CHAPTER ONE

ADVANCE FEE FRAUD AND OTHER FRAUD RELATED OFFENCES ACT

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ADVANCE FEE FRAUD AND OTHER FRAUD RELATED OFFENCES ACT

An Act to prohibit and punish certain offences pertaining to advance fee fraud and other fraud related offences and to repeal other Acts related therewith.

[2007 No. 62]

[5th June, 2006]

[Commencement]

ENACTED by the National Assembly of the Federal Republic of Nigeria

Introductory Comment

The phenomenon of advance fee fraud, otherwise called “419” is one negative concept that had severely battered and damaged Nigeria’s reputation thereby adversely affecting foreign investors’ interest in the economy of the nation. Perhaps, after armed robbery, cases of advance fee fraud ranked second amongst the serious economic and financial crimes confronting the Nigerian nation. Little wonder, the Special Fraud Unit (SFU) of the Criminal Investigation Department of the Nigerian Police Force was established in 1993 to address this ugly menace.¹ Advance fee fraud is similar to obtaining property under false pretences in the Nigerian Criminal Code.²

The historical background of advance fee fraud is traceable to the period of 1973 to 1974 when Nigeria began to experience an

¹ See Farida Mzamber. Waziri Esq., Advance Fee Fraud, National Security and the Law (Ibadan: Nigeria, Book Builders Publishers 2005) at page ix, which is the foreword, written by Dr. I. A. Coomassie, formerly, Inspector General of Police (1993 – 1999). F. M. Waziri retired as an Assistant Inspector General of Police and headed the Special Fraud Unit in 1995 in Lagos as a Commissioner of Police. She was erstwhile chairman, Economic and Financial Crimes Commission in Nigeria. The SFU was the successor to the Presidential Task Force, also known as the Task Force on Trade Malpractice established in 1991.
unprecedented increase in foreign exchange earnings with the increase in oil prices due to the Middle East crisis. In 1981, when the world oil market suddenly slumped, the Nigerian economy could not absorb the shock. Consequently, there was a drastic reduction in government revenues and foreign exchange earnings. By 1986 when Structural Adjustment Programme (SAP) was introduced, new trends in advance fee fraud were developed. The adverse effects of SAP on the average Nigerian household were enormous. There was devaluation of the naira, the era of the “tokunbo” emerged with second hand market, factories closed down as they were no longer able to import raw materials, government and companies alike retrenched workers, and the unemployment rate was high. In such uncertain economic times, with so many unemployed graduates, the conditions were ripe for fraudulent practices on a large scale. Nigeria slowly evolved from an era of few syndicated fraudsters of the early 1980s to a more organized crime system in the late 1980s, which culminated into a wide scale “advance fee fraud industry” better known as 419.

Advance fee fraud has been described by Dr. Ibrahim Coomassie as a conspiracy between some dubious Nigerians and gullible foreigners to transfer illegally, abroad, non-existing funds.

Advance Fee Fraud involves some persuasion of the target (victim) by a trickster, to advance some money of relatively smaller value in the hope or promise of realizing a much larger

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gain. Among the variants of this type of scam is the so called Nigerian “419” frauds. The number “419” was derived from the Criminal Code Act which provides for the offence of “obtaining goods by false pretence” under section 419. Other sections dealing with fraud and involving false pretence under the criminal code include: sections 19A, 19B and 20. False pretence is defined under section 418 of the Criminal Code Act.

The Economic and Financial Crimes Commission\(^6\) is responsible for the investigation, coordination and enforcement of all the economic and financial crimes laws including advance fee fraud etc,\(^7\) in Nigeria. The Commission has, since its inception in 2003, been combating economic and financial crimes, including advance fee fraud. Success stories of arrests, prosecutions and convictions have been recorded.

This Act was intended to cover, as much as possible, in a single legislation. Highlighting the importance of the Act in AJUDUA V. FRN\(^8\), his Lordship, Ogebe JCA stated the aim of the Advance Fee Fraud (etc) Act as follows:-

"... Advance Fee Fraud ... is a special legislation designed to combat a variant of criminal manifestations that have made a dent on the psyche of the country as a component of the world community with the tendency to lower or undermine the self-esteem of the country."

Justice Mufutau Olokooba, a judge of the High Court of Lagos State, Ikeja, described advance fee fraud as an international embarrassment to the nation. Delivering judgment on the matter of an Advance Fee

\(^6\) Established under section 1 of the Economic and Financial Crimes Commission (Establishment) Act, Cap E1, LFN 2004.

\(^7\) Section 6 of the Economic and Financial Crimes Commission (Establishment) Act Cap E1 LFN 2004

\(^8\) (2006)1 EFCLR, 1 at 10, para 25 – 30 C.A.
Fraud (419) kingpin, Adedeji Alumile (a.k.a Ade Bendel\(^9\)), the Hon. Justice Mufutau stated that not visiting the accused with the full weight of the law would be inappropriate. He sentenced the accused to six years imprisonment for defrauding an Egyptian General, Abdel Azim Attia of over $500,000 (N65million) in 2003. He also ordered the accused to refund US$500,000 that he obtained from the complainant. Justice Mufutau reiterated as follows:

"The offence is an international embarrassment to the nation and the courts do have mercy for such offence, to serve as deterrent to present generation and upcoming generation”.

The two essential ingredients of the offence under this Act are “false pretence” and “intention to defraud”. It is observed that whilst “false pretence” is defined under the Act\(^10\), the term “fraud” is not defined anywhere in the Act. This is a fundamental omission on the part of the draftsman and the legislature.

Intent to commit a crime or criminal intent (to deprive or defraud the true owner of his property) is a necessary component of most “conventional” crimes, including advance fee fraud, and it involves a conscious decision on the part of one party to injure or deprive another. Intent to defraud is a necessary component to establish the offence under this Act.

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\(^9\) Ade Bendel was arrested and arraigned by EFCC and charged alongside one Chief Olafemi Ayeni in 2003, claiming to be the owner of World-Wide Company in charge of American currencies. The accused with one Olafemi Ayeni, upon going to the office of the complainant, told him he wanted to buy some chemicals that would be used to clean security covers from the notes in boxes, for which the complainant parted with the sum. He later found out that the organization was fake and the so-called chemicals only existed in the imagination of the swindlers. Attia, who was in court when the accused person was convicted was, however, full of praises for the EFCC and the court for the judgment.

\(^10\) Section 20 of the Act; see also section 418 of the Criminal Code Act, Cap C38, LFN 2004.
Offences

1. Obtaining property by false pretence, etc.

(1) Notwithstanding anything contained in any other enactment or law, any person who by any false pretence, and with intent to defraud—

(a) obtains, from any other person, in Nigeria or in any other country, for himself or any other person;
(b) induces any other person, in Nigeria or in any other country, to deliver to any person; or

any property, whether or not the property is obtained or its delivery is induced through the medium of a contract induced by the false pretence, commits an offence under this Act.

(2) A person who by false pretence, and with the intent to defraud, induces any other person, in Nigeria or in any other country, to confer a benefit on him or on any other person by doing or permitting a thing to be done on the understanding that the benefit has been or will be paid for commits an offence under this Act.

(3) A person who is guilty of an offence under subsection (1) or (2) of this section is liable on conviction to imprisonment for a term of not more than 20 years and not less than 7 years without the option of a fine.

Cross Reference
- For the definition of “False Pretence” see section 20 of the Act; also see section 418 of the Criminal Code Act, Cap C38 LFN, 2004

Comment

Section 1 creates a number of offences relating to obtaining property by false pretence. Two elements are essential under this section: false pretence and intention to defraud. Under this Act, “False Pretence” is defined to mean:-

“a representation, whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or laws, either past or present, which representation is false in fact or law, and which the person making it knows to be false or
Section 418 of the Criminal Code Act defines false pretence thus:

“Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact and which the person making it knows to be false or does not believe to be true, is a false pretence.”

Tobi JSC in ONWUDIWE V. FRN, citing A Dictionary of Modern Legal Usage, (2nd ed.), defined False Pretence to mean:

“knowingly obtaining another person’s property by means of a misrepresentation of fact with intent to defraud”

The Court of Criminal Appeal in England approved the definition of “deceive and defraud” given by Buckley J, in Re: London and Global Finance Corporation Ltd, where he said that:

“to deceive is to induce a man to believe that a thing is true which the person practicing his deceit knows or believes to be false. To defraud is to deprive by deceit, it is by deceit to induce a man to act to his injury”.

From the above definition, the offence of False Pretence generally imputes knowledge which is founded on deceit and intent to defraud. The act of the accused must convey an element of deceit to obtain some advantage for the accused or another person, or to cause loss to any other person.

The Proof of deliberately misleading another is a crucial element

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11 Section 20 of the Advance Fee Fraud and Other Related Offences Act, see also Section 418 of the Criminal Code Cap C38 Laws of the Federation of Nigeria 2004.
13 (1903) 1 Ch. 728
for the offence of false pretence. In FRN V. OLOWE & ORS\textsuperscript{14}, the court (High Court of Lagos State) held that:

“In order that a person may be convicted of that offence... it is necessary for the prosecution to prove to the satisfaction of the jury that there was some mis-statement as to an existing fact made by the accused person; that it was false and false to his knowledge; that it acted upon the mind of the person who parted with the money; that the proceeding on the part of the accused was fraudulent. That is the only meaning to apply to the word with intent to defraud”.

Under section 1 (1) (a) & (b) & (2) of this Act, the fraudulent act of the accused person need not be for his own advantage; provided the relevant mens rea, the intent to defraud exists. The location of the proposed or actual victim, (whether within or outside Nigeria) is immaterial.

The offence could be committed by oral communication or in writing or even by the conduct of the accused person to induce or make the victim part with a thing capable of being stolen or make the victim deliver a thing capable of being stolen.

In determining the offence of obtaining property by false pretence, the fact must be clearly shown that the victim believed the representation of the accused and intended as a result to part with the ownership and possession of the thing obtained by means of the pretence perpetrated by the accused. The actual purpose of the accused need not be accomplished for the offence to be complete. Once it is established that the accused person at the material time possesses the mens rea accompanied with some positive acts to commit the offence of obtaining by false pretence, he is liable.

\textsuperscript{14} (2008) 7 EFCLR 173, para 5 – 35 H.C.
In R. V ANIJOLOJA\(^{15}\), the accused falsely represented to B that he was a clerk to C and that C asked him to collect 3s. 6d from B when in fact accused was not employed or instructed as such. Accused was held liable for the offence of obtaining by false pretence.

To secure conviction for the offence under Section 1, the prosecution must establish the following ingredients as held in FRN V. KALU\(^{16}\) by the High Court of Lagos State

1. That there is a pretence;
2. That the pretence emanated from the accused person;
3. That it was false;
4. That the accused person knew of its falsity or did not believe in its truth;
5. That there was an intention to defraud;
6. That the thing is capable of being stolen.

Intent to defraud can be proved as a fact or gathered from the circumstances. It is rarely the subject of direct evidence. The fact that the representation was false or that it was made recklessly or without any regard for it being true would be evidence from which to infer intent to defraud.

In FRN V. KALU (supra), the accused person and another (convicted) were arrested and charged for conspiracy and attempt to obtain money by false pretence from one Tanveer Ahmad. The convict pleaded guilty and was sentenced accordingly. The accused however, insisted that he did not act in concert with the convict, because he was only in company of the convict at a MR BIGGS Restaurant when they were arrested. The prosecution was unable to discharge the onus on it to establish the relevant

\(^{15}\)(1936) 13 NLR 3 at 83

\(^{16}\)(2008) 7 EFCLR 110 at 133; see also FRN V. ODIAWA (2006) 3 EFCLR 123 and ALAKE V. STATE (1991) 7 NWLR (pt. 205) 567 on elements for proof of the offence of false pretence.
ingredient of intent on the accused person and he was accordingly discharged.

Note that the circumstance envisaged under this Act is that there must be a deceit or an intention to deceive flowing from the fraudulent action or conduct of the accused person to the victim of such action or conduct. In other words, an honest belief in the truth of the representation on the part of the accused which later turns out to be false, cannot found a conviction on false pretence\textsuperscript{17}.

Any person who commits any offence under section 1(1) & (2) is liable upon conviction to a term of imprisonment between 7 years and 20 years without an option of a fine\textsuperscript{18}. The sentencing of an accused person convicted under Section 1 of the Act may depend on the discretion of the court exercised, based on the circumstances of each particular case. The court shall however not impose terms below the minimum of 7 years or above the maximum of 20 years\textsuperscript{19}.

Since the penalty of imprisonment is without an option of fine the court does not have the discretion to impose a fine in lieu of or as an option to the prescribed penalty. See DADA V. BOARD OF CUSTOMS & EXCISE\textsuperscript{20}.

2. Other fraud related offences
   A person who—
   (a) with intent to defraud, represents himself as capable of producing, from a piece of paper or from any other material, any currency note by washing, dipping or otherwise treating the paper or material with or in a chemical substance or any other substance; or
   (b) with intent to defraud, represents himself as possessing the power or as capable of doubling or otherwise increasing any sum of

\textsuperscript{17} ONWUDIWE V. FRN (Supra) at p. 812, per Niki Tobi, JSC
\textsuperscript{18} Section 1 (3) of the Advanced Fee Fraud and other Fraud Related Offences Act
\textsuperscript{19} SLAP V. ATTORNEY GENERAL OF THE FEDERATION (1968) NMLR 326
\textsuperscript{20} (1982) 2 NCR, p. 79
money through scientific or any other medium of invocation of any juju or other invisible entity or of any thing whatsoever; or

(c) not being the Central Bank of Nigeria, prints, makes or issues, or represents himself as capable of printing, making or issuing any currency note.

commits an offence and is liable on conviction to imprisonment for a term of not less than 5 years without the option of a fine.

Cross Reference
- For the authority to print and issue currency note in Nigeria, see section 18 of the Central Bank of Nigeria (Establishment) Act Cap. C4 LFN, 2004; see also section 1 (1) and section 12 of the Counterfeit Currency (Special Provisions) Act Cap C35 LFN 2004.
- For provision of protection to whistle blowers, see sections 5 and 24 of the Indian Prevention of Corruption Act, 1988.

Comment

In all circumstances, under section 2(a) and (b), the offence is proved and complete by the existence of an intent to defraud on the part of the accused person. Under section 2(a) it is an offence to make representation to any person that one is capable of producing any currency note by means of dipping or otherwise treating a piece of paper or any material with a chemical substance.

The currency note need not be the local currency (Naira note). Any currency note of any country recognised as a medium of exchange qualifies as a currency note within the meaning of this provision. Where the prosecution establishes that the accused person made such representation with a fraudulent intention, the offence is complete. The person receiving that representation need not have believed the truth of such representation or acted on it.

The same principle under section 2(a) applies to section 2(b). Where the accused person manifests any act or conduct with intent to defraud another person, which suggests that he, the accused person, can double the volume of any money by way of physical or metaphysical ingenuity, he is liable under this subsection. The relevant ingredients of offences under section 2 (a) & (b) are:
(a) That the accused made a representation to another person
(b) That the representation was made with intent to defraud
(c) That the representation was made with the intent that the
person receiving the representation should act on it.

The mischief sought to be cured by section 2 of the Act is the
prevalence of fake currency in the system due to the activities of
fraudsters commonly known as “money doublers” who engage in the
production of fake or counterfeit currency. They lure and deceive
their victims with few currency notes they purport to have produced
using some chemical. They would later urge their victims to source
and bring some (real) money to them for the purchase of more
quantity of the chemical to enable them print the boxes of currency,
with the promise that their victims will turn millionaires. The Act
seeks to prohibit any form of production of money illegally. Only the
Central Bank of Nigeria (CBN) has the sole authority to print, and
issue currency note in Nigeria.²¹

This Act, like the other anti – corruption laws in the country would
not achieve significant result because individuals and victims are
usually reluctant and do refuse to blow the whistle. This is because
there is inadequate mechanism for the protection of whistle blowers
and witnesses. Those who have vital information would rather not
come forward out of fear of reprisals. In some cases, anonymous
petitions are written, often as political reprisal measures or sheer
witch-hunt. In many cases where such actions based on anonymous
petitions are brought before the courts they are usually exercises in
futility for absence of complainant or witnesses. A clear example is
WIKE V. FRN²², where the Court of Appeal stated that:

“It is no doubt trite law that for the petition to be of
any purpose, it is necessary for the maker to be
available for trial”.

²¹ Section 18 of the Central Bank of Nigeria (Establishment) Act, Cap C4, Laws of the
In this case, a group called “Rivers Union” petitioned the appellant, but the group is non-existent and the petitioners were anonymous. It was the case of the appellant that nobody from the supposed union made any statement to the EFCC and nothing was volunteered by the supposed union as evidence against the appellant.

Given the failure of proper prosecution of cases brought pursuant to anonymous complaints and the fear of reprisals by complainants against the activities of high level fraudsters, it is important that appropriate legislative provisions for protection of whistle blowers and witnesses be introduced, either through amendments of relevant laws or through enactment of separate legislation. India took some clear step in this direction to provide protection to whistle blowers.

The use of the word “or” under the subsection, means that the violation of any of the subsections under section 2 may attract terms of imprisonment between 5 years and 15 years without any option of fine.

3. **Use of premises**

A person who, being the occupier or is concerned in the management of any premises, causes or knowingly permits the premises to be used for any purpose which constitutes an offence under this Act commits an offence and is liable on conviction to imprisonment for a term of not more than 15 years and not less than 5 years without option of a fine.

**Comment**

Emphasis in this subsection is on the words “Occupier” and “Premises”. These terms have been aptly defined in ODUA V. FRN per Chukwuma – Eneh JCA. Thus:

“...Occupier” has its ordinary dictionary meaning as

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23 Sections 5 and 24 of the Indian Prevention of Corruption Act, 1988
24 (2002) 5 NWLR (pt 761) 615 at 631 – 632
To be liable under this section, it must be proved that the accused person was the occupier or person concerned with the management of the premises in question and that the accused knowingly permitted the said premises to be used in committing the offence under the Act. The prosecution must link the accused person with the premises and prove that the accused knowingly permitted its use in the commission of the offence. The “Occupier” or “Manager” of the premises need not be the owner of that premises.  

4. **Fraudulent invitation**

A person who by false pretence, and with the intent to defraud any other person, invites or otherwise induces that person or any other person to visit Nigeria for any purpose connected with the commission of an offence under this Act commits an offence and liable on conviction to imprisonment for a term of not more than 20 years and not less than 7 years without the option of a fine.

**Comment**

Where it is shown that the accused person manifested a fraudulent action or conduct aimed at inviting or inducing any person resident outside Nigeria, to visit Nigeria for the purpose of obtaining any advantage or for any other purpose connected with the commission of any offence under the Act, that person is liable under this section. Such false pretence could be done by oral communication, or in writing or even by conduct of the accused person. Prosecution must prove that such act of the accused was aimed at inducing the victim’s invitation for the purpose of committing an offence under the Act. It is not an offence if accused merely invited or induced such invitation for any other purpose than a purpose connected with the commission of an offence under the Act. For the accused to be liable, the

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25 ODUA V. FRN (Supra) at 632 – 633
prosecution need not show that the victim actually came into Nigeria. All that is required is that the accused actually sent an invitation with evidence to that effect, and that he had a fraudulent intent for such invitation against the provisions of the Act. This section was inspired by the need to curb the menace of fraudsters who send countless solicitations to unsuspecting foreigners through letters, e-mails and telephone calls offering mouth-watering non-existent deals with the sole aim of defrauding them.

5. Receipt of fraudulent letter, etc., by victim to constitute attempt

(1) Where a false pretence which constitutes an offence under this Act is contained in a letter or other document, it shall be sufficient in a charge of an attempt to commit an offence under this Act to prove that the letter or other document was received by the person to whom the false pretence was directed.

(2) Notwithstanding anything to the contrary in any other law, every act or thing done or omitted to be done by a person to facilitate the commission by him of an offence under this Act shall constitute an attempt to commit the offence.

Cross Reference
- For what constitutes an attempt see section 4 of the Criminal Code Act Cap C38 LFN, 2004
- For the definition of “Document” see section 20 of the Act; also see section 2 of the Evidence Act Cap E14 LFN, 2004

Comment

An attempt to commit an offence is an act done with intent to commit that crime and usually forms part of the series of acts, which would constitute its actual commission if it were not interrupted\textsuperscript{26}. The crime of attempt includes acts that, although initiated with the aim of committing a crime, falls short of completion of the ingredients for the substantive offence. In other words, any act or thing done or omitted to be done by a person to facilitate the commission by him, of

\textsuperscript{26} See Stephen’s Digest of Criminal Law (5\textsuperscript{th}) ed, 1894
an offence under the Act constitutes an attempt to commit the offence\textsuperscript{27}.

The 	extit{mens rea} of the offence, which is the intent to defraud, and the \textit{actus reus}, which is the receipt of the fraudulent letter by the intended recipient make this offence complete irrespective of the response of the recipient.

In \textit{SANNI V. STATE}\textsuperscript{28}, Achike JCA in describing what constitutes an attempt to commit an offence had this to say:-

\begin{quote}
\emph{The actus reus of an attempt to commit a distinct or specific offence comprises an act done by the accused in furtherance of the immediate commission of the distinct or specific offence and the act cannot reasonably be regarded as having any purpose except the commission of the distinct or specific offence.}
\end{quote}

Thus, the mere receipt of the fraudulent letter or document, constitutes the offence of an attempt to commit an offence under the Act. Under this section, the prosecution need not show that the writer’s intended offence of defrauding the recipient has been consummated, or that the recipient actually acted upon the fraudulent document\textsuperscript{29}.

In \textit{FRN V. AMADI}\textsuperscript{30}, the court held that the constituent elements of the inchoate crime of an attempt are:-

\begin{enumerate}
\item[a)] a physical act by the offender sufficiently proximate to the complete offence, and
\item[b)] an intention on the part of the offender to commit the offence.
\end{enumerate}

Also in \textit{NWANKWO V. FRN}\textsuperscript{31}, it was held that under section 5(1) of the (Advance Fee Fraud) Act, where a false pretence is contained in

\textsuperscript{27} Section 4 of the Criminal Code Act Cap 38 Laws of the Federation of Nigeria. 2004
\textsuperscript{28} (1993) 4 NWLR (pt. 285) 99 at 122
\textsuperscript{29} MIKE AMADI V. FEDERAL REPUBLIC OF NIGERIA (2008) 7 EFCLR 64 at 99
\textsuperscript{30} (2006) 1 EFCLR 14 at 45
\textsuperscript{31} (2003) 4 NWLR (pt 809) 1
a letter or other document, it shall be sufficient in a charge of an attempt to commit an offence under the Act to prove that the letter or document was received by the person to whom the false pretence was directed.

The term “Document” under section 20 of the Act is given a wider meaning beyond the definition of “document” in the Evidence Act\textsuperscript{32}. Document under the (Advance Fee Fraud) Act includes “letters, maps, plans, drawing, photographs and also includes any matter expressed or described upon any substance by means of letter, figures or marks or by more than one of these means, intended to be used or which may be used for the purposes of recording that matter and further includes a document transmitted through fax or telex machine or any other electronic or electrical device, including a telegram and a computer printout.

In **MIKE AMADI V. FRN (Supra)** Appellant was charged with the offences of attempt to obtain money by false pretence, forgery and uttering forged documents contrary to sections 1(3), section 5(1) and 8(b) of the Advance Fee Fraud and Fraud Related Act, and section 467(2) of the Criminal Code. The appellant had severally sent e-mails to one Graham Rouse in England in the name of Nuhu Ribadu, former Chairman of the Economic and Financial Crimes Commission and purporting to be him, with fraudulent intentions to obtain money by false pretence. An agent of the EFCC Abdulkarim Chukkol, acting on a tip-off served as an agent provocateur in the name of Fabio Fajan, leading to the arrest of the appellant. Upon conviction on counts 1, 2, and 4, appellant appealed to the court of appeal. Unanimously dismissing the appeal, the Court of Appeal held that for the prosecution to succeed in proving the offence, it must prove the following essential ingredients, to wit:

1. That there is a pretence
2. That the pretence emanated from the appellant
3. That the pretence constitutes an offence under the Act

\textsuperscript{32} Cap E14 Laws of the Federation of Nigeria, 2004; see section 2 thereof.
(4) That such pretence is contained in a letter or other document

(5) That the letter or other document was received by the person to whom the false pretence was directed

per Galinje, JCA, at p.99 lines 25 – 45

6. Possession of fraudulent document to constitute attempt

A person who is in possession of a letter containing a false pretence which constitutes an offence under this Act is guilty of an attempt to commit an offence under this Act if he knows or ought to know, having regard to the circumstances of the case, that the letter contains the false pretence.

Cross Reference
- For the definition of “Document”, see section 20 of the Act; also see section 2 of the Evidence Act Cap E14 LFN, 2004

Comment

The accused person under this section, need not have completed the offence under the Act, as the intent to defraud appears to be the essential ingredient. All the prosecution is required to prove is the fraudulent intentions of the accused person and that the accused person was actually in possession of a letter or other document containing a false pretence which constitutes an offence under this Act.

On the essential ingredients the prosecution must prove to establish the offence as provided in this section and punishable under section 8(b), see FRN V. ABDUL34 In this case, the accused was charged on a two count information of possession of documents containing false pretence contrary to sections 6, 8(b) and 1(3) of the Advance Fee Fraud Act. The accused was alleged to have in his possession a document containing false pretence, with intent to defraud one Mr.

33 See section 20 of the Act for the meaning of “Document”. Also see Section 2 of the Evidence Act, Cap E14, LFN 2004.
34 (2007) 5 EFCLR p.204 per C. O. Idahosa J.
Richard Bradley and one Mr. Theron Conner, by representing himself as Head of Security, Royal Bank of Scotland. The accused represented himself as being capable of releasing to the supposed victim an unclaimed sum of £8 million British pounds purported to belong to one Mr. Enrique Salcedo (deceased). Accused was later arrested in a cybercafé with a black dairy containing 3 e-mail addresses, which were later found to contain scam e-mail messages. The messages were printed out by the EFCC official and tendered and marked D1 & D2.

The intriguing aspect of this section is the question as to what may constitute “possession”. With the advancement of technology in this information age, it may be difficult to ascertain whether documents contained in an e-mail box and other device of similar category, will suffice as possession against the owner of such e-mail box and similar device.

Discharging the accused in FRN V. ABDUL (supra), the High Court, Edo State, per Idahosa J stated as follows:-

“The problem is that with this new technology, the traditional definition of possession, in my view seems inadequate to describe a situation where there are electronic mail boxes, with documents in them floating about in space. There is a need to explain this to the court vide an expert witness ... This could enable the court determine whether or not the facts of a document floating about in space in the e-mail box of the accused was in his possession as charged.”

See p.226, paras 30 – 45.

His lordship in that case went further to state that:

“... where a letter has been posted in the regular method of sending, the person who posted same cannot be held to be in possession of the letter,... while the writer may be guilty of sending a scam letter,
certainly, he cannot be guilty of being in possession of a letter he has written and posted ...” See p. 228, para 30 – 40

7. **Laundering of funds obtained through unlawful activity, etc.**

   (1) A person who conducts or attempts to conduct a financial transaction which in fact involves the proceeds of a specified unlawful activity—
   
   (a) with the intent to promote the carrying on of specified unlawful activity; or
   
   (b) where the transaction is designed in whole or in part—
   
   (i) to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of a specified unlawful activity; or
   
   (ii) to avoid a lawful transaction under Nigerian law, commits an offence under this Act if he knows or ought to know, having regard to the circumstances of the case, that the property involved in the financial transaction represents the proceeds of some form of unlawful activity.

   (2) A person who commits an offence under subsection (1) of this section, is liable on conviction—
   
   (a) in the case of a financial institution or corporate body, to a fine of N1 million, and where the financial institution or corporate body is unable to pay the fine, its assets to the value of the fine shall be confiscated and forfeited to the Federal Government; or
   
   (b) in the case of a director, secretary or other officer of the financial institution or corporate body or any other person, to imprisonment for a term of not more than 10 years and not less than 5 years

   (3) When as a result of negligence, or regulation in the internal control procedures, a financial institution fails to exercise due diligence as specified in the Banks and Other Financial Institutions Act, 1991 as amended or the Money Laundering (Prohibition) Act, 2004 in relation to the conduct of financial transactions which in fact involve the proceeds of unlawful activity—
   
   (a) the financial institution commits an offence and is liable on conviction to refund the total amount involved in the
financial transaction and not less than ₦100,000 sanction by the appropriate financial regulatory authority.

(b) a director, secretary, employee or other staff of the financial institution who facilitates, contributes or otherwise is involved in the failure to exercise due diligence as stipulated under this section, commits an offence and is liable on conviction to imprisonment for a term of not less than three years and may also be liable to be banned indefinitely for a period of three years from exercising the profession which provided the opportunity for the offence to be committed.

(4) A person who transports or attempts to transport a monetary instrument or funds from a place in Nigeria to or through a place outside Nigeria or to a place in Nigeria from or through a place outside Nigeria -

(a) with the intent to promote the carrying on of specified unlawful activity; or

(b) where the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and the transportation is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of a specified unlawful activity; or

(ii) to avoid a lawful transaction under Nigerian law, commits an offence under this act, if he knows or ought to know, having regard to the circumstances of the case, that the monetary instrument or funds involved in the transportation are the proceeds of some form of unlawful activity and the intent of the transaction.

(5) A person who commits an offence under subsection (3) of this section is liable on conviction to a fine of N500,000 or twice the value of the monetary instrument or funds involved in the transportation, whichever is higher, or imprisonment for a term of not less than 10 years or to both such fine and imprisonment.

(6) In this section—

(a) "conducts" includes initiating, being involved, connected with, concluding, or participating in initiating or concluding a transaction;
(b) "financial institution" means a banks, body association or group of persons, whether corporate or incorporate which carries on the business of investment and securities, a discount house, insurance institutions, debt factorization and conversion firms, bureau de change, finance company, money brokerage firm whose principal business includes factoring, project financing, equipment leasing, debt administration, fund management, private ledger services, investment management, local purchase order financing, export finance, project consultancy, financial consultancy, pension funds management and such other businesses as the Central Bank of Nigeria or other appropriate regulatory authorities may from time to time designate.

(c) "financial transaction" means—

(i) a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects foreign monetary instrument; or

(ii) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, foreign commerce in any way or degree;

(d) "knows or ought to know that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew or ought to have known that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes an offence under this Act;

(e) "monetary instrument" means coin or currency of Nigeria or of any other country, traveller's cheque, personal cheque, bank cheque, money order, investment security in bearer form or otherwise in such form that title thereto passes upon delivery;

(f) "proceeds" means any property derived or obtained, directly or indirectly through the commission of an offence under this Act;

(g) "property" includes assets, monetary instruments and instrumentalities used in the commission of an offence under this Act;

(h) "specified unlawful activity" means—

(i) any act or activity constituting an offence under this Act;

(ii) with respect to a financial transaction occurring in whole
or in part in Nigeria, an offence against the laws of a foreign nation involving obtaining property by fraud by whatever name call

(i) "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution, includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

Cross Reference
- For concealing or disguising or transferring or transporting or retaining proceeds of crime, see sections 15 and 17 of the Money Laundering Act, 2011; also see sections 17 and 18 of the Economic and Financial Crimes (Establishment, etc) Act
- For requirement of due diligence and customer identity by banks and other financial institutions, see sections 3 and 4 of the Money Laundering Act 2011; also see section 14 of the Economic and Financial Crimes (Establishment, etc) Act Cap. E1

Comment

This section aims to prevent the laundering of proceeds through any form of financial transaction, flowing from the commission of any offence under the Act, or any other unlawful activity. The “proceeds” referred to under this section is not limited to monetary or financial benefits alone but includes assets and other monetary instruments such as cheques, money order, investment security etc. Laundering of such illegal proceeds from any unlawful activity for purposes of concealing the source, nature and ownership, with knowledge of the nature of such proceeds, is an offence

For the purpose of the section, it is immaterial that the person laundering the proceeds of the specified unlawful activity was the owner of such proceeds or was not involved or did not participate in the specified unlawful activity from which the proceeds accrued. All

35 See section 7(1) (a) of this Act. Also see section 14 Money Laundering Act, Cap M18, LFN, 2004
that the prosecution needs to establish is that such a person involved in the laundering knew or, from the circumstances, ought to have known that the proceeds was from an unlawful activity. It suffices if the circumstances revealed that the accused reasonably ought to have known that the proceeds was not from a legal transaction or activity. If the circumstances show that the accused person had sufficient reason to know that the property in question was a proceed from an unlawful activity, the offence is proved. What is required of the persecution is to show that the accused person was at the material time certain or almost certain—more than merely suspicious—that the property is the proceed of an unlawful activity. What constitutes a “specified unlawful activity” is a question of fact.

A person, under the provisions of this section, need not complete the act of laundering the proceeds of the specified unlawful activity to be liable for the offence; mere attempt to launder under this section is enough and punishable under section 8(b) of the Act, which relates to attempt to commit an offence. An attempt to commit an offence is an act forming part of a series of acts, which would constitute its actual commission if it were not interrupted.

The section provides for the offence of transporting fund or monetary instrument being the proceeds of any unlawful activity prohibited under the Act into or outside Nigeria. The accused person needs not be the owner of the proceed(s) of the unlawful activity. What is essential to prove is that at the material time, the accused person knew or reasonably ought to have known that the fund or such monetary instrument being transported by him was the earned from some form of unlawful activity prohibited by the Act.

It is immaterial that such proceeds have been actually transferred, provided that there was an overt act which clearly manifests the intention with the knowledge that such proceeds emanated from a specified unlawful activity or to avoid a lawful transaction under

36 See section 7 (b) (d) of the Act
Nigerian law, or to conceal the nature, location, source, or ownership of the unlawful proceeds.

8. **Conspiracy, aiding, etc.**

A person who—

(a) conspires with, aids, abets, or counsels any other person to commit an offence; or

(b) attempts to commit or is an accessory to an act or offence; or

(c) incites, procures or induces any other person by any means whatsoever to commit an offence, under this Act, is guilty of the offence and liable on conviction to the same punishment as is prescribed for that offence under this Act.

*Comment*

The punishment for any of the offences under this section is the same as the main offences as prescribed under the Act. Thus, a person who conspires with, aids and abets or counsels any other person to commit an offence under this Act, is liable on conviction to the same punishment as the principal offender.

Conspiracy is not defined under this Act. His lordship, Tobi JCA (as he then was) defined conspiracy in the case of *SHODIYA V. THE STATE*\(^{37}\). Thus:-

“legally, conspiracy simply means the meeting of two or more minds to carry out an unlawful purpose …”

In this respect, two or more persons who enter an agreement for the purpose of accomplishing an unlawful act or accomplishing a lawful act by unlawful means are guilty of conspiracy.

\(^{37}\) (1992) NWLR (pt 230) 457 at 472 para F – G.

*Cross Reference*

- For conspiracy, aiding, abetting, procuring, counseling, inciting, inducing etc commission of offences, including economic and financial crimes; see sections 7 and 516 to 521 of the Criminal Code Act Cap. C38 LFN 2004; see section 18 of the Money Laundering Act, 2011; also see section 14 of the National Drug Law Enforcement Agency Act Cap N30, LFN, 2004.
In *FRN V. OLAWOYIN*\(^{38}\), - The two accused persons were charged upon complaint by the EFCC, at the Ikeja High Court on 4 counts charge of conspiracy, common intention to defraud and obtaining money by false pretence from one Mrs. Victoria Iyoha, contrary to sections 8(a) and 2 (b) of the Advance Fee Fraud Act, No 13 as amended by Act No. 62, 1999. Discharging and acquitting the accused persons, the court defined conspiracy thus:-

"legally, conspiracy simply means the meeting of two or more minds to carry out an unlawful purpose in an unlawful way ... while the law does not require the physical meeting of the minds in a predetermined or known place, as the offence of conspiracy could be committed by written communication, the prosecution must establish that the criminal minds really met somewhere to hatch a crime."\(^{39}\)

It is essential that the offence of conspiracy must relate to the commission of an offence under the Act\(^{40}\).

Conspiracy may not be always proved by direct evidence as it is generally a matter of inference deduced from certain criminal acts and conducts of the parties accused, done or carried out in pursuance of an apparent criminal purpose in common between them\(^{41}\). The intendment of this section of the Act is to hold liable all those persons, though not being the principal offenders, but who in one way or another facilitated or played a role towards the commission of the offence. To be liable for aiding and abetting the offence under this

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\(^{38}\) (2006) 1 EFCLR 139

\(^{39}\) Also see GBADAMOSI & ORS V. THE STATE (1991) 6 NWLR (pt 196) 182


\(^{41}\) See Kekere – Ekun J. in FEDERAL REPUBLIC OF NIGERIA V. OLAWOYIN (Supra) P. 175 paras 10 – 30. Also see IKEMSON V. THE STATE (1989)3 NWLR (pt 110) 455; FRN V. ODIAWA 2006) 3 EFCLR 125; SHODIYA V. STATE (Supra);
Act, it must be shown that the accused did or omitted to do an act, either before or after the commission of the actual offence in order to promote or facilitate the commission of the offence or its concealment. Such act of the accused must be contemporaneous with the actual commission of the offence.42

To be liable for counselling, procuring, inciting or inducing the commission of an offence under the act; the prosecution must show that accused person was involved in some positive act of encouragement. There must be a relationship between the act of the accused person and the commission of the actual offence. This can be deduced from the surrounding circumstances.43 Note that the person who procures, counsels and induces the commission of the offence under this Act will be liable even if the execution of the actual offence he procured or counselled differed in respect of time, place, and manner.44

To constitute an attempt, the act must be immediately connected with the possible commission of the substantive offence. In other words, there must be a clear and unequivocal nexus between the overt act envisaged by section 8 and the substantive offence.45

The mere mental determination not accompanied by an act to execute such intention is neither criminal nor punishable in law as an attempt. Whilst mere preparatory acts do not ordinarily constitute an offence, a proximate act that falls within the definition of “attempt” may constitute an offence distinct and separate from the crime which is committed when the act is consummated. Thus, the offender under subsection (b) of this section must undertake an overt act which clearly manifests the intention, but which does not amount to its

43 See R. v. CALHEM (1895) IK. B. 808.
44 See STATE v. OKECHUKWU (1994) 9 NWLR (pt 369) 273.
45 IDEN v. STATE (1994) 8 NWLR (pt. 365) 719 at 727 – 728 per Tobi, JCA (as he then was)
fulfillment\textsuperscript{46}. Under the Criminal Code, attempt to commit a felony or misdemeanor is itself a felony or misdemeanor, but the punishment is usually not the full measure of the punishment of the full offence.

9. Conviction for alternative offence

(1) Where a person is charged with an offence under this Act and the evidence establishes an attempt to commit that offence, he may be convicted of having attempted to commit that offence although the attempt is not separately charged and such a person shall be punished as is prescribed for the offence under this Act.

(2) Where a person is charged with an attempt to commit an offence under this Act, but the evidence establishes the commission of the full offence, the offender shall not be entitled to acquittal but shall be convicted of the offence and punished as provided under this Act.

Comment

Where the offence for which a person is charged was not established by the evidence adduced by the prosecution, such accused person may be convicted of attempt to commit the offence, provided that attempt to commit such offence was proved. It does not matter that the accused person was not charged with attempt.\textsuperscript{47} What this means is that the accused may be convicted for attempt to commit the offence charged even though not charged with it, provided that the ingredients to established attempt are proved. Punishment is as prescribed for the main offence under the Act.

\begin{quote}
\textit{The duty of the court is to uphold the law by ensuring that order is maintained ..., courts are vested with powers to convict for a kindred offence other than that charged, to serve the ends of justice and ensure that no one escapes the long arm of the law. ... Thus being}
\end{quote}

\textsuperscript{46} See sections 509 & 510 of the Criminal Code Act Cap C38, LFN 2004
\textsuperscript{47} See BABALOLA V. THE STATE (1988) 4 NWLR 264; OKABICHI V. THE STATE (1975) 9 NSCC 124 at 132 - 133
charged under a wrong law cannot serve as an escape
to let corrupt and dishonest persons escape being
punished.”

In BABALOLA V THE STATE (supra) the Supreme Court, per Karibi-Whyte JSC held that:

“...As a general rule, an accused person can only be
found guilty in respect of the offence for which he is
charged .... But there are circumstances where the
evidence adduced by the prosecution in support of the
charge against the accused has failed to support a
conviction for that charge but fully establishes the
commission of a kindred offence. It is in this respect
interest rei publicae ut sit-fins litium, that the courts
are empowered to convict an accused person of an
offence other than the one with which he is expressly
indicted on the charge.”

Conversely, this section also permits the conviction for the main
offence, where the accused person is charged with attempt but
evidence adduced established the ingredients of the main offence.

In FRN V. ABDUL (supra) at p.299 para 10 – 15, the prosecution
being unable to prove the offence for which the accused was charged
as provided under section 6(8)(b) and 1(3) of the Act, sought for the
conviction of the accused person under this section.

1. Acknowledgment of service.
2. Detention of person refusing to acknowledge service
3. Offence under Act to be seizable offences and bailable etc
4. Prohibition of dealing with property outside Nigeria
5. Forfeiture of property upon prosecution for an offence
6. Independent counsel to investigate President, etc.

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7. Presumption in certain offences etc.
8. Public evidence of corroboration
9. Presumption in favour of admissibility of certificate issued by principal or employer etc.
10. Joinder of offences
11. Certificate of indemnity in favour of full disclosure
12. Protection of informers and information
13. Protection of officers of the Commission
14. Liability for offences outside Nigeria
15. Application of provisions of this Act to any prescribed offence.
16. General penalty for other offences
17. Powers of police officers under this Act.
18. Right of appeal
19. Repeal of Act No. 5 of 2000