wrongdoers should not be Allowed to Profit from their Own Wrong: Application in Nigeria and England and Wales	
Remigius N Nwabueze	
Chapter Two.....	27
Nigerian Banks and the Garnishee Trap: A Cursory Examination	
Collins Chito Okpanum	
Chapter Three.....	51
Nigeria's Fundamental Rights (Enforcement Procedure) Rules: Obfuscation or Clarity to the Justiciability of Socioeconomic Rights?	
Obiajulu Nnamuchi	
Chapter Four.....	83
Beyond the Act: Women's Health, Human Rights and the Impact of Laws on Violence against Women in the African Region	
Irehobhude O. Iyioha	
Chapter Five.....	106
Requirements for Applications Seeking Prohibition of Payment on Letters of Credit and Performance Guarantees	
Ebenezer Adodo and Chumah Amaefule	
Chapter Six.....	139
Rethinking Ethnic Identity and the Right to Self-Determination of Peoples Under International Law: A Nigerian Example	
Pius L Okoronkwo	
Chapter Seven.....	177
The Legal Regulation of Electronic Contracting in Nigeria in the Age of Jumia and Konga	
Andrew Ubaka Iwobi	

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Dr Andrew Ubaka Iwobi commenced his academic career at the University of Nigeria Enugu Campus and currently lectures in the Hillary Rodham Clinton Law School, Swansea University, U.K. He graduated with First Class Honours from the Faculty of Law, University of Jos, Nigeria, was a double prizeman at the Nigerian Law School, Lagos, where he was awarded the Taslim Elias Prize for the Best Overall Performance in the Bar Examinations and the Nabo Graham Douglas Prize for Commercial Law, and obtained his PhD from the University of Birmingham, U.K. His current research and teaching interests are in the areas of E-commerce Law, Credit and Security Law and Equity and Trusts Law. He is the author of two books: *Essential Trusts* (3rd ed. 2001) and *Essential Succession* (2nd ed. 2001) and his scholarly articles have been published in various leading British, American and Canadian law journals.

INTRODUCTION

REMIGIUS N NWABUEZE

A Biographical Sketch of James C Ezike, Esq.

At the level of intellection, a collection of essays, such as this, is the very least that can be done to honour and celebrate the life of a man, Mr James C Ezike, whose professional excellence as a lawyer is a matter of common knowledge to both the Bar and the Bench in Nigeria, and the general public as well. The profundity and fecundity of Mr Ezike's legal practice are not only evidenced by its multidimensionality, but also, by his prodigious contributions to the development of Nigerian law. Obviously, an introductory chapter of this type is not the ideal place to embark on the exegesis of the jurisprudence developed by the Nigerian courts with the help of Mr Ezike's advocacy, but the snippets of some of his reported cases, drawn from various areas of the Nigerian law, can be highlighted here.

In the realm of election petition law, *Ojukwu v Obasanjo* is the leading case in Nigeria;¹ the petition was argued at the Supreme Court by Mr Ezike on behalf of the then APGA presidential candidate, Chief Chukwuemeka Odumegwu Ojukwu, who challenged the election of Chief Olusegun Obasanjo in 2003 as the president of Nigeria. Mr Ezike also argued Chief Ojukwu's case in the following presidential election round in 2007, in *Ojukwu v Yar'Adua*.² Mr Ezike was also highly sought after by election petitioners in other cases, including *APGA v Anyanwu*³ and *Amaechi v Omehia*.⁴ Furthermore, in *MV "Caroline Maersk" v Nokoy Investment Ltd.*,⁵ a seminal admiralty case in Nigeria argued by Mr Ezike, he established his authority as a leading maritime lawyer. In the field of tort law, particularly conversion and detainee, Mr Ezike's legacy is equally prominent. Thus, in the Supreme Court case of *Civil Design Construction Nig. Ltd. v SCOA Nig.*

¹ *Ojukwu v Obasanjo* [2004] 12 NWLR (Pt. 666) 169.

² *Ojukwu v Yar'Adua* [2008] 4 NWLR (Pt. 1078) 285.

³ *APGA v Anyanwu* [2014] 7 NWLR (Pt. 1407) 541.

⁴ *Amaechi v Omehia* [2008] 5 NWLR (Pt. 1080) 227.

⁵ *MV "Caroline Maersk" v Nokoy Investment Ltd.* [2002] 12 NWLR (Pt. 782) 472.

Ltd.,⁶ Mr Ezike successfully argued the case of the claimant-cross-appellant. In the field of human rights, particularly the principles relating to fair trial, Mr Ezike has left his prints in the sand of the law through the Supreme Court case of *Adefulu v Okulaja*.⁷ Similarly, Mr Ezike's contribution to the nascent law of unjust enrichment in Nigeria could be seen in *Sani Abacha Foundation for Peace and Unity v UBA Plc*,⁸ a case he successfully argued for the appellant.

Mr Ezike's law office has produced many prominent and successful legal practitioners and academics. This book's editor (Dr Nwabueze) and one of the contributing authors (Dr Okoronkwo), for instance, worked in Mr Ezike's office for many years before proceeding to Canada for their graduate studies. Despite his status as a leading legal practitioner in Nigeria, Mr Ezike has, regrettably, not been conferred with the rank of Senior Advocate of Nigeria (SAN), the highest professional privilege for a legal practitioner in Nigeria; but this is only because he has refused to apply for that privilege, due to his personal objections against the constitutionality of the rank of SAN.

Mr Ezike celebrated his 70th birthday on 29th November 2017. I had hoped that the publication of this book would be ready before that date so that it could be lunched as part of his 70th birthday celebration; however, that plan did not come to fruition because some of the chapters were then still at the early stage of writing. Mr Ezike is from Mbosi village, in Ihiala Local Government Area, Anambra State, and he was called to the Nigerian Bar in 1975. He attended King's College, Lagos, and obtained his LLB from the University of Nigeria. Even as an undergraduate student at the University of Nigeria, Mr Ezike had begun to show his stellar leadership and intellectual qualities; thus, he was President of the Law Students' Association; a member of the Students' Parliament; and Editor-in-Chief of the law students' journal. Mr Ezike was also one of the only two Nigerian law students selected, on a competitive basis, to represent Nigeria at the Philip Jessup International Law Moot Court Competition in Washington D.C., USA, in 1974, where they won three out of the four prizes set for the competition. Mr Ezike has never shied away from politics. On the contrary, while he was only 30 years old, he vied for an election to the Federal House of Representatives in 1979, under the banner of the National Party of Nigeria (NPN), to represent the Ihiala Local Government Area. Since then,

⁶ *Civil Design Construction Nig. Ltd. v SCOA Nig. Ltd* [2007] 6 NWLR (Pt. 1030) 300.

⁷ *Adefulu v Okulaja* [1998] 5 NWLR (Pt. 550) 435.

⁸ *Sani Abacha Foundation for Peace and Unity v UBA Plc* [2009] 7 NWLR (Pt. 1139) 97.

Mr Ezike has remained active in politics, although he has refused to seek an elective position because of his lack of faith in the integrity of the electoral processes in Nigeria since after the military overthrow of the democratically elected government in Nigeria in 1983. Mr Ezike has never been a member of any of the registered political parties in Nigeria formed after 1983; and while he represented APGA or its candidates in some of the election petitions above, the cases turned on constitutional issues rather than on matters bordering on party ideology. Currently, Mr Ezike uses the print and electronic media as the main platform for his political activism. Major television channels in Nigeria have broadcast Mr Ezike's interviews on various political issues in Nigeria; recently, as well, Mr Ezike's political insights, published by the leading newspapers in Nigeria, have been published in the form of a monograph.⁹

Summary of Chapters

To reflect the extensive depth and scope of Mr Ezike's legal practice, this book covers an extensive array of legal categories, from land law to cyberspace law. Chapter 1 opens with Nwabueze's rigorous analysis of the legal principle, derived from public policy, which prohibits a wrongdoer from profiting from his or her own wrong; this principle was first recognised and applied by the apex court in Nigeria, in the context of a dispute involving land, in *Solanke v Abed*.¹⁰ There, it was held that a landlord who had failed to get the statutory consent necessary for the validity of a tenancy could not capitalise on such a failure in order to defeat the tenant's claim for trespass. When the opportunity presented itself again for the application of the principle, in *Savannah Bank v Ajilo*,¹¹ the Supreme Court refused to seize the opportunity, although it recognised the legitimacy of the principle. *Ajilo* basically involved a mortgagor's repudiation of the mortgage on the ground that he had failed to obtain the necessary statutory consent. The Supreme Court's refusal to apply the principle in *Ajilo* was based on the ground that the issue had not been properly raised in the appeal filed by the appellant's counsel. Since then, *Ajilo* has been much vilified by both lawyers and judges. Even the Court of Appeal in *Adedeji v NBN Ltd.* found some pretext to distinguish *Ajilo*,¹² preferring *Solanke* instead. In this chapter, Nwabueze argues that *Solanke* was wrongly decided, and should

⁹ JC Ezike, *My Thoughts on Nigeria* (Lagos, Nigeria: Printtechnique Ind. Ltd., 2017).

¹⁰ *Solanke v Abed* [1962] NSCC 160.

¹¹ *Savannah Bank v Ajilo* [1989] 1 NWLR (Pt. 97) 305.

¹² *Adedeji v NBN Ltd* [1989] 1 NWLR 212.

be overruled because it ignored, and did not even advert to, the fundamental conditions precedent for the application of the principle prohibiting profit from own wrong. One of such conditions is that the principle must not be used to defeat the application of a relevant statute, such as the Land Use Act. Therefore, Nwabueze argues that *Ajilo's* decision was right, even though the outcome was harsh. To avoid such a harsh outcome, Nwabueze suggested that the courts should turn to one of two equitable principles: the maxim that equity regards as done that which ought to have been done, and the maxim that a court will not allow a statute to be used as a cloak for fraud. In *Solanke* or *Ajilo*-type situations, Nwabueze suggests that recourse to these maxims, especially the latter, would produce not only a desirable outcome, but also a much better defensible judicial reasoning than was witnessed in *Solanke*.

In chapter 2, Okpanum takes the reader through the murky waters of the law relating to enforcement of judgement, especially the interesting, but hardly discussed, issue of the enforcement of judgement debt through the procedure of garnishee proceedings. Okpanum posits that banks in Nigeria are almost invariably the defendants (or respondents) in garnishee proceedings, but such a proceeding poses several challenges and difficulties for the banks, difficulties that Okpanum characterised as “traps” for the banks. Okpanum identifies the first trap in relation to s. 86 of the SCPA,¹³ which provides, among other things, that after an order *nisi* has been served on a garnishee and the garnishee failed to appear, the court may order execution to issue to recover the judgment debt and costs of the garnishee proceeding, upon proof that the garnishee was served. The trap here, Okpanum observes, is that the court's order above, after proof of the service of the order *nisi*, becomes an absolute and final order, which can only be challenged on appeal. This is exacerbated by the vicissitudes of the service of court processes in Nigeria on corporate institutions. For instance, if the order *nisi* was served on a remote branch of a bank, its legal department might not receive timeous notice of the garnishee proceeding, and thus, would not be able to file a defence before the order becomes absolute. The second trap is that it is currently uncertain whether or not the judgement debtor is a necessary party to the garnishee proceeding and can appeal against an absolute order made by the court. The third trap arises when a garnishee proceeding relates to an advance payment guarantee (APG), under which, for instance, an employer deposits a contract sum (usually an advance payment) with a bank and instructs the bank to make stipulated or periodic payments to the contractor subject to the contractor's satisfaction

¹³ The Sheriffs and Civil Process Act.

of agreed milestones. The difficulty here arises because a third party may secure a judgement debt against the contractor even before the contractor is able to perform the agreed work. In that situation, can that third party successfully issue garnishee proceeding against the bank? The fourth trap centres on the false perception by some courts and judgement creditors that banks collude with their customers, who are judgement debtors, to cheat judgement creditors of the fruit of their judgements. Finally, Okpanum considers the fifth trap, which addresses the nascent and problematic practice among judgement creditors under which a garnishee proceeding is brought against all banks, rather than a specific bank of the judgement debtor, and leaving it to all such randomly sued banks to prove whether or not they have money belonging to the judgement debtor. Okpanum argues that these traps constitute very serious threats to the development of the banking industry in Nigeria, and he suggests several ways of dealing with the problem.

Nnamuchi takes the reader to the interesting field of human rights enforcement in chapter 3, and in particular, he analyses the scope and impact of the new Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules). Nnamuchi's essay tackles the problematic issue of the justiciability of socio-economic rights in Nigeria and he argues that, in view of the express purpose of the new FREP Rules and the cosmopolitan and indivisibility paradigm of modern human rights scholarship and praxis, socioeconomic rights are justiciable under the new Rules. Nnamuchi starts by observing that the 2009 FREP Rules is revolutionary, in that it bars courts from dismissing or striking out a human right's action for want of *locus standi*. This is a significant departure from the 1979 FREP Rules. The new judicial obligation in relation to *Locus standi* under the 2009 Rules would encourage public interest litigations; thus, human rights activists, advocates or groups, as well as non-governmental organizations (NGOs), are imbued with a legal standing to initiate human rights proceedings on behalf of an aggrieved party. Nnamuchi then segues onto the express purpose and objectives of the FREP Rules, encapsulated in the preamble, and observes that they have a significant and positive impact on the justiciability of socio-economic rights. Accordingly, he notes that the FREP Rules explicitly require the courts to enforce international instruments such as the African Charter on Human and Peoples' Rights and other legal frameworks (including protocols) in the African human rights system, and the Universal Declaration of Human Rights (UDHR), as well as other instruments (including protocols) in the United Nations (UN) human rights system. By extension, Nnamuchi argues, the Rules encourage the application of decisions made by international human rights bodies; these include the

African Commission on Human and Peoples' Rights, the African Court of Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights. Also included are the interpretations by treaty monitoring bodies, such as those contained in concluding observations and general comments. Nnamuchi argues that this sort of direct incorporation of international instruments, which themselves embody socio-economic rights, clearly shows that the intendment of the 2009 Rules is to make room for the justiciability of socio-economic rights in Nigeria.

In chapter 4, Irehobhude engages rigorously with the absolutely interesting and important topic of the prevention of violence against women and children; her analysis is set against the backdrop of recent legislation in South Africa, Kenya and Nigeria that criminalises violence against women. She opines that these laws target both physical and psychological harm against women, and therefore, they implement states' commitment to international norms and obligations on gender equality and the eradication of discriminatory practices against women. One of such international norms is the United Nations Declaration on the Elimination of Violence Against Women. In view of the pervasive and ongoing violence against women in Africa, Irehobhude doubts the effectiveness of the domestic legislation that proscribes violence against women, and she attributes such legislative attrition to the problem of implementation. Drawing on empirical research and relevant theoretical frameworks, Irehobhude identifies several factors that account for the discrepancy between legislative aspirations and the reality of the problem of violence against women. These factors range from the limitations inherent in the criminal justice system, to a medley of political, implementational, economic, informational and judicial barriers. Particularly, Irehobhude focuses on the social and cultural contexts in which laws on violence against women are passed and sought to be implemented. She argues that such social and cultural contexts are principally to be blamed for the ineffectiveness of, and lack of compliance with, domestic laws that seek to protect women against violence.

In chapter 5, Adodo and Amaefule introduce the reader to the field of commercial law; particularly, they consider the requirements for applications seeking prohibition of payment on letters of credit and performance guarantees. Generally, when the account party or some other interested party under a letter of credit or performance guarantee believes that payment under the credit or guarantee should not be made because the beneficiary is practicing fraud, he or she may apply to the court for an injunction to restrain payment or receipt of payment. In such a case, Adodo and Amaefule argue, a question that frequently arises concerns the criteria that the claimant *must* satisfy in order to cause an injunction to be issued. In

this chapter, therefore, Adodo and Amaefule provide a detailed analysis of the applicable principles under English and Welsh law, with comparisons to the relevant laws in the USA, Canada and Singapore. While Nigeria is not the focus of Adodo and Amaefule, it is hoped that their analysis of the laws in these foreign jurisdictions might be useful to a Nigerian scholar or practitioner who is engaged with an equivalent topic under the Nigerian law. While this chapter focuses on the cases relating to applications for an interlocutory injunction to restrain payment or receipt of payment under letters of credit and performance guarantees, it does not examine the similar issues that arise in relation to applications for a *mareva* injunction. As Adodo and Amaefule argue, a claimant may consider that the urgency of his or her claim requires the immediate restraint of a bank from honouring a call or a beneficiary from receiving payment under a letter of credit transaction. In this regard, the most expedient course the claimant may take will be to apply for and obtain an *ex parte* interlocutory injunction, although the interlocutory action will subsequently be heard *inter parte*, in which case the defendant will then have a chance to request the court to set aside or vary the injunction. The authors posit that, currently in England and Wales, the courts will not grant an application for an interlocutory injunction to interrupt payment or request for payment under a letter of credit or performance guarantee transaction, unless the claimant proved that there was a clear case of fraud and that the bank was aware of the fraud. Thus, the authors argue that such a fraud-based requirement is inappropriate in interlocutory proceedings. Consequently, the authors criticise the legal requirement that a cause of action must be established before an interlocutory injunction could be granted against an issuing bank. Furthermore, the authors explore the propriety of the application by the English courts, to interlocutory proceedings on letters of credit or performance guarantees, of the balance of convenience guidelines formulated by the House of Lords in the *American Cyanamid* case.¹⁴ The authors conclude with proposals for reform.

Considering the current clamour and campaign by some nationalities in Nigeria for self-determination or for some sorts of constitutional restructuring, Okoronkwo's chapter 6 is both timely and important, in that it examines the legal and constitutional basis of a claim to the right of self-determination. Okoronkwo anchors his analysis in the historical context of the Nigeria-Biafra civil war of 1967-1970, and he rigorously analyses the legitimacy of the Biafran declaration of independence in 1967 under the prevailing constitutional law of Nigeria and international law at that time.

¹⁴ *American Cyanamid Co v Ethicon* [1975] A.C. 396.

Okoronkwo compares the social, political and constitutional circumstances of Nigeria at the time of the Biafran declaration of independence to the current, and similar, socio-political circumstances of Nigeria today. According to Okoronkwo, *peoples* who are struggling to liberate themselves anchor their claim on the right to self-determination. It is this right that the French invoked to emancipate themselves from the rule of their monarch, Louis XVI, and placed sovereignty in their own hands. The tension between the position of the claimants and opponents of the right to self-determination in the context of independent African states has generated a discourse as to what actually is the right to self-determination. The questions that arise include: who can exercise the right and under what circumstances? By what means can it be exercised? What is the possible outcome of the exercise of this right? This chapter contributes to this discourse by suggesting answers to these questions based on the claim of the Igbos of Nigeria to the right of self-determination, leading to their declaration of the independent state of Biafra in 1967. Okoronkwo argues that the secession of Biafra might be considered lawful under both international law and the 1963 constitution of the federal republic of Nigeria, and therefore, the Nigeria government, by waging war against Biafra, violated Article 2(4) of the UN Charter; and that also, the Nigerian government could not invoke the protection of Article 51 of the same Charter. Consequently, Okoronkwo concluded that the fact that Biafra was outgunned does not in any way render the secessionist attempt illegal either under international law or the constitution of the Federal Republic of Nigeria. Rather, the defeat of Biafra demonstrated the extent the interplay of self-interests of the big powers could undermine a genuine secessionist self-determination effort.

Finally, in chapter 7, Iwobi takes the reader to the exciting world of the cyberspace, where he painstakingly examines the legal regulation of electronic contracting in Nigeria, against the backdrop of relevant model laws developed by some international organisations. He notes that both the pace and scope of electronic/Internet transactions have increased in Nigeria over the years, such that inadequate or ineffective regulation of electronic contracting in Nigeria is bound to leave the country's economy worse off in comparison to other countries that are more alert or efficient in relation to the regulation of e-commerce. In this context, Iwobi decries the late development of the relevant regulatory frameworks in Nigeria, and in particular, the fact that the main law in this regard, the Electronic Transactions Bill (2017), has not even become a binding statute, having not passed through all the necessary legislative rounds. Nonetheless, Iwobi provides an illuminating and trenchant analysis of the key provisions of the Bill, with a view to understanding how they have sought to accommodate

the peculiar requirements and exigencies of doing business within today's electronic environment. He focuses on those provisions of the Bill that are particularly concerned with the contractual dimensions of electronic transactions. As he observes, these provisions have been heavily influenced by corresponding provisions of the UNCITRAL Model Law on Electronic Commerce,¹⁵ which are primarily intended to deal with the complexities surrounding the formation of electronic contracts and to place such contracts on more or less the same legal footing as contracts entered into by more traditional means. Iwobi concludes that the manner in which the Nigerian legal system has sought to fulfil its regulatory remit leaves a lot to be desired. The whole procedure has been unnecessarily protracted and convoluted, and the Electronic Transaction Bill, which is meant to constitute the vital cog in the regulatory machinery, is deficient in various material respects. Iwobi posits that, in the final analysis and as things currently stand, the process of devising a suitable legal and regulatory framework for Nigeria's emerging electronic marketplace is still very much a work in progress.

¹⁵ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 (hereafter referred to as the MLEC). Available at http://www.uncitral.org/pdf/english/texts/electcom/V1504118_Ebook.pdf. (last accessed in May 2018)

CHAPTER ONE

THE PRINCIPLE THAT WRONGDOERS SHOULD NOT BE ALLOWED TO PROFIT FROM THEIR OWN WRONG: APPLICATION IN NIGERIA AND ENGLAND AND WALES

REMIGIUS N NWABUEZE

1. INTRODUCTION

The maxim that a court will not allow a person to derive a profit or benefit from his or her own wrong embodies a principle of public policy,¹ which could be used to bar a claim or defence.² In that sense, the maxim resonates with the illegality principle, another principle of public policy, which embodies the idea that a court should not give its assistance to a cause of action founded on some illegality or immorality.³ While both principles achieve the same end and can arise from the same set of facts, the illegality principle appears to have a narrower scope of operation than the maxim that prohibits profit from own wrong. For instance, if the moral turpitude or illegality of the claimant's conduct was not sufficient to trigger the illegality principle, a question might nonetheless arise as to whether granting the claimant's claim would have the effect of assisting the claimant to derive a

¹ *Benyon v Nettleford*, 3 Mac. & G. 102; *Ayerst v Jenkins* [1873] LR 16 Eq. 275 at 283.

² I refer to the maxim in various shorthand, such as the 'maxim that prohibits profit from own wrong'.

³ *Holman v Johnson* [1775] 1 Cowp. 341 at 343. *Patel v Mirza* [2016] UKSC 42 represents the current approach to the illegality principle in England and Wales. There, the majority of the Supreme Court developed a flexible approach to the illegality principle that involves a trio of considerations.

benefit or profit from his or her wrongful behaviour. This chapter focuses on this latter (and broader) principle, the maxim that no person should be allowed to derive a profit or benefit from his or her own wrong.

Applying the maxim in *Solanke v Abed*,⁴ the Nigerian Federal Supreme Court (as it was then known⁵) held that the defendant-landlord, who had failed to obtain the statutory consent necessary to effectuate a tenancy agreement, could not be heard to plead that the tenancy agreement was void and unenforceable for want of consent. In other words, a wrongdoer was not entitled to defeat a claim by taking advantage of his or her own wrong. In *Solanke*, the defendant-landlord's wrongdoing was his failure to obtain the Governor's consent to the tenancy agreement as required by s. 11 of the Land and Native Rights Act 1948.

While the Land and Native Rights Act 1948 was restricted in its application to the northern region of Nigeria, the substantial reproduction of its provisions, especially its consent provisions, in the more widely applicable Land Use Act 1978 has meant that the decision in *Solanke* is relevant to the interpretation of the consent provisions of the Land Use Act.⁶ Therefore, the question which *Solanke* raises for the interpretation of the Land Use Act is whether a transferor who failed to obtain the Governor's consent to a transfer governed by the Land Use Act can rely on that fault, their own very fault, to impugn or defeat the enforcement of the transfer? Particularly, can a mortgagor, who defaulted on the mortgage, successfully resist foreclosure and sale of the property on the ground that he or she had failed to obtain the required consent to the mortgage under the Land Use Act? As indicated above, albeit within the context of the Land and Native Rights Act 1948, *Solanke* answered these questions in the negative, relying

⁴ *Solanke v Abed* [1962] NSCC 160.

⁵ Now simply known as the Supreme Court of Nigeria.

⁶ Land Use Act 1978:

s. 22: 'It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the military Governor first had and obtained';

s. 26: 'Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Decree shall be null and void'.

In 2009, the Land Use Act (Amendment) Bill 2009, apparently still making legislative rounds, was introduced to amend the Land Use Act, by deleting from s. 22 above, the words 'mortgage, transfer of possession, sublease'. When passed into law, the Governor's consent will no longer be required for alienations by way of mortgage and sublease.

on the public policy principle that a wrongdoer should not be allowed to derive a *profit* or *benefit* from his or her own wrong.⁷

In this chapter, I argue that the decision in *Solanke*, and its application in more modern Nigerian cases, is wrong. Consequently, I argue that the maxim that a court will not allow a person to derive a benefit or profit from his or her own wrong reflects a principle of public policy, which is never applied to defeat the purpose of a statute or regulation. Furthermore, I argue that whenever the maxim is deployed in the equitable realm, its use is almost always to reinforce an existing fiduciary relationship. Since the landlord-tenant relationship in *Solanke* and the mortgagor-mortgagee relationship in more recent *Solanke*-type cases below were not fiduciary in nature, and since the application of the maxim in *Solanke* and more recent Nigerian cases had the effect of defeating the legislative purposes enshrined in the Land and Native Rights Act 1948 and the Land Use Act 1978, the decisions in *Solanke* and similar cases were therefore wrongly decided.

I recognise that despite its deeply flawed reasoning the outcome in *Solanke* is salutary, in that it prevented the palpable unjust enrichment of the landlord; similarly, the application of *Solanke* in more recent Nigerian cases prevented the unjust enrichment of the mortgagors, who tried to void the mortgages (after obtaining huge amounts in loans) on the basis of their non-compliance with the consent provision of the Land Use Act. Accordingly, I contend that the sort of salutary outcome in *Solanke* might equally be achieved through a more defensible remedial framework that does not run afoul of a binding statute like the Land Use Act. The search here is, therefore, for a more convincing and defensible equitable framework that could undergird the laudable outcome in *Solanke*-type cases.

I start by analysing the principle of public policy which prohibits a person from profiting from his or her own wrong. I argue that the important limitations foisted upon the operation of that principle were not respected

⁷ I have intentionally used the alternative expressions “profit” and “benefit” to identify and express the public policy maxim at play here in order to give the maxim the widest ambit and greatest reach. This contrasts with the expression of the maxim in terms of “profit” only in the Canadian Supreme Court case of *Hall v Herbert* [1993] CarswellBC 92, where McLachlin J defined *profit* (for the purpose of the maxim) ‘in [the] narrow sense of a direct pecuniary reward for an act of wrongdoing’ (at 7). Applied to *Solanke*-type cases, this narrow definition of ‘profit’ will easily render the decisions in such cases unjustifiable, because the defendant-landlord in *Solanke*, for instance, had no prospect of deriving a direct pecuniary benefit from a potentially successful statutory defence in that case (recall that he was in breach of the relevant statute); the landlord, however, stood to benefit in some sense (retaining paid rent, for instance) if the statutory defence, arising from his own wrong, had been successful.

by *Solanke*. Thereafter, I examine two equitable principles on which the outcome in *Solanke* could be anchored. First, the maxim that equity regards as done that which ought to have been done. Second, the equitable principle that a court will not allow a statute to be used as a cloak for fraud. Based on the insurmountable objections arising from the first potential solution above, I argue that the second principle offers a more viable justificatory framework for the outcome in *Solanke*-type cases. For these reasons, more fully analysed below, I suggest that *Solanke* was wrongly decided, and should be overruled by the Supreme Court of Nigeria at the earliest opportunity.

2.1 A COURT WILL NOT ALLOW A WRONGDOER TO BENEFIT FROM HIS OR HER OWN WRONG

As highlighted above, the maxim that a court will not allow a person to derive a benefit or profit from his or her own wrong reflects a principle of public policy,⁸ which finds its earliest and most authoritative expression in Nigeria in the decision of Unsworth FJ in *Solanke v Abed*.⁹

In *Solanke*, the defendant-landlord entered into a tenancy agreement with the claimant-tenant and, on the strength of that agreement, he put the claimant into possession of the premises. Unfortunately, the landlord failed to obtain the consent of the Governor to the tenancy agreement as required by s. 11 of the Land and Native Rights Act 1948. When the landlord trespassed on the premises, and was sued by the claimant-tenant for damages for trespass, he argued that the claim was not enforceable because the tenancy agreement on which it was based was void for the lack of Governor's consent. Unsworth FJ dealt with the landlord's defence in two ways. First, he considered that the landlord's defence raised the illegality principle, the idea that no court will give its assistance to an action founded on immorality or illegality (otherwise known as *ex turpi causa non oritur action*). Unpersuaded by this defence, Unsworth FJ held (though not in terms) that the illegality principle did not apply to bar the tenant's claim, because the tenancy agreement was only void, but not illegal, under the Land and Native Rights Act 1948; that is, the 1948 Act did not impose any penalty for the breach of its consent provision. Regardless of the 1948 Act, he observed that it would not 'appear necessary in the interest of public policy for an agreement of (sic) alienate to be treated as illegal'.¹⁰

⁸ *Benyon* (n1); *Ayerst* (n1).

⁹ *Solanke* (n4).

¹⁰ *Ibid.*, at 162-163.

Second, having dismissed the illegality defence, Unsworth FJ nonetheless considered whether the landlord's wrongful behaviour (i.e., failing to obtain the Governor's consent) made it inappropriate for the landlord to contend that the tenancy agreement was void and unenforceable. Thus, he asked whether the landlord was 'entitled to take advantage of his own wrong as against the plaintiff in this action for trespass and allege that the agreement was null and void...?'¹¹ Pointedly, he observed that the landlord 'cannot be heard as against the plaintiff, to put forward his own wrongful act and say that the agreement was unenforceable because he himself had failed to get the necessary consent under s.11 of the Land and Native Rights Act'.¹² And, similarly, that it was 'not open to the defendant...to rely upon his own wrongful act so as to allege, as against the plaintiff, that the agreement of tenancy was null and void and unenforceable'.¹³ As the quotations above show, Unsworth FJ was undoubtedly applying to the facts of *Solanke* the public policy principle that prohibits a wrongdoer from profiting from his or her own wrong. I argue that his deployment of the principle in *Solanke* was wrong for two reasons. First, the principle is never applied if its application would defeat or stultify the purpose of a statute or regulation. Unfortunately, Unsworth FJ did not comply with this requirement in *Solanke*, with the result that his application of the public policy maxim above practically stultified or defeated the purpose expressed by the legislature in the Land and Native Rights Act 1948. Second, when deployed in an equitable action or as an equitable weapon, the public policy principle that no person should be allowed to benefit from his or her own wrong is usually applied to reinforce an existing fiduciary relationship. As the claim in *Solanke* was neither equitable (it was a common law tort claim) nor involved a fiduciary relationship, there was no basis for the application of the public policy principle that prohibits a person from benefiting from his or her own wrong. Below, I shall examine the two limitations above placed on the operation of the public policy principle considered here. Based on that analysis, I will examine some of the more recent cases that have considered or followed *Solanke*.

2.2 LEGISLATIVE INTERFACE WITH THE PRINCIPLE AGAINST PROFITING FROM OWN WRONG

As indicated above, a major limitation in the application of the principle of public policy that prohibits profit or benefit from own wrong is the legal

¹¹ *Ibid.*, at 162.

¹² *Ibid.*

¹³ *Ibid.*, at 163.

requirement that the principle should not be used to defeat the purpose of a statute or regulation. In other words, the court would enforce a relevant and mandatory statutory provision even though the enforcement of the statute was demanded, self-servingly, by a party who was in breach of that statute, and would benefit from its enforcement. The reason for this is clear; to do otherwise would enable the court to use the public policy maxim at play here as a cloak for defeating the will of the legislature clearly enshrined in the relevant statute; it would also amount to judicial interference with the legislative function, contrary to the concept of separation of powers. The limitation adumbrated above is supported by significant judicial authority.

In *Buswell v Godwin*,¹⁴ a closing order had been made against the property in question by a local authority under the Housing Act 1957, because the house was in a state unfit for human habitation. Acting on the closing order, the landlord-claimant claimed possession of the premises from the tenant-defendant. The tenant's defence to the landlord's action is best stated in the words of Widgery LJ:

Here it is said that, if the house was so unfit, it was unfit because the landlord had broken either a statutory or contractual duty to keep it fit, and so it is contended that the landlord's claim should have been rejected on the footing that a man may not profit from his own wrong.¹⁵

Dismissing this defence, Widgery LJ observed that the 'proposition that a man will not be allowed to take advantage of his own wrong is no doubt a salutary one and one which the court would wish to endorse, *but I am not satisfied that it can be applied to the circumstances of this case*'.¹⁶ Particularly, Widgery LJ observed that the maxim against profiting from one's own wrong is never applied to defeat the purpose of a statute, such as the Housing Act, and pertinently noted that 'it seems to me that if one recognised in this case that the landlord was profiting by his own fault one would, in effect, be allowing the landlord's fault to frustrate the local authority's public purpose as well, and in my judgment that cannot be right'.¹⁷ Furthermore, he observed that while the landlord might have benefited from the closing order, assuming that it was made as a result of his breach of duty, 'the basic purpose of such orders is not to benefit the landlord but to secure the maintenance of public health at the instance of the local authority'.¹⁸ Thus, Widgery LJ opined that the maxim that no one

¹⁴ *Buswell v Godwin* [1971] 1 W.L.R. 92.

¹⁵ *Ibid.*, at 94.

¹⁶ *Ibid.*, at 96. Italics supplied.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

should be allowed to profit from his or her own wrong applies only to matters of private right devoid of regulatory intervention; accordingly, he observed that the matter before the court was ‘not a case in which the *only issues are matters of private right* between landlord and tenant’.¹⁹ *Solanke* honoured the principles above more in the breach than in the observance. *Solanke* was not a case involving matters of private rights only; it involved an important and binding property statute, the Land and Native Rights Act. While enforcement of that statute would have benefited the landlord in *Solanke* in some sense, such a benefit would not have represented the real aim and intention of the court; the basic purpose of the enforcement would have been to give effect to the aims and purposes of the Land and Native Rights Act. Of course, *Buswell* was decided after *Solanke*, and in any event, *Buswell* is not binding on courts in Nigeria. However, since *Solanke* purported to have applied the English and Welsh law on the matter,²⁰ it is appropriate to critique *Solanke* by reference to relevant English and Welsh cases. The reasoning *Buswell* is evident in other cases.

In *National Coal Board v England*,²¹ the claimant, a collier, sustained severe injuries in a colliery while assisting a shotsman to prepare and fire a shot. Under the applicable regulation (Explosives in Coal Mines Order 1934, made pursuant to the Coal Mines Act 1911), the shotsman had the exclusive responsibility and duty to prepare and fire the shot, so that the joint endeavour in that regard between the claimant and the shotsman constituted a breach of statutory duty by both men. Also, the court found that, in addition to the shotsman’s common law negligence in firing the shot without making sure that it was safe to do so, the claimant failed to take proper care for his own safety, and was therefore, contributorily negligent. Essentially, the question before the court was whether the claimant’s claim (against the defendant-employer on a vicarious liability basis) for damages for negligence and breach of statutory duty was barred by the claimant’s illegality, the breach of statutory duty. Holding for the claimant, but discounting the amount of his damages for contributory negligence, the House of Lords held that the illegality defence was not applicable, probably because the breach in that case was not of sufficient moral turpitude. Thus, Lord Porter observed that ‘I cannot believe that a breach of a statutory obligation drafted to ensure the adoption of a careful method of working is a “turpis causa” within the meaning of the rule’.²² But the point is that the

¹⁹ Ibid. Italics supplied.

²⁰ In *Solanke*, Unsworth FJ considered and distinguished *Delaney v Smith* [1946] 2 All ER 23.

²¹ *National Coal Board v England* [1954] A.C. 403 (HL).

²² Ibid., at 419.

House of Lords, having rejected the illegality defence, did not proceed to accuse the claimant of seeking to profit from the enforcement of a statute of which he was in breach, the sort of accusation the Supreme Court of Nigeria made in *Solanke*. Nor did the House of Lords accuse the claimant of trying to benefit from his own wrongful act of negligence, which significantly contributed to his injury. Obviously, the House of Lords recognised that it was its duty to enforce the safety regulations made pursuant to the Coal Mines Act 1911, as well as its duty to enforce the defendant's common law duty in negligence; consequently, the House of Lords enforced the duties above notwithstanding that such an enforcement was called for by the claimant who was in breach of the relevant statutory provision, and was also contributorily negligent.

Similarly, in *Hall v Herbert*, albeit not involving a breach of statutory duty, the claimant suffered significant head injuries when he tried to push start a car and lost control of it in the process; the car suddenly veered off the road and was overturned. The claimant sued the defendant, the owner of the vehicle, for damages in negligence; he alleged that, as both of them had been drinking alcohol excessively immediately before the accident, the defendant knew that the claimant was drunk and should not have allowed the claimant to drive the defendant's car. The defendant, raising the illegality defence, argued that the court should not entertain the claimant's action, because the claimant was trying to profit from his own unlawful conduct, which contributed to his injury. The majority of the Supreme Court of Canada gave judgement for the claimant, subject to an apportionment of liability for his contributory negligence. McLachlin J observed that the judicial power to bar a claim on the ground of illegality should be exercised only in very limited circumstances, and that the justification for the exercise of such a power must be to preserve the integrity of the legal system or avoid an inconsistency in the application of the law. Particularly, the majority held that the claimant, who sought compensation in damages for the personal injuries he suffered as a result of the defendant's negligence, could not be said to have sought profit from his own wrong. Notice that *Hall* involved a matter of private right only (no statutory intervention), which ordinarily (per *Buswell* above) should have paved the way for the application of the public policy maxim that no person should be allowed to profit from his or her own wrong. Yet, the majority of the Supreme Court of Canada suggested that such a principle should not be used to defeat a common law claim in tort. A fortiori, the public policy principle that prohibits profit from own wrong should not be used to defeat a claim or defence based on a relevant and binding statute; the Supreme Court of Nigeria did just that in *Solanke*. Moreover, it is arguable that, as a statute, the Land and Native Rights Act

1948, whose enforcement was in issue in *Solanke*, called for greater judicial vigilance, in ensuring that its purpose was not defeated, than the common law claim in tort in *Hall*.

In *Singh v Kulubya*,²³ the Ugandan-claimant leased his *Mailo* land to the defendant-Indian, who was resident in Uganda. Under the relevant property statutes in Uganda, the lease was illegal because the Governor's consent was not obtained; it was the duty of both parties to obtain the Governor's consent. The claimant and defendant risked criminal prosecution under the statutes for concluding the leasehold transaction without the Governor's consent. Nevertheless, the defendant was put into possession of the property by the claimant, and he had remained in possession for over 13 years and paid rent to the claimant. Relying on his registered title to the *Mailo* land, the claimant brought a claim for possession of the property, on the ground that, the lease being illegal, the defendant had no right to possession of the property, nor any interest therein. The defendant pleaded the illegality defence, contending that the claimant's action was barred for illegality. The Privy Council dismissed the illegality defence on the ground that the claimant based his claim for possession on his registered title, rather than on the illegal lease. Furthermore, the Privy Council held that since the objective of the property statutes in question was to protect the claimant's proprietary interests as an African, the claimant belonged to the category of a statutorily protected class, and therefore, was not subject to the application of the illegality principle. Obviously, *Singh* was a case where a claimant tried to benefit (and actually benefited) from his own breach of a statutory duty; nonetheless, the Privy Council enforced the claim in order to give effect to the purpose of the relevant property statutes. A contrary decision would have defeated the protective regime established by the relevant property statutes. This sort of concern about carrying out the purpose of a statute was clearly lacking in *Solanke*.

In *Strongman v Sincoc*,²⁴ the defendant was an architect and owner of certain buildings; he employed the claimant to carry out some significant repair work on the buildings. Under the Defence Regulations 1939, the contracted repair work could only be done with the authority of a licence. Although the defendant promised to obtain all the necessary licences for the work, he failed to do so. Nonetheless, the claimant executed all the contracted work and sued for payment of the balance of the contract price. Alternatively, the claimant sued the defendant for damages (on a collateral contract) for breach of the warranty to obtain the licences. The defendant

²³ *Singh v Kulubya* [1964] A.C. 142.

²⁴ *Strongman v Sincoc* [1955] 2 Q.B. 525.

argued that the claims were not maintainable because the contract was illegal, the work having been done without the required statutory licences. Here, again, the defendant was clearly trying to benefit from his own wrong or illegality, something that Denning LJ (as he then was) highlighted when he observed, in relation to the defendant's defence, that 'it comes ill from the mouth of the defendant to raise this point as against the plaintiffs'.²⁵ Lord Denning further observed that the defendant's evidence 'shows quite clearly that on his own admission he has misled them (claimant) and now seeks to turn it to his own advantage'.²⁶ Yet, the Court of Appeal, in order to enforce the licence requirement under the Defence Regulations 1939, accepted the defendant's illegality defence, and thus, held that the claimant could not recover the balance of the contract price. However, the claimant was awarded damages on the alternative claim for breach of warranty, arising from the collateral contract. But the point of *Strongman* is to emphasise that the Court of Appeal's duty to enforce the licence requirement under the Defence Regulations 1939 did not leave any room for applying the maxim that prohibits profit from own wrong. It is remarkable that in similar circumstances, in *Solanke*, the apex court in Nigeria gave short shrift to the Land and Native Rights Act 1948, a statute that it was obligated to enforce.

In short, the maxim that a wrongdoer should not be allowed to derive a benefit or profit from his or her own wrong was wrongly applied in *Solanke*, in that *Solanke* violated the legal requirement that the maxim should not be used to defeat the purpose of a statute.

2.3 EQUITABLE APPLICATION OF THE MAXIM AGAINST PROFITING FROM OWN WRONG

While *Solanke* engaged a common law claim in tort, rather than an equitable claim, later Nigerian cases discussed below, which applied *Solanke*, suggested that the maxim that prohibits profit from own wrong could be applied to any equitable claim, or used as an equitable weapon to deny a defence or claim asserted by a wrongdoer. I argue that the maxim that prohibits profit from own wrong has no such extensive application in equity. Furthermore, while the maxim that prohibits profit from own wrong is similar to the clean hands maxim in equity, the two are not identical.²⁷ I

²⁵ *Ibid.*, at 537.

²⁶ *Ibid.*

²⁷ The application of the clean hands maxim, unlike the maxim that prohibits profit from own wrong, does not require that a fiduciary relationship should exist between the parties; this requirement is more fully examined below. For a good discussion of