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Larry O.C. Chukwu
University of Abuja, Nigeria

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PENSION TRUST INVESTMENT IN NIGERIA – CELEBRATING THE SEA CHANGE WROUGHT BY THE PENSION REFORM ACT

DR. LARRY O.C. CHUKWU*

ABSTRACT

This work surveys the modalities for pension trust investment in Nigeria, which has only recently been favoured with a distinct legal framework. It gives a brief historical account of pension administration in Nigeria, identifies the policy and philosophical underpinnings of the new pension regime, expounds the relevant provisions of the Pension Reform Act 2014 together with the Regulation on Investment of Pension Fund Assets, and concludes with a critique of the Act and recommendations. Pertinent comparison is made between the provisions of the new legislation and extant Trustee Investments Act (which hitherto governed pension trust investments) with a view to underscoring the sea change wrought by the new Act. Despite drafting flaws and other inadequacies, by creating a separate regime for pension trust investment; introducing defined contribution scheme and pension trusts into the public service; enlarging the scope of pension trust investments and initiating guaranteed minimum pension and Pension Protection Fund, the recent enactment represents a milestone in the annals of Nigerian pension legislation.

* Ph.D, LL.M., B.L., LL.B; Associate Professor of Law, University of Abuja, Nigeria.

I. INTRODUCTION

This discourse is concerned with the investment of funds held in trust under occupational pension schemes, which could be either earnings-related or money-purchase schemes. The former, also known as a “defined benefit” scheme, was implemented in the entire public service across the Federation of Nigeria under the pension statutes¹ in force prior to 2004 when the Pension Reform Act (PRA) was first enacted. Then, the pension scheme was either non-funded, in most cases, or grossly underfunded, in others. That regime was marred by a weak, inefficient and corrupt administration² and, overall, it was unsustainable due to vast accumulated pension liabilities. Retirees suffered untold hardship and many even died in the struggle for access to their retirement benefits. To remedy the situation, the money-purchase scheme, otherwise referred to as a “defined contribution” or “contributory pension” scheme, was introduced by the Act with the aim of providing a reliable, sustainable and adequate source of retirement benefits.

By Section 1(2) of the 2004 Act, its application covered employees in the public service of the Federation, Federal Capital Territory and any private sector organization having at least five employees. The 2004 Act was recently repealed and re-enacted as PRA 2014, Section 2(1) of which extends its application to employees in the public service of the States and Local Government Councils while Section 2(2) raises the benchmark for private sector participation to a minimum of 15 employees.³ However, as this writer has argued elsewhere,⁴ the extension of the application of the Act to employees of the States and Local Government

1. Including the Pensions Act, Cap. P4, Laws of the Federation of Nigeria 2004 [hereinafter LFN 2004]; Police and other Agencies Pensions Offices (Establishment, etc.) Act, Cap. P20, LFN 2004 and Police (Pension Rights of Inspector-General of Police) Act, Cap. P21, LFN 2004, all of which were repealed by the Pension Reform Act No. (2) (2004), A61 § 99 (Nigeria) [hereinafter PRA]. See also the pre-2004 Pensions Laws of the various States.

2. Not long ago, there was a startling discovery of large-scale frauds involving about ₦32.8 billion of the Police Pension Funds, for which the alleged culprits (eight of them, including a Permanent Secretary in the Federal Civil Service) have been charged to court: see *THIS DAY*, Mar. 30, 2012, at 10. One of the accused persons, John Yakubu Yusufu, an Assistant Director in the Police Pensions Board, who was said to have confessed that he received ₦3 billion as his own share of the loot, entered into a plea bargain with the prosecution whereby he pleaded guilty to three counts of an amended charge and he was forthwith convicted and sentenced to prison with option of fines (which he instantly paid and went home): see *Federal Republic of Nigeria v. Esai Dangabar & 7 Ors.*, [2013] No. FCT/HC/CR/64/2012 (F.H.C., Abuja Jan. 28, 2013).

3. Exemptions have been made for judicial officers and military, intelligence and secret service personnel (but not police officers) as well as public servants who were under the defined benefit scheme prior to 25 June 2004 when PRA first came into force and as at that date had not more than three years to retire.

Councils as well as private sector organizations is clearly unconstitutional.

Under the new pension scheme, both the employer and employee to whom the Act applies are obligated to contribute a minimum of ten percent and eight percent, respectively, of the employee's monthly emoluments.⁵ The contributions are transferred to private pension fund managers to be held in trust and managed for the benefit of the employee and his dependants. By contrast, the previous public service earnings-related pension scheme was generally non-funded; hence it involved no trust funds. However, a few statutory corporations, such as the Nigerian Ports Authority, National Electric Power Authority, and Nigerian National Petroleum Corporation, established superannuation funds which were held in trust for their retired employees. This basically explains why the law and practice relating to pension fund trusts are still at the embryonic stage of development in Nigeria.

The PRA established the National Pension Commission (PenCom),⁶ whose functions include, *inter alia*, the issuance of guidelines, rules and regulations for the investment and administration of pension funds.⁷ It also introduced a dual trusteeship arrangement whereby the Pension Fund Administrator (PFA) is charged with the management of the funds, while the Pension Fund Custodian (PFC) is given the custody of the pension fund assets.⁸ Both the PFA and PFC must be incorporated as limited liability companies and licensed by PenCom which exercises regulatory and supervisory powers over them.⁹

In most common law jurisdictions, pension trusts have always been governed by the same investment principles as orthodox trusts.¹⁰ Thus, in

4. L.O.C. Chukwu, *Extension of the Pension Reform Act to State Public Service and Private Sector Employments: Overreaching the Legislative Powers of the National Assembly*, 11 NIGERIAN L. & PRAC. J. 48 – 65 (2012).

5. PRA (2014), § 4(1).

6. *Id.* § 17 (re-enacting PRA (2004), § 14).

7. *Id.* § 23(b) (re-enacting PRA (2004), § 20(b)).

8. *Id.* §§ 54 – 57 (re-enacting PRA (2004), §§ 44 – 47).

9. *Id.* §§ 58 – 62 (formerly PRA (2004), §§ 49 – 52).

10. *Cowan v. Scargill*, [1984] 2 All E.R. 750 at 763 (Eng.); *Wilson v. Law Debenture Trust Corp. plc*, [1995] 2 All E.R. 337(Eng.); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 – 11 (1989); *Bathgate v. National Hockey League Pension Society* (1994), 16 O.R. 3d 761 at 776 (Can.); *Stuart v. Armourguard Security Ltd.* (1996- 1 NZLR 484 (N.Z.); *Fasel Services Ltd v. Nigerian Ports Authority* [2003] 8 NWLR (Pt. 821) 73, CA; affirmed [2009] 9 NWLR (Pt. 1146) 400, SC (Nigeria). *Cf. Imperial Group Pension Trust Ltd v. Imperial Tobacco Ltd*, [1991] 2 All E.R. 597 (Eng.). *See also* G. Moffat, *Pension Funds: A Fragmentation of Trust Law*, (1993) 56 M.L.R. 471, who, however, rejects “any necessary symbiosis” between pension trust law and the orthodox law of trusts.

Nigeria, the provisions of the Trustee Investments Act (TIA)¹¹ had hitherto been applicable to pension fund trusts as any other trusts.¹² At present, special provisions governing the investment of pension funds are contained in Part XII of PRA 2014 which, by virtue of Section 119 thereof, supersede the provisions of TIA. It is, however, submitted that, despite the introduction of a distinct regulatory regime, pension trusts are still subject to the general principles of equity which could also be called in aid when interpreting the provisions of the new legislation. Should there be a conflict between the rules of equity and the statutory provisions, the latter shall naturally prevail.

The new Act imposes a duty on the PFA to invest all pension funds under its management “with the objectives of safety and maintenance of fair returns on amount invested.”¹³ Meanwhile, PFA has to hold all pension contributions entrusted to it in a single investment fund, until provisions are made by PenCom for multiple investments.¹⁴ The underlying philosophy of the investment provisions of the Act appears to be to liberally broaden the scope of pension trust investments and to jolt PFAs to embrace the portfolio investment technique. Thus, with the exception of securities issued by private companies and the direct acquisition of land, virtually all other types of investment that could be contemplated by any savvy investor have been authorized for PFAs, subject to the scheme of apportionment of investments or limits set out in the regulations made by PenCom.

Under the repealed PRA 2004, the investment of pension funds outside the territory of Nigeria could only be made with the approval of the President upon the recommendation of PenCom.¹⁵ It appears, however, that no such presidential approval has been given so far. By contrast, the 2014 Act¹⁶ allows the investment of pension funds outside Nigeria within the categories of trustee investments authorized by the Act, but subject to portfolio limits approved by the President on the recommendation of PenCom.

Considering the expressed fundamental objectives of safety and maintenance of fair returns, perhaps, the makers of the former Act thought that

11. Cap. T22, LFN 2004.

12. *See, e.g.*, Fasel [2003] 8 NWLR (Pt. 821) 73.

13. PRA (2014), § 85(1) (re-enacting PRA (2004), § 72).

14. As at the time of writing, PenCom was in the process of introducing a multiple-fund structure for pension fund investments.

15. PRA (2014), § 74(2).

16. PRA (2014), § 87. Note that there is no scope for foreign investment under the TIA.

the costs, hazards and obstacles associated with foreign investment are apt to be disproportionate to the expected returns, for which reason it needs to be checked. "Of course, the downside to an international portfolio is increased management and transaction costs, and increased numbers of managers means an increased risk of fraud and error."¹⁷ Moreover, there might be legal impediments to the beneficiaries' enforcement rights under a foreign legal system, such as the non-recognition of trusts or of the dual trusteeship of the PFA and PFC by the foreign law. Other associated risks include exchange control regulations, exchange rate fluctuations, unfavourable fiscal policies and nationalization of foreign assets. So also there might be challenges in the realization and repatriation of foreign investments, which could frustrate the attainment of the overarching goal of the new scheme, i.e., to ensure that pension benefits are paid "as and when due."¹⁸ Over and above all these considerations, the desire to develop the local economy clearly justifies the imposition of some restriction on foreign investment. As an eminent English judge once acknowledged whilst considering the propriety of overseas investment of pension funds, "a case, perhaps a strong case, can be made for legislation or other provisions that in the general public interest would restrict the outflow of large funds from this country and put the money to work here."¹⁹ If such an investment philosophy could be expressed in a developed economy like Britain, *a fortiori*, a developing economy such as ours needs such an undoubtedly gargantuan block of investment capital²⁰ like oxygen. Surely, no pension fund could be so vast as to be incapable of absorption by the domestic investment market.

Having said that, it seems not open to question that there are occasions when foreign investments would have the prospects of higher returns without the safety and accessibility of the funds being compromised. Besides, investing in foreign markets provides international diversification that might prove useful in mitigating certain risks associated with investing exclusively in the domestic market.²¹ Accordingly, it may well be in the best interests of pension trust beneficiaries to accommodate some prudently selected foreign investments in the investment portfolio.²² It is,

17. G. WATT, *TRUSTS AND EQUITY* 416 (4th ed. Oxford Univ. Press 2010).

18. PRA (2014), § 1(c) (re-enacting PRA (2004), § 2(a)).

19. *Per* Megarry, V-C, in Cowan, 2 All E.R. 750 at 766.

20. As of June 30, 2014, the total value of pension fund assets under the contributory pension scheme stood at N4.43 trillion: see C. Anohu-Amazu, *The Contributory Pension Scheme as a Catalyst for Economic Development in Nigeria*, Paper Presented on Behalf of the National Pension Commission at the Annual General Conference of the Nigerian Bar Association (Aug. 25 – 28, 2014).

21. G. BARROW, *PENSION FUND ADMINISTRATION IN NIGERIA* 111 (Abuja: Pen & Pages 2008); E. Ford, *Trustee Investment and Modern Portfolio Theory*, 10 T.L.I.102 (1996).

22. For a classic illustration, see Cowan, 2 All E.R. 750.

124 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

perhaps, in recognition of this truism that the framers of the PRA 2014 decided to throw the door open to foreign investment, the only restriction now being the setting of portfolio limits by PenCom with the approval of the President.

II. INVESTMENTS AUTHORIZED BY PRA 2014

Section 86 of PRA 2014 prescribes the investments in which pension funds can be invested as follows:

Subject to guidelines issued by the Commission [PenCom], pension funds and assets shall²³ be invested in any of the following –

- (a) bonds, bills and other securities issued or guaranteed by the Federal Government and the Central Bank of Nigeria;
- (b) bonds, bills and other securities issued by the States and Local Governments;
- (c) bonds, debentures, redeemable preference shares and other debt instruments issued by corporate entities and listed on a Stock Exchange registered under the Investments and Securities Act;
- (d) ordinary shares of public limited companies listed on a Stock Exchange registered under the Investments and Securities Act;
- (e) bank deposits and bank securities;
- (f) investment certificates of closed-end investment fund or hybrid investment funds listed on a securities exchange registered under the Investments and Securities Act with good track records of earning;
- (g) units sold by open-end investment funds or specialist open-end investment funds registered under the Investments and Securities Act;
- (h) real estate development investments; or
- (i) specialist investment funds and such other financial instruments as the Commission may, from time to time, approve.

23. Compare Section 3(1) of the TIA wherein the word “may” is used. The implication of the word “shall” in this provision is that it is mandatory, unlike the provision of Section 3(1) of the TIA which has been held not to be mandatory or exclusive, see *Fasel*, [2003] 8 NWLR (Pt. 821) 73, 107 – 108.

III. SECURITIES ISSUED BY THE FEDERAL GOVERNMENT

As can be seen from the above-quoted provision, the first class of securities authorized for the investment of pension funds consists of bonds, bills and other securities issued or guaranteed by the federal government and the Central Bank of Nigeria (CBN). The provision of Section 86(a) of the PRA 2014 is equivalent to Section 2(1)(a) of the TIA, which permits all trustees to invest in securities issued by or on behalf of the federal government. These include sovereign bonds (which are issued by the Debt Management Office and fully guaranteed by the federal government) and Nigerian Treasury Bills (which are issued by CBN).

Government securities (traditionally known as gilts) are ultra-secure in the sense that they produce guaranteed income whilst also maintaining the nominal value of the capital. For this reason, generally, a trustee cannot go wrong by investing in such securities. Under the latest Regulation on Investment of Pension Fund Assets made by PenCom on December 17, 2012 (herein referred to as “PenCom Regulation”),²⁴ this class of securities has the highest allocation of 80% of pension fund assets.²⁵ Indeed, under the initial Guidelines for Assets Allocation made by PenCom in 2006, it was permissible to invest 100% of pension fund assets in federal government securities only. This lends credence to the notion that government securities are comparatively the most suitable type of trustee securities, despite the major drawback of their inability to react to inflationary trends.

IV. SECURITIES ISSUED BY STATES AND LOCAL GOVERNMENT COUNCILS

The 2014 Act, unlike its predecessor, has now authorized the investment of pension funds in bonds, bills and other securities issued by the States and Local Government Councils. Before now, however, the PenCom Regulation²⁶ had extended the investment powers of PFAs to bonds issued by eligible state and local governments or state government agencies or wholly-owned companies. Such bonds must be fully guaranteed by Irrevocable Standing Payment Orders (ISPO) or external guarantees by eligible banks or development finance institutions or Multilateral Development Finance Organizations (MDFO) such as the World Bank, Af-

24. Regulation on Investment of Pension Fund Assets (2012), available at http://www.pencom.gov.ng/docs/Regulation_on_Investment_of_Pension_Assets_2012.pdf [hereinafter PenCom Regulation].

25. *Id.* §§ 4.1, 9.3(i); see the tables under PenCom Regulation, §§ 7.4, 9.4.

26. *Id.* § 4.2.

rican Finance Corporation or African Development Bank.²⁷ As a precondition, however, such state and local governments or state government agencies or wholly-owned companies must have fully implemented the contributory pension scheme.²⁸ This sounds like PenCom using the carrot-and-stick approach to compel the States to enact the new Pensions Law which it imposes on them. Thus, any State that fails to contract in to the new contributory pension scheme would lose out in the scramble for access to the vast pension fund investments.

For state and local government bonds to attract pension fund investment, they must have sinking funds that are backed by legislation as well as ISPO or external guarantee by a bank, development finance institution or MDFO or a minimum credit rating of 'A' issued by a registered or recognized rating company.²⁹ Where the bond or debt instrument is not backed by ISPO, it must have a sinking fund backed by legislation and an Irrevocable Letter of Guarantee of Repayment of the instrument, supported with adequate Internally Generated Revenue and a trust arrangement with a reputable trustee registered by the Securities and Exchange Commission (SEC).³⁰ Also, the securities must be currently traded or tradable on a securities exchange registered by SEC or trading facility recognized by CBN.³¹

The maximum percentage of pension fund assets investible in this class of securities is 20%, if the issue is secured by an ISPO or a guarantee, as stipulated in regulation 4.2, or three percent, if not so secured. So also, a maximum of five percent of the pension fund assets can be invested in the total securities issued by any state or local government. There is a further limit per issue based on the credit rating of the bond/debt instrument as follows: (i) BBB: 16% of the issue, (ii) A: 18% of the issue, and (iii) AA and above: 20% of the issue.³² Thus, for any state or local government bond to qualify for pension fund investment, it must have a minimum credit rating of BBB by a registered or recognized rating company.³³

Comparing the PenCom Regulation with the provisions of the TIA, it is to be noticed that, first, while the former permits the investment of pen-

27. *Id.*

28. *Id.* § 2.7.

29. *Id.* § 5.2.1(iii).

30. *Id.* § 5.2.1(iv).

31. *Id.* § 5.2.1(v).

32. See the tables under PenCom Regulation, §§ 7.4, 9.4; *see also id.* § 9.5.

33. *Id.* § 5.1.3.

sion funds in bonds issued by Local Government Councils and State-owned corporate entities, there is no room for such investments under the latter. Secondly, whereas state government bonds require presidential declaration by notice in the Federal Gazette for them to qualify as trustee securities under Section 2(1)(b) of the TIA, there is no such requirement under both Section 86(b) of PRA 2014 and the PenCom Regulation. This is a welcome development, as the requirement of presidential declaration constitutes an unnecessary obstacle in the way of the smooth operation of the statutory scheme. Indeed, it is not only fair, but also conducive to healthy competition for both the federal and state governments to operate on a level playing field in the capital market, leaving investors to make their choice. In a federation, such as ours, to create a situation where State Governors have to go cap in hand to seek the approval of the President (a market competitor who might also be a political opponent) for their bonds to be marketable to trustee investors surely leaves much to be desired.

V. DEBT SECURITIES ISSUED BY CORPORATE ENTITIES

Securities falling within this class include bonds, debentures, redeemable preference shares and other debt instruments issued by corporate entities and listed on the Nigerian Stock Exchange (NSE).³⁴ The PenCom Regulation has expanded the scope of this class of securities to include mortgage-backed securities, asset-backed securities, infrastructure bonds, global depository notes and Eurobonds.³⁵ Under the PenCom Regulation, the PFA is permitted to invest a maximum of 35% of its pension fund assets in this class, subject to a maximum of 15% investible in infrastructure bonds.³⁶ Such investment shall not exceed five percent of all securities of this class issued by one corporate body.³⁷ There is also a limit per issue based on the credit rating of the bond or debt instrument thus: (i) BBB: 16% of the issue, (ii) A: 18% of the issue, and (iii) AA and above: 20% of the issue.³⁸ Furthermore, a maximum of 2.5% of each issue of global depository note or Eurobond may be acquired.³⁹ By and large, for any corporate bond to qualify for pension fund investment it must have a minimum credit rating of BBB by, at least, one registered or recognized

34. PRA (2014), § 86(c).

35. PenCom Regulation, §§ 4.3, 4.9; see the tables under PenCom Regulation, §§ 7.4, 9.4.

36. See the tables under PenCom Regulation, §§ 7.4, 9.4.

37. *Id.*; see also *id.* § 9.5.

38. *Id.*

39. *Id.*; for other requirements for investing in global depository receipts or notes and Eurobonds, see Section 5.2.13.

rating company.⁴⁰ Other prerequisites for investing in this class of securities are set out in Section 5.2.2 of the PenCom Regulation.

The securities contained in Section 86(c) of the Act are substantially comparable with the debt securities authorized by Section 2(1)(d) of the TIA. There are, however, material points of distinction that need to be illuminated. Section 2(1)(d) of the TIA authorizes trustees to invest in “debentures . . . of any company incorporated by and registered under the Companies and Allied Matters Act (other than a private company)”; whereas Section 86(c) of PRA allows investment in “bonds, debentures, redeemable preference shares and other debt instruments issued by corporate entities.” A common denominator between the two provisions is that securities falling under either of them must be listed and tradable on the NSE.⁴¹ As can be appreciated, however, the latter provision is wider in scope than the former.

Firstly, the former mentions only debentures, whilst the latter goes further to weave redeemable preference shares into the fabric of “debt instruments” listed therein. But, strictly speaking, redeemable preference share is neither a debenture nor any other debt instrument, for that matter. Basically, a preference shareholder is an investor in, and part-owner of, a company, and not its creditor at all. Indeed, the only two common characteristics of debentures and redeemable preference shares are that both are fixed-income securities and the principal sums invested in both are repayable. Secondly, whereas pension funds can be invested in a company’s debentures *simpliciter*, under the scheme of investment in the TIA, there is no room for the investment of trust funds in a company’s debentures unless it is combined with the company’s shares,⁴² but investment in only the shares of a company is allowed.⁴³

Thirdly, the provision of Section 2(1)(d) is restricted to securities issued by public limited companies; whereas Section 86(c) refers to securities issued by “corporate entities.” The expression “corporate entities,” no doubt, is wider than “public limited companies” in that the former also encompasses statutory corporations such as those listed in the Schedule to the TIA.⁴⁴ Perhaps, the draftsman, being cognizant of the fact that those statutory corporations have no securities on offer, but still in-

40. *Id.* § 5.1.3.

41. TIA, § 2(2)(b); PRA (2014), § 86(c); PenCom Regulation, § 5.2.2(v).

42. *See* TIA, §§ 2(1)(d), 2(3)(b).

43. *Id.* § 2(2)(c), (3)(c).

44. To wit: Nigerian Coal Corporation; Nigerian Ports Authority; Nigerian Railway Corporation; and the now defunct National Electric Power Authority.

tending not to shut them out completely, used that expression advisedly so that should they perchance issue corporate bonds, such bonds would be eligible for pension fund investments under the umbrella of this provision. Having done that, the draftsman presumably took full advantage of the economy of words by dropping altogether the idea of making a separate provision for investment in securities issued by statutory corporations. However, the interpolation of redeemable preference shares into that provision seems to have taken statutory corporations out of the purview of its application, for such corporations, having no share capital at all, are incapable of issuing any shares.

With these apparent incongruities, the only explanation for redeemable preference shares finding their way into that provision is that perhaps Homer had nodded at the time of its drafting. In other words, slip or inadvertence on the part of the draftsman must have been responsible for the fixing of redeemable preference shares in paragraph (c) of Section 86 which deals with debt securities, instead of paragraph (d) which deals with shares where, in our view, they rightly belong.⁴⁵ Indeed, Professor Pennington,⁴⁶ whilst highlighting the essential characteristics of preference shares, had this to say:

In the first place, preference shares are part of the company's share capital, and are not loans; consequently, preference dividends can be paid only if the company has earned sufficient profits, because if the dividend were to exceed available profits, the payment of the dividend would be an illegal return of capital to the preference shareholders.⁴⁷ Secondly, unless a company's memorandum or articles otherwise provide, a dividend becomes payable to shareholders only when it is declared in the manner laid down by the company's articles, and so unless the preference dividend for the year or other period is properly declared, preference shareholders cannot claim it or sue the company for it.⁴⁸

45. Regrettably, this obvious drafting infelicity which originated in Section 73(1)(b) of the 2004 Act has been slavishly replicated in sections 4.3, 5.2.2 and 9.3 (iii) of the PenCom Regulation. However, there is no specific mention of redeemable preference shares in the investment limits set out in the tables under Sections 7.4 and 9.4. It is thus unclear what proportion of pension fund assets could lawfully be invested in redeemable preference shares.

46. R.R. PENNINGTON, *COMPANY LAW*, 257 (Butterworths 7th ed. 1995).

47. *Trevor v. Whitworth*, [1887] 12 App. Cas. 409.

48. *Bond v. Barrow Haematite Steel Co.*, [1902] 1 Ch 353; *Re Accrington Corp. Steam Tramways Co.*, [1909] 2 Ch 40.

Conversely, loan capital (comprising debt securities) “does represent indebtedness by the company, and holders of loan capital have the remedies of creditors to recover what the company owes them.”⁴⁹

VI. ORDINARY SHARES OF PUBLIC LIMITED COMPANIES

Section 86(d) authorizes the investment of pension funds in ordinary shares of quoted public limited companies. The PenCom Regulation allows PFA to invest a maximum of 25% of its pension fund assets in ordinary shares,⁵⁰ and a maximum of five percent of the pension fund assets in the shares of any particular company.⁵¹ It goes further to stipulate that such an investment must not exceed 4.5% per issue of the ordinary shares of any particular company.⁵²

Clearly, the prerequisites for equity investments are significantly different under this provision as compared with the parallel provisions of the TIA. Here, there is neither a stipulation of any minimum share capital for a company to qualify for pension fund investment nor a requirement that the shares must be fully paid up.⁵³ By contrast, under the TIA,⁵⁴ a trustee can invest only in fully paid-up shares of a company with fully paid-up share capital of not less than one million Naira at the time of making the investment. Furthermore, the cap imposed on pension fund equity investments is 25% of the total fund, whilst the cap on corporate bonds is 35%. Thus, the combined limit of pension fund investments in both types of company securities is 60% as against 33.3% or one-third of the total trust fund, which is stipulated in Section 2(3)(a) of the TIA. This connotes that PFAs have a wider scope for investing in company securities than other trustees.

Remarkably, PRA 2014 has done away with the prescription by its 2004 predecessor that a company, in whose ordinary shares pension funds could be invested, must have declared and paid dividends in the preceding five years. Nonetheless, the PenCom Regulation (which was made under the 2004 Act) prescribes that the company must have made taxable profits for at least three out of the five years preceding the investment

49. R.R. PENNINGTON, *supra* note 46, at 249.

50. See the table under PenCom Regulation, § 7.4. However, for RSA Retiree Funds, the limit is set at 10% in the table under Section 9.4, apparently because it is not in the best interests of aged retirees to embark upon long-term investment in shares.

51. See PenCom Regulation, § 9.5 and the table set out under § 7.4.

52. *Id.*

53. Note, however, that one of the NSE listing requirements is that the securities must be fully paid up at the time of allotment.

54. TIA, § 2(1)(d), (2) .

and paid dividends or issued bonus shares for at least one year within the five years.⁵⁵ The PenCom Regulation, however, does not specify the minimum amount of dividend required. By contrast, under Section 2(2)(c) of the TIA, for a company's shares to qualify as trustee securities, it must have duly paid dividends of not less than five percent of the nominal value of the shares for each of the immediately preceding three years.

As can be appreciated, the restriction under the TIA is more stringent than the restriction under the PenCom Regulation. Moreover, by dropping the requirement of prior dividend payouts, those concerned with the crafting of the PRA 2014 appear to have fallen in with the current global trend of libertarianism in trustee investment regulation. They have equally demonstrated full grasp of the current realities of the Nigerian capital market, which seem to suggest that it might have been easier to find ten pious men in the Biblical Sodom and Gomorrah than to locate ten public limited companies that have paid dividends consistently for the past five years. Surely, had the five-year-dividend requirement remained in force, that coupled with the scheme of apportionment of investments under the PenCom Regulation and the suffocating restrictions imposed by the Act⁵⁶ would have made it difficult, if not impossible, for PFAs to find a sufficient width of equity securities to invest in today. Inasmuch as there is still, in this writer's view, need to obligate PFAs to invest only in blue chip public companies, the current capital market trend seems to favour capital appreciation as a more reliable criterion for assessing the growth and profitability of a company than dividend payouts.

As for the limit of investment in the shares of any particular company, whereas TIA sets it at one-twentieth (i.e., five percent) of the total trust fund, the PenCom Regulation prescribes bifurcated limits of five percent of the pension fund assets as well as 4.5% of the issued shares. As can be observed, the caps under the two regulatory frameworks are linked to different factors – the former to the value of the trust fund only, and the latter to both the value of the pension fund and shares issued by the company. This entails that the computation under the PenCom Regulation is a little more complicated. Suppose, for example, the PFA has pension fund assets valued at ₦100 million and it wants to subscribe to the shares of ABC Company plc that has issued ten million shares at one Naira each. Although it is authorized to invest up to a maximum of ₦5

55. PenCom Regulation (2012), § 5.2.4(ii).

56. See PRA (2014), §§ 88, 89.

million (i.e., 5% of the pension funds) in the shares of that company, it can only subscribe to 450,000 shares (i.e., 4.5%) of this issue. If, however, ABC Company plc subsequently issues more shares, the PFA can subscribe again, subject to the cap of 4.5% of each issue until it exhausts the maximum of ₦5 million investible in the shares of that company. Overall, the PFA is allowed to invest a maximum of 25% of ₦100 million (i.e., ₦25 million) in the shares of various companies put together. To exhaust this amount, therefore, it has to invest in the shares of at least five different companies, observing the limits of investment in each company and in every single issue.

Perhaps, it should be stressed that the PFA is not allowed to trade on margin accounts with pension funds,⁵⁷ or to trade in financial instruments at prices that are prejudicial to the pension fund assets.⁵⁸ Margin account is defined as “an account maintained with a lender (Bank or Broker) which records transactions on margin trade.”⁵⁹ In margin trading, a bank or stockbroker lends money to a customer to purchase securities, the collateral for the loan being the same securities to be purchased with it. Such an investment offends Section 89(1)(c) of the 2014 Act, which prohibits the application of pension fund assets as collateral for any loan. These statutory provisions are consonant with the rudimentary principles of equity under which a trustee is precluded from making speculative or hazardous investments. Indeed, borrowing money to purchase securities on behalf of a pension fund trust is not truly an investment of pension fund, for the borrowed fund was never part of the pension fund contributions entrusted to the PFA. The PFA, like any other trustee, should be concerned basically with the preservation of the pension fund assets and realization of fair returns from their investment rather than embarking on an ambitious business adventure, bearing in mind that a trustee is to be judged not so much by success as by the absence of any proven default.

VII. BANK DEPOSITS AND SECURITIES

Unlike the TIA, the PRA⁶⁰ authorizes investment in bank fixed deposits and money market instruments such as guaranteed Commercial Papers and Bankers' Acceptances. The latter goes further to add investment in “bank securities,” which is understood to mean shares and debentures issued by banks. This addendum, however, appears to have introduced a

57. PenCom Regulation, § 2.4.

58. *Id.* § 2.6.

59. *Id.* § 1.10.

60. PRA (2014), § 86(e) (replacing PRA (2004), § 73(1)(d)).

red herring into the trail. On the one hand, since most banks in Nigeria are public companies whose securities are listed on the NSE, clearly, their securities are already comprehended in paragraphs (c) and (d) of Section 86, thus rendering the additional provision redundant. On the other hand, for the few banks whose securities are not publicly quoted, allowing the investment of pension funds therein would flatly contradict a fundamental principle of the Act, which is the prohibition of investment in unlisted securities. It is, therefore, suggested that this anomaly should be remedied by expunging the repugnant words “and bank securities” appearing in Section 86(e).

By using the word “bank,” which is defined as “a commercial or merchant bank licensed by the Central Bank of Nigeria,”⁶¹ the Act appears to have restricted allowable investments to such conventional banks, thereby excluding investments in other financial institutions, going by the maxim *expressio unius est exclusio alterius*.⁶² This is not without justification, in view of the relative vulnerability of those other financial institutions when compared with the conventional banks. However, as we shall see shortly, the PenCom Regulation has extended authorization to the money market instruments of discount houses. Indeed, even for banks, as earlier acknowledged, the aphorism “all that glitters is not gold” has been borne out by recent experiences. For this reason, the PenCom Regulation has not only capped investments in money market instruments at 35% of the pension fund assets,⁶³ but also apportioned the maximum investments according to the credit ratings of banks as follows: BBB: 3%; A: 4%; AA and above: 5%.⁶⁴ Thus, any bank in whose money market instruments pension fund assets are to be invested must have a minimum credit rating of BBB by a registered or recognized rating company.⁶⁵ For Commercial Papers, a maximum of five per cent of the pension fund assets may be invested in the total issues of any one corporate entity with a minimum rating of A.⁶⁶ So also there is a limitation per issue based on the credit rating of the Commercial Paper, to wit: A: 18% of the issue and AA and above: 20% of the issue.⁶⁷

When interest rates are high, fixed-term deposits are apt to yield higher and quicker income than equities. However, like all fixed-income invest-

61. PenCom Regulation, § 1.10.

62. The express mention of one thing implies the exclusion of another.

63. See the tables under PenCom Regulation, §§ 7.4, 9.4.

64. *Supra* note 51.

65. *Id.* § 5.1.4.

66. *Supra* note 51.

67. *Id.*

ments, the real capital value is susceptible to the depreciatory effects of inflation and other economic vagaries. There is also a further risk of bank failure, although, since the recapitalization of banks in Nigeria about a decade ago, the incidence has become rarer than frequent. Barring the total collapse of a depository bank, it seems safer to invest in its fixed-interest deposits and debentures than in its equities, as the current experience in Nigeria reveals.

VIII. UNIT TRUSTS

Unlike the TIA, the PRA 2014⁶⁸ expressly authorizes the investment of pension funds in unit trusts. This is a welcome development, for this collective investment mechanism has witnessed an exponential development in the modern commercial world, in which respect Nigeria is, happily, no longer left out. Whereas collective investment schemes were yet to be embraced in this country at the time of the enactment of the TIA over fifty years ago, today they have become a significant feature of the Nigerian investment market.

The essential conditions for investing in this class of securities are set out in Section 5.2.10 of the PenCom Regulation. The maximum portfolio limit allowable for this class of investments is 20% of the pension fund assets.⁶⁹ So also a maximum of five percent of pension fund assets may be invested in all open-end, closed-end and hybrid funds issued by one asset-management company, and not more than ten percent of any one of such funds may be purchased.⁷⁰

IX. REAL ESTATE INVESTMENTS

By Section 86(h) of the Act, “real estate development investments” are listed as an authorized pension fund investment. Hitherto, Section 73 (1)(h) of the 2004 Act had authorized “Real Estate Investments.” Neither expression, however, is statutorily defined. No matter how one looks at either expression anyway, it seems beyond argument that it includes the purchase or acquisition of real estate. Indeed, that ought to be the first and most natural meaning before any other connotation can be comprehended. But, curiously enough, the PenCom Regulation stipulates that “Due to reason of subjective valuation of real estate properties, RSA Funds under management with PFAs shall not directly invest in Real Estate; as investments shall only be through instruments such as Mort-

68. PRA (2014), § 86 (f), (g).

69. See the table under PenCom Regulation, § 7.4.

70. *Id.*

gage Backed Securities (MBS) and Real Estate Investment Trusts (REITs).⁷¹ The Regulation thus precludes the direct acquisition of real estate by the PFA.⁷²

It is, however, difficult to find the platform upon which PenCom stands in outlawing real estate acquisition. In our view, PenCom followed neither the spirit nor the letter of the law; for, as observed earlier, the underlying objective of the PRA is to enlarge, not to curtail, the range of investments available to pension trust investors. Inasmuch as the exercise of the investment power conferred by the Act is subject to guidelines issued by PenCom, this affords no warrant for PenCom to repudiate any investment which is expressly authorized by the enabling Act. Thus, it seems clear that, in the exercise of the powers conferred on it to make regulations, rules or guidelines for carrying into effect the provisions of the Act,⁷³ PenCom can only expand, but not circumscribe, the range of investments authorized by the principal Act. What's more, by Section 119 of the Act, if any other enactment or law relating to pensions is inconsistent with the Act, the Act shall prevail. It is, accordingly, submitted that the said provision of PenCom Regulation is *ultra vires* and void to the extent that it purports to prohibit investment in real estate other than through MBS and REIT. Indeed, these two novel types of real estate investment prescribed by PenCom are still too way-out for the Nigerian investment market. As at the time of writing, only three REITs,⁷⁴ but no MBS at all, have been listed on the NSE. The resulting situation is that PFAs have been unduly hamstrung in the exercise of their statutory power to invest in real estate.

REIT is a type of closed-end investment fund which invests only in real estate acquisition and/or loans secured by the mortgage of real estate.⁷⁵ Together with unit trusts, REIT has been subsumed under the class of collective investment schemes in the PenCom Regulation, as is also done

71. *Id.* § 5.2.6. As exceptions, however, closed pension fund administrators and approved existing schemes that operate defined benefit schemes are allowed to directly invest in real estate subject to their internal investment guidelines and Guidelines on Direct Real Estate Investments issued by PenCom Regulation Section 12.5.

72. It is worth noting that the English Pensions Acts of 1995 and 2004 do not prohibit investment by way of real estate acquisition.

73. *See also* PRA (2014), §§ 23(b), 115(1).

74. Skye Shelter Fund, Union Homes REITS and UPDC Real Estate Investment Trust. For a useful insight, see O. N. Onyema, *Pre-requisites for Exchange Traded Funds and Asset Backed Securities on the Nigerian Stock Exchange*, (Sept. 22, 2011), available at <http://www.nse.com.ng>. UPDC Real Estate Investment Trust floated an initial public offer of three billion units at ₦10.00 each on the NSE in February 2013.

75. For the characteristics of REIT, see Investment and Securities Act 2007, § 193(3) [hereinafter ISA].

under Part XIII of the Investment and Securities Act (ISA) 2007. Accordingly, investment in REIT is guided by the regulations already discussed under the immediately preceding sub-heading. In addition, Section 5.2.8 of the PenCom Regulation prescribes the requirements which a REIT must satisfy to qualify for pension fund investment.

By contrast, MBS has been defined as “an investment instrument that is secured on a pool of mortgages or real estate loans.”⁷⁶ It is “the process of pooling (originating) homogenous assets (both in kind and in underwriting criteria) in the primary mortgage market, the process of packaging these designated pools of mortgages with or without credit enhancement, into securities in the secondary mortgage market and the process of distributing/sale of these securities to investors in the capital market.”⁷⁷ From these definitions, it would appear that what financial experts term “mortgage-backed securities” are what in legal parlance are known as “contributory mortgages.” Essentially, this entails a mortgage institution originating mortgage loans from a network of primary lenders (such as mortgage banks, savings and loans banks and universal banks) and then selling packages of the loans via the capital market to investors who acquire participatory interests in the group of mortgages.⁷⁸ It is, however, enlightening to note that investment in MBS (as in mortgages generally) is not, legally speaking, an investment in real estate; rather, it is an investment in a loan in return for interest, which is secured by the MBS.

The drafters of the PenCom Regulation seem to be blowing hot and cold when in one breath they classify MBS under corporate bonds or debt securities⁷⁹ (where they properly belong) and in another breath they treat MBS as real estate investments.⁸⁰ Nevertheless, it has to be noted that the investment limits set for corporate debt securities (which have already been examined) apply equally to MBS. Further requirements for allowable MBS are stipulated in Section 5.2.7. Indeed, a critical reading of these requirements bears out the proposition that MBS is, for all practical purposes, a form of collective investment in corporate debt securities rather than an investment in real estate per se.

76. G. BARROW, *supra* note 21, at 183.

77. I. O. Osamwonyi, *Current Developments in Mortgage-Backed Securities – A Global Perspective (sic)*, 1 L. & INVESTMENT J. 61 (2007); see also T. Yakubu, *Mortgage-Backed Securities: A Capital Market Option for Financing Housing & Urban Development*, 1 L. & INVESTMENT J. 48 (2007).

78. For the objections to the use of this scheme as a trust investment technique, see A.W. SCOTT, *ABRIDGEMENT OF THE LAW OF TRUSTS* 440 – 41 (Little, Brown & Co. 1960).

79. See PenCom Regulation (2012), § 4.3 and the table under § 7.4.

80. See *id.* § 5.2.6.

X. SUCH OTHER INVESTMENTS AS PENCOM MAY APPROVE

Section 86(i) of the Act authorizes the investment of pension funds in “such other financial instruments as the Commission may, from time to time, approve.” Thus, unlike in the TIA, the list of authorized classes of investment under the PRA is not closed. Furthermore, Section 115(1) of the Act empowers PenCom to make regulations generally for carrying into effect the provisions of the Act, while Section 117(4) preserves the extant PenCom Regulation. Consistent with these provisions, the PenCom Regulation has added other classes of investment not expressly authorized by the Act. These include investments in money market instruments issued by discount houses,⁸¹ supra-national bonds,⁸² infrastructure funds,⁸³ and private equity funds.⁸⁴ Due to space constraint, these PenCom-authorized investments cannot be discussed in detail.

XI. RESTRICTIONS ON INVESTMENT AND SALE OF PENSION FUND ASSETS

Section 88 of the Act stipulates that the PFA shall not invest pension funds in the shares or any other securities issued by – (a) the PFA or its PFC and (b) a shareholder of the PFA or its PFC. Furthermore, Section 89(1) of the Act provides as follows:

The PFA shall not –

- (a) sell pension fund assets to –
 - (i) itself;⁸⁵
 - (ii) any shareholder, director, affiliate, subsidiary. Associate, related party or company of the PFA;
 - (iii) any employee of the PFA;
 - (iv) the spouse of any of the persons referred to in subparagraphs (i) to (iii) of this paragraph or those related to the said persons;

81. *See id.* § 5.1.4 and the table under § 7.4.

82. *See id.* § 4.8 and the tables under §§ 7.4, 9.4.

83. *See id.* §§ 5.2.3, 4.7 and the table under § 7.4.

84. *See id.* §§ 5.2.11, 4.7 and the table under § 7.4.

85. One learned writer opines that this provision is merely declaratory of the company law rule that a company cannot buy its own shares: see A. EMIOLA, PENSION LAW AND ADMINISTRATION IN NIGERIA 97 – 98 (Emiola Publishers 2007) (citing Companies and Allied Matters Act, § 161); *African Continental Seaways Ltd. v. Nigerian Dredging, Roads and General Works Ltd.*, [1974] 1 FRCR 227, 233 (Nigeria). It is, however, submitted that there is a distinction between the PFA buying its own shares and buying pension fund assets which it holds in trust for the pension fund beneficiaries. Moreover, unlike this provision of the PRA, the statutory prohibition of a company buying its own shares is not absolute. Thus, it seems that the instant provision is rooted in the equitable rule against self-dealing by trustees rather than in the said company law rule.

138 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

- (v) affiliates of any shareholder of the PFA; or
- (vi) the PFC holding pension fund assets to the order of the PFA and any related party to the PFC.
- (b) utilise pension fund to purchase assets from the persons mentioned in sub-section (a) of this section; and
- (c) apply pension fund assets under its management by way of loans and credits or as collateral for any loan taken by a holder of retirement savings account or any person whatsoever.

Understandably, these provisions⁸⁶ are designed to forestall conflict of interests, insider trading, constructive fraud or any other inequitable conduct on the part of those concerned with the management and investment of pension funds. Thus, the PFA, like any other trustee, is precluded by the “self-dealing rule” from selling⁸⁷ or lending⁸⁸ the pension funds to itself or to a co-trustee (in this case, the PFC). However, the statutory prohibition seems to be more encompassing than the applicable rules of equity. For instance, Section 89(1)(a)(iv) extends the restriction on sale of pension fund assets to the spouses of any shareholder, director or employee of the PFA or those related to them. Similarly, the PFA is prohibited from selling to any of its affiliates or affiliates of its shareholders. Further, Section 89(1)(a)(vi) as well as the PenCom Regulation⁸⁹ prohibit investment in the shares or any other securities issued by any related party or affiliate of the PFC holding the pension fund assets. Exceptions are, however, allowed only for the money market instruments of a bank or discount house that is an affiliate of the PFA or PFC.⁹⁰ Such spouses, affiliates and related persons arguably fall outside the scope of the self-dealing rule under the general principles of equity, though any dealing with any of them would ordinarily be scrupulously scrutinized by the courts and set aside at the slightest suspicion of abuse of confidence, undue influence or unconscionable bargain.⁹¹

Indeed, a strict adherence to the overly restrictive statutory stipulations could render investment nightmarish for the PFA. Considering the fact

86. See also PRA (2014), § 77; PenCom Regulation, § 6.

87. *Campbell v. Walker* [1805] 5 Ves. 678 (Austl.); *Tito v. Waddell* (No. 2), [1977] 3 All E.R. 129 at 241 (Eng.); *Okesuji v. Lawal* [1986] 2 NWLR (Pt. 22) 417, 433 (Nigeria).

88. *Carrier v. Carrier*, 226 N.Y. 114 (1919); *Re David Feldman Charitable Foundation* (1987), 58 O.R. 2d 626 (Can.).

89. PenCom Regulation, § 6.1(iii).

90. *Id.* § 6.2.

91. See, e.g., *Farrar v. Farrars Ltd.*, (1888) 40 Ch. D 395 (Eng.); *Tito v. Waddell* (No. 2), [1977] 3 All E.R. 129 (Eng.). Contrast *Re Thompson's Settlement*, [1986] Ch. 99 (Eng.).

that most, if not all, of the licensed PFAs and PFCs are either large public companies or their subsidiaries, how on earth would the PFA be able to isolate all its shareholders, directors and employees as well as their spouses and all those “related” to them? And how can the PFA identify all the “affiliates” of all its shareholders as well as each and every shareholder of, or party related to, the PFC? As for the word “related” appearing in Section 89(1)(a)(iv), it seems the most nebulous word to fit into a statutory provision that seeks to preclude a certain class of persons from purchasing pension fund assets.⁹² The question is: related in what sense – by friendship, affinity or consanguinity – and to what degree? In an attempt to clear the ambiguity, the PenCom Regulation⁹³ states that “‘Related Persons’ includes father, mother, child, brother, sister, uncle, aunt and cousins where applicable, their spouses and any other relationship that can be reasonably construed as related persons or a corporate entity where any of the aforementioned holds 5% or more beneficial interest.” However, the use of the word “includes” and the expression “any other relationship that can be reasonably construed as related persons” as well as the extension of the definition to corporate entities seems to have rendered nugatory the attempt at precision, thus leaving the categories of prohibited relationships still open-ended. This leads to a situation (which has become a common phenomenon in Nigeria) in which legislation that is couched in such fluid and negatively all-embracing terms renders itself more honoured in breach than in observance. After all, it is axiomatic that the law does not compel the doing of impossibility: *lex non cogit ad impossibilia*. Even if it were practicable to extend the tentacles of the exclusionary provision to this open-ended array of “related persons,” then it will be difficult for the PFA to find a suitable buyer whenever there may be need to sell the pension fund assets.

Perhaps, the following amendments will help in attenuating the conundrum with which PFAs seem to be confronted. First, Section 88(b) prohibiting the investment of pension fund assets in the shares or any other securities issued by a shareholder of the PFA or its PFC should be deleted. Such legislative over-cautiousness is scarcely necessary considering the facts that the power of investment in company securities has been hedged in with numerous statutory safeguards, including stipulations as to the quality and listing of the securities as well as the mandatory investment proportions and, crucially, that the PFA and PFC have to be two unrelated corporate entities. Secondly, the term “affili-

92. The same argument goes for the equally protean term “affiliate” that is very often defined in the context in which it is used, but which is unfortunately not defined anywhere in the Act.

93. PenCom Regulation, § 1.10.

ate” used in Section 89(1)(a) should be defined as precisely as possible and the exclusion should be limited to affiliates of the PFA, as in paragraph (ii), thus eliminating paragraph (v) which extends it to affiliates of its shareholders. Thirdly, the categories of “related persons” who are precluded from purchasing pension fund assets by the operation of Section 89(1)(a)(iv) should be narrowed down and precisely defined. Fourthly, the additional category of “any related party to the PFC” engrafted upon Section 89(1)(a)(vi) (which was not in the original PRA, 2004⁹⁴) should be dropped.

Having provided in Section 89(1)(c)⁹⁵ that pension fund assets shall not be applied “by way of loans and credits or as collateral for any loan taken by a holder of retirement savings account,” nevertheless, the Act makes an exception in Section 89(2). The latter provides that the PFA may, subject to guidelines issued by PenCom, apply a percentage of the pension funds in the retirement savings account towards payment of equity contribution for payment of residential mortgage by a holder thereof. This novel provision is in line with the modern legislative trends in other jurisdictions⁹⁶ altering the orthodox rule of equity that the purchase of a house for the occupation of a beneficiary is not a permissible trust investment.

Indeed, for trustees, nay all fiduciaries, the equitable rule against conflict of interests is, and has been from the earliest times, a very stringent one.⁹⁷ Consistent with principle, therefore, the PenCom Regulation (Section 6.7) stipulates that every PFA shall develop a framework and establish a risk management committee that would review issues of conflict of interests and render quarterly reports to PenCom.

XII. THE PENSION PROTECTION FUND

Section 82(1) of the Act provides that PenCom shall establish and maintain a fund to be known as the Pension Protection Fund for the benefit of eligible pensioners covered by any pension scheme established, approved or recognized under the Act. Section 82(2) prescribes the sources of funding of the Pension Protection Fund. And Section 82(3) provides that PenCom shall utilize the Pension Protection Fund for –

94. Cf. § 76(1)(a)(vi).

95. See also PenCom Regulation, § 6.4(i).

96. See, e.g., Trustee Act, 2000, c. 29, § 8(1) (Eng.); Trusts Act, 1973, § 28 (Austl.).

97. For instance, see *Keech v. Sandford*, [1726] EWHC (Ch) J76, Sel. Cas. Ch. 61(Eng.); *Bray v. Ford*, [1896] A.C. 44 at 51 (Eng.); *Regal (Hastings) Ltd v. Gulliver*, [1942] 1 All E.R. 378 (Eng.).

- (a) the funding of the guaranteed minimum pension;
- (b) the payment of compensation to eligible pensioners for shortfall or financial losses arising from the investment of pension funds; and
- (c) any other purpose deserving protection with the Pension Protection Fund as PenCom may, from time to time, determine.

The establishment of the Pension Protection Fund is a welcome innovation. The idea has been presaged by the establishment of the Investors Protection Fund under Part XIV of the ISA 2007 out of which investors who fall victims of defalcation by capital market operators are to be compensated. Besides, the lawmakers probably drew upon the Pensions Protection Fund and Fraud Compensation Fund established under the English Pensions Act 2004.⁹⁸ The obvious aim is to ensure that the fortunes of pension fund contributors are not imperilled by maladministration or fraud on the part of pension fund trustees, investment losses or other risks. It is noteworthy that the implementation of the guaranteed minimum pension provided for by Section 71(1) of PRA 2004 had been frustrated largely by the absence of a definite provision for its funding.

XIII. PENALTIES FOR CONTRAVENTION OF THE ACT

The Act creates a number of offences and prescribes punishments for those offences. Of especial relevance to pension management and investment duties is the provision of Section 91, which stipulates that any PFA who fails to comply with any provision of the Act shall be liable to a penalty of not less than ₦500,000 for each day that the non-compliance continues. In addition, the PFA shall forfeit any profit made from an unauthorized investment to the pension fund beneficiaries and, where such investment has resulted in a loss, it shall make good the loss. Likewise, Section 100(3) provides as follows:

Whenever a person is convicted of an offence under this Act, the court, in passing sentence, shall, in addition to any punishment which the court may impose in respect of the offence, order the forfeiture to the Federal Government of Nigeria of any property, asset or fund with accrued interest, or the proceed of

98. The former applies to defined benefit schemes, while the latter applies to defined contribution schemes.

any unlawful activity under this Act (sic) and is in the possession, custody or control of the convicted person.

However, a critical analysis of this provision reveals that the prescribed destination of any assets or funds forfeited in the exercise of the power thereby conferred on the court is clearly misplaced. First, it has to be acknowledged that the PFA or PFC is licensed to engage in no other business than the management of pension funds or keeping custody of pension fund assets, respectively.⁹⁹ It, therefore, follows that the bulk of their assets consist of pension fund assets and incomes accruing from them. Again, the expression “any unlawful activity under this Act” can be presumed to refer to trafficking with or misappropriation of the pension funds and assets. The question is, when a trustee engages in illegal dealings with the trust funds and he is held criminally liable, apart from criminal sanctions against him, to whom should the benefit of any necessary restitution go? The answer, surely, is that restitution should be awarded to the victim of the offence, i.e., the trust beneficiaries, and not to the state.¹⁰⁰ Indeed, this view is fortified by the second limb of the above-stated provision of Section 91 of the Act, which equally accords with the equitable principle that where a trustee makes an improper trust investment, the profit accrues to the trust beneficiaries while any loss is borne by the trustee personally. It is, accordingly, submitted that the stipulation that the court shall order the forfeiture of the assets acquired by or proceeds of any unlawful activity under the Act to the Federal Government of Nigeria is ill-conceived. The provision should be modified to the effect that the forfeited assets or funds should be awarded to the beneficiaries of the pension funds.

XIV. CRITIQUE OF THE ACT

The first observation is that the Act is replete with typographical and grammatical errors as well as drafting infelicities, although it has made a marked improvement on the drafting of the repealed one. The notable relics of the drafting errors of its predecessor include those already demonstrated vis-à-vis the provisions of paragraphs (c) and (e) of Section

99. PRA (2014), §§ 60(e), 62(a).

100. Compare *Mafa v. The State* [2013] 3 NWLR (Pt. 1342) 607, where the court, having convicted the appellant, a bank manager, of criminal breach of trust and sentenced him to five years imprisonment with an option of fine, exercised its powers under Section 78 of the Penal Code and ordered him to pay the misappropriated sum as compensation to the bank for the benefit of the depositors of the funds

86. Again, Sections 100(1)¹⁰¹ and 104 of the Act purport to impose on the PFA or PFC – an incorporated company – not only fines for the respective offences created thereby, but also terms of imprisonment. Clearly, this is erroneous, for although a corporate body may be convicted of an offence, it cannot be sentenced to imprisonment.

As for the apparent inconsistencies of some of the provisions, two examples would suffice. First, whereas Section 2(2) of the Act pegs at 15 the minimum number of employees for a private sector organization to qualify for the compulsory contributory pension scheme, Section 2(3) states that, notwithstanding this provision, employees of organizations with less than three employees shall be entitled to participate under the scheme in accordance with guidelines issued by PenCom. Likewise, while Section 4(1) stipulates that the minimum contribution for any employee to which the Act applies shall be ten percent by the employer and eight percent by the employee (which adds up to 18% of the employee's monthly emoluments), Section 4(4)(b) states that, notwithstanding this provision, an employer may elect to bear the full responsibility of the scheme provided that the employer's contribution shall not be less than 20% of the employee's monthly emoluments.¹⁰² Indeed, a comparison of the Act with the originating Bill reveals that these incongruities arose from inadvertence or lack of attention to details on the part of those concerned with the final vetting of the Bill after it had been passed with some amendments. The original Bill had proposed a minimum of three employees for a private sector organization to be eligible, and a minimum contribution of 12% of an employee's monthly emoluments by an employer.¹⁰³ In passing the Bill, the legislators increased the minimum benchmark for private sector participation to 15 employees and reduced employer's contribution to a minimum of ten percent of an employee's monthly emoluments. Unfortunately, the ultimate drafters of the Act failed to carry the amendments through, hence the inconsistent provisions. Needless to say that this blunder might have set the regulators and operators of the pension scheme on a collision course.¹⁰⁴

101. A parallel provision in Section 86 of the PRA 2004 was similarly flawed: see EMIOLA, *supra* note 85, at 121.

102. Surely, the lawmakers could not have intended that an employer should bear a greater burden where it elects to shoulder alone the full responsibility of contributing to the scheme than the combined obligations of both the employer and employee.

103. See Pension Reform Bill 2013, §§ 2(2), 4 (1)(a), NAT'L ASSEMBLY J., no. 09, vol. 10 (Apr. 22, 2013) (published by the National Assembly Press, Abuja).

104. Indeed, the Director-General of PenCom stated in a conference paper presented soon after the enactment of the Act that the minimum number of employees required for a private sector organization to fall under the compulsory scheme is now three: Anohu-Amazu, *supra* note 20.

There is no provision as to what should, in the long run, become of the statutory reserve fund created pursuant to Section 81. Accumulation of 12.5% *per annum* of the net profits of the PFA will amount to a stupendous fund after many years, which might be far in excess of the contingent liabilities defrayable from the fund. This would raise complex questions about ownership of the surplus funds, tax implications and so forth, which the Act offers no clue as to how to resolve them. Indeed, problems akin to these concerning surplus funds in a defined benefit scheme have taxed the minds of leading English scholars and judges in the last century.¹⁰⁵

The Act does not state the number of years of contribution that will qualify a contributor for a guaranteed minimum pension under Section 84(1). That factor coupled with the uncertainty of the amount of the guaranteed minimum pension and (before now¹⁰⁶) its source of funding, all of which were left for PenCom to fix, have resulted in the modalities for the implementation of such an important provision still hanging in the balance after several years of operation of the contributory pension scheme.

There is no specific provision under the Act prohibiting the indemnification of PFAs or PFCs out of the pension funds for financial penalties payable by them for contravention of any of the statutory provisions or regulations. By contrast, Section 256 of the English Pensions Act 2004 has such a provision. However, the new Act has moved a step further than its predecessor by criminalizing the indemnification of any staff, officer or director of a PFA or PFC for a fine imposed on him under the Act.¹⁰⁷ Under the rules of equity, where a trustee improperly incurs expenses in the administration of the trust, and no benefit is thereby conferred upon the trust estate, he is not entitled to reimbursement out of the trust estate. For instance, it has been stated that where the trustee improperly fails to pay tax upon the trust estate, with the result that he is compelled to pay penalties for the delay, he is not entitled to reimbursement for the amount of the penalties.¹⁰⁸

Before concluding on the downside, it is pertinent to reiterate the two instances of what, in this writer's submission, smacks of *ultra vires* leg-

105. See, e.g., Moffat, *supra* note 10; R. Ellison, *Pension Fund Surpluses*, 5 T.L.I. 60 – 68 (1991); D. Pollard, *Pensions Law and Surpluses: A Fair Balance between Employer and Members?*, 17 T.L.I. 2 – 24 (2003); and the cases discussed in those works.

106. Section 82(3)(a) of the 2014 Act has now provided for the funding of the guaranteed minimum pension from the newly established Pension Protection Fund.

107. PRA (2014), § 99(4).

108. A.W. SCOTT, *supra* note 78, at 377; cf. *Hulbert v. Avens*, [2003] EWHC 76 (Ch), [2003] WTLR 287 (Eng.).

isolation, as earlier demonstrated. First, it is respectfully submitted that the National Assembly overstepped its legislative bounds by extending the application of the Act to employees in the public service of the States and the private sector. Secondly, PenCom seems to have acted *ultra vires* by paring down real estate investments to REIT and MBS, thereby outlawing direct real estate acquisition, which is authorized by the spirit and tenor of the enabling provision of the Act.

On the credit side, compared with its predecessor,¹⁰⁹ the 2014 Act¹¹⁰ has significantly enhanced the fortunes of pensioners by providing that all interests, dividends, profits, investment and other incomes accruable to pension funds and assets shall not be taxable. Here, there is a conflict between the desire to put more money in the public treasury and the need to make adequate provision for the post-retirement welfare of those who have laboured to produce the wealth of the nation. In our view, the resolution of the conflict in favour of the latter is laudable. For, if those who never worked at all are entitled to look up to the state for gratuitous old age pension¹¹¹ payable from the wealth produced by the workers, *a fortiori*, it will not be too much for the workers to enjoy tax exemptions on their deferred emoluments which are invested in order to ensure their comfort at retirement. It is noteworthy that the position in England is that whilst pension (but not lump sum payment) is taxable,¹¹² pension fund investments are exempt from income tax¹¹³ and capital gains tax.¹¹⁴

By and large, it can be said that the Act represents a bold step taken by the Nigerian legislature to swim with the global tide of pension trust investment legislation. Apart from liberally extending the scope of authorized pension fund investments, it has significantly filled the lacunae in the antediluvian trust law, which have rendered it inadequate for the protection and enhancement of the interests of modern pension scheme members. Moreover, the introduction of such modern investment vehicles as asset-backed securities, real estate investment trusts, infrastruc-

109. Although the 2004 Act gave tax relief to both employer and employee contributions as well as retirement benefits (see Sections 10 and 7(1), now re-enacted by Section 10(1) and (3) of the 2014 Act), there was no tax relief for the pension fund assets and investment incomes. In 2010, for instance, it was reported that the taxes paid on pension fund assets amounted to ₦1,229.59 million for five percent withholding tax on interest incomes and ₦663.09 million for five percent value added tax on fees payable to pension operators: see the 2010 Annual Report of PenCom, *available at* <http://www.pencom.gov.ng> (last visited Feb. 23, 2015).

110. PRA (2014), § 10(2).

111. See CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999), § 16(2)(d).

112. Income Tax (Earnings and Pensions) Act, 2003, § 393, pt. 9 (Eng.).

113. Income and Corporation Taxes Act, 1988, § 592 (Eng.).

114. Taxation of Chargeable Gains Act 1992, § 271 (Eng.).

ture funds, private equity funds, guaranteed commercial papers, bankers' acceptances, supra-national bonds, global depository notes, and Eurobonds into the range of allowable pension fund investments is a great tribute to the progressiveness of those concerned with the crafting of the PenCom Regulation.

The salient features of the Act and PenCom Regulation designed to protect the interests of pension scheme members include the following:

1. The PFA and PFC must be separate unrelated corporate entities, thus making it difficult for either to misappropriate or deal improperly with pension funds.
2. The parent company which owns a PFC is obligated to issue a guarantee to the full value of the pension fund assets under its custody.
3. The contributions of the Federal Government of Nigeria and Federal Capital Territory Administration to the retirement benefits of their employees have been made a charge on the Consolidated Revenue Fund of the Federation and Revenue Fund of the Federal Capital Territory, respectively.
4. Strict investment limits have been set and risk rating institutions licensed by SEC have to rate the allowable instruments in which pension funds are to be invested.
5. Every pension fund administrator must employ a Compliance Officer who will be under a duty to ensure compliance with PenCom's regulations and directives and report any violations to the Board of the company and PenCom.
6. Licensed operators as well as their external auditors are required, under pain of criminal sanctions, to furnish information and reports regularly to PenCom, and to publish their annual audited accounts.
7. A contributor is entitled to receive up-to-date information on his retirement savings account, thus enabling him to "blow the whistle"¹¹⁵ as soon as he reasonably suspects foul play.
8. Every PFA must maintain a Statutory Reserve Fund to be credited annually with 12.5% of its net profit after tax or such percentage as may be prescribed by PenCom to meet its liabilities.
9. PenCom is mandated to establish and maintain Pension Protection Fund for the funding of the guaranteed minimum pension, payment of compensation to eligible pensioners for shortfall or losses arising from pension funds investments and any other deserving purpose.

115. PenCom has issued what it termed "Whistle Blowing Guidelines for Pensions," available at <http://www.pencom.gov.ng> (last visited Feb. 23, 2015).

10. Pension fund assets are protected from seizure or execution by the PFC's creditors in the event of its liquidation.
11. Any eligible private sector employer still operating a defined benefit scheme is now under a statutory duty to ensure that it is fully funded at all times and that the pension fund assets are segregated from the employer's assets and also to undertake a yearly actuarial valuation¹¹⁶ of the pension fund assets.
12. Stiff legal and administrative sanctions have been stipulated for non-compliance with the statutory rules and regulations.

XV. CONCLUSION

From the foregoing, it is safe to conclude that the PRA is, true to its title, revolutionary in more senses than one. It introduced the defined contribution scheme and pension trusts into the public service of this country for the first time. It has equally opened up new outlets for the investment of pension funds with appropriate safeguards embedded in the regulatory and administrative schemes provided for under both the Act and the PenCom Regulation. Compared with the anachronistic TIA, the pension legislation has gone a long way in the quest to align the Nigerian trustee investment legislation with the current global best practices. Indeed, PFAs, compared with other trustee investors, now have every reason to heave a sigh of relief. So do pension trust beneficiaries, who are the ultimate beneficiaries of the reformed investment regime. Significantly, the accumulation of vast funds in the hands of private pension fund managers has increased the number of institutional investors in the Nigerian capital market with concomitant enhancement of market capitalization and liquidity. It has also created unprecedented employment opportunities in the pension industry.

However, a lot still needs to be done to fine-tune the new regulatory framework, especially in terms of synchronizing the provisions of the Act with those of the PenCom Regulation, harmonizing both with the provisions of the 1999 Constitution, eliminating the numerous drafting infelicities and errors contained in the Act, updating the range of permissible pension trust investments and creating the much desired multiple fund structure for the investment of pension funds. The introduction of multiple funds will offer pension fund contributors the opportunity to

116. The sort of reporting obligation imposed on external auditors of PFAs and PFCs under Section 68 of the Act ought to have been extended to actuaries. Compare the position in England where an actuary is under a duty to inform the Pensions Regulator if his valuation of the pension fund shows that it is underfunded, failing which he may incur financial penalty: Pensions Act, 2004, Sections 225, 227 and Pensions Act, 1995, Section 10.

148 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XXI

choose investments that satisfy their risk appetites and, especially, make room for ethical investment. Although the current trend in most common law jurisdictions¹¹⁷ is to give trustees (including pension fund trustees) a *carte blanche* to invest as if they were absolute beneficial owners of trust funds, thereby enabling them to invest in accordance with the modern portfolio theory, as this writer has argued elsewhere,¹¹⁸ the relatively low standard of investment skills and problem of integrity in this country make such an approach inadvisable for now.

117. See, e.g., Trustee Act, 2000, c. 29, § 3 (Eng.); Pensions Act, 1995, c. 26, § 34 (Eng.); Uniform Prudent Investor Act, § 2 (1994); RESTATEMENT (THIRD) OF THE LAW OF TRUSTS, § 80 (2007); Trusts Act 1973, § 21(Austl.); Superannuation Industry (Supervision) Act 1993, § 52(2)(f) (Austl.).

118. See L.O.C. Chukwu, *Half a Century of Trustee Investments Legislation in Nigeria: A Case for Law Reform*, 2 NIALS J. BUS. L. 178, 228 (2013).