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SOME RECENT DEVELOPMENTS IN NIGERIAN COMPANY LAW

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The Nigerian Company Law took a definite and progressive turn when the new Companies and Allied Matters Decree, 1990 (now Act) was promulgated into law in 1990. (CAMA) It repealed the Companies Act 1968, which was nothing but a copy of the English Companies Act of 1948. In England, the law on companies had been reviewed and revised so many times and on various issues while the rest of the world especially the Commonwealth countries like the Caribbean countries, Ghana etc. have also reviewed their laws. In effect, the review of the Nigerian Company Law was over due.

In this paper, the aim is to consider and analyse very important changes in the law and proffer suggestions.

PRELIMINARY REQUIREMENTS OF INCORPORATION

The attempt to study the preliminary Requirements of Incorporation of Limited Liability Company will be better understood against thee backdrop of the historical origin of Joint Stock Companies. The successive legislations from the Bubble Act of 1720, to the 1844 Act for Registration, Incorporation and Regulation of Joint Stock Companies which has as its philosophy full and adequate publicity. The

1856 Companies Act introduced majority of the preliminary requirements for incorporation we now have today.[1] One may safely conclude that our Companies Act 1968 or CAMA 1990 did not blaze any trail as regards preliminary requirement of incorporation. Under the Companies Act 1968, and the CAMA 1990, the preliminary requirements depend on whether the company is a private or public Company, unlimited or one Limited by guarantee. We shall endeavour to examine preliminary requirements for incorporation under the following sub-headings:

Membership of the Company

The 1968 Act draws a sharp distinction between a Private and Public company by requiring a minimum of seven persons to form a public company and minimum of two persons to form a Private Company[2]. However the dichotomy has been removed under the CAMA 1990, section 18 states "As from the commencement of this Act, any two or more persons may form and incorporate a company by complying with the requirements of this Act in respect of registration of such company".

However, the reason why the Act prescribes 2 persons is very vague. But we submit that the two man company is a farce and does not represent the true position of things. The Law should be made to accord with practice and development in society. In actual fact, only one man in majority of cases actually forms a company in Nigeria and only needs another person to enable him comply with the

[1] Memorandum and articles of Association to replace the deed of settlement, requirement of minimum of 7 persons to form a limited liability company e.t.c.

[2] See S.1 Companies Act, 1968

Law. The argument for a two man company was that it takes at least two to form a company and that a man cannot hold meetings with himself. Furthermore perpetual succession is ensured better if the minimum number is two. The argument that it takes two to form a company is a fiction as earlier stated, further in the case of EL SOMBRERO LIMITED[3] one man was ordered to hold a meeting, while the issue of perpetual succession can be assured by the provision that not less than two Directors may be appointed at each particular time. Equally obvious is the fact that the personal representatives of the Sole Share holder continues to exercise his rights as regards the company.

Nigeria will not be the first to adopt the one man company structure, as Ghana,[4] Canada and the Caribbean use the same. It merely brings law in line with reality and the decision in the case of SALOMON v. SALOMON.[5] We therefore submit that a one man company structure be introduced. It is even more appropriate in Nigeria where greed and inordinate ambition and petty jealousy have caused the end of most popular joint ventures and where people prefer to do it alone.

A good innovation in the CAMA 1990 is the provision that disqualifies infants, people of unsound mind and undischarged bankrupt from becoming subscribers to a Memorandum of Association. However, an infant may subscribe if any other two subscribers are not otherwise disqualified[6]. One must hasten to state that the exception in the case of an infant subscriber seems illogical for an infant

[3] (1958) Ch.900
[4] Draft Companies Code Bill S.8
[5] [1897] A.C. 22
[6] S.20

cannot be held responsible for shares not paid up in the event of liquidation and a creditor cannot enforce any claim arising there from[7], so that the exception does not remove the obvious fact that the infant is a subscriber whether other subscribers are adults or not or otherwise disqualified or not.

Name of the Company

The name of a company is a necessary prerequisite to registration all over the world, not only to distinguish a company from others, but also to designate and warn creditors and anybody dealing with it of its legal status.

Section 19 of CAMA 1990 now provides the addition of Public Limited Company (PLC) must now be used to differentiate between private and public companies following the English Companies Act, 1985 while a company limited by guarantee must put in brackets (Ltd/Gte) after its name. And unlimited company must end its name with UNLIMITED (ULTD.)[8]

The use of Unlimited as part of the name of an unlimited liability company is a good innovation as it now removes the confusion between an unlimited incorporated company and those that are registered under the Registration of Business Names 1961.[9]

Section 30 (i) (d) gives the Corporate Affairs Commission the right to refuse (amongst others reasons), registration of a company which

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[7] Steinberg Vs. Scala (Leeds) Limited (1923) Ch. 452

[8] See Western Nigeria Finance Corporation V. West Coast Builders Ltd (1971) UILR 93

[9] Now repealed by the CAMA 1990, S.672

> *"in the opinion of the commission would violate any existing Trademark or business name registered in Nigeria unless the consent of the owner of the trade mark or business name has been obtained".*

It will of course be a practical impossibility for the commission to determine whether a name to be incorporated will violate any existing trade mark or business name until the trade marks and business names department are computerised. Apart from this, there cannot be any real conflict as a business name cannot use the word limited or any other designation.

Share Capital

Another very important innovation in the requirements for incorporation of company and one which has led to a lot of misunderstanding is the paragraph 2 of section 2(f). CAMA, 1990 which limits the share capital of a private company to not less than N10,000.00 and N500,000 in the case of public company with division into shares of fixed amount.The subscribers are to take among them a total of a value of not less than 25% of the authorised share capital.

It could assist in collection of revenue for the Government but it cannot as the Law Reform Commission seems to desire[10] stop proliferation of companies. Further, the provision is reinforced by sections99 and 103 CAMA, 1990. the present position will be that at very point in time, and as a condition for incorporation 25% of the share capital must have been issued and accepted. There is nothing to suggest in the Act as some people are now saying that promoters are

[10] Law Reform Commission report on review of Company Law Part 1

required to pay up for the share issued or deposit some money in a Bank. It is enough if the commission is satisfied that the share has been issued and accepted.

In conclusion, the CAMA, 1990 has slightly changed the nature of preliminary requirements for incorporation and may well, as time goes on, prove to be more cosmetic and totally inadequate to meet the demand of the business community.

CAPACITY AND POWERS OF COMPANY (ULTRA VIRES DOCTRINE)

A company incorporated under the law must register as part of its preliminary requirements for incorporation the Memorandum and Articles of Association. The Memorandum of Association consists of the Name of the Company, the location of the company, the objects for which it is established and authorised i.e. the type of business and the share capital of the company.[11] It also must contain the powers of the company.[12] At common law all acts not included in the objects clause, as set out in the Memorandum of Association is ULTRA VIRES or beyond the power of the company. Ultra vires doctrine has always been a common law doctrine until now when it has been entrenched in the CAMA, 1990. What then is the position of the law in Nigeria?

Historically, the Ultra vires doctrines could be traced to the 1844 Joint Stock Companies Act which provided that the Deed of settlement must contain amongst other things the 'Business or purpose of the Company'[13]. The Act of 1844 provides that the power of the Directors is restricted to the

[11] S. 27 C.A.M.A. 1990
[12] S. 27 (1) and (2) C.A.M.A 1990
[13] S.25 of the 1844 Joint Stock Companies Act 1844

objects of the company.[14] There was no provision as to alteration. The restriction was in order, it was mainly for the protection of the shareholders who at this time did not enjoy limited liability. However, the Companies Act 1862 went further to prohibit any alteration of the Memorandum of Association.[15] This was the beginning of the ultra vires doctrine.

Lord Cairns L.C. in ASHBURY RAILWAY CARRIAGE and IRON CO. LTD. V RICHE[16] said:

> *"the covenant therefore is no more by that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions and if there is a covenant that no change shall be made in the objects for which the company is established, I apprehend that the object being pursued by the company, or attempted to be attained by the company in practice, except on object which is mentioned in the memorandum of association"*

In this case, the shareholders cannot even sanction any act of directors outside the objects in the words of Lord Cains, they "would thereby by unanimous consent have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing".[17] The basis of the rule itself was explained by Lord Hatherlay that:

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[14] S.25 clause No. 12
[15] S.12 of the 1862 Companies Act
[16] 7 H.L. 653 at 670
[17] Ibid p. 692

> *"... it was necessary that the public that is, the persons dealing with a limited company, should be protected, as well as that the shareholders themselves should be protected"*[18]

It is therefore clear that the rule was principally designed to protect (1) people dealing with the company and (2) shareholders.

Due to the consequential hardship on the company itself and unwary outsiders business men and lawyers started looking for ways to curb and avoid the rule.

The ultra vires doctrine was explained in A.G. v. GREAT EASTERN RAILWAY as a rule of construction, in the words of Lord Selborne.[19]

> *"The doctrine of ultra Vires ought to be reasonably and not unreasonably understood and applied whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires"*[20]

Though the rule of construction would seem to relax, the rule, yet it created its own problems. What may be incidental or consequential may entirely be subjective considerations depending on the circumstances of each particular case.[21]

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[18] Ibid p. 684

[19] (1880) 5AC 473

[20] Ibid. p. 481

[21] See Re Lee Brehens & Co. Ltd. (1932) 2 Ch.46; Park v. Doily News (1962) 2 All E.R. 429, Re Roith Limited (1969) I WLR 432; Evans V Brunes Mend & Co. (1921) 1 Ch. 359.

For the avoidance of doubt, the companies thereafter, adopted the style of specifing all the objects of the company both actual and speculative; all will be properly and accurately stated. The court came up with the Ejusdem generis rule of construction, where a specified provision is followed by general word, the latter will be deemed to be limited to the things of the kind already specified. To evade this rule, the companies adopted the use of independent object clause. In the case of COTMAN v. BROUGHAM,[22] the Memorandum after stating, all the objects concludes that each clause:

> *"shall not be restricted or limited by reference to any other clause or by the name of the company, and subsidiary to the first clause".*

The House of Lords in England was forced to unhold the independent object clause which is still in use even in Nigeria today.

Another way of avoiding the rule was devised by using a clause that are wholly subjective, or dependent on the decision of the directors. One of such was examined in the case of Bell Houses LImited v. City Wall Property Limited,[23] the object clause included a clause allowing the company,

> *"to carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or ancillary to any of*

[22] (1918) A.C.514
[23] (1965) 3 AllE.R. 427

the above businesses or other general business of the company..."[24]

This provision which may mean that the company could embark on any business whatsoever was held to be effective to empower or the company to undertake business the directors bonafide believed could be advantageously carried on as an adjunct to its other businesses. In Nigeria, in the case of CONTINENTAL CHEMISTS LIMITED v. Dr. Ifeakundu[25] clause of this nature was examined and rejected as useless.

The law had since provided for the alteration of the Memorandum of Association and in fact the law in Nigeria provides for alteration of the Memorandum by special resolution.[26] WHAT IS THE PRESENT POSITION OF ULTRA VIRES DOCTRINE. Section 39 (1) provides:

> *A company shall not carry on any business not authorised by its memorandum and shall not exceed the powers conferred upon it by its memorandum or this Act".*

While S.39(3) declares that no

> *"act of a company and no conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such act conveyance or transfer was not done or made for the furtherance of any of the authorised business of the company*

[24] (1890) 44 ch.D. 634
[25] (1966) 1 All NLR
[26] S.46 C.A.M.A. 1990

or that the company was otherwise exceeding its powers".

Only (a) any member of the company (b) the holder of any debenture secured by a floating charge over all or any of the company's property or by the trustee of the holders of any such debentures[27] may prohibit by way of injunction any proposed ultra vires act.

The position or the law on ultra vires doctrine in Nigeria seems still ambiguous in view of section 39(i) which specifically restates the doctrine in Nigeria while S.39(3) emphatically makes ultra vires transaction valid. As far back as 1945,[28] the Cohen Committee in England has declared as 'illusory' the so called protection to members and outsiders. In 1962 Jenkins Committee[29] in England went further to recommend the abolition of the doctrine. Indeed in Nigeria, upon full consideration of the position of the law in England, Canada, some states in the United States of America, Ghana and the Caribbean, the Law Reform Commission in their report[30] states:

"the commission holds therefore that the doctrine should be abolished ..."

and recommended that Nigeria should copy the position in S.24 and 25 of the Ghana Draft Companies Code Bill and the Caribbean Company Law Bill with necessary modifications. It is therefore the intention of the legislature to

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[27] S.39 (4)
[28] Cohen Committee Report (Cmd. 6659) paras. 11, 12
[29] Jenkins Committee Report (Cmnd. 1749)
[30] Law Reform Commission Report (Part 1) p.28

abolish the doctrine entirely as it is no longer serving any useful purpose. Upon the careful reading of the law, it is clear that the doctrine has been reduced to an internal check within the company and the outsider will not be prejudiced in any way if it decides to enter into any contract involving ultra vires transaction with the company. The member or debenture holder may only stop acts that are still executory and not concluded as ultra vires act.

Considering the effect of the rule in Foss v. Harbottle,[31] otherwise known as the majority rule, the member complaining of ultra vires transaction, may rely on the exception to the rule[32] to institute an action, however he may be confronted with two formidable obstacles, one, is that the majority may by special resolution, easily amend the memorandum to include any object they desire even after the action to stop ultra vives act has been instituted. Secondly, the action itself must be still executory and not a concluded transaction.

It is hereby suggested that the doctrine be abolished and removed from the statute book as it is no longer serving any useful purpose.

EFFECT OF ARTICLES OF ASSOCIATION

The Articles of Association is a document regulating the rights of the members of the company and the manner in which the business of the company shall be conducted. It deals with the issue of transfer of shares, alteration of the capital, borrowing powers, general meetings, voting rights, directors-appointment and powers, dividends, accounts,

[31] 67 E.R. 189
[32] See S.300 (a)

audit of accounts, winding-up and various other matters[33] S.33 states:

> *"there shall be registered with the memorandum of association, articles of association signed by the subscribers to the memorandum of association, and prescribing regulations for the company".*

The articles must be registered and must be duly signed by the subscribers to it. What is the effect of the articles, and the present position of the law in Nigeria?

The position of the Law on the contract represented by the articles has not always been clear, and has been a subject of both academic and judicial disputes. Green M.R. observed,[34] "it has been the subject of considerable controversy in the past, and it may very well be that there will be considerable controversy about it in future".

Section 16 of the Companies Act, 1963 provides, "subject to the provisions of the Act, the Memorandum and articles of Association shall, when registered, bind the company and the members thereof to the extent as if they respectively had been signed and sealed by each member and contain covenants on the part of each member, to observe all the provisions of the Memorandum and of the articles..."

This clause was adopted from S.20 of the English companies Act, 1948 as well as S.16 of the Companies Consolidation Act, 1908 of England.

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[33] S34 (1)

[34] Beatline V Beatrie Ltd (1938) Ch. 708 at 721-722

It is settled that under the Common Law, the articles represent a contract between the members of the company and the company and never with outsiders. No outsider can rely on the contract represented by the articles of association. IN ELEY v. POSITIVE GOVERNMENT SECURITY LIFE ASSOCIATION,[35] it was held that the outsider cannot rely on the articles of association.

Historically, the origin of the law could be traced to the after effect of the promulgation of the Bubble Act of 1720. Many businessmen were forced to adopt the rules of trust. The member will constitute a Deed of Settlement which is a contract between the members to the company and the members inter se. It normally contains provisions that are now included in the modern Articles of Association.

POSITION OF THE LAW UNDER 1968 ACT

The proper interpretation of S.16 and in fact the law was laid down in the leading case of Hickman v. Kent or Romney Marsh Sheepbreeders Association.[36] In the case, by the article of association of the company, any dispute between the members and the company must be referred to arbitration in the first instance. A dispute arose and the Plaintiff commenced an action in court. The company applied for a stay on the ground that they were bound to refer the matter to arbitration in the first instance. Astbury J, interpreting S.14 of the Companies (Consolidation) Act of 1908 which clause was similar to S.16 of the Companies Act 1968, held,

(a) No article can constitute a contract between the company and a third party.

[35] (1876) 1 Ex.D. 88
[36] (1915) 1 Ch. 881

(b) No right merely purporting to be given by an article to a person whether a member or not in capacity other than that of a member as for instance as solicitor, promoter or director can be enforced against the company.

(c) Articles contain the rights and obligations between the members and the company respectively.

It follows that the member is entitled to enforce the provisions of the articles even against the company e.g. a member may restrain the company from excluding him from membership;[37] to compel the company to pay him dividends or return of capital on winding up.[38]

As between member the law is now settled that the articles bind the members, inter-se. In the words of Starlin J in the case of Woods v. Odessa Water works,[39] "...the articles of association constitute a contract not merely between the company and the shareholders, but between each individual shareholder one with the other". The law therefore allows the member to maintain an action against the director so far as the director is a member, and the member is suing to prevent a violation of the articles.[40]

The summary of the decisions is that outsiders cannot enforce the article of association even if they are members.[41] Lord Wedderburn in an article[42] argued very forcefully, that an outsider director, solicitor etc. can successfully enforce the

[37] Pender v Lushington (1879) 6 ch. D.70, Griffith V Paget (1879) 5 Ch.D 894
[38] Woods v Odessa Water (1899) 42 Ch. 2 636
[39] Op.Cit p. 642
[40] Rayfield v Hands (1960) Ch. 1
[41] Rayfield v Hands (1960) Ch. 1
[42] Lord Wedderburn; "Shareholders Rights and the Rule in Ross v. Herbottle" (1957) CAMB L.J. 194 at 203

articles of association if they are members by merely framing his action in such a way as to show that he is merely enforcing the compliance on the articles. He relied on the case of Salmon v. Quin and Axtens Limited.[43]

Upon a proper appraisal of Lord Wedderburn's view, it is more logical and direct; it only means that except where a member can enforce a right or obligation granted to an outsider by suing as a member, the outsider cannot rely on the articles. But why go the roundabout way to enforce a right? If there is a breach of the article, one would have thought that any member should be able to force the company to comply with the articles, whether director, solicitor or not, so far as he is a member to the article i.e. a member of the company.

POSITION OF THE LAW UNDER THE COMPANIES AND ALLIED MATTER ACT, 1990

The Act provides in S.41 (i) that,

> *"Subject to the provisions and articles, when registered shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered from time to time in so far as they relate to the company, members or officers as such"*

The CAIMA, 1990 has, in effect removed the distinction between member and outsiders; the member need not sue as a member in order to enforce the article, in favour of

[43] (1909) A.C. 442

outsider or officer. It is also important to note that the officer or outsider need not necessarily be a member before he can enforce the articles. The law allows him to proceed and enforce his rights in so far as they relate to the officers as such. The law has gone further to restate that the articles bind the member inter-se, and between member and officer, a members can maintain an action against the director or officers of the company.

A novelty has also been introduced into the law in S.41(3). It states:

> *"where the memorandum or articles empower any person to appoint or remove any director or other officer of the company, such power shall be enforceable by the person notwithstanding that he is not a member or officer of the company".*

This provision has introduced an absurdity into this area of the law. The memorandum and articles constitute the contract, under seal[44] between the members and officers of the company. Where, however the officer or the 'person' is not a member of the company, that is he is an outsider in the absolute sense of the words he may still maintain an action to enforce contract (article) which he is not a party to.

The above may be difficult to understand; and its practicability even more difficult. The likely explanation may be found in the principle in law of contract that, as stated by Lord Denning,

> *"where a contract is made for the benefit of a third person, the third person may enforce it in the*

[44] S.41(i)

name of the contracting party or his executor or personal representative or jointly with him or if he refuses by adding his as defendant".[45]

The House of Lords in England disagreed with this view, and were of the opinion that, there is no privity of contract whatsoever between the beneficiary and the contracting parties.[46]

In Nigeria, the position of the law is very clear. No one who is not a party to a contract can enforce or claim any right in such contract, even if the contract was made for his benefit, such person cannot enforce such contract. The Supreme Court of Nigeria in the case of Union Beverages Limited v. PepsiCola International Limited and Ors.[47] stated the position thus "...only parties to a contract can enforce it. A person who is not a party to it cannot do so, even if the contract was made for his benefit and purports to give the right to us upon it"[48]

S.41(3) of CAMA, 1990 is therefore a very strange provision and should be repealed. The practical use of the section is still doubtful. We may, as a way out, conclude that S.41(3) is an exception to the law on Privity of Contract. The practical application of which is yet to be tested.

CONCLUSION

The provision of the CAMA, 1990 is laudable and to a large extent has not only modernized our law, but has adapted the law to suit our socio-economic situation. It

[45] Beswick v Beswick (1966) A.C. 538
[46] Ibid. pp. 554-555. See also G.H. Triefel, The Law of Contract 7th ed. p. 465
[47] (1994) 3 NWLR (Part 330) p. 1
[48] Ibid per Adio J.S.C.

should be noted that the above represents a few of the recent developments in this area of law as the CAMA, 1990 virtually restated the law on Companies and other Business Associations. However, in areas like Ultra Vires Doctrine, the law ought simply to have abolished the doctrine instead of going to such extent to paralyse its operations; while still retaining it in the law book. It is also noteworthy that the law on Articles of Associations has now been elevated from the Schedule to the law, to substantive provisions. And the law makers have succeeded in drafting a law that now accords with the practical usage. But we believe the law has gone too far in allowing outsiders to enforce the Articles and thus creating an unwarranted exception to the rule of privity of contract. S.41(3) should be repealed entirely.