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DEVELOPERS, DESIGN CONSULTANTS AND CONTRACTORS LIABILITIES' IN THE CONSTRUCTION INDUSTRY IN NIGERIA: A PROPOSAL FOR A BALANCE

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Abstract

Construction opportunities come with risks and liabilities. The risks and liabilities may be bodily injury, loss of life and damage to property including financial loss which resulted from human negligence or factors. This paper therefore examined the liabilities of the owners, design consultants and contractors in the building industry in Nigeria. The examination revealed that the Insurance Act 2003 required the owner or developer of any building of more than two floors to be constructed to insure it prior to the commencement of the construction to provide for the liability of such developer arising from construction risks caused by his negligence or the negligence of his servants, agents or consultants which may result or cause bodily injury, loss of any life or damage to property belonging to any workman on the site or any member of the public. But no corresponding duty was imposed on the design consultants and the contractors in the Public Procurement Act 2007 and the Federal Competition and Consumer Protection Act 2018. It suggested therefore for the immediate amendment for the latter to provide and impose liability on the contractor of a building and the design consultant who may have supervised or directed the work for the losses and damages if the said building should collapse total or partial within a period of ten years and above after the completion and handover due to defects in construction arising from negligence even if the defects or collapse was due to defect in ground or soil.

1.0 Introduction

Opportunity comes with risk and liability. The risks and liabilities that come with construction opportunities may be bodily injury, loss of life or damage to property which resulted from the negligence of the owners of properties design consultants or contractors. In Nigeria, the liabilities of the owners (developers) of properties, design consultants and contractors are governed by the contracts of the parties and are provided in the laws. This paper therefore examines the liabilities of the developers, design consultants and contractors in the building industry in Nigeria as provided in the Insurance Act 2003 (IA), the Public Procurement Act 2007 (PPA) and the Federal Competition and Protection Act 2018 (FCCPA) to ascertain the laws stipulated.

2.0 Liability under the Insurance Act 2003

In the IA, it is mandatory in Nigeria for certain class of buildings about to be constructed to be insured prior to the commencement of the constructions to provide for the liability of the owners arising from construction risks caused by their negligence or the negligence of their servants, agents or consultants which may result or cause bodily injury, loss of any life or damage to property belonging to another person. The relevant section stipulates that no person shall cause to constructed any building more than two floors without insuring with a registered insurer his liability in respect of construction risks caused

by his negligence or the negligence of his servants, agents or consultants which may result in bodily injury or loss of life to or damage to property of any workman on the site or any member of the public.[1]

The duty to insure a building in this category or to provide insurance cover for constructions risks arises once the building is under construction.[2] The failure to insure this class of building before commencing construction contrives the mandatory section of the law, and it is a criminal offence which the contravener or defaulter is liable on conviction to a fine of N250, 000.00 or imprisonment for three years or both.[3]

In the IA, the insurance policy for the building under construction must cover the legal liabilities of an owner or occupier of the premises in respect of loss of or damage to property or bodily injury or death suffered by any user of the premises and third parties.[4] Any occupier or owner of premises who fails to take out insurance commits an offence and is liable in conviction to a fine of not more than N100, 000.00 or to imprisonment for one year or both.[5]

The use of substandard materials in construction works in order to maximize profit[6] is one of man-made causes of failure or collapse of structures under construction and during the service life. Some of the substandard materials used for constructions are sourced or produced locally while some are imported. As way to checking and ensuring that inferior construction materials are imported and used for construction, the IA requires owners and contractors to insure imported materials which are described as 'goods' in the Act with Nigerian insurance companies[7] as opposed registering them with foreign insurers. In the IA, it is an offence which on conviction attracts a fine of N500, 000.00 for any importer, broker or agent to effect any insurance or facilitate the importation of construction goods or materials into the country contrary to the provisions of the Act.[8]

The IA further stipulates that every public building shall be insured with a registered insurer against the hazards of collapse, fire, earthquake, storm and flood.[9] In the definition section, the phrase 'public building' is defined to include: a tenement house, hostel, a building occupied by a tenant, lodger or licensee and any building to which members of the public have ingress and aggress for the purpose of obtaining educational or medical service, or for the purpose of recreation or transaction of business.[10] By this definition, government and private owned buildings or structures such as schools, churches,

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[1]IA 2003, s 64 (1).
[2]*Ibid*, s 64 (2)
[3]*Ibid*, s 64 (3)
[4]IA 2003, *s* 65 (3).
[5]*Ibid*, s 65(6).
[6]IG Chendo and NI Obi, 'Building Collapse in Nigeria: 'The Causes, Effects, Consequences and Remedies' (2015) *International Journal of Civil Engineering, Construction and Estate Management,* 45.
[7]IA 2003, s 67 (1).
[8]*Ibid*, s 67 (4).
[9]*Ibid*, s 65 (1).
[10]*Ibid*, s 65 (2)

plazas or malls, office complexes or hospitals which members of the public have access in and out for one purpose or the other are covered.

It is glaring from the foregoing that the liability for construction risks is not on the servant, agent or consultant who may have caused the risk which has resulted to bodily injury or loss of life to or damage to property or a workman on the site or of any member of the public, but on the developer or owner a building.[11] The insurance policy to be taken out as required by Section 64 (1) covers only the construction risks that may occur during the construction of the building[12] and the duty to insure arises when the building is under construction.[13] The purport of these provisions is that the policy subsists as long as the project is under construction. It ceases to be in force and effective once the building or the construction has been completed and perhaps, handed over to the client/owner.

The community consideration of Section 65 (2) and (3) means also that construction risks that occur after the building or construction has been completed and handed over to the developer or owner for the intended use or purpose are outside the coverage of the insurance policy including the risk of the collapse that may have caused to anybody or property or any member of the public. When this is the case, it appears that the owner of the project is not liable even if the cause of the injury or damage is due to the negligence of the servants, agents, consultant and contractor during the design and construction during which may be made an issue under a different law.

In consideration of the pivotal role the design consultants and contractors play in the civil engineering process and those who engaged them to provide professional services rely on their avowed knowledge, experience and expertise, therefore, they should be made to bear the responsibility for their negligence. This will help to keep them on their toes as they render design and construction services in the industry. This is important because the failure to perform in accordance with the applicable standard of care constitutes negligence to control against the 'moral hazard'[14] for which they should not be shaded from bearing responsibility.

Given the above, the provisions of the IA relating to insuring of building of two floors and above against construction risks are not intended to check, avert or minimise human negligence or errors in the design and construction of buildings as a means to minimising defective designs and constructions in the building industry in Nigeria. The provisions rather provided security for construction risks that may arise during the construction of buildings on the site. For this reason, the provisions of the IA are inadequate. The building industry is in dire need of a legislative protection against preventable and avoidable construction risks resulting from design and construction mistakes or deliberate intents and not just only security for construction risks alone that may arise during construction which is what section 64 (1) of the IA is.

[11]IA 2003, *s* 64 (1).
[12]*Ibid*, s 65 (3).
[13]*Ibid*, s 65 (2).
[14]GS Kelley, *Construction Law: An Introduction for Engineers, Architects and Contractors* (New Jersey: John Wiley 2013) 198-201.

In the absence of a provision in the IA demanding the architects, engineers and contractors' to also take out liability insurance, the owners of building construction projects may require the design and construction professionals to maintain liability insurance policy known as errors and omissions (E&O) insurance to cover construction risks that may arise from their negligence or mistakes after the completion of a project[15] or demand for the evidence as the alternative and a precondition for the award of building contracts to them.

3.0 Liability under the Public Procurement Act 2007

As a condition for the award of any procurement contract upon which any mobilisation fee is to be paid, the PPA requires the supplier or provider of procurement service to provide performance guarantee which shall not be less 10% of the contract value in any case or an amount equivalent to the mobilisation fee requested by the supplier or contractor whichever is higher.[16] The phrase 'performance guarantee' is not defined in the interpretation section of the PPA. But it means a surety taken out by the contractor for the benefit of its obligation under the contract,[17] a bond that assures the developer of a project that the contract will be completed according to its terms, or where the contractor's contract was terminated for default, the guarantor will ensure that project which is subject of the contract will be completed with another contractor with its funds where the initial contractor has been paid. [18]

The guarantee provides a financially responsible party to stand behind some aspects of the contractor's performance.[19] It obligates the surety to fulfill the terms of the contract if the principal does not perform so that the owner receives the project for which it bargained.[20] The amount of such bond is either 10 % of the contract sum or 100% of the contract sum.[21] This is a common practice in the construction industry. The challenge is that the provision of the PPA on performance or payment bond, or guarantee is not liability for poor workmanship or defective works against the design consultants and contractors in a project procurement undertaking.

The PPA also requires the exercise of requisite skills and imposes the obligation of fitness for purpose in service provision in execution of projects in the public sector. It stated specifically that subject to any exemption allowed by the Act, all public procurement shall be conducted with the aim of achieving value for money and fitness for purpose.[22] Subsection (28) of the same Section 16 stipulates that all procurement contracts shall contain warranties for durability of goods, exercise of requisite skills in service provision and use of genuine materials and inputs in execution.

[15]*Ibid*, 202.
[16]PPA 2007, s 36; Rivers State Public Procurement Law No. 4 of 2008, s 33.)
[17]P Abuka and S Abuka, 'Construction and Engineering Laws and Regulations Report 2022 – 2023 Nigeria' <https://iclg.com/practice-areas/construction-and-engineering-law-laws-and-regulations/nigeria> accessed 4 April 2023.
[18]Kelley (n 14) 208.
[19]J Sweet and MM Schneier, *Legal Aspects of Architecture, Engineering and the Construction Process* (8th edn, USA: Cengage Learning 2009) 741.
[20]CJ Circo and CH Little *A State-by-State Guide to Construction and Design Law* (2nd edn, American Bar Association 2009) 13.
[21]Abuka and Abuka (n 17).
[22]PPA 2007, s 16 (1) (e).

In situations where the goods or materials used in project procurements in the public sector failed to meet the warranty of durability because they were substandard goods or materials; or where the requisite skills were not deployed or exercised in the provision of procurement services and the procurements turned out to be unfit for the purpose or failed to achieve the value for money due to human negligence in the critical areas of the designs and constructions, the PPA states that the supplier, contractor or service provider that breached the obligations of the exercise of reasonable skills and fitness for purpose by way of non-performance or improper performance of the contract awarded pursuant to the Act is liable either individually or jointly and severally.[23]

However, the nature of the non-performance or improper performance that shall constitute breach of the responsibilities of exercise of the requisite skill and fitness for purpose is not stated or defined in the PPA. For instance, it is not clear whether the total or partial collapse of the subject matter of a construction contract during or after construction, handover and expiration of the defects liability period due to the condition of the ground will qualify as the non-performance or improper performance of the contract for which the contractor or both the contractor the architect or engineer who supervised the construction can be held liable individually or jointly and severally. The lack of clarity is problematic and it is not a healthy development since prove of 'non-performance' or 'improper performance' will be required and the meaning will be subject to the interpretation that will be given to it.

4.0 Liability under the Federal Competition and Consumer Protection Act 2018

In spite of the separation principle introduced by the FCCPA with the restriction of the application of the obligation of fitness for purpose to only undertakings for the supply of goods to the exclusion of contracts for the provision or supply of services such as design and construction services, it provides that in an undertaking for the supply of goods or service, or the supplier or provider of goods or services which caused bodily injury and damage to the consumer's property by reason of being defective shall be liable for the damage caused by the defective goods or services.[24]

Under the law, a person who is affected by the defective goods or services has the right to sue[25] for damages or compensation. The liability of the undertaking that supplied defective goods or service which has caused losses or damages caused shall not be excluded or restricted.[26] It is immaterial whether or not there is a contractual relationship between the supplier of the defective goods or service and the consumer or user who has suffered bodily injury or damage to personal property.[27] This presupposes therefore that the common law doctrine of privity of contract does not apply to stop a third who has suffered personal injury or damage to property as a result of the supply of defective goods or service under a contract such person is not a party from suing for compensation.

Under the FCCPA, the onus of prove is not on the consumer or user of the alleged defective goods or services to prove as alleged, it is on the supplier or provider of goods or services alleged to be defective

[23] *Ibid*, s 16 (5).
[24] FCCPA 2018, s 136 (1).
[25] *Ibid*, s 136(4).
[26] *Ibid*, s 136(5).
[27] *Ibid*, s 136 (3).

to establish that they are not defective as alleged. The provision states thus: 'where it is alleged that supplied goods or services is defective, the onus shall lie on the undertaking that supplied the goods or services.'[28] This provision is an exception to the principle of law in evidence which places the burden of proves on the party who alleges the existence of a fact or set of facts[29] and it is positive and commendable.

But it appears that this provision on burden of proof will only avail a consumer or user if the purpose the goods or services are needed for is communicated to the undertaking that will supply or provide the goods or services following the provisions of which states that in addition to the right set out in Subsection (1), Section 131, a consumer must have specifically informed an undertaking of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the undertaking ordinarily offers to supply such goods or acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.[30] This is the caveat.

Without the prior notification, it appears the provider or supplier is let off the hook of liability to consumer or user who was supplied defective goods or services. It also suggests that supplier or provider of goods or service is at liberty to supply or provide low quality, substandard or defective goods or services where the purpose the goods or service for which they are needed for is disclosed. This is not a health development because the provision on prior information is not in tandem with the objectives of Standard Organisation of Nigeria which includes the maintenance of acceptable standards; ensuring compliance with standards designated and approved the Council in relation to the quality of goods and products, services as well as facilities under the law.[31]

As a way of checking the sales and supply of low quality goods or materials and the use in construction activities, the FCCPA stipulates that where goods or materials are supplied by sample and description, the goods delivered must correspond with the sample and description. It is not enough that the goods correspond with sample but did not correspond with the description.[32] The liability of the seller to the consumer for breach of the obligations arising from seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose, shall not be excluded or restricted by reference to any contract term.[33] The implication is that the purchase or use of goods or materials that are contrary to the sample and description as stated in the contract specification is an instance of the use of substandard construction materials, non-compliance with the terms of contract and a breach of contract.

[28]FCCPA 2018, *s* 145.
[29]Evidence Act 2011, s 131 (1).
[30]FCCPA 2018, 131 (2).
[31]SONA 2015, s 5 (1).
[32]FCCPA 2018, s 121 (3).
[33]*Ibid*, s 138 (2).

The FCCPA also provides that the performance of services such as design consultancy services should be in a manner and quality that reasonable persons are generally entitled to expect.[34] and where an undertaking fails to perform a service in a like manner and quality as it is expected or below the standard, the consumer or the developer of a project may require the provider of the services to either remedy any defect in the quality of the services performed or goods supplied, or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied having regard to the extent of the failure.[35] The non-imposition of the obligation of fitness for purpose on contracts for the supply of services such as design and construction services is antithetical to this provision that requires the performance of services to be carried out 'in a manner and quality that reasonable persons are generally entitled to expect' and may mar the objective and achieving the purpose or the intendment of the Act.

The FCCPA declares as void and unenforceable in Nigeria any clause, term or condition in an undertaking or agreement for the supply of goods or services between the supplier or provider of goods or materials and services and the customer like a developer or contractor which seeks to limit or exempt the undertaking from liability for any loss directly or indirectly attributable to gross negligence of the undertaking or any person who is acting for or who is controlled by the undertaking, or that seeks to avoid an obligation under the contract or any duty under the Act including liability for damage arising from the supply of defective goods or materials and poor service delivery.[36]

One of the reasons for voiding and making unenforceable exemption or limitation of liability clauses for loss or damage resulting from the supply of defective goods and services in contractual undertakings is that the consumer or user of the goods and services is entitled to the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect if the goods are required for performance of the services.[37] The other reasons are that every consumer or user in a contract for the supply of goods and services has the right to the receive goods or services which are reasonably suitable for the purposes for which they are generally intended; goods that are of good quality, in good working condition and free of defects; goods that will be useable and durable for a reasonable period of time, having regards to the use to which they will normally be put and to all the surrounding circumstances of their supply; and that comply with any applicable standards set by the industrial sector regulators.[38]

The major challenge however, is that the FCCPA limited the requirement or obligation of 'suitable for the purposes' or fitness for purpose it provided to only contract for the supply of goods alone[39] to the exclusion of the contract for provision of services. In other words, goods supplied under an undertaking for the supply of goods must be fit for the purpose they are required. But in an undertaking for the provision of services like building design and construction consultancy services, the FCCPA did not provide or require that the outcomes from the professional services must be fit for purpose.

[34]*Ibid*, s 130 (1) (c).
[35]FCCPA 2018, s 130 (2).
[36]*Ibid*, s 129 (1) (2).
[37]*Ibid*, s 130(1) (d).
[38]FCCPA 2018, s 131 (1) (a) (b) (c) (d).
[39]*Ibid*, s.131 (a).

The implication therefore is that since the FCCPA did not impose the obligation of fitness for purpose in project procurement contracts carried out the parties in the private sector and in undertakings for the supply of professional services such as building design and construction services, a right, duty or liability for fitness for purpose that would arise under such undertakings can be negated or varied by express agreement or by the course of dealing between the them or by usage as binds both parties in a project delivery contract in the private sector in the construction industry in Nigeria. For instance, the standard forms of construction contracts limited the liability of design consultants and constructors to only the duty of skill, care and diligence[40] to the exclusion of the duty of obligation to achieve result (an obligation *de resultat)*[41] or fitness for purpose because the latter imposes a higher degree or standard of care compared to the former.

Where the obligation of fitness for purpose is provided in a construction contract, it is limited to design and build contracts only[42] (to exclusion of other types of project procurement contracts). The exclusion of the duty of fitness for purpose in the standard forms of construction contracts used in Nigeria is supported by provision of the law which states the where a right, duty or liability would arise under a contract for the supply of a service, it may be negated or varied by express agreement or by the course of dealing between the parties or by such usage as binds both parties to the undertaking as long as it does not negate a term implied by the FCCPA[43] or any law. As it relates to the issue of fitness for purpose obligation and design and construction services, the provision does not provide the needed check on curbing human negligence in the areas of design and construction activities in the construction industry in Nigeria; rather it contributes to exposing the sector to the menace of building collapse.

5.0 Proposal for the Provision or Imposition of Decennial Liability in Building Contracts in Nigeria

From the beginning of humanity, humans have sacrificed their time, energies and resources to have shelters as mean to protecting themselves against environmental hazards. This explains why homes or buildings have always been a desired necessity and fundamental possession till the modern day. This is a fact the professionals in the construction industry are aware of. In spite of the obvious, they have, in the course of carrying out civil construction or engineering activities made a number of errors over the years resulting in narrow escapes, badly performing structures, and even fatal collapses and do not want the repeat of their errors, some of which were caused by mistakes in design or construction or both. A few of the errors and incidents were caused by deliberate intent.[44] This is unlike the past when design consultants and contractors design and build to satisfy their clients and to avoid liabilities, and with the aim of ensuring that their works lasted after they are gone, or even for eternity.[45] The examples are ancient monuments and cathedrals or temples in Nigeria and other parts of the world.

[40]NIA CECSA 2000, clause 9.1; JCT 2016, clause 2.17.1; FIDIC (White Book) 2017, clause 3.3.1.
[41]M Grose, *Construction Law in the United Arab Emirates and the Gulf* (1st edn, UK: John Wiley & Sons Ltd 2016) 85.
[42]JCT 2016, clause 2.17.
[43]FCCPA 2018, s 144 (1) (2) (3).
[44]R Whittle, *Failure in Concrete Structures: Case Studies in Reinforced and Prestressed Concrete* (New York: CRC Press 2013) ix; xiii.
[45]*Ibid*.

The legislative response to reminding the design and construction professionals of their past mistakes or grave errors arising from negligence and deliberate intent and to checking and minimising the repeat is the legislation imposing the obligation of fitness for purpose **and** decennial liability in construction contracts. Professionals in the built industry are aware that the reason why some of the lessons from their past errors get embodied in clauses in codes of practice[46] as well as the laws governing design and construction in the industry is to avoid the reoccurrence of the booboos of the past.

Duty of fitness for purpose in construction contracts places a higher responsibility on design and construction professionals when juxtaposed with the duty of care or skill and care. The former requires the professionals to exercise higher standard of care that would lead to achievement of result unlike the duty of reasonable skill, care and diligence which simply means and requires what a reasonable man would do to the exclusion of achieving the intended object or result.[47] It also places higher or more risks on them compare to the latter.

The obligation of higher responsibility (result) and the liability, perhaps, are the reasons why the standard forms of construction contracts authored by design and construction professionals themselves, did not provide or have provisions for the duty of fitness for purpose other than the duty of skill and care except the FIDIC's Model Services Agreement (White Book) 2017 which provided the duty of fitness for purpose but limited it to only contract for design and build only.[48] Since the FIDIC standard form contract is not law, design and construction professionals may exclude the obligation in their undertakings without the knowledge of unsuspecting clients who are laymen in design and construction activities in the construction sector.

In view of the above possibilities, the failure to impose the duty on building procurement contracts in the private sector in Nigeria with legislation or the omission in FCCPA 2018 is therefore a categorical mistake. The report of the inventory of building collapse and lives lost between 1971 - March 2016 which showed that out of the 175 buildings that collapsed within the period, private and corporate buildings that collapsed in the private sector were 151 compared to the 24 buildings that collapsed in public sector,[49] buttressed the point. Legislative imposition of the duty of fitness for purpose in building construction contracts will force the professionals in the construction sector to be more careful in carrying out their responsibilities in the construction processes because of the implication of breaching the obligation due to negligence, or mistakes of deliberate intent.

The obligation of fitness for purpose imposes higher responsibility (result) and the liability appears to be a duty owed for eternality, but the introduction and imposition of decennial liability period limited the applicability and weight of the doctrine of fitness for purpose on the design and construction

[46]*Ibid*.
[47]Grose (n 41) 84.
[48]FIDIC 2017, subclause 4.1.
[49]FC Omenihu and Others, 'An Analysis of Building Collapse in Nigeria (1971-2016): Challenges for Stakeholders'' (2016) (XXVI) *Annals of Borno,* 132.

professionals. Compared to the shorter defects liability period of six months practice in Nigeria[50] or the one year duration operational in most jurisdictions like Malaysia,[51] UAE[52] and USA,[53] decennial liability extends the duration of the liability of design and construction professionals to their clients for works they have done to cover a period long enough for latent structural defects structures to manifests or be discovered. In other words, it provides room for hidden structural defects which may not have manifested within the defects liability period or even within the two years period provided in Clause 11.3 of FIDIC 2017.

For example, a report of the survey on defects liability periods practice in Malaysia and Nigeria revealed that the occurrence of defects is higher after the expiration of the defects liability period.[54] This suggests that the six months defects liability period practiced in Nigeria is not sufficient or long enough for hidden structural defects to appear.[55] On one hand, the report buttresses the need and importance of decennial liability in the building industry. On the other, it reveals the danger of not providing and imposing it on building or construction contracts in Nigeria as it is the case in other jurisdictions like France, Egypt, UAE and USA. Compared to decennial liability period, the one year or two years defects liability period is also not enough to allow latent structural defects or errors to reveal themselves. The introduction of the former on building contracts with legislation collaborates the assertion.

In essence, the statutory imposition of decennial liability period in building or construction contracts extended the responsibility and liability of design and construction professionals beyond what are provided in the standard forms of construction contracts used in the construction industry the world over. In fact, it provided what has been described as expanded professional liability (EPL) in the construction industry which denotes 'a method of eliminating incompetent practitioners from the profession, to supplement the unarguably ineffective registration laws or, at least in the area, the inefficient marketplace'.[56]

In Egypt for example, a ten year liability period is imposed on the architects, builders and contractors in building construction contracts. Specifically, the architect and contractor are jointly liable for any defects or damages to a building or structure for a period of ten years.[57] The liability period starts from the date of the completion of the building or structure[58] and it applies to any defects or damages that affect the stability or safety of the building or structure.[59] The builder, architect or contractor can be held

[50]AA Oluwole and Others, 'Comparative Study of Defect Liability Period Practice in Malaysia and Nigerian Building Industry' (2012) (3) (6), 810.
[51]*Ibid*.
[52]A Masadeh, 'Decennial Liability in Construction: Law and Practice in the United Arab Emirates' <hhtps://www.irbnet.de/daten/iconda/CIB_DC27637.pdf> accessed 5 May 2023.
[53]Kelley (n 14) 212.
[54]Oluwole and Others (n 50) 810.
[55]*Ibid*.
[56]Sweet and Schneier (n 19) 300.
[57]Egyptian Civil Code 1949, art 651.
[58]*Ibid*, art 652.
[59]*Ibid*, art 653.

liable for damages or defects even if they were not negligent.[60] The ten years liability period cannot be waived or shortened by agreement.[61]

In the UAE, the liability of design consultants and contractors for structural failure or collapse as well as defects in buildings and other fixed installations and the duration is stated thus:

> If the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect, to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend that such installation should remain in place for a period of less than ten years. The said obligation to make compensation shall remain notwithstanding that the defect or collapse arises out of a defect in the land itself or that the employer consented to the construction of the defective buildings or installations. The period of ten years shall commence as from the time of delivery of the work.[62]

Similarly, in Puerto Rico (USA) the liability of contractor and architect for collapse of building is provided thus:

> The contractor of a building which may have been destroyed by reason of defects in the construction shall be liable for the losses and damages if said building should collapse within ten years, to be counted from the completion of the construction, and during the same time the same liability shall be incurred by the architect who may have directed the work if the collapse is due to defects in the ground or in the direction. If the cause should be non-compliance of the contractor with the conditions of the contract, the action for indemnity may be brought within fifteen years.[63]

The quoted passages are strict liability provisions that do not require proof of negligence or fault[64] on the part of the design consultants and the contractors. It suffices once there is defects in a structure or it collapses. The defence to this liability is the proof that the cause of defects in building or the collapse was wholly unpredicted and inevitable[65] such as natural disaster, an unavoidable accident as well as act of a third party, or an act of the person suffering loss. However, it will not be a defence that the owner of the project or property consented to the construction of the structure,[66] maybe without soil test of the

[60]*Ibid*, art 654.
[61]*Ibid*, art 655.
[62]UAE Civil Transaction Code No. 5 of 1985, art 880 (1) (2) (3).
[63]PR Civil Code 1999, art 1483.
[64]Grose (n 41) 111; Masadeh (n 52).
[65]Corp. Presiding Bishop CJC v Puerrell (1986) DPR 714.
[66]Masadeh (n 52)

land to be developed. The exclusion of the requirement of proof or imposition on the professionals is based on public policy[67] whether or not it is expressly stated or provided.

The EPL extended the duty of skill and care and the concept of defects liability period provided in the standard forms of construction contracts which the design and construction professionals are comfortable with because they limit duration of their obligations and risks or liabilities to their clients. The idea of EPL is intended to make design (and construction) practitioners to be careful – perhaps, too careful in carrying out their responsibilities. Though the result may be overdesign, an unwillingness to take design tasks, and mediocre design, but it is or has been justified as a process for allocating responsibility to the people who are responsible and who can best spread the loss. In climes where decennial liability is practiced, it has slowly reduced the ranks of sole practitioners and small partnership and led to increased specification[68] and minimized collapse of structures.

Furthermore, the introduced EPL or decennial liability achieved two things in the construction industry. Firstly, it pegged the liability of the design consultants and contractors to a specific period or number of years after completion of their works.[69] With this, the professionals and theirs estates will not be perpetually liable for defective works that may occur even years after they are gone. Secondly, it terminated the application or the defence of doctrine of acceptance in construction contracts which architects or civil engineers ad contractors previously relied on to evade liabilities for their actions and inactions or failure to achieve desired and expected results.[70]

The doctrine of acceptance shifted the liabilities of design and construction professionals who were negligent in the performance of their duties to innocent developers/owners of building projects or structures who have accepted the projects after completion.[71] It cuts off the liability for latent structural defects that may manifest after completion and handover of a structure. In other words, it was an intervening factor that severed the causal link between the contractor's negligence and the developer/owner's because it amounted to latter's affirmative duty to maintain the structure in reasonably safe condition.[72] Accordingly, the acceptance of a project is an indication of the developer/owner's satisfaction for which the developer/owner cannot come back to make complaints about the work.[73]

6.0 Conclusion

The design consultants and contractors in Nigeria should be held accountable for serious defective works or collapse of structures that may occur within a given timeframe after completion and handover. The period should be long enough to allow latent structural defects in buildings to manifest as evidence of poor workmanship or failure to carry out the works in the manner that shows that the works were

[67]Grose (n 41) 107; Masadeh (n 52).
[68]Sweet and Schneier (n 19) 300-301.
[69]*Ibid*, 63.
[70]Sweet and Schneier (n 19) 63.
[71]*Ibid*.
[72]*Ibid*.
[73]*Ibid* 537.

performed by persons who have the requisite training, knowledge, and experience from the perspective of those capable of judging such works. Moreover, it is in public interest that structures should be structurally sound and design consultants and contractors as professionals in the building sector are in a better position than most developers or owners to deliver an outcome which is consistent with the objectives.

Without a legislative provision imposing decennial liability on the design and construction professionals for defective construction and total or partial collapse of building within a given period of about ten years long enough for latent defects to manifest within a timeframe after the completion and handover of the construction or project, the performance of design and construction services in a manner and quality that reasonable persons are generally entitled to expect as stipulated in Section 130 (1) (b) of the FCCPA 2018 is guaranteed and the fight against the menace of building collapse is far from being won.

7.0 Recommendation

Since no law provided for decennial liability and decennial liability period in Nigeria, Sections 136 and 144 of the Federal Competition and Consumer Protection Act 2018 should be amended to incorporate ten years liability period as provided in Article 1483 of Puerto Rico Civil Code 1999 and Article 880 of UAE Civil Transaction Code 1985 to apply in or to all building procurement or construction contracts both in the private and public sectors.