

**PRACTICE NOTES ON ADMISSIBILITY OF COMPUTER
AND ELECTRONICALLY GENERATED EVIDENCE:
RECENT JUDICIAL GUIDANCE FROM THE DANA CASES**

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Introduction

When the Evidence Act³ was signed into law by former president Goodluck Ebele Jonathan, GCON on the 2nd day of June 2011, it was received with maximum enthusiasm by the Nigerian legal community; and particularly by trial lawyers. The basis of this enthusiasm was the very many innovations introduced by the amended law, updating the law of evidence which at that point in time had been in force for about 68 years.⁴

The law of evidence had, prior to 2011 and except for few amendments, remained significantly stagnant notwithstanding the developments in all other areas of law in the country, and especially in information technology.

One of the most significant provisions in the 2011 Evidence Act is section 84 of the Act which deals with the requirements and procedure for admissibility of computer generated evidence.

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³ 2011 (Act No. 18) with its commencement date being 3rd June 2011. The Act repealed the Evidence Act Cap. E14, Laws of the Federation of Nigeria 2004.

⁴ Note that the Evidence Act Cap. E14 LFN 2004, which was repealed by the Evidence Act No. 18 of 2011, was originally enacted as Evidence Ordinance No. 27 of 1943 but was to come into force via Notice No. 618 of Gazette No. 33 of 1945 and as No. 46 of 1945. Its various alterations via amendments came in the form of No. 20 of 1950, No. 6 of 1955 and No. 21 of 1955, respectively. It became reenacted as the Evidence Act cap. 62 of 1958, cap. 112 of 1990 and cap. E14 2004 before it was repealed to give way for a new Evidence Act 2011.

Section 84 of the Evidence Act 2011 in Focus

Section 84 of the Evidence Act provides as follows:

- “84. (1) In any proceeding a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question*
- (2) the conditions referred to in subsection (1) of this section are –*
- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;*
 - (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;*
 - (c) that throughout the period the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and*
 - (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities;*
- (3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2) (a) of this section was regularly performed by computers, whether –*
- (a) by a combination of computers operating over that period,*
 - (b) by different computers operating in succession over that period,*
 - (c) by combinations of computers operating in succession over that period;*
- or*
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers all the computers used for that purpose during that period shall be treated as constituting a single computer; and references in this section to a computer shall be construed accordingly.*
- (4) In any proceeding where it is desired to give a statement in evidence by virtue of this section a certificate –*

- (a) *Identifying the document containing the statement and describing the manner in which it was produced;*
- (b) *giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer.*
- (i) *dealing with any of the matters to which the conditions mentioned in subsection (2) above relate; and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.*
- (5) *for the purpose of this section-*
- (a) *information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment;*
- (b) *where in the course of any activities carried out by any individual or body, information is supplied with a view to its being stored or processed for the purpose of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;*
- (c) *a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.”*

Facts of the Dana cases at trial

Aside the case of **Kubor v. Dickson**⁵ decided by the Nigerian Supreme Court in 2012, we have not had many cases or opportunities for the interpretation of section 84 of the Evidence Act 2011 concerning the requirements for the admissibility of computer-generated or electronic documents in our *corpus juris*. The ongoing trial in the *Dana Aircrash* cases pending before the Federal High Court in Lagos and its peculiar facts presented a better opportunity for the court to interpret the provisions of section 84 of the Evidence Act in broad terms, in line with statutory and decided authorities.

The relevant facts of the two (2) Dana cases⁶ in which the Federal High Court has been presented with the opportunity to elaborate on the provisions of section 84 of the Evidence Act are as follows. The two victims of the aircrash worked for organizations based in the UK.

⁵ (2012) LPELR - 9817 (SC).

⁶ FHC/L/CS/827/2014- Mr. George Okonji v. Dana Airlines Limited & Anor; and FHC/L/CS/848/2014 – Mrs. Adeboola Eytayo Oluwayomi v. Dana Airlines Limited & Anor.

The two victims' families are being represented by a consortium of lawyers in Nigeria, UK and USA i.e., the Aviation Aviation Group (AAG). In the course of gathering evidence and documentation from the former employers of the victims, the Plaintiffs' lawyers based in the UK wrote letters which they sent by emails to the employers requesting certain information and documents concerning the employment of the victims. The employers responded to these requests by emails and sent the information and documents to the lawyers based in the UK, who in turn forwarded the documents/information to the Nigerian lawyers by emails for use in pleadings and at trials.

The Nigerian lawyers (the law firm of SPA Ajibade & Co.) frontloaded these documents/emails/letters etc., as prescribed under the Rules. During the course of trial in the two cases, objections were taken by the judge from the Defendants' lawyers on admissibility of the documents. In the opinion of defence counsel these documents did not meet the requirements for admissibility as computer-generated evidence under section 84 of the Evidence Act.

Apart from the two (2) Dana cases in which the court has now provided some guidance, there was a 'pilot' case⁷ in the Dana cases in respect of which the presiding judge had ruled on similar objections. In the pilot case, the judge held that some of the email documents do not bear the email address/signature of the recipient through whom the documents were sought to be tendered, i.e., that there was no correlation between the sender of the email, the UK lawyers and the Nigerian lawyers who received the front-loaded emails (and whose email addresses appeared on the email) and the witness in the box through whom they were sought to be tendered in evidence.⁸

Strategy Adopted to comply with the provisions of Section 84

In view of the Judge's ruling on the objections in the pilot case, and to avoid a similar ruling in the two (2) cases that are the subject of this practice note, the Nigerian lawyers instructed their UK counterparts to forward the emails with their attachments sent and received from the victims' employers directly to the email addresses of the witnesses (plaintiffs) who will tender them in evidence. As soon as this was done, the Nigerian lawyers prepared additional list of documents together with two sets of certificates of authentication in line with the requirements of section 84 of the Evidence Act. The UK lawyer who sent or received the letters/emails/documents and information was requested to sign one set of the certificate of authentication stating that the email and documents were properly received by her before they were sent to the witnesses/plaintiffs. The witnesses/plaintiffs in turn signed a second set of

⁷ FHC/L/CS/836/2014 – Mr. Femi Anibaba v. Dana Airlines Limited & Anor.

⁸ In compliance with the section 84 (4) of the Evidence Act 2011.

certificate of authentication stating that the email and documents were properly received by them. In addition to these steps and even though it is not a requirement of section 84 of the Evidence Act, the plaintiffs' lawyers filed the two back-to-back certificates of authentication at the court's registry as though they were court processes. The certificates together with a table of schedule of the emails/documents indicating where the emails and documents were frontloaded in the additional list of documents were tendered in evidence along with the letters, emails and documents. Again, and just as was the case in the pilot case, objections to the admissibility of the entire computer generated documents, letters and emails and the certificates of authentication were raised by the defendants' lawyers and arguments taken on these objections as follows:-

Grounds of Objections

1. The first ground of objection made was a challenge to the admissibility of the certificates of authentication attested to by one of the UK lawyers on the ground that the attester has to personally attend court to depose to the certificates of authentication.
2. Second, defendants' counsel challenged the admissibility of the emails on the ground that the plaintiff is not the maker of the emails and as a result he cannot give evidence of the emails.
3. Third, that some of the emails were neither signed nor dated. Counsel to the 2nd Defendant further contended that the emails and some of the victims' employment documents and all other letters to and from the employers are not originals and no evidentiary foundation was laid before tendering them.
4. Fourth, it was also contended that some of the letters written by the victims' former employers did not have addressees and as a result the contents are mere statements and that the plaintiff/witness not being the author of the aforementioned documents could not testify to the content of these letters. The defendants' lawyers contended that this was a breach of section 39 of the Evidence Act.

Response to Objections

In response to the objections above, the plaintiffs' lawyers contended that the objections were misconceived. Relying on the provisions of section 84 (4) (b) (i) of the Evidence Act, it was argued in rebuttal that a certificate of authentication is not equivalent to an affidavit, neither is there any provision of the law which requires such a certificate to be in the form of an affidavit. In other words, the Evidence Act does not require a certificate of authentication for computer-

generated documents to be sworn before a Commissioner for Oaths for the purpose of admissibility.

It was also argued that proper foundation was laid before the documents were sought to be tendered. In this wise, plaintiff's lawyers argued that the plaintiff, during his testimony stated that the documents were obtained from his late brother's employers by his UK lawyers. It was further argued that it is not a requirement of the law that the makers of the documents must necessarily be brought to court to tender the documents in view of the difficulty and impracticability of doing so without incurring unreasonable expenses. Counsel submitted further that it is for the Court to determine whether it is reasonable or unreasonable in the circumstances to bring to Nigeria the victims' employers, who are based in the UK, for the purpose of tendering documents only.

The plaintiffs' lawyers further contended on behalf of the plaintiffs that section 84 of the Evidence Act presupposes that being computer-generated documents, the documents are not originals, and if the authenticity of the documents are challenged, that goes to weight to be attached and not admissibility of the documents. Counsel further submitted that the documents had been pleaded and frontloaded and therefore the objections were not valid. Reliance was placed on Section 39 of the Evidence.⁹

The Decision of the Court

Relying on the provisions of section 84(4) as reproduced above and the English case of **R v. Shepherd**,¹⁰ the court dismissed the first objection. The court distinguished between the competence of a witness to sign a certificate envisaged by paragraph 84 (a) of schedule 3 of the English Police and Criminal Evidence Act¹¹ and his competence to give oral evidence on the reliability of the computer. In **R. v. Shepherd**, the English court had held, while interpreting paragraph 8 (d) of schedule 3 of the English PACE Act *in pari materia* with section 84 (4) of the Evidence Act regarding matters contained in section 69(1) of the PACE Act (equivalent to section 84 [4]) of the Evidence Act, that although the store detective understood the operation of the computer and could speak to its reliability, she had no responsibility for its operation but that both the oral evidence or written certificate duly signed in terms of paragraph 8 of schedule 3 is acceptable to prove the reliability of the computer. The court in the two Dana cases followed the decision of **R. v. Shepherd** to the effect that once the certificate was signed by somebody whom from his job description can confidently be expected to be in a position to

⁹ Section 39 provides thus: 'Statements, whether written or oral, of facts in issue or relevant facts made by a person – (a) who is dead; (b) who cannot be found; (c) who has become incapable of giving evidence; or (d) whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are admissible under section 40 to 50.'

¹⁰ (1993) 1 ALL ER 225 H.L.

¹¹ Otherwise known as PACE Act; similar to Section 84 (4) of the Nigerian Evidence Act 2011.

give evidence, is fully familiar with the operation of the computer stores and could speak to its reliability, that was sufficient. The judge held on this score that nothing in the Evidence Act 2011 requires the UK lawyer who attested to the certificate of authentication to be present in court or before a commissioner for oaths to depose to the certificate. All that the law requires is that the certificate should identify the device used, the condition of the device and the name and signature of the officer responsible for the operation of the device.

Regarding the arguments on inadmissibility of emails on the ground that the witness is not the maker, the court agreed with the plaintiffs that there are at least two (2) exceptions to the rule that a maker of a document should tender same in evidence. The court relied on the Evidence Act and the Nigerian Supreme Court's decision in **Mega Ban Plc. v. O.B.C. Limited**¹² and held the exceptions to be where (1) the maker is dead or (2) the maker can only be procured by involving the party in so much expense that it would be outrageous in the circumstances of the case. The arguments that the emails were not signed were also rejected. The court also relied on the English case of **Pereira Fernands v. Mehta**¹³ and held that the emails contained the names of the authors, the positions they occupy and above all, it was signed with their email addresses and phone numbers. The court held that there has been full and substantial compliance with the requirements of the Evidence Act. On the objection of not laying proper evidentiary foundation for the documents, the court found in favour of the plaintiff and held that the necessary foundation had been laid before the documents were sought to be tendered.

Concluding Comments

1. Counsel should anticipate and be wary of objections, leaving little or no room for superior arguments that may be raised by opposing counsel. This requires adequate preparation weeks and days before scheduled trials. Arguments and indeed cases are won during preparations.
2. Counsel should strive to comply fully with the provisions of the Evidence Act, and if in doubt, go the extra mile to ensure that critical documents necessary to prove client's claims are admitted in evidence. An example of going the extra mile was the filing of the certificate of authentication as a process of court in the two Dana cases.
3. Note that a document generated electronically or via computers must still satisfy other requirements for admissibility of documents in order to be admitted in evidence.¹⁴ In other words, the document must be primary evidence except where secondary evidence of the

¹² NSCPR VOL 21 (2005) 171.

¹³ (2001) ALL ER 891.

¹⁴ Kubor vs Dickson (supra)

document is admissible by law, in which case, only admissible secondary evidence of the document must be tendered.¹⁵

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¹⁵ See generally, sections 84 – 106 of the Evidence Act 2011, et seq, dealing with admissibility of statements in documents produced by computers; primary and secondary documentary evidence; proof of execution of document; and public and private documents.