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Corporate Personality: A Shield to Company's Members? - Salomon V. Salomon Revisited

*Olusegun Onakoya and **Simeon Ola Oni

Abstract

Business entities upon registration by the Registrar of companies and award of certificates of incorporation thereof, become registered companies.

The issue of a certificate of incorporation incorporates the members of the company into a persona at law with other attendant consequences.

However, the issue of the status of the company as a corporate legal personality was not given a clear legal interpretation until the celebrated English case of SALOMON v. SALOMON & CO. LTD. ([1897] A. C. 22; 66) which later became a locus classicus on this subject.

It is imperative to note that there are two controversial judgments in this case at the court of first instance and the Court of Appeal respectively before the matter was laid to rest at the House at Lords.

This paper seeks to examine some germane issues raised by the House of Lords in this case. Some of the questions bother on whether the principle is essentially to protect members of the company, the management or employees of the company against the third party.

To what extent can the principle serve as a shield, if it is one? Or is such a protection absolute? Laws are not usually enacted to take retrospective effect, therefore holistic approach should be adopted with a view to properly situate pre-incorporation contract, particularly where the going-concern was previously operating as a 'business name' and or 'registered partnership'.

Keywords: Company's incorporation; Corporate personality; Company's members; Corporate management.

1. Introduction

Historically, the oldest forms of business enterprises are unincorporated "sole-trading" involving individuals carrying on businesses in exchange of 'goods for goods' otherwise referred to as trade by barter.[1]

With increased commercial activities in the early centuries, individuals began to pool their resources together with the common goal of making profits, and this later became known as 'partnership' though largely unregistered. However, with the Industrial Revolution which marked significantly the transition to the new manufacturing processes in the period in the 18th century, the need arose for the emergence of incorporated companies.[2]

The first Companies Act was passed in 1844. This Act provided for the registration of the 'deed of settlement' of such companies. Upon the registration they are conferred with corporate status. The Companies Act of 1844 was the step in giving these companies legal recognition.[3]

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[1] The transaction may sometimes involve exchange of "goods for services" or "services for services". This was before the introduction of money as a medium of exchange.

[2] Industrial Revolution. Retrieved November 2, 2016 from http://www.history.com/topics/industrial-revolution.

[3] Sealy, L. & Worthington, S. (2010) Sealy's Cases and materials in Company Law. 9th edition. New York. Oxford University Press, p. 5.

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In Nigeria, consequent upon the Supreme Court Ordinance the origin of the Company Law evolved from the numerous judicial decisions of the English Courts and the English Company Act of 1862 which was then in force.[4] The phenomenal growth witnessed in Nigerian economy was followed by many reforms to the laws regulating company's practice and management which led to the enactment of the current law that is the Companies and Allied matters Act (CAMA).[5]

Prior to January 1, 1990 when the Companied and Allied Matters Act (CAMA) became operative, registration of business names, whether of one person business (otherwise known as sole proprietorship) and or, of business partnerships was affected under the provisions of the Registration of Business Names Act 1961.[6]

1.1 What is a Company?

A registered company is one incorporated under any of the Companies Acts recognized by law as a body corporate[7]. The word "company" has no strict legal meaning. It is clear however that the term denotes an association of persons for common objects with a view to accomplish their set goals[8].

Company is often referred to as a corporation, or less commonly, an association or union that carries on a commercial or industrial enterprise.[9]

Akomolede defines a company as a body of association of persons with distinct personality, legally recognizable, which makes it to be different from similar business relationships or associations such as partnerships and sole trading[10]. The set-goals of companies are usually for trading in goods and services, with the view to making profits. However, companies are sometimes formed for other purposes, which include charitable, social, promotion of education or science, and for many other purposes.[11]

Upon the incorporation of a company, the association becomes a body corporate in the name contained in its memorandum of Association from the date mentioned in the certificate of incorporation.[12]

1.2 Types of Legally Recognized Corporate Institutions

Generally, three types of broadly-classified corporate organisations are recognized in law, they are:

(i) Registered Companies
(ii) Chartered Companies
(iii) Statutory Companies

(a) Registered Companies

These are companies registered or incorporated under the relevant legislation regulating companies and which is in force at the time of registration. Such legislation for instance in Nigeria includes the Company and Allied Matters Act. A registered company may be private

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[4] Olakanmi J., (2009) Synoptic Guide, Companies and Allied matters Act 2004 & Investment & Securities Act 2007. 2nd edition. Abuja. LawLords Publications, p. 2.

[5] Formerly Companies and Allied Matters Decree 1990 now codified as Chapter C. 20 Laws of Federation 2004.

[6] This is now set out in Part B of CAMA.

[7] Ola, C.S. (2002). *Company law in Nigeria.* Ibadan. Heinemann Studies in Nigerian Law, page 14.

[8] *Ibid.* p. 4

[9] Garner, B.A. (2004) Black's Law Dictionary, 8th ed. St. Paul. Minn. West Publishing company, p. 298

[10] Akomolede, I. (2008) *Fundamentals of Nigerian Company Law*, Lagos, Niyak Print and Publications p. 1

[11] *Ibid.* p. 2

[12] *R.T.O.D.A v (Tegas) D. N. Ltd.* [2015] All FWLR pt. 811 p. 1369 at p. 1381, paras. A-B.

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or public and may be limited by shares, guarantee or limited irrespective of whether it is a private or public company.[13]

(b) Chartered Companies

This classification refers to organisations established by virtue of special charter and are vested with the power to engage in the acts/objects spelt out in the enactment setting them up. Such companies are usually professional organisations like the Institute of Chartered Accountants, Institute of Chartered Secretaries and Administrators, Legal Practitioners, just but to mention a few.

(c) Statutory Companies

Statutory companies are public enterprises brought into existence by a Special Act of the Parliament. The statutory companies are also known as statutory corporations or public corporations. These are actually public bodies established and operated by statute. These statutory bodies have well-defined functions and powers together with various rules and regulations that regulate its employees.[14]

Gower, described statutory companies as bodies with special types of object which it has been thought desirable to encourage, may be formed under general Public Acts, such as the Friendly Societies, the Industrial and Provident Societies and the Building Societies Acts.[15]

According to Akomolede, the main objective of statutory companies is to provide essential social services to the people and not to make profit. They do not have shareholders and the affairs are basically not regulated by the Companies and Allied Matters Act, but by the specific Act that established them.[16]

However, the focus of this paper shall be exclusively on registered companies, particularly the incorporation process and its attendant effects.

2.0. Formation of Companies

Generally, legislations governing the operation of companies clearly spelt out the formalities or procedure for its formation, irrespective of the type of company being formed. Most of the Companies' Acts usually consider the following critical issues, namely:

i. Right to form a Company
ii. Capacity to form a Company
iii. Types of Companies[17]

a. Right to form a Company

Various Companies' Acts carefully outline the right of persons or group of persons to form a company, whether Private or Public company, limited by shares or by guarantee.

In Nigeria, section 18 of the Act[18] provides that as from the time the Act comes into force, any two or more persons may form and incorporate a company by fulfilling all the requirements spelt out by Act as prerequisites for registering such a company.

[13] Akomolede, *ibid.* p. 2
[14] The Gemini Geek, retrieved Nov. 8, 2016 from http://www.thegeminigeek.com/what-are-the-statutory-companies/
[15] Davies, P.L. (2001) Gower's Principles of Modern Company Law, 6th ed. London, sweet & Maxwell, p.5
[16] Akomolede, *ibid. p.3.*
[17] See, for example Sections 18-26 CAMA Cap. C. 20 LFN 2004.
[18] The Company and Allied Matters Act Cap. C. 20 LFN 2004

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The above provision is further reinforced by the provision of section 19 of the Act which provides *inter-alia* that:

> *No company, association, or partnership consisting more than 20 persons shall be formed for the purpose of carrying on any business for profit or gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of other enactment in force in Nigeria.*[19]

b. Capacity to form a Company

'Capacity' simply refers to a person or group or persons ability, capacity, or fitness to do something; a legal right, power, or competency to perform some act.[20] Legal capacity is the attribute of a person who can acquire new rights, or transfer rights, or assume duties, according to the mere dictates of his own will, as manifested in juristic acts, without any restraint or hindrance arising from his status or legal condition.[21]

Generally, only a person who is not disqualified under the Act or other enabling laws may join in the formation of a company. Some of the Companies' Acts clearly highlight such persons who are so disqualified. For instance, CAMA provides that an individual shall not join in the formation of the company if-

(i) he is less than eighteen years of age, unless there are two other persons of full age and capacity who have already subscribed to the memorandum;
(ii) he is of unsound mind and has so found by a court in Nigeria or elsewhere;[22]
(iii) he is an undischarged bankrupt; or
(iv) he is disqualified under section 254 of the Act from being a director of a company.[23]

Similarly, the Act provides that a corporate body in liquidation cannot join in the formation of a company.[24] The status of aliens is not substantially different from that of citizen, save for the compliance with the relevant provisions of the Immigration Act[25] and the Nigerian Investment Promotion Commission Act[26].

However, there is a proviso to the minimum age requirement of eighteen years, which evidently reveals that the requirement is not an absolute bar to persons below the age of eighteen. Section 20(2) of the Act provides that a person shall not be disqualified under paragraph (a) of subsection (1) of this section, if two other persons not disqualified under that subsection have subscribed to the memorandum.

c. Types of Company

Before company's incorporation, it is imperative that the prospective first set of directors and members determine within the ambit of the law the type of company they wish to form. This initial

[19] See the case of *Akinlose v. A.I.T. Co. Ltd.* (1961) W.N.L.R 213
[20] Retrieved Nov. 10, 2016 from legal-dictionary.thefreedictionary.com
[21] Retrieved Nov. 10, 2016 from http://thelawdictionary.org/capacity/
[22] This can only be proved by tendering the final judgment of a court where such a person has been so pronounced.
[23] See generally Section 20 CAMA LFN 2004.
[24] Section 19(2) CAMA, C 20 LFN 2004.
[25] Cap. 11, LFN 2004;
[26] Cap N 117,LFN 2004.

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decision will enable them to know not only the general, but specific requirements of the enabling law(s).

Companies registered under the Act may be private or public and a company whether private or public may be limited by shares, limited guarantee or unlimited.

(i) What is a Private Company?

A "private company" is any company that is not public company.[27] The Companies Act of the United Kingdom (U.K) further described succinctly what a private company depicts as follows:

The articles of a private company shall include provisions which-

(a) prohibit the company from offering shares or other securities issued by the company to the public; and;
(b) limit the number of its shareholders to fifty, not including shareholders who are-
   (i) employees of the company; or
   (ii) former employees of the companies who became shareholders to the company while being employees of such company and who have continued to be shareholders after ceasing to be employees of the company.[28]

The status of a private company in Nigeria is not different from what obtains under the English Act. CAMA defines a private company as one which is stated in its memorandum to be a private company. Its article clearly differentiates it from the public company. It must by its articles restrict the transfer of its shares and its membership must not exceed fifty, not including persons who are *bona fide* in the employment of the company, or were, while in that employment and have continued after the determination of that employment to be, members or shareholders of the company.

Private companies also have two distinguishing features, namely: (a) They are so prohibited from inviting the public to subscribe for any of its shares or debentures; or (b) It is mandatory that they deposit money for fixed periods or payable at call, whether or not bearing interest.[29]

However, where a private company makes default in complying with any of the above conditions, it will cease to be entitled to the privileges and exemptions conferred on a private company by or under the Act, and the Act will apply to the company as if it were not a private company; but a court may on an application by an interested person grant relief to the company if it is satisfied that the failure to comply was accidental or due to inadvertence or to some other sufficient cause or that on other grounds it was just and equitable to grant relief.[30]

(ii) Public Company

This is a form of company with a share capital whose memorandum states that the company is a public company. Two or more persons are required to form the company while its name, of a necessity must end with the words "public limited company" or sometimes abbreviated with an acronym "PLC." it is often referred to as a legal designation of a limited liability company which has offered shares to the general public and has limited liability.

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27 Companies Act 2006 – Explanatory Notes. Retrieved Nov. 10, 2016 from www.legislation.gov.uk-ukpga-notes
28 See Section 27 U.K. Companies Act, No. 07 of 2007.
29 See generally section 22 CAMA, Cap. C 20, LFN, 2004.
30 *Ibid.* Section 23.

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Its shares are offered to the general public and can be acquired by anyone, either privately, during initial public offering or through trades on the stock market.[31]

The CAMA defines a public company as "any other company other than a private company. . . and its memorandum shall state that it is a public company.[32] Primarily, a further classification of a company as being; (a) limited by shares,(b) limited by guarantee or (c) unlimited is of great significance to our discourse in this paper.

(1) Company Limited by Shares

This simply means that the liability of the shareholders to the creditors of the company has a limit, which is to the extent of the members' subscription as per their share capital.

Shares create very valuable security and the limitation of liability enables the shareholder to determine the limit of his liability and indebtedness. A member who has paid up his shares in full cannot be held liable for any part of the liability of the company. However, members with outstanding called-up shares will have to be called upon to pay in full the called-up shares whenever called upon to do so before his liability can be fully discharged.[33]

Most limited companies are 'limited by shares". This means that the shareholders responsibilities for the company's financial liabilities are limited to the value of shares that they acquired/own, whether fully paid for or not.[34]

(2) Company Limited by guarantee

The Act[35] provides *inter alia* that-

> *Where a company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof, is to be paid or transferred directly or indirectly to the members of the company limited by shares, but may be registered as a company limited by guarantee.*

A fundamental feature of company limited by guarantee is that it shall not be incorporated with object of carrying on business for the purpose of making profits for distribution to members. However, where this provision is violated, all officers and members thereof who are cognizant of that fact shall be jointly and severally liable for the payment and discharge of all the debts and liabilities of the company incurred in carrying on such business and the company and every such member shall be liable to a daily penalty of fine for as long as the violation continues.[36]

(3) Unlimited Company

This type of company, in the real sense of its definition are rare, this is largely due to the scope of members' liability. It is a form of registered company which provides that the members' liabilities are unlimited for the indebtedness of the company in the event of winding up. The consequence of the

31 Retrieved Nov. 14, 2016 from www.investopedia.com/terms/p/plc.asp
32 Section 24 CAMA Cap C20 LFN 2004
33 *Ibid.* Orojo, page 35.
34 Retrieved Nov. 15, 2016 from https://www.gov.uk/business-legal-structures/limited-company.
35 See Section 26(1) CAMA Cap. C20 LFN 2004.
36 *Ibid.* Section 26.

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aforesaid is that in the event of liquidation, and the company's assets are inadequate to offset its indebtedness, the members will be personally liable for the indebtedness.[37]

Section 25 of the Act provides thus:

> *As from the commencement of this Act, an unlimited company shall be registered with a share capital; and where an existing unlimited company is not registered with a share capital, it shall, not later than the appointed day, alter its memorandum so that it becomes an unlimited company having a share capital not below the minimum share capital permitted under section 99 of this Act.*[38]

4. Incorporation of Company

Upon the filing with the Corporate Affairs Commission[39] or any other body so designate in other jurisdictions of the following documents, namely:

(a) The memorandum of Association

(b) The Article of Association

(c) The notice of the address of the registered office

(d) Statement of the authorized share capital

(e) Any other necessary documents as may be required by law, together with a statutory declaration of compliance filled-out and filed in a prescribed form by a legal practitioner, the Registrar of the Commission shall issue a certificate of incorporation certified under its seal.

5. Certificate of Incorporation

The certificate of incorporation is *prima facie* evidence that all the requirements of the Act in respect of registration and of matters precedent and incidental to it have been complied with and that the association is a company authorized to be registered and duly registered under the Act.[40]

The certificate which is issued under the seal of the Commission must be dated and the date on which the Registrar-General actually signs the certificate is stated as the date of incorporation, but if the certificate states an earlier date of incorporation, that date and not the date of signature is decisive.[41]

In *Magbagbeola v. Sanni,*[42] the Supreme Court of Nigeria held that the best evidence of incorporation is the production of the certificate of incorporation. This decision therefore underscores the importance and the evidential value of a certificate of incorporation.

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[37] *Ibid.* Akomolade, p. 7.

[38] For a succinct definition of an 'Unlimited Company', see also Section 21(1) (c) CAMA LFN 2004.

[39] The Corporate Affairs Commission, otherwise known as CAC is the regulatory body for Companies' registration and control in Nigeria. The Commission is headed by a chairman, though its Registrar-General is the Chief Executive and Accounting Officer. See generally Sections 1-10 on the establishment, appointment of members and the duties of the Commission.

[40] Section 36 (6) (CAMA), See *Gaiman v. National Association of Mental Health (1971) Ch. 317*

[41] See *Jubilee Cotton Mills Ltd. v. Lewis* (1924) AC 598

[42] [2005] All FWLR Pt. 267 p. 1367 at Pp. 1374 – 1375, paras. F-A.

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3.1 Effects of Company's Incorporation

Generally, upon its incorporation company is vested with a recognized status in law with its attendant consequences. Some of the attributes are outlined in various Companies' Acts.

For instance, Section 37 of CAMA provides as follows:

> *As from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the asset of the company in the event of its being wound-up as is being mentioned in this Act.*[43]

In a very clear term, a company becomes a juristic person, which is a 'legal abstraction' upon its being registered capable to do what a natural person could do, though with certain limitations. For instance, the Supreme Court of Nigeria relying on the earlier English decisions held that a company, though a juristic person, it can only act through an alter ego, either its agents or servants. It may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in that company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and are treated by the law as such.[44]

The legal consequences of company's incorporation are examined in some depth below:

(a) Perpetual Succession

By virtue of its incorporation, a company becomes a different and distinct from its members who are human beings and can die at anytime. However, the most important feature here is that the death of a member or two or more members cannot bring to an end the 'life' of a company. The members of a company are subscribers and shareholders who are entitled to vacate their memberships as a result of retirement, bankruptcy, mental disorder, or death of members.[45]

The combined effects of sections 154 and 155 CAMA provides for how the shares of a deceased member are transferred whether he died testate or intestate. The bottom line is that there is continuity. For instance in *Metal Construction (West Africa) Ltd. v. Migliore*[46] upon the death of an Italian shareholders his widow obtained letters of administration and thereafter applied for the rectification of the register of shares so as to substitute her name for the deceased's and also for a share certificate to be issued her. The Supreme Court of Nigeria granted the relief so claimed.

(b) Right to acquire, own, possess and transfer property

The shareholders of a company are not the individual owners of its property and have no power as individuals to dispose of the company's property.[47] Company has the right to acquire and possess

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[43] *R.T.O.D.A v. (Tegas) D.N. Ltd.* [2015] All FWLR Pt. 811 p. 1369 at 1381, paras A-B. See also *CDBI v. COBEC (Nig.) Ltd.* (2004) 13 NWLR 376.

[44] *Marine Management Associates Inc. v. National Maritime Authority* [2013] All FWLR pt. 678 p. 790 at 816, paras. C–G. See also *Kate Ent. V. Deawoo Nigeria Ltd.* (1985) 2 NWLR (pt. 5) 116

[45] Keenan, D. (1987) *Smith and Kennan's Company Law*, Seventh ed., London, Pitman Publishing, p. 18

[46] [1979] NSCC 145. See also *Re Noel Tedman Holding Pty. Ltd.* (1967) Qd.R, 561.

[47] See *Phillips v. Abou-Diwan* (1976) 2 F.R.C.R 24.

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property in its registered name and not in the name of its individual members. Such power extends to alienation of such property by way of lease, sale, gift, and by any other means howsoever.

According to Pennington, it is clear that unlike the earlier misconception that the companies held their property in trust for their members so that these shares embodies equitable rights of property, the current position of law is that "... from early in the last century it has consistently been held that shareholders are not the owners at law or in equity of the company's property, and if the company does hold its property upon a trust, it is simply a trust to manage it in accordance with the company's constitution".[48]

A shareholder does not even have an equitable lien on the company's property, similar to a partner's lien, to ensure that it is properly applied in conforming to the company's constitution. Shareholders' rights were purely contractual at Common Law and rights given to the shareholder by the Companies Act.[49]

(c) Right to Sue and be Sued

Upon its incorporation, a company becomes a juristic person, a legal entity with rights to sue and be sued in its registered names.

Closely related to issue of property is the right to sue and to be sued vested on incorporated company. It is now a settled principle of law that a company can only sue and be sued in its registered name.

The Court in *Okon v. Ubi*[50] and other similar cases[51] held that the proper plaintiff in an action in respect of a wrong alleged to have been done to a company or association of persons is *prima facie* the company itself. It follows therefore that any action instituted on behalf of the society in the instant case must be brought under its registered name; otherwise such action would not have been properly instituted.

In other words a company as a legal person can take action to enforce its legal rights and can be sued for breach of its legal duties.

d. Borrowing Powers

An obvious advantage of incorporation is the power to generate income through obtaining loans and debentures. This could be from the banks or other financial institutions. An incorporated company can issue debentures and secure it with a floating charge, for example, on the assets of the company while public companies quoted on the stock exchange can invite the public to subscribe to its shares to enable it raise more money from the capital market.[52]

e. Legal entity distinct from its members

The fundamental attribute of corporate personality from which all the other consequences flow is that the corporation is a legal entity distinct from its members. In other words it has 'legal personality' and is often described as an 'artificial person' in contrast with a human being, a natural person.

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[48] Pennington, R.R. (1973) *Company Law*, 3rd ed. London, Butterworths, p. 59.

[49] Barnes, K. D. (1992) *Cases and Materials on Nigeria Company Law*, Ile-Ife, Obafemi Awolowo University Press,69 See also *Short v. Treasury Commissioners* [1948]1. K.B 116, 122, C.A. per Evershed L.J.

[50] *[2005]* All FWLR pt. 328 p. 717 at 746 paras. A-C

[51] *Ejikeme v. Amaechi* (1998) 3 NWLR pt. 542 p. 456. *Ide v. The Registered Trustees of the Diocese of Ibadan* (1966) 1 All NLR 287;*The Registered Trustees of the Apostolic Church, Ilesha Area v. Attorney-General, Midwestern State* (1972) 1 All NLR pt. 1 p. 356; *South Hetten Coal Co. Ltd. v. N. E. News Association Ltd.* (1894) 1 QB 133.

[52] *Ibid.* Akomolede, I., p. 41

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A company becomes a legal person from the date of incorporation separate and distinct from its members, directors and shareholders. It possesses rights and is subject to duties the same way as a natural person. It is this attribute of separate legal personality that is the distinctive feature of modern incorporated companies. This principle has been described as the most pervading of the fundamental principles of company law.[53]

It is noteworthy that this principle enables a company to be distinguished from similar business associations such as partnership and sole trading.

The principle was firmly established at common law and given judicial approval in the celebrated House of Lords' decision in *Salomon v. Salomon & Co. Ltd.*[54] Plethora of judicial decisions have kow-tow the principle of corporate legal personality as was laid down in *Salomon v. Salomon*[55]

For instance, the Supreme Court of Nigeria in a more recent decision in *Oyebanji v. The State*[56] cited with approval the case of *Trenco Ltd. v. African Real Estate Ltd.*[57] held as follows:

> *The separation of the personality of a company and the members are to be maintained. That is to say a company is legally different from its subscribers and directors. . .*

It cannot be over-emphasised that the principle of corporate legal personality has largely defined the space of what today constitutes corporate legal practice. It has therefore become imperative that *Salomon v. Salomon*[58] be revisited and examined with a view to appraise its continued existence and relevance.

4.1 Legal Personality – Salomon V. Salomon, Revisited

In this case Salomon carried on business as a leather merchant and boot manufacturer. In 1892 he formed a limited company to take over the business. The memorandum of association was signed by Salomon, his wife, his daughter, and four of his sons. Each subscribed for one share. The company paid £39,000 to Salomon for the business, and the mode of payment was to give Salomon £10,000 in debentures, secured by a floating charge on the company's assets, and 20,000 shares of £1 each and the balance in cash. Less than one year later the company fell on hard times and a liquidator was appointed. The debts of the unsecured creditors amounted to nearly £8,000 and the company's assets were approximately £6,000.

The unsecured creditors claimed all the remaining assets on the ground that the company was a mere alias or agent for Salomon. The case presented by the liquidator broke down completely, the trial judge Vaughan Williams held that the company was Mr. Salomon in another form. He used the name of the company as an alias. He employed the company as his agent; Salomon could not therefore be treated as entirely different and distinct entity from the company.[59]

Mr. Salomon appealed; but his appeal was dismissed with costs, though the appellate court did not entirely accept the view of the court below by introducing agency relationship into the matter. The Court of Appeal however is of the view that Mr. Salomon acted fraudulently and dishonestly and therefore dismissed his appeal.

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[53] Akanki, O. (1977-80) The Relevance of the Corporate Personality Principle. *N.L.J* 9 at p. 10.
[54] [1897] AC 22
[55] Supra.
[56] [2015] 8 SC p. 164 at 183 paras D-G
[57] [1976] 4 SC p. 9
[58] Supra.
[59] See generally *Broderip v. Salomon* [1895] 2 Ch. 323 at p. 333; Sealy, L. and Worthington, S. [2010] *Sealy's Cases and Materials in Company Law*, 9th edition, Oxford. Oxford University Press. Pp. 32-37; Keenan, D., *ibid.* pp.427-428.

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However, dissatisfied with the decision of the court of Appeal, Mr. Salomon further appealed to the House of Lords.

The House of Lords laid these controversies to rest when it held *impari-materia* thus:

> *The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.*

The House of Lords further held that:

> *It has become the fashion to call companies of this class "one man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the [companies] Act may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possession an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that I can see the contrary to the true intention of the Act, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid, it is easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.*[60]

Lord Halsbury dismantled the agency analogy of the lower court when he asserted thus:

> *Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be an agent at all; and is impossible to say at the same time that there is company and there is not.*

In the words of Gower,[61] the final decision in this *locus classicus* on corporate legal personality opened new vistas in corporate law practice and world of commerce. The outcome of the case revealed that it was possible for an investor not merely to limit his liability to the sum or sums of his subscription but also an added advantage of avoiding serious loss by subscribing for debentures rather than shares.

In spite of what appears to be a major acceptance of the principles laid down in *Salomon v. Salomon*[62], the decision of that particular case (given its facts) have been seriously criticized.

Puig,[63] argued that the House of Lords decision in *Salomon v. Salomon* evinces the accuracy of Gooley's observation that the separate legal entity doctrine was a "two-edges sword" in that on the one hand it established that corporations are separate legal entities but on the other hand it extended the benefits of incorporation to small private enterprises. He however agreed with the lower courts

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[60] Per Lord Macnaghten, *ibid.* at 51 & 53.

[61] *Ibid.* p. 79

[62] Supra.

[63] Puig, G. V. (2000) A Two-Edged Sword: Salomon and the Separate Legal Entity Doctrine. *Murdoch University Electronic Journal of Law.* Vol. 7 Number 3 (Sept. 2000). Retrieved January 5, 2017 from www.austlii.edu.au/au/journals/MurUELJ/2000/32.html

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that the case has promoted fraud and evasion of legal obligations with attendant unpleasant outcome.

Despite having been cited in court, *Salomon's case* has met considerable criticism. Much of the criticism has been based on the fact that corporate veil may sometimes lead to manifest injustice. Similarly, the decision has also been criticized for giving preference to the concept of separate legal entity over the economic reality of 'a one person company'.

It becomes imperative to note significantly that sometimes subscribers to a company could be accorded the benefits of limited liability in an unwarranted situation which could occasion manifest injustice and adversities to an unsuspecting innocent third party.[64]

Moreover, the decision gives dubious promoters opportunities to abuse the principle laid down in this case, which has later found its way into many Companies Acts.

However, what appears to be a very damaging criticism could be gleaned from the caustic assertion of Otto Khan-Freund[65] when he asserted thus:

> *However, owing to the ease with which companies can be formed in this country, and owing to the rigidity with which the courts applied the corporate entity concept ever since the CALAMITOUS DECISION[66] in Salomon v. Salomon & Co. Ltd, a single trader or a group of trader's are almost tempted by the law to conduct their business in the form of a limited company, even where no particular business risk is involved, and where no outside capital is required.*
> *This state of affairs would not necessarily call for reform, if it were not for the fact that the courts failed to give protection to the business creditors, which should be the corollary of the privilege of limited liability.*

The erudite legal scholar posited further thus:

> *What can be done? How is it possible to check the one man company and other abuses of company law for purposes which it was never meant to serve? Is it conceivable that Salomon's case can be abrogated by legislation? Could the interests of outsider creditors be protected by a general clause under which persons owning a controlling interest in a company would be liable for its debts? Or could there be a provision according to which a company would be deemed to act as agent for the owners of controlling interests?[67]*

Schmitthoff[68] aptly examined the House of Lords decision in *Salomon's case* from the perspective of the difficulties it posed regarding the Holding and Subsidiary Companies relationship. He considered the issue of jurisdiction of courts and the liability of the holding companies for the indebtedness of the subsidiaries.

However, in spite of all the criticisms of the landmark decision and principle of corporate legal entity in general as laid down in the celebrated but controversial case of *Salomon v. Salomon,*

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[64] Retrieved January 5, 2017 from https://writepass.com/journal/2016/11/the-doctrine-of-seperate-legal-entity-a-case-of-salomon-vs-salomon-co-ltd/#criticism-against-salomons-case

[65] Khan-Freund, O. "Some Reflections on Company Law Reform" (1944) MLR 54.

[66] Emphasis Supplied.

[67] Retrieved Jan. 5, 2017 from lawexplores.com/the-salomon-principle-and-the-corporate-veil/

[68] See generally Schmitthoff, C. in "The Wholly Owned and Controlled Subsidiary" [1978] *JBL* 218.

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courts in this jurisdiction (Nigeria) and elsewhere have continued to follow the decision in plethora of decided cases.[69]

In Nigeria, Section 37 of CAMA gives effect to the principle of corporate legal personality as was established in *Salomon's case.* Courts in this jurisdiction and elsewhere have further device measure by which erring companies and their members are dealt with, that is through "veil-lifting" or "lifting the veil of incorporation".

The issue of pre-incorporation contract under the common law is akin to the effect of the principle of corporate legal personality. The two principles shield members of the incorporation from escaping what would have otherwise be their obligations.

5. **Pre-Incorporation Contract and Corporate Legal Personality**

Pre-incorporation contracts are agreements entered into by a company promoter on behalf of the company being promoted prior to the incorporation of the proposed company.[70] The promoter has duty of bringing the company into legal existence and to ensure its successful running. In order to accomplish this obligation, the promoter may enter into some contracts on behalf of the prospective company. These types of contract are called 'Pre-incorporation Contract'.

Thus, a corporate promoter (also referred to as a "projector") is a person who solicits people to invest money into the company, usually when it is being formed. While an investment banker, an underwriter, or a stock promoter may, wholly or in part, perform the role of a promoter, promoter generally owe a duty of utmost good faith, so as not to mislead any potential investors, and disclose all material facts about the company's business. He is a person who does the preliminary work incidental to the formation of company.[71]

Pre-incorporation contract is slightly different from the ordinary contract. While the nature of other contract is bilateral, pre-incorporation contract is tripartite because it involves the interest of a third party i.e the company yet to be incorporated. Legal consequences resulting from a promoter's dealings with third parties on behalf of a future company are significant,[72] because, it is very clear from the point of promoter that he is not the agent of the company nor is he doing any authorized work, yet, he is entering into a contract with a third party on behalf of non existing principal.[73]

Lord Justice Lindley in *Lidney & Wigpool Iron Ore Company v. Bird,*[74] defined the promoter thus:

> *Although not an agent for the company or a trustee for it before its formation, the old familiar principles of law of agency and of trusteeship have been extended and very properly extended to meet such cases. It is perfectly well settled that a promoter of a company is accountable to it for all monies secretly obtained by him from it just as the relationship of the principle and agent or the trustee and cestui que between him and company when the money was obtained.*

In Nigeria, promoter is statutorily defined by Section 61 of the CAMA as:

[69] See generally the following cases: *Lee (Catherine) v. Lee's Air Farming Ltd.* [1960] 3 All ER; *Macaura v. Northern Assurance Co.* [1925] AC 619; *Gramophone and Typewriter Co. Ltd. v. Stanley* [1908] 2 KB 89; *Onuekwusi & Ors. v. Methodist Zion Church* [2011] 3 SCM p. 167 at 184 paras. A- G; *Marina Nominees Ltd. v. FBIR* (1986) 2 NWLR 48.

[70] Whincop, M.J., "Of Dragons and Horses: Filling Gaps in Pre-incorporation Contracts" (1998) 12 *JCL* 223-225.

[71] Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218

[72] Prasidh Raj Singh, Promoter & Pre incorporation contract. Retrieved Nov. 14,2016 from http://ssrn.com/abstract=1938065.

[73] *Ibid.* Prasidh Raj Singh.

[74] [1866] 33 Ch. D 85

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> *Any person who undertakes to take part in forming a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose, or who, with regard to a proposed or newly formed company, undertakes a part in raising capital for it, shall prima facie be deemed a promoter of the company: Provided that a person acting in a professional capacity for persons engaged in procuring the formation of the company shall not thereby be deemed to be promoter .*

Similarly in America, Section 2(a) of the Investment Company Act of 1940 states that the:

> *Promoter of a company or a proposed company means a person who, acting alone or in concert with other persons, is initiating or directing, or has within one year initiated or directed, the organization of such company.* [75]

The position of a promoter becomes very ambiguous, especially, when the corporation refuses to adopt the pre- incorporation contract.[76] In Nigeria, the status of the pre-incorporation contracts is stated under Section 72(1) & (2) of the CAMA thus: by Section 72(1),

> *Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto.* By sub-section (2) CAMA states that *prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.*

From the above, section 72(1) states the following:

(1) It gives the new company the discretion of deciding whether to ratify and accept a pre-incorporation contract;
(2) It applies to all contracts and transactions executed prior to formation of the company; and
(3) It also expunges the distinction in *Kelner v Baxter*[77] and *Newborne v Sensolid Ltd*[78] , as to how a promoter signs a pre-incorporation contract; and
(4) The benefits and liabilities on the pre-incorporation contract fall on the new company after ratification.[79]

In addition, section 72(2) also shows the following: (1) it seeks to protect a *bona fide* third party who was not aware of the promoter's lack of authority, by providing remedy for the injured third party, who may recoup under the contract from the promoter if, after incorporation, the company does not ratify the contract;

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[75] Investment Company Act of 1940 (as amended) p.l. 112-90, Approved January 3, 2012]; See, also, Section 30 15 U.S. Code § 80a–2.
[76] *Ibid.* Prasidh Raj Singh.
[77] (1866) LR 2 CP 174
[78] (1954) 1 QB 45
[79] *Edokpolo v Sem-Edo Wire Industries Ltd.* (1984) N.S.C.C. 553

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(1) The injured party can also recoup under the contract from the promoter if the company eventually does not come into existence; and

(2) It also requires the consent of the third party to any later post-incorporation agreement or resolution by the new company, not to ratify which also seeks to absolve the agent from liability.[80]

Section 72 CAMA arose from the practical obstacles encountered under the old common law rule governing pre-incorporation contracts. According to Maryke Boonzaier,[81] common law of agency placed an obstacle ahead of businessmen who tried to contract with promoters (Agents), and also where the promoters tried to contract on behalf of a Principal (the Company yet to be incorporated) in an attempt to obtain benefits for that Principal. The common law principle is that a company not yet incorporated is not yet a legal entity and can therefore not perform juristic acts. In the same vein, no person has the authority to act as an Agent of a company that has not yet been established. Where a promoter proceeds to contract on behalf of a non-existing Principal, with the expectation that the Principal will ratify the transaction upon incorporation, the common law rules of agency will preclude the ratification. These rules assert that a Principal, not yet in existence at the time of the transaction, is not competent to ratify and hence there can be no representation of such a person. According to Boonzaier, ratification has a retrospective effect and for this reason a person cannot act on behalf of a Principal that does not exist. A company can thus not acquire rights nor incur liabilities in this manner.

The applicable English Common Law on Pre-Incorporation Contracts prior CAMA 1990 was *Kelner v Baxter*,[82] where Earle, CJ, held that the promoters who had purchased wine prior to the incorporation of the corporation would be personally liable as the corporation lacked personality prior to its registration. In the case, three promoters purchased wine from Kelner as agents of the company. The company was formed but went into bankruptcy prior to payment for the wine, and in a lawsuit for the cost of its winery, Lord Earle in his lead judgment held that if the company had been in existence, the defendant would have agreed as agents, but since the company was not in existence, the documents in which the agreement was set out would be inoperative unless it was a contract between the plaintiff and the defendant. If there is no existing principal, such a contract' binds the person professing to be agents.[83] In addition, Willes, J., opined in the case that 'Ratification can only be... by a person in existence either actually or in contemplation of law.[84]

Further, the common law attempted to distinguish between situations (a) where the promoters signed as "for and on behalf of" the future corporation and (b) where the promoter wrote his own name without indicating that he was an agent as occurred in *Newbourne v Sensolid Ltd.* Unlike *Kelner v Baxter*, where the agent had signed for a disclosed principal and so caught by the Warranty of Authority rule, the court in *Newbourne*'s case, held that the contract was a nullity which was not capable of being ratified because Newbourne did not disclose any principal and the Seller intended to contract with the purported corporation only, and never with the promoters.[85] The rule in *Newbourne* is that since the intent of the third party was to contract solely with the non-existing

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[80] See Agomo, C.K., The Status of Pre-incorporation Contracts, in Essays on Company Law (E.O. Akanki ed, University of Lagos Press, 1992) 83. (Hereinafter "Agomo").

[81] Oglivie H.M., Company Law-Contract-Liability of Persons Purporting to Contract as Agent for Unformed Company: *Phonogram v. Lane.* (1983) UBC Law Rev. 321; See also *Stephen v Build Co. Nigeria Limited*, 91968) 1 All NLR 183.

[82] Supra.

[83] *Ibid.* Per Lord Earle, CJ at page 183.

[84] *Ibid.* 184

[85] See Agomo, supra note 20, at page 80.

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corporation and was not to contract with the agent, the contact was declared a nullity since there was no meeting of the minds.

Thus, in the Nigerian case of *Caligara vs Giovanni Sartori & Co Ltd.*[86] the Court followed the ruling in *Newbourne's* case. In December 1956, Giovanni had obtained a loan of £800.00 from Caligara by a cheque cashed on 24th January 1957, but Giovanni had obtained the loan in the name of the proposed corporation. Honourable Justice Sowemimo, relying on Paragraph 824, Page 425 of Volume 6 of the Halsbury's Laws of England, (3rd edition), held that the loan transaction was a nullity and so rejected the argument that the later corporation was liable since Mr. Sartori had not acted as an agent. Furthermore, the court also held that the corporation could not ratify the loan, since it had no legal capacity to confer any authority on the borrower. The court further held that since at the time the cheque was cashed, the defendant company was not in existence and it could not be said to have taken the benefit of this contract, the Plaintiff's claim must fail. He has his remedy which he can enforce against the proper person.[87]

The same view was advocated by Honourable Justice Nnamani, (JSC) in *Edokpolo v Sem-Edo Wire Industries Ltd.*[88] that it is now a well settled principle of Company Law that a company is not bound by a pre-incorporation contract being a contract entered into by parties when it was not in existence. No one can contract as agent of such a proposed company there being no Principal in existence to bind.[89]

In case after its registration, can a company enter into a new contract, on the same terms as the old contract? This is 'Novation' under Company Law. Novation of contract is defined in *Scarf v Jardine*[90] as, 'being a contract in existence, some new contract is substituted for it either between the same parties (for that might be) or different parties, the consideration mutually being the discharge of the old contract.' Novation is different from Ratification because in Novation, a new contract is made on the same terms but this time between the company and the third party, whereas Ratification dates back to the time of the act ratified, so that if the non-existing company ratifies, its subsequent ratification is ineffective. In Novation of Contract, the Company can replace the promoter from the pre-incorporation contract. But one might say that such contract would not be called pre-incorporation contract, but it should be called post-incorporation contract; because novation of contract result into a new contract.

In Nigeria, in *Enahoro v Bank of West Africa Ltd.*[91] Plaintiff bank had lent money to the principal shareholder. Prior to the incorporation of the company, the loan was transferred to the company, and after formation, a resolution was passed authorizing the transfer of indebtedness to the new company. Also, after incorporation, the shareholder as the principal officer obtained a second loan on behalf of the company. Honourable Justice Lewis, held that the company was liable for the 2nd loan, however, held that the 1st loan cannot be enforced against the new company because a subsequent ratification by a company of an agreement purporting to be made on its behalf prior to its formation can only be with the assent of the third party to the agreement, and in effect, will be a new agreement: We do not see that the liability incurred by the second defendant prior to the coming into existence of the first defendant, albeit transferred to the loan accounts of the first defendant...and no novation was in our view pleaded by the plaintiff, so that the plaintiff cannot now rely upon novation...[92]

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86 (1961) 1 All N.l.R. 555.
87 Per Honourable Sowemimo, J., in *Caligara v Giovanni Sartori & Co. Ltd.* (1961) 1 All N.L.R. 555, at page 556
88 (1984) N.S.C.C. 553.
89 *Ibid.* at 555
90 [1882] 7 AC 345
91 (1971) 1 NCLR 180.
92 *Ibid.* per Lewis, JSC at p. 192. 9. (1984) N.S.C.C. 553

In the Nigerian case of *Edokpolo v Sem-Edo Wire Industries Ltd.*[93] Justice Nnamani held that after incorporation the company...in its meetings can enter into arrangements similar to those contained in the old agreement of 1975. This decision has over the years been popular as against that of *Kelner v Baxter* that received various calls in late 20th century for its abrogation since it worked injustice.[94] Agomo's view on the rule in *Kelner v Baxter* was that it was one of the weakest points of English company law, and one which in one's opinion reduced judges to a sterile role and made an automation of them.[95]

6. Corporate Legal Personality as Absolute Shield from Liability?

The Principle of law laid down in *Salomon v. Salomon and Co. Ltd.* is often considered the basis of which the jurisprudence of corporate personality has been written world over. However, the history of commercial litigation has witnessed situations where the Courts have gone beyond the corporate cloak and analyzed the workings and the motives of the members or directors of the company. In doing this, the Courts have evolved the concept of lifting, piercing or getting behind the corporate veil. The effect of this principle is that there is a fictional veil between the company and its members. In other words, the company has a corporate personality which is distinct from its members. The famous Salomon case of more than a hundred years old, where the United Kingdom's House of Lords established the maxim that a company is a separate legal entity distinct from its members, determined the direction of modern company law and the nature of limited liability companies. The rationale behind this is that the law will not allow the corporate form to be misused or abused. In those circumstances in which the court feels that the corporate form is being misused, it will rip through the corporate veil and expose its true character and nature disregarding the Salomon principle laid down by the House of Lords.[96]

When companies crash into liquidation, creditors often assume that limited liability means that there is little prospect of recovery from those who operate the company. Many creditors erroneously believe that the directors have limited liability. They do not. The primary reason that individuals operate their businesses using the corporate structure is to take advantage of limited liability. But the liability that is limited is that of shareholders. Although many individuals who are directors of companies may also be shareholders, it is in their capacity as directors that actions can be brought against these individuals and it is in that capacity that their liability will be assessed. Many unsecured creditors of companies seem to be unaware that the limited liability company is not an impenetrable shield. Directors may sometimes be made responsible for losses suffered by the company creditors. Indeed, in *Re:Group Hub Ltd; The PC Company Ltd v Sanderson*[97] involving the reckless trading provisions in the Companies Act 1993, Priestley J brilliantly commented:

> *The shield of incorporation will be of no avail to a director on the battlefield of trade if that director knows full well, or ought to have known, that creditors' claims cannot be met or if the shield-carrying director is allowing the company to trade recklessly. If a company is in a situation where there is a substantial risk of serious loss to its creditors or a director cannot hold a reasonably grounded belief that the company will perform its obligations then the company should cease to*

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[93] *Ibid.* per Nnamani, JSC, at page 562; See also, *Edwards v Halliwell*, (1950) 2 All ER 1064; *Heyting vs Dupont*, (1964) 1 WLR 843; *Burland vs Earle*, [1902] AC 83 (PC).

[94] Honourable Justice Karibi-Whyte, (JSC) Some Reflections on Company Law Reform. *Nigerian Business Law and Practice Journal*, Vol. 1. No. 32 July/Dec. 1988.

[95] See Agomo, supra note 20, at page 82.

[96] See Agomo, supra note 20, at pages 79 – 80.

[97] Hamilton High Court CP 18/00, 1 November 2001, at paras 10-11.

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> *trade. The shield is not required after surrender and will not protect a combatant who refuses to surrender.*

When companies crash into liquidation they often leave behind a string of disgruntled unsecured creditors. Those creditors, who might struggle to keep their own businesses afloat as a result of the failure to pay, may be forced to write off the money owed. Creditors often assume that limited liability of the company means that there is little prospect of recovery from those who operate the company. Some may curse the rules of company law that appear to allow dishonest and incompetent business people to hide behind companies and force others to bear the loss for their failures. Others may fear a backlash where honest and diligent directors will be unjustifiably punished for their unsuccessful ventures, crushing entrepreneurial conduct and spirit.

Salomon's case is to the effect that, a company is a separate person at law from those who operate on its behalf and through it; namely its directors, employees and shareholders. But this does not necessarily protect directors from liability; it means only that the liability of directors must be assessed separately from the liability of the company. If a cause of action can be established against a director, there is no bar against proceeding with that action just because that director is also a shareholder in the company and has limited liability in their capacity as shareholder.

In Nigeria, the decided cases on piercing the veil of incorporation have generally been based on fraud. Our courts have recognized that the veil of incorporation can be pierced where the justice of the case so requires, especially where there is impropriety or wrongdoing on the path of the *alter ego* of the company. The Supreme Court in the case of *Akin-Wunmi Alade v. Alic Nigeria Ltd*[98] where Galadima (JSC) stated that:

> *The consequences of recognizing the separate personality of a company is to draw a veil of incorporation over the Company. One is therefore generally not entitled to go behind or lift this veil. However, since a statute will not be allowed to be used as an excuse to justify illegality or fraud it is a quest to avoid the normal consequences of the statute which may result in grave injustice that the Court as occasion demands have to look behind or pierce the corporate veil.*

The "statute" referred to above is the *Companies and Allied Matters Act* in which Section 37 codifies the common law decision in *Salomon v A Salomon*. However, the point to note is that the element of fraud is a similar instance wherein the veil of incorporation can be lifted. The law of trusts has been given judicial impetus in a number of cases. In *Kotoye v. Saraki*[99] the law of trusts was applied in a commercial dispute relating to the shares of a company. The decision of the Supreme Court in *Ughutevbe v. Shonowo*[100] show that the Courts desire to utilize the law of trusts to disputes brought before them. The issue in these cases will be whether the words and actions of the director can be assessed separately from those of the company. Creditors will particularly look for a cause of action against the directors of a failed company when the company director has deeper pockets than the insolvent company.

In answering the question as regards lifting the veil under the English law, section 165 of the UK Companies Act 1948 was given approval in the judicial decision of the Denning M.R where he lend credence to this by asserting in *Norwest Holst v Secretary of State for Trade and Industry*[101] where he commented that "The whole management and control is in the hands of the directors. They are self-perpetuating oligarchy; and are virtually unaccountable."

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[98] [2010] 19 NWLR (pt. 1226) 111
[99] (1994) 7 NWLR (pt. 357) 414
[100] (2004) 16 NWLR (pt. 899) 300
[101] (1978) Ch 201, or 3 All ER 280.

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7. Conclusion

Generally, the landmark judgment in *Salomon's case* has no doubt re-defined the modern company law practice. The principle of company being a distinct entity from its members has been codified into Companies Acts. The principle, no doubt is very fundamental to a sustainable corporate legal practice world-over in spite of the criticisms that greeted the decision.

However, the highlighted criticisms cannot be wished-away, particularly given the possibility of unscrupulous promoters who, acting with fraudulent intent might take advantage of the principle of corporate legal entity to defraud unsuspecting innocent third-party.

As noted earlier, the concept of 'veil-lifting' is one of the effective ways of sanctioning such errant promoters, as clearly demonstrated by the Supreme Court of Nigeria in *Oyebanji v. State*[102] where the apex court pierced the veil of incorporation to allows for prosecution of fraudulent members of the company.

It is however our suggestion that the Companies Acts be amended to ensure that the procedure for 'conversion' and "re-registration" of companies are more stringent to prevent the promoters froms taking advantage of innocent and unsuspecting third parties.[103]

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[102] [2015] All FWLR p. 1256 at 1274-1275, paras. E-F. See also *Mezu v. Co-operative & Commercial bank Nigeria Plc. & Anor.* [2012] 12 SCM Jp. 175 at 199 paras. B – D.

[103] For conversion and re-registration of companies in Nigeria, see generally Section 50 to 53 of CAMA Cap C 20 LFN 2004.