AN APPRAISAL OF THE ROLE OF CORPORATE AFFAIRS COMMISSION AS A REGULATORY BODY UNDER NIGERIAN COMPANY LAW

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NOVEMBER, 2012

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A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, NIGERIA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M)

DEPARTMENT OF COMMERCIAL LAW, FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA, NIGERIA.

NOVEMBER, 2012

DECLARATION

I hereby declare that this thesis is written by me and it is my own research work. It has not been presented by any previous application for higher degree. All quotations and references are indicated with requisite acknowledgement.

_____ _____

John Osilama, ERAMEH **DATE**

CERTIFICATION

This thesis entitled "**AN APPRAISAL OF THE ROLE OF CORPORATE AFFAIRS COMMISSION AS A REGULATORY BODY UNDER NIGERIAN COMPANY LAW"** written by **John Osilama ERAMEH**, meets the regulations governing the award of the degree of Masters of Laws (LL.M) degree of the Ahmadu Bello University Zaria and is approved for its contribution to academic knowledge and literary presentation

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DEDICATION

This thesis is dedicated to the memory of my late beloved father, **Chief J. S. Erameh,** who showed me love beyond words and impacted in me virtue of love, education, humility and care for all and sundry and also Mrs. Mary-Angela Momoh who has always been encouraging and supportive. Also to my darling wife, Matilda Oshuwa Erameh for her perseverance and endurance in the course of my undertaking this research work.

This thesis is further dedicated to all those who believe and crave daily to improve themselves but are held back by challenges and circumstances, I pray that mercy and favour of God will help them achieve and accomplish all their goals.

ACKNOWLEDGEMENT

May I express my profound gratitude to the following persons whose inestimable contribution have accounted for the completion of this work.

I thank the Lord Almighty for his mercy and grace for without him, I wonder how I could have come this far in the mist of several challenges and despair. You alone desire all adoration, glory and praises.

To my supervisors, Dr. Andrew A. Akume and Dr D.C. John, I thank you for your invaluable and incalculable contributions, guidance, patience and encouragements especially when I almost gave up, you were there like older brothers propelling and pushing me. Indeed, I am perpetually grateful to you.

May I also acknowledge my wife, Mrs. Matilda Erameh for her support, encouragement, and for creating an enabling environment conducive for academic pursuit which now has culminated to the writing of this thesis. My words are but pale imitation of the true dept of my gratitude. I am forever in your debt as always.

I also owe monumental debt of gratitude to distinguished Victor Omoluabi, Esq for his constant infusing of positive encouragement during the course of my academic sessions. It was then and has always been a privilege to have your formidable cerebral resources at my disposal. I am grateful.

My most sincere gratitude goes out to Mrs. Bridget Erameh, Mr.& Mrs. Felix Ayegbeni Erameh, Rex Erameh, Felix Katchy, Augustine Akpamgbo, Mrs Laah (ABU, Zaria), Ogechukwu Ikwueme (my indefatigable secretary) and a host of others for which time and space and the frailty of the human memory cannot now allow me to specifically name. Your collective contributions are the links in the chain that has pulled me to this point. I am in your debt.

Above all, my gratitude, praises, and thanks go to the Almighty God, my saviour and redeemer for favouring me with good health, intellectual capacity, mental acuity, and financial resources that made the dream of undertaking this thesis assignment a reality – May your name alone be glorified.

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1. Aderawos Timber Co. Ltd V. FBIR (1966) NMLR, 140.
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2. Companies Act, 1968
3. English Companies Act, 1948
4. Companies Act, 1922
5. Federal High Court (Civil Procedure) Rules, 2009
6. Constitution of The Federal Republic Of Nigeria, 1999
7. Interpretation Act
8. Immigration Act
9. Exchange Control Act
10. Banks and Other Financial Institutions Decree, 1990
11. Nigerian Enterprises Promotion Act
12. Business Names Act, 1961
13. Pensions Act
14. Exchange Control Act

TABLE OF ABBREVIATION

1.	A.C	-	Appeal Cases
2.	A.G	-	Attorney General
3.	All ELR	-	All England Law Report
4.	ALL NLR	-	All Nigeria Law Report
5.	ANO	-	Another
6.	BOFID	-	Banks and Other Financial Institutions Decree
7.	CAC	-	Corporate Affairs Commission
8.	CAMA	-	Companies And Allied Matters Act
9.	CCHCJ	-	Certified Copies of the High Court Judgement (of Lagos State)
10.	FBLR	-	Federal Board of Inland Revenue
11.	FSC	-	Selected Judgement of the Federal Supreme Court
12.	LRHL	-	Law Report of House of Lords
13.	LRN	-	Law Report of Nigeria
14.	NLR	-	Nigeria Law Report
15.	NMLR	-	Nigerian Monthly Law Report
16.	NSCC	-	Nigeria Supreme Court Cases
17.	NWLR	-	Nigerian Weekly Law Report
18.	Ords	-	Others
19.	QB	-	Queens Bench Division
20.	S.C	-	Supreme Court
21.	SEC	-	Securities and Exchange Commission
22.	WLR	-	Western Law Report

ABSTRACT

The importance of an effective regulatory body in a growing economy cannot be overemphasized. Hence the need for the Corporate Affairs Commission to function as such is a sine-qua-non to the provision of good legal principles that must be adhered to and effectively enforced in corporate governance. This research work, therefore covers the historical development of the Company and Allied Matter Act, its roles/functions and how it enforces the provisions of the Act. It also proffers suggestions to some challenges been faced by the Corporate Affairs Commission and re-commendations that would make them more potent as a regulatory authority.

TABLE OF CONTENTS

Cover page ---- -- -- -- -- -- -- -- -- i

Title page -- -- -- -- -- -- -- -- -- ii

Declaration -- -- -- -- -- -- -- -- -- iii

Certification -- -- -- -- -- -- -- -- -- iv

Dedication -- -- -- -- -- -- -- -- -- v

Acknowledgement -- -- -- -- -- -- -- -- vi

Table of Cases -- -- -- -- -- -- -- -- viii

Table of Statutes -- -- -- -- -- -- -- -- ix

Table of Abbreviation -- -- -- -- -- -- -- x

Table of Contents -- -- -- -- -- -- -- -- xii

Abstract -- -- -- -- -- -- -- -- -- xv

CHAPTER ONE
GENERAL INTRODUCTION

1.1 Introduction -- -- -- -- -- -- -- -- 1

1.2 Statement of Problem -- -- -- -- -- -- 4

1.3 Aims and Objectives -- -- -- -- -- -- 5

1.4 Scope of Limitation -- -- -- -- -- -- 6

1.5 Literature Review -- -- -- -- -- -- 6

CHAPTER TWO

BRIEF HISTORY OF COMPANY LEGISLATION IN NIGERIA BEFORE CAMA 1990

2.1 Introduction -- -- -- -- -- -- -- 8

2.1.1 The Period Before 1876 -- -- -- -- -- -- 9

2.1.2 The Period Between 1876-1912 -- -- -- -- -- 11

2.1.3 The Period Between 1912-1968 -- -- -- -- -- 12

2.1.4 The Companies Act 1968 -- -- -- -- -- -- 13

2.2 The Companies and Allied Matters Act, 1968 -- -- -- 15

2.3 The Binding Effect of English Decisions in Companies Matters in Nigeria -- -- -- -- -- -- -- 15

2.5 The Purpose of Company Legislation -- -- -- -- 17

CHAPTER THREE

COMPOSITION AND ADMINISTRATION OF THE CORPORATE AFFAIRS COMMISSION

3.1 Membership of the Companies -- -- -- -- -- 19

3.1.1 Duration of Membership -- -- -- -- -- 22

3.1.2 Disqualification of Members -- -- -- -- -- 22

3.1.3 Proceeding of the Commission -- -- -- -- -- 22

3.1.4 Functions of the Commission -- -- -- -- -- 23

3.1.5 Calling or Directing the calling of an Annual General Meeting -- 27

3.2 Powers of the Corporate Affairs Commission in the case of default to call meeting -- -- -- -- -- -- 28

3.2.1 Extra-Ordinary General Meeting -- -- -- -- -- 30

3.2.2 Statutory Meeting -- -- -- -- -- -- -- 31

3.2.3 Proceedings at Statutory Meeting -- -- -- -- 33

3.2.4 Power of the court to order meeting -- -- -- -- 34

3.3 Administrative and Other Matters -- -- -- -- -- 35

3.4 Powers to Penalize Companies for Donations to public assets -- 35

3.5 Power to lift the veil of the company -- -- -- -- 36

3.6 Power to Investigate Companies -- -- -- -- -- 38

3.6.1 The Procedure for Investigation -- -- -- -- -- 43

3.6.2 Appointment of Investigators -- -- -- -- -- 49

3.6.3 Powers of Inspector -- -- -- -- -- -- 52

3.6.4 Issues Arising from Investigators Report -- -- -- -- 54

3.6.5 Expenses of the Investigators -- -- -- -- -- 54

3.6.6 Likely Problem Associated with Investigative Function -- -- 56

3.7 Supervisory Power to Impose Restriction on Shares Debentures -- 58

3.8 Registration of Charges, Section 197 of the Act -- -- -- 57

3.9 Liquidation or Winding Up of Companies -- -- -- 60

3.9.1 The Winding Up Process -- -- -- -- -- -- 60

3.9.2 Winding Up by the Court -- -- -- -- -- -- 61

3.10 Insider Dealing Prohibition -- -- -- -- -- 64

CHAPTER FOUR
SOME CASES OF PRACTICAL APPLICATION OF THE POWER OF THE COMMISSION

4.1 Power to Register Business Names -- -- -- -- 67

4.2 Procedure for Registration of Companies and other Allied Bodies-- 68

4.3 Power to Issue Certificate of Registration-- -- -- -- 68

4.4 Power to Determine What Names Must Be Registered -- -- 69

4.5 Power to Prohibit and Restrict the Registration of Business Name-- 71

4.6 Effect of Failure to Register a Trade name -- -- -- 73

CHAPTER FIVE
SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary -- -- -- -- -- -- -- -- 75

5.2 Findings -- -- -- -- -- -- -- -- 77

5.3 Recommendations -- -- -- -- -- -- -- 79

5.4 Conclusions -- -- -- -- -- -- -- -- 83

Bibliography -- -- -- -- -- -- -- -- 83

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

The Corporate Affairs Commission hereinafter referred to as "the Commission" or CAC for short, is one of the major regulatory bodies of companies in Nigeria. The body is a creation that came into being by virtue of the **Companies and Allied Matters Act** (hereinafter referred to as CAMA) **Cap 50, Laws of the Federation of Nigeria, now Cap C20** of the **Laws of the Federation, 2004**. Principally, the Commission is one of the innovations of CAMA that gives the Commission the responsibility of incorporation of companies, registration of Business Names, Incorporation of Trustee of certain committees, bodies, associations and other regulations. CAMA also introduced Corporate audit Committee, insider trading, codified the duties of directors, the fundamental principles emanated in the rules of Fossal Foss V Harbottle, the rule in Royal British Bank V Turguard.

Before the advent of CAC, the **Companies Act of 1968** was the Act that regulated the activities of companies in Nigeria. The present CAMA was borne out of draft documents prepared by the **Nigerian Law Reform Commission** in an effort to reform and improve on the **Companies Act of 1968**, which could no longer address the various challenges associated with the regulation and supervision of Companies in Nigeria.

In the pre-oil boom era of the Nigerian Economy (1970-1979), the then company legislation was severally criticized. "…*One of the major criticism of the Act*

is that, it is little more than the putting together of some Sections of the repealed Companies Act Cap 37 and some Sections of the U.K Companies Act 1948, instead of taking the bold step of codifying both the statutory and case law on companies…"[1] The preparation of such a code would have provided the opportunity for reviewing and modifying some of the more inconvenient common law rules.

In its Report on the reform of Nigeria Company Law 1988, the **Nigerian Law Reform Commission** commentary on the above inadequacy and some others observed that "*with paucity of Nigerian cases on Company Law and the present heavy cost of obtaining English Law reports and textbooks, that difficulty in finding the law in this country can be well imagined…*"[2]

As a result of these numerous problems in our company laws as hitherto mentioned, the **Nigerian Law Reform Commission** was set up among other reasons "*to evolve a comprehensive body of Legal Principles and Rules governing Companies and suitable for the circumstances of the country. These rules was to facilitate business activities in the country and protect the interest of the investors, the public and of the nation as a whole*"[3]

After extensive consideration and submissions of papers by various stakeholders, the Commission came out with a draft copy which was forwarded to the then Attorney General of the Federation and Ministry of Justice, who set up a Consultative Assembly which further deliberated on the draft between 1988-1989 and

[1] Orojo, Nigeria Company Law and Practice (1994) (2nd Ed, Vol 1. 1993), PG 11.
[2] Vol. I Pg 2 Report on Ghana Company Law.
[3] Nigerian Law Reform Commission's Working Papers on the Reform of Nigerian Company Law, Vol 1, pg 3 and 12.

submitted a reviewed copy to the AG and Minister of Justice who made further alterations before it was promulgated into law as the Company and Allied Matters Decrees 1990 (No 1 of 1990) now referred to as the **Companies and Allied Matter Act, Cap 59 Laws** of the Federation of Nigeria. The Act came into effect on 1st of January, LFN, 2004. It is this Act that now created the CAC and made it the Apex regulator of corporate Affairs in Nigeria.

Prior to the promulgation of CAMA 2004, the hitherto Companies Act of 1968 was under the control of Federal Ministry of Trade, through its Corporate Affairs Division. Then it had a central Companies Registry in Lagos which was later moved to Abuja in 1988. It was in charge of incorporation of Companies, filling of annual returns and other statutory documents required to be submitted to the Registry. The Registrar of Companies was in charge of the Company Registry. The Company Registry was saddled with plethora of problems, viz:-

1. It was not self accounting, its budget depended on the budget of the Federal Ministry of Trade.
2. The Registrar was a staff of the Ministry i.e a lawyer who was deployed from the Federal Ministry of Justice.
3. It was grossly under funded inspite of the huge money being made by the Company Registry from incorporation of Companies, Business Name Registration, filing of Annual Returns and other statutory documents.
4. The accommodation for staff was unsuitable and staff welfare was at its lowest ebb that affected their productivity.

5. The normal civil service bureaucracy affected the administration to effectively and effectually carry out their functions.

Based on the above problems, several options were considered by the **Nigerian Law Reform Commission** such as "*leaving the Registry as it is at present, constituting a Board in the Ministry to supervise its work, forming a guarantee company like the Stock Exchange to run the Registry, and establishing a statutory body to take over its functions*"[4].

The last option was preferred. This option gave birth to the Corporate Affairs Commission to take over the functions of the Company Registry, with the enormous task of making rules to facilitate business activities in the interest of investors, the public and the nation that would allow for the much desired conducive atmosphere that could lead to the much desired economic development of the country.

1.2 STATEMENT OF THE RESEARCH PROBLEM

Inspite of the laudable intention for the creation of the Commission and wide powers under CAMA, there are still some challenges been encountered by the Commission that have called to question its role as a regulatory organ under CAMA. It is such challenges that necessitated this research. The challenges include:-

1. The non stipulation of the qualification of inspectors to investigate companies, a lacuna that may have affected the quality of report due to the incorporative, inexperience lack of skill and knowledge of some persons, that this effected the administration of companies.

[4] Nigerian Law Reform Commission Working Papers on the Nigerian Company Law. Vol 1-12

2. The inability of the Commission to fully enforce its policies of compliance with certain provision of CAMA e.g payment of annual returns and the necessity for all companies to have company secretary and the abuse of incorporated trustee by members of public.
3. The provisions of CAMA especially on the requirement of shareholders/members to enable the company ignite investigation are questionable as to the intention of such requirement in the light of the aim of investigation in a company.
4. The impact of normal civil service bureaucracy on the ability of the CAC to efficiently and effectively carry out its functions.

1.3 AIMS AND OBJECTIVES OF STUDY

The objective of this research is to appraise the functions and roles of the Commission as a regulatory body under the Nigerian Company Law since the coming into being of the Companies and Allied Matters Act given its extensive powers of control and supervision over Nigerian Companies, to find out whether it is effectively carrying out its statutory functions with the inherent enforcement mechanism and how it has come to bear on the general corporate governance of companies. Further, the likely problems inhibiting the Commission from effectively discharging its statutory functions and recommendation to enable it achieve its functions.

1.4 SCOPE AND LIMITATION

This research work concerns itself with the independent regulatory organization that regulates the activities of the companies and other allied bodies in Nigeria.

Attempt would be made pointing out the purpose of company legislation in Nigeria, the historic development of company law in our country and its relevance. The composition and administration technique of the body will be examined, the various functions and power of the Commission, portraying it as an independent agency, the challenges of the Commission and recommendation for the Commission to be efficient would be examined.

1.5 LITERATURE REVIEW

Based on the topic of research, an appraisal of Corporate Affairs Commission as a regulating body under Nigeria Company law, the primary law for company regulation in Nigeria is Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria 2004 which is the basic law for this research. Some views of workers are considered based on divergent opinions.

These powers to companies registered in implausible to companies registered in Nigeria and foreign companies. Thus, a foreign company is allowed to participate in trade or business in Nigeria after incorporation. It behooves the Commission to involve it powers as stated in Section 5 of CAMA to invoke the penalty for non registration before doing business, which makes an officer of a company or it's agents who knowingly and willingly authorizes or permits the default to register in Nigeria

shall be liaise on convention to a fine of N2,500 for jointly with the company. However, according to Bhadmus[5], inspite of the fact that a company is not registered in Nigeria, it does not inhibit such a company from suing to protect its rights and be sued where liable without registration in Nigeria, the above position according to the learned authority has legal basis in statutory and judicial authority[6].

Inspite of the position of our laws on the issue of locus standi, it is however our view that it is misplaced to insist on registration before doing business in Nigeria, whereas, the same law allows such companies have capacity to sue or be sued in Nigeria in the absence of registration. The current position of our laws on the regulation of foreign companies capacity to sue would encourage most foreign companies to do business in their respective countries to consummate such business without registration and if there are challenges subsequently they will use an attorney or agent to do business in Nigeria without having to maintain physical presence in Nigeria.

One other vary important issue of regulation of companies is in the area of corporate Governance in the regulation of Take Over bid of companies. It is important to state that the issue of corporate governance is the sole means through which the Commission can act as checks and balances on how a company may be taken over by another. Some are of the view that the provision of CAMA on Take over bid and its

[5] Bhadmus on Corporate Law practice (2009) Chenglo ltd, Enugu Nigeria.
[6] S.60(b) of CAMA 2004.

regulations therewith frustrate the functioning of the capital market. According to Sofowora[7], the ideas of requiring groups intending to make a take over bid to apply to Corporate Affairs Commission,

According to the learned scholar the above limits the scope available for take over thus impairing the functioning of the market for corporate control.

The regulation of companies will not be possible without, the Corporate Affairs Commission. However, the provision of Chairman and Secretary of the Commission are not clear and gives room for divergent in views. According to C.S. Ola[8] Section 5(2) of CAMA does not make the position of Chairman clear and evident especially provisions dealing with his powers beyond supervisory roles of chairing meetings. Further, no express provision is made of the office of Secretary, as is the case with quorum, there is no provision on the quorum of the members of the Commission. This to a large extent encourages the recourse to the Interpretation Act, Ola belongs to the school of thought that for the issue of quorum of the members of the Commission, the Interpretation Act especially provision Section 27 (1) & (2) must be resorted to instead of the Companies and Allied Matters Act.

[7] Modern Nigerian Company Law, 2nd Ed. 2002, Soft Associates, Lagos
[8] University press Plc, Ibadan, 2001

Inspite of all the positions held by writers and scholars, it is hoped that this research work will attempt to put the various positions in the proper perspective and with a view to take a stand and thereby contributing to the discourse to how the Corporate Affairs Commission has faired in the regulation of companies within the confines of the Nigeria Company Law.

CHAPTER TWO

BRIEF HISTORY OF COMPANY LEGISLATION IN NIGERIA BEFORE C.A.M.A 1990

2.1 Introduction

The history of company legislation in Nigeria will not be complete without taking into cognizance the metamorphoses of the laws through the years before the advent of the colonial era and during the colonial era and eventually before the promulgation of the Companies and Allied Matters Act. They are generally categorized into the following periods viz:

i. The period before 1876

ii. The period between 1876 and 1912

iii. The period between 1912 and 1968

2.1.1 The Period Before 1876

Prior to 1876, in Nigeria and indeed African traditional system, there were types of mini corporations and partnership. These corporation of individuals coming together for usually economic reasons with a particular object of business with a view to pull resources together in order to make more profit. They held their own peculiar regulations that bounded members operated within he confines of this unwritten ruled. However, with some of these bodies had some level of written terms which helped them to operate without much hindrance. Further, they had their own traditional mechanism to settle issues/challenges among them. Most of their bodies relied on

traditional institutions in place in their various locality to help enforce agreed terms among what was akin to shareholders of the Association.

Further, apart from what could be termed local bodies, there were also companies duly registered in England as limited liability companies that operated in Nigeria then and had all the privileges of a registered company registered in England under the Companies Act of 1862 as the Act applied to foreign companies that were based in Nigeria. It is noteworthy that this applicability of the Companies Act 1862 applied to Lagos colony having been ceded to the British administration and became subject to British Crown in 1861. The Corporations in England were legal entities with status different from their members. This also applied to companies in Lagos. In summary, during this period under review, there was no general regulation of companies in Nigeria except in Lagos that has an element of regulation applicable to companies duly registered under English laws. Other Associations were basically subject to the codes agreed by members.

2.1.2 The Period Between 1876-1912

The regulations of companies were not significantly different from the 1961 era where the laws in England were the compass with which affairs of companies were directed. However, in 1876, the Supreme Court ordinance was promulgated for the Colony of Laos. The ordinance made it obligatory for courts to apply the Common Law Doctrine of Equity and statutes of General Application in Lagos as a colony of Britain. This

also meant that corporate regulations in England were applicable to companies operating in Nigeria.

It is instructive to note that before the 1876, period that most unincorporated companies in Nigeria feel into series of mishap, fraudulent shareholders and promoters of companies since there was no regulations of activities except certain conventions in England that were not justiciable in Nigerian Court. The 1861 Supreme Court ordinance gave a temporary brief.

2.1.3 The Period Between 1912-1968

As a result of the shortcoming in company practice and regulation 3 principal companies statutes were introduced between 1912-1968. They are as follows"-

(a) The Companies Ordinance 1912,

(b) The Companies Ordinance 1922,

(c) The Companies Decree 1968.

1912

It is on record that the Companies Ordinance 1912 was the 1st Companies statute in Nigeria, it was meant to provide for the operation of companies by incorporation.

Initially, it was meant to apply to Lagos only though it was later extended to apply to the whole country after the amendment of the law in 1917 by virtue of the companies' ordinance (Amendment and Extension)

1922

Based on the usual clamour for improvement, the Companies Ordinance of 1912 and 1917 respectively were replaced and the Companies Act 22 was introduced as was almost a norm then it applicable Lagos alone until it was later extended to other parts of the country.

As it is the practice with most of our laws. The Companies Ordinance of 1922 was akin to the English Companies (CONSOLIDATION) Act 1908 and English Companies Act of 1917. The Act soon be came inadequate in regulating company practice.

This was due to the fact that he Companies Act 1922 (which was designated Act (1963) could no longer cope with the nature, pace, scope of business activities in Nigeria.

2.1.4 The Companies Act of 1968

The 1968 Act promulgated was substantially a repetition of the English Act 1948 and a carry over of some parts of the replaced old Companies Ordinances.

However, this criticism was not farfetched as past compares legislations were merely copycats of entrenched laws and principle in England. The foregoing is not unusual especially since they (England) were our colonial masters. Consequently, the incorporation of English Law into our legal system is unavoidable though some were later subject to relevant local statutes for instance, the concept of a corporate entity being separate from its members was enunciated in the celebrated case of Salomon V Solomon[1] this common law locus clasicus is part of our judicial and statutory company law in Nigeria.

Also the doctrine of ultra as decided in the English famous case of **Ashbury Rialway Carriage and Iron Co. V. Riche[2]**, this English case was incorporated in CAMA[3] by way of statutory acceptability.

As it is the practice in most economic climes, the Company Act 1968 sufficed only for a short period of time. Soon, in the words of Dr. E. M. Asomogha the 1968 Companies, the Act no longer served any useful purpose. The believe by most company law experts was that the legislation was tune in the with time and there a clarion call to improve on same. This however was in line with the practice generally in the world.

[1] (1887) AC 22
[2] (1875) LR, 7 HL 653
[3] S. 39, CAMA

The criticism against the Act gave bases to Nigeria Law Reform Commission to come out with a report 1987 that was fine tuned by the Consultative Assembly of 1988 on Company Law that has so may erudite and experienced Nigerians. The report later led to the 1990 Companies and Allied matters Act being enacted.

2.2 COMPANIES AND ALLIED MATTERS ACT 1990

With reference to Companies, the desired objective of the Nigerian Law Reform Commission was to evolve a comprehensive body of Legal Principles and Rules governing companies and suitable for the circumstances of the country.

In pursuance of this objective, a broad approach was adopted. Not only the statutory provisions, but also the common law principles and the doctrines of equity applicable to company law in Nigeria were examined and, wherever desirable, enacted often with some necessary amendments to suit our peculiar clime.

The Act is a product of careful consideration and extensive consultation. It represents the general views and consensus of users of Common Law in Nigeria.

2.3 BINDING EFFECT OF ENGLISH DECISIONS IN COMPANY MATTERS IN NIGERIA

Although most of our company laws were inherited from England, English decisions are not necessarily binding on Nigerian Courts in company matters.

A Nigerian Judge is expected to give interpretation to the Nigerian Companies Acts and not the **English Companies Act**, the similarity of both statutes notwithstanding, where an English decision is relevant to the case before the court in Nigeria, the judge will invariably take cognizance of same where there is no Nigerian precedent.

The principle involved was clearly elucidated by **Ikpeazu J. in the case of ADERAWOS TIMBER CO. LIMITED V FEDERAL BOARD OF INLAND REVENUE**[4] where he held thus:-

> *"IN DETERMINING WHETHER THE AID OF ENGLISH DECISIONS WILL BE INVOKED, THE PROVISIONS OF THE LOCAL LAW HAS TO BE EXAMINED TO KNOW WHETHER SUCH NEED HAS ARISEN. TO MY MIND, WHERE EXPRESSIONS OR TERMS USED IN OUR LOCAL STATUES ARE SIMILAR TO THOSE USED IN ENGLISH STATUES AND SUCH TERMS OR EXPRESSIONS ARE USED IN THE SAME CONTEXT AND WITH THE SAME CONNOTATION AND WHERE THESE EXPRESSIONS OR TERMS HAVE BEEN GIVEN JUDICAL INTERPRETATION OR CONSTRUCTION BY THE ENGLISH COURT, IT IS THESE DECISIONS THAT WE MUST GO IN SEARCH OF LIGHT TO CONSTRUE THOSE TERMS IN OUR LAWS WHERE THE STATUTE ITSELF HAS SUPPLIED NONE"*

[4] (1966) NMCR 140

The above position is in consonance with the **Federal High Court Rules**[5] which allows other laws or rules to apply where there are no specific Rules especially in a situation where it is the Federal High Court that has jurisdiction in **Companies and Allied Matters Act**[6].

2.5 PURPOSE OF COMPANY LEGISLATIONS

The basic philosophy behind legislations on company affairs is to prevent fraud on creditors and the investing public which was the canker-worm that pervaded its initial reception, and which could have led to its early extinction but for legal ingenuity coupled with its advantages which far out weigh its disadvantages.

The legislature and the courts developed the concept for trading concerns aimed at preventing and checking abuses in corporate business in order to protect the unwary investors and creditors of companies.

Generally speaking, it may seem from the provisions of the statues, that the protection accorded creditors is not strictly at par with that of the investors. This is not surprising, when one considers the risks undertaking by the investors/shareholder out weights that of the creditor. Some legal rules have been shaped by the **Companies and Allied Matters Act 1990** to provide adequate protection for those who properly

[5] Order 56. Fed. High Court Civil Procedure Rules 2009.
[6] S.251(1)&(e) of Federal Republic of Nigeria Constitution, 2009

fall within the definition of a creditor as explained above. In view of this, emphasis can be placed on the following matters:

i. Ultra Vires Rule[7]

ii. Constructive notice[8]

iii. The Rule in Turquand's Case[9].

iv. Alteration of Objects[10].

v. Maintenance of Share Capital[11].

vi. Lifting the veil of incorporation[12].

vii. Debentures[13].

viii. Scheme of Arrangement and Compromise[14].

ix. Minority protection against unfairly prejudicial and oppressive conduct[15].

x. Winding up[16].

xi. Company Secretaries[17].

xii. Insider trading[18].

xiii. Audit Committee[19].

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[7] S.39 CAMA
[8] S.68 Ibid
[9] Section 69 Ibid
[10] Section 45 Ibid
[11] Section 99 Ibid
[12] Section 93 and 506 Ibid
[13] Section 166 Ibid
[14] Section 539 Ibid
[15] Section 299 Ibid
[16] Section 401 Ibid
[17] Section 293 Ibid
[18] Section 615 Ibid

[19] Section 317 Ibid

CHAPTER THREE

COMPOSITION, ADMINISTRATION AND FUNCTIONS OF THE CORPORATE AFFAIRS COMMISSION

3.1 Membership of the Commission

Before going into the functions of Corporate Affairs Commission (CAC), it is important to have background knowledge of the composition and how the activities of the Commission is administered.

According to the Provisions of **Companies and Allied Matters Act**[1], the **MEMBERSHIP OF THE COMMISSION** are:

(a) A chairman who shall be appointed by the President, Commander - In - Chief of the Armed Forces, being a person who by reason of his ability, experience or specialized knowledge of corporate, industrial, commercial, financial or economic matters would in his opinion be capable of making outstanding contributions to the work of the commission.

(b) One representative of the business community, appointed by the Minister on the recommendation of the Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture;

[1] S.2, Ibid

(c) One representative of Labour, appointed by the Minister on the recommendation of the Nigerian Labour Congress.

(d) One representative of the legal profession, appointed by the Minister on the recommendation of the Nigerian Bar Association;

(e) One representative of the accounting profession, appointed by the Minister on the recommendation of the Institute of Chartered Accountants of Nigeria;

(f) One representative of the Manufactures Association of Nigeria, appointed by Minister on the recommendation of the Association;

(g) One representative of the Nigerian Association of Small Scale Industrialists, appointed on the recommendation of the Association;

(h) One representative of the Institute of Chartered Secretaries and Administrators, appointed by the Minister on the recommendation of the Institute;

(i) One representative of the Securities and Exchange Commission not below the grade of Director or its equivalent;

(j) One representative of each of the following Federal Ministries, that is-

(i) Trade and Tourism

(ii) Finance and Economic Development,

(iii) Justice

(iv) Industry

(v) Internal Affairs; and

(k) The Registrar - General of the Commission

The Registrar General's membership reflects its compound and tripartite role as Companies Registrar, Registrar of Business names, and Registrar of Incorporated Trustees (voluntary, religious, friendly and other societies) and its general role as administrator of the **Companies and Allied Matters Act 1990**.

In the composition of the membership, every segment of corporate and non-corporate life is represented, in order to have a commission that is constituted in such a manner as to be capable of formulating policies on anything within the three major branches covered by the Act. Not only is the membership drawn from all material works of life, it requires the highest and most suitable qualifications. It is basically constituted based on efficiency of the members in addition to statutory requirements.

The Registrar - General is appointed by the President and is a member of it. He must be a person who has been qualified to practice law in Nigeria, for not less than ten years and he must have had experience in company law practice or administration, for not less than eight years[2]. He is the Chief Executive of the Commission, and he is subject to the directives of the commission and also the accounting officer of the

[2] S.8 (1) Ibid

Commission[3]. He is entitled to represent the commission in legal proceedings in Court.

[3] S.8 (2) Ibid

3.1.1 Duration of Membership

Members of the commission other than ex-officio members hold office for five years and are eligible for a further term of five years. With the exception of the Registrar, generally, they are all part-time members unless they otherwise cease to hold office in the circumstances specified in the Act[4].

3.1.2 Disqualification of Members

As with most property articulated Act, CAMA provides for grounds for disqualification of member. A member of the commission ceases to hold office, if:-

1. he becomes of unsound mind or is incapable of carrying out his duties.
2. he becomes bankrupt or has made arrangement with his creditors,
3. he is convicted of felony or any offence involving dishonesty,
4. he is guilty of serious misconduct relating to his duties, or
5. he is disqualified or suspended from practicing his profession by the order of a competent authority made in respect of him personally[5].

3.1.3 Proceedings of the Commission

A summary of **Section 27 (1) and (2) of the Interpretation Act, Cap 192, Laws of the Federation 1990,** shows that where a body established by an enactment

[4] S.8 (1) Ibid
[5] S.8 (3) Ibid

comprises three or more persons, any authorized act which the body can do may be done by a majority in the name of the body.

The quorum for meetings of the commission is five[6], excluding the representatives of the **Institute of Chartered Secretaries and Administrators**. The rationale for the exclusion from the quorum of the first of these representatives is not clear. The others might have been excluded because they are part of the establishment.

In view of the sensitive nature of the functions of the Commission, the members are required to disclose their interest in any company or enterprise in the affairs of which are being considered, or of any interest in any contract made or to be made by the Commission[7].

3.1.4 Functions of the Commission

The functions of the Corporate Affairs Commission is expressly provided in CAMA shall be to –

(a) Subject to section 541 of the Act. Administer this Act including the regulation and supervision of the formation, incorporation, registration management and winding up of companies under or pursuant to this Act;

[6] S.5 Ibid
[7] S.6 Ibid

(b) Establish and maintain a companies registry and offices in all the states of the Federation suitably and adequately equipped to discharge its functions' under the Act or any other law in respect of which it is charged with responsibility; and

(c) Arrange or conduct an investigation into the affairs of any company where the interests of the shareholders and the public so demand;

(d) Perform such other functions as may be specified by any Act or enactment; and

(e) Undertake such other activities as are necessary or expedient for giving full effect to the provisions of this Act[8].

The most salutary and sticking aspect of the Act is the wide powers which the Act confers on the Commission for administrative, regulations and super vision of companies and other allied bodies from the period of formation, incorporation, registration, investigation and management to windingup.

Apart from the powers mentioned in Section 7 of CAMA, other sections of CAMA like **Section 36 (1) CAMA 2004** also gave the Commission further powers as it relates to Memorandum and Article of Association of a company thus:-

"The Commission shall register the memorandum and articles unless in its opinion:-

(a) They do not comply with the provisions of this Act;

[8] S.7 Ibid

(b) The business which the company is to carry on, or the objects for which it is formed, or any of them are illegal; or the propose name conflicts with or is likely to conflict with an existing trade mark or business name registered in Nigeria".

The above provision in Section 36(1) is another novel introduction in the Act that was absent in the hitherto Act, 1968. Under the **Companies Act 1968**, the Registrar of Companies had a duty to register a Company provided the objects of the proposed Company were lawful and the promoters had complied with the requirements of the **Companies Act.**

In **Lasisi V Registrar of Companies**[9], it was held that the Registrar had no discretion to refuse to register the Memorandum and Articles of Association contravening the provisions of another law.

See also **Kehinde V Registrar of Companies**[10] **as Section 17 (1) Companies Act 1968** did not extend to any other law but limited itself to the Companies Act.

The above position is a different one today under the current dispensation. The commission may not refuse to register a Company for non compliance with the

[9] (1976) 7 SC 73
[10] (1979) 3 LRN 213

requirements of any other law as to registration and incorporation of companies and other allied bodies.

It is important to note that the certificate of incorporation is the most important document to be issued by the commission which will serve as a prima facie evidence that all 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 carry out business. However, this presumption is rebuttable and therefore, not conclusive.

Evidence can be led to prove that the requirements of the Act were not complied with before company was registered by the Corporate Affaires Commission.

A typical illustration of this is **Section 36 (e) CAMA 2004** which provides thus:

> *"the proposed name conflicts with or likely to conflict with an existing trade mark business name registered in Nigeria".*

This section points to the fact that the Act forbids not only the registration of a company with a name which is identical with or nearly resembles that of an existing company. See the case of **Niger Chemist Ltd V Nigeria Chemists**[11].

It further prohibits the incorporation of companies whose names conflicts with or likely to conflict with an existing trade-mark or business name registered in Nigeria[12]. This was further demonstrated by the Court of Appeal in the recent case of **Mustapha Vs Corporate Affairs Commission**[13].

Apart from the earlier functions of Corporate Affairs Commission, which could be termed pre-incorporation functions, for example, refusal to register a company for reasons it deems fit, the monitoring function of the commission as a regulatory body commences at the stage of incorporating a company or other allied bodies. During the pre-incorporation period, the commission is saddled with the responsibility of refusing the issuance of Certificate of incorporation.

As was in the case of **Erda Establishment V Onipede** where the Federal High Court terminated the incorporation of a company on the ground that its registration violated the **Immigration Act**. However, the decision was reversed on appeal for the different reason faulting the view of the trial judge, that **Section 17 (1) of the Companies Act**

[11] (1961) 1 All NLR 171
[12] S. 30
[13] (2009) 8 NWLR, pt 1142, 35

1968 is only conclusive as the requirements of the Companies Act and that it was not conclusive regarding compliance with the requirements of the **Exchange Control Act or the Immigration Act**.

The other functions of Commission could be categorized as **post incorporation duties**. Some of the duties are stated as follows:-

3.1.5 CALLING OR DIRECTING THE CALLING OF AN ANNUAL GENERAL MEETING.

Every company must hold an Annual General Meeting within eighteen months of its incorporation and thereafter in each year, with the additional requirement that not more that fifteen months must lapse between the annual meeting and the next. Where the commission calls a meeting in pursuance of subsection (2), the meeting held does not dispense with the need to call the Annual General Meeting of that particular year.

The holding of general meeting is mandatory for all companies whether private, public, limited or unlimited.

The CAMA makes it compulsory that a company must hold a general meeting, in addition to any other meeting in that same year. **Section 213(1)**:-

> *"Every company shall in each year hold a general meeting as its annual general meeting in addition to any other meeting in that year, and shall*

specify the meeting as such in the notice calling it and not more than 15 moths shall lapse between the date of the annual meeting of a meeting of a company and that of the next".

Inspite of these mandatory provisions, some companies are not wont to holding such meeting. The CAMA gives a member of the company power to apply to the commission to call or direct the calling of annual general meeting in the company and thereafter the commission may give consequential directions as it thinks fits.

3.2 POWERS OF CORPORATE AFFAIRS COMMISSION IN CASE OF DEFAULT TO HOLD ANNUAL GENERAL MEETING

If default is made in holding an annual general meeting, any member of the company may apply to the Corporate Affairs Commission to call, or direct the calling of an annual general meeting in the Company, and upon such application, the commission may give consequential directives as it thinks expedient.

The directions of the Commission may even modify or supplement the articles of the company in relation to the calling, holding and conducting company meetings. A member present in person or by proxy may apply to the court for an order to take a decision which shall be binding on all the members of the Company. A general meeting held in the year the default is made will be deemed to be annual general meeting of the company for that year unless the commission directs otherwise. Where the meeting so held is not held in the year in which the default is holding the company's annual general meeting occurred, the meeting so held will not be treated as

the annual general meeting for the year in which it is held unless as the meeting the company resolved that it should be so treated. Assuming the last date for holding the annual general meeting of a company in 2007 is 30th of June, 2007 and the company defaults, and the commission directs an annual general to be held in November, 2007, that will be deemed the company's annual general meeting for 2007. But assuming the direction of the Commission upon which a general meeting was held came in March, 2011, will the general meeting held be regarded as Annual general meeting for 2010 of for 2011? Unless at that meeting, the company resolves that a meeting shall be treated as an annual general meeting, a copy of the resolution must within 15 days after the passing of the resolution be filed at the Corporate Affairs Commission. Default in holding a meeting directed by the commission or in complying with any directions of the commission renders the company and every officer of the company who is in default liable to a fine of N500.00. If default is made in filing with the commission a copy of the resolution deeming a general meeting as annual general meeting, the company and every officer of the company who is in default shall be liable to a fine of N25.

3.2.1 Extra - Ordinary General Meeting

The law does not insist directly that a company should hold this kind of meeting but it is usually convened to deal with matters that are so urgent and important and cannot be delayed until the next annual general meeting. The board of directors may convene an extraordinary general meeting whenever they deem fit and if at any time there are

not within Nigeria sufficient directors capable of acting or form a quorum, a director may convene an extraordinary general meeting[14].

Section 215 (2) gives the members of the company the right to call extra ordinary general meeting. This right, which is a very important minority right cannot be taken away by the articles. The procedure adopted by members to call this meeting is called **requisition**.

The procedure for requisitioning a meeting is as follows[15]:

(a) If the company has a share capital a member or members must have one-tenth (1/10th) of the total paid up capital of the company to be able to make the requisition but if the company does not have share capital then such member or members mush have one-ten (1/10th) of the total voting rights of all the members at general meetings of the company.

(b) The requisitionist after signing the requisition shall deposit it at the registered office of the company. The object of the meeting must be stated in the requisition.

(c) The directors are supposed to call the meeting within 21 days from the date of the deposit of the requisition.

[14] S.215 CAMA
[15] S.215(8) Ibid.

(d) If the directors do not, within 21 days from the date of the deposit of the requisition proceed to call the meeting, the requisitionists, anyone or more of them representing more than one half of the total voting rights of the original requisitionists may convene the meeting.

(e) The meeting must be convened by the requisitionist within three (3) months from the date of deposit of the requisition, if not, the requisitionist have lost the right to convene such meeting unless they make a new requisition.

A reasonable expenses incurred by the requisitionist or requisitionists if calling the meeting shall be repaid to the requisitionist by the company.

All businesses transacted at an extraordinary general meeting shall be deemed special business.

3.2.2 Statutory Meeting

Every public company must within a period of six months from the date of its incorporation, hold a general meeting of the members of the company referred to as "Statutory Meeting"[16].

Statutory Report

The directors must, at least 21 days before the meeting forward to every member of the company copy of the statutory report which must be certified by not less than two

[16] S.211 Ibid

directors or by a director and the secretary of the company[17]. The purpose of this report is to acquaint the share holders of the various facts which should be known to them, so as to enable full advantage to be taken of the statutory meeting as an opportunity for discussion of circumstances of the company's promotion, its development since incorporation, and its immediate prospects.

The statutory report must state:[18]

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid-up otherwise in cash, and stating in the case of shares partly paid-up, the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(b) the total amount of cash received by the Company in respect of all the shares allotted distinguished as aforesaid:

(c) the names, addresses and descriptions of the directors, auditors, managers, if any, and the secretary of the company;

(d) the particulars of any pre-incorporation contract together with the particulars of any modification or proposed modification thereon;

(e) any underwriting contract that has not been carried out and the reasons therefore;

(f) the arrears, if any, due on calls from every director;

[17] S.211(2) (3) (a) Ibid
[18] S.211(3) Ibid

(g) the particulars of any commissions or brokerage paid or to be paid in connection with the issue or sale of shares or debentures to any director or the manager- and

(h) the report shall also contain an abstract of the receipts of the Company and of the payments made from them up to a date within 7 days of the date of the report.

The statutory report must, so far as it relates to the shares allotted by the Company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be certified as correct by the auditors. The directors must cause a certified copy of the report to be delivered to the Commission for registration after sending of copies to the members of the company.

2.2.3 Proceedings at the Statutory Meeting[19]

The directors must make sure a list showing the names, descriptions and addresses of the members of the company and the number of shares held by them respectively, to be produced at the commencement of the meeting and to remain open and accessible to any member of the company during the continuance of the statutory meeting. The members of the company present at the statutory meeting must be at liberty to discuss any matter relating to the formation of the company, and its commencement of business or any matter arising out of the statutory report. Any member who wishes a

[19] S.211 (6) – (10) Ibid

resolution to be passed on any matter arising out of the statutory report must give further 21 days notice from the date on which the statutory report was received to the company of his intentions to propose such a resolution. The statutory meeting may adjourn from time to time, and at the adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting will have the same powers as an original meeting[59]. If any public company fails to hold a statutory meeting or delivered statutory report as required, the company may be wound up by the court under **Section 408 of CAMA**. The company and any officer in default may also be liable to a fine of N50.00 for every day during which the default continues.

3.2.4 Power of Court to Order Meeting

If for any reason it is impracticable to call a meeting of a company or of the board of directors in any manner in which such meeting should be called or be conducted in a manner prescribed by the articles or the Act the Court may, either on its own motion or on the application of a director or any member entitled to vote, order a meeting to be called, held and conducted in such manner as the court thinks fit, and may direct that one member present and voting in case of a meeting of a company or one director in the case of a board may, apply to the court for an order to take a decision which shall bind all the members.[20]

[20] S.223 Ibid

3.3 Administrative and Other Powers

The commission has the power to administer parts 'B' and 'C' of the Act which provides for the registration of business names and for incorporated trustees respectively. It could conduct enquiries with respect to the compliance, by any person or company, with the provision of the Act, POWERS OF STRIKING OFF ERRING COMPANIES AND OTHER ALLIED BODIES. The Commission can check the proliferation of mushroom companies which exist only on paper. Where a company is not active, the commission may proceed to strike off its name from the register of companies and the company is thereby dissolved.[21] This affords a cheap way of dissolving defunct companies. This power has been must used within the past 5 years, where the Commission, made several publications in National dailies that Companies that have not functional as indicated by non filing of Annual Returns pursuant to **Section 525 of CAMA** where given 60 days to comply otherwise their names would be stuck out from the Company Registry list. Consequently, such company's name were struck out

However, any aggrieved member of such company may, within the period of 20 years of such striking out, apply to the court for restoration of the Company in the register[22]. It should be emphasized at this juncture that striking off does not absolve any

[21] S.525 (1) – (3) Ibid
[22] S.525 (6) Ibid

Director, managing officer or member of such company from liability prior to the striking out.

3.4 Power to Penalize Companies for Donations to Political Association

Another uniqueness of the CAMA is that it prohibits companies registered in Nigeria from donating funds, gifts or properties to political Associations for any political purpose[23].

This position was given judicial approval by the Apex Court in **Obasanjo Vs Yussuf**[66] where it held that companies in Nigeria shall not donate or give gifts to political Associations.

Within these powers, CAC may sanction a company that indulges in such and penalize the officers in default and any other member who voted for such an act.

3.5 Power to Lift the Veil of the Company

The commission may lift the veil of incorporation if there is a good reason to investigate the true ownership of a company in order to ascertain the persons who are or have been interested in the success or failure of a company. Instances when good reasons could arise are matters pertaining to fraud, breach of exchange regulations and breach of **Nigerian Enterprises Promotion Degree** which places some

[23] S.38(2) Ibid

restrictions on ownership of companies by foreigners. This will assist to uncover the true actors behind the scene of economic crime.

In the past and even at present, persons of dubious intent often foreigners, operated under the guise of corporate personality as they perpetrate economic crimes. Foreigners make use of Nigerians to perpetrate all forms of economic crimes in our companies.

Expatriate ran hospitals, operated schools and owned all description of enterprises without regard to the enterprises provisions of the **Nigerian Enterprises Promotion Act**.

All these were done under the mark of corporate personality using Nigerian Subscribers and Directors.

However, the commission may now lift the veil without reference to the court.

i. For example where a company carries on business with number of its members reduced below the prescribed minimum in **Section 93 of CAMA** and it carries on such for more than 6 months where the number is so reduced. All its members shall be jointly liable for any thing done as a corporate entity.

ii. In winding up of a company in compliance with **Section 506 of CAMA**. If it appears that any business of the company have been carried out in a reckless manner or with intent to defraud creditors of the company or for a fraudulent purpose, the court on the application of the official receiver, or liquidator, or any creditor, contributory of the company – such a person shall be personally liable.

iii. In applying the principle to Agency, where a member of a company transacts with another on behalf of a company in his personal name, he would be personally liable. This principle is one of the exceptions to the liability of an Agent in contract. Such a person would be personally liable as he intended to act in his name not the name of the Corporate Entity.

iv. Another area where the principle is prevalent is in the area of public policy, where individuals who under the guise of corporate personality, loots public funds, the Government Agencies in charge of anti fraud – EFCC, ICPC - are more inclined to charge the individuals behind the companies and justifiably disregard the principle of corporate personality.

3.6 Power to investigate Companies

The most salutary and striking aspect of the Act is the wide powers which CAMA confers on the Commission for administration, regulation and supervision of companies and other allied bodies, from the period of formation, incorporation, registration, investigation and management. However, for the purpose of this paper,

we shall dwell comprehensively on the investigative powers of the Commission under Section 7(1)(C).

From the wording of Section 7(1)(C) which states thus:

> *"Arrange or conduct an investigation into the affairs of any company when the interest of the shareholders and the public so demand."*

It denotes that the Commission can only investigate the affairs of a company for 2 reasons:-

(a) Shareholders' interest

(b) Public interest.

Consequently, based on the interest of the shareholders of the company, the Commission can rightly decide to investigate the company. It is our respectful submission that this interest is justified based on the share interest of the individual which invariably confers on them the essential locus to act under this ambit.

However, one wonders the rationale for the Act to allow the Commission to investigate a company on the basis of public interest even when there is no interest of any shareholder at stake. This certainly calls to play the issue of locus.

It is our respectful submission that the Commission does not need to have locus to investigate in the absence of a complaint or interest of shareholders in so far that the investigation is done with the sole interest or for the protection of public policy

especially against the backdrop of the powers in Section 7(1)(C) which could be invoked to ensure due compliance with the provisions of the act as to give effect to their powers.

Furthermore, it has been argued in the academic world that the investigative powers of the Commission negate the concept of capitalism and freewill which demands that the conduct of internal affairs be left for the shareholders. Certain scholars are of the opinion that the peculiarities of the company management makes regulatory intervention imperative via investigative power. Professor L.C.B Gower stated the essence of investigation process thus:

> *It is now widely recognized in all countries that the only effective way of preventing impropriety in the management of corporate enterprise is to ensure effective supervision by some Government agency. The idea that shareholders can be relied upon to supervise management and to take effective steps to perfect themselves is anachronism ... Even if shareholders have the determination and the financial means; they will often lack the inside knowledge of the facts which is needed before any legal action can be recommended. Accordingly, the tendency in all committees is to provide powers of investigation and inspection*[24].

Professor Okwonkwo also describes the corporate investigative powers as "most effective method of discovering, checking and remedying mismanagement of corporate affairs."[25] The reason for corporate investigation was well captured by **Lord Denning M.R.** in **Northwest Hoist Vs Department of Trade & ors**

[24] Final report of the Commission of Enquiry into the working and administration of the Company Law in Ghana P. 163
[25] Okonkwo C.O

> *It sometimes happen that the public companies are conducted in a way which is beyond the control of the ordinary shareholders. The majorities of the shareholders knows little and are told little. They receive the glossy annual reports. Most of them throw them into the waste paper basket. There is an annual general meeting but few shareholders attend. The whole management and control are in the hands of the directors. They are self - perpetuating oligarchy; and are virtually unaccountable. Seeing that the directors are the guardians of the company the question is asked: Quis custodiet ipses custodes? - Who will guard the guards themselves?*[26]

Also in the Nigerian case of **Oguntayo V Adebutu**,[27] the court acknowledged the powers of the commission to investigate the affairs of the company.

The Corporate Affairs Commission begins its duty under Section 7(1)(c) at the pre-incorporation stage. At this nascent stage, the Commission is saddled with the responsibility to ensure that all incorporation documents are scrutinized under this investigative powers[28], the Commission may refuse to register a company on the basis that it does not conform with Section 36 (1) (a) (b) (c) (d) & (e) of CAMA 2004.

Under these investigative powers, the Commission may refuse to incorporate a company based on conflict of name or where the name is close to an existing name[29]. In **Mustapha Vs Corporate Affairs Commission**[30] the Court of Appeal held thus:-

[26] (1978) 3 ALL E.R 280
[27] (1997) 12 NWLR Pt 531 83
[28] Section 35 of CAMA 2004
[29] Section 30 of CAMA 2004
[30] (2009) 8 NWLR Pt 1142, 35 at 50

> *The Corporate Affairs Commission is under a mandatory duty to refuse to register any company in Nigeria with a name identical or so resembling another company already registered.*

The above power to register a name is an indication that the investigative function starts upon submission of the incorporation document and the Commission must not wait for the company to be incorporated before it starts exercising its power under Section 7(1)(C) of CAMA.

The issuance of the certificate of incorporation is a proof that all the requirements prior to incorporation had been fulfilled[31]. See **ERDA ESTABLISHMENT Vs ONIPEDE**[32]. This would avoid protracted litigation where companies would want to sue the Commission in situation where their certificate of incorporation is withdrawn and thereby wasting tax payers money on unnecessary litigation.

The Commission's investigative role after incorporation appears more challenging as it has to investigate the activities of the companies with a view to protecting shareholders, detect fraud, mismanagement and other irregularities with the aim of redressing them before harm is caused to the company[33]. These powers are applicable to all types of companies and exercisable even when the company is in the process of winding up, voluntarily or otherwise.[34]

[31] Section 36(6) of CAMA 2004
[32] (1979) 4 FRCR 8
[33] Adamu M.A.O, A Critical Appraisal of the Function of the Corporate Affairs Commission.
[34] Section 314 of CAMA 2004

Some of the instances where the Commission may invoke its investigative powers shall be highlighted in the later part of this paper especially as to compliance with CAMA 2004 and safeguarding the interest of the minorities in the company.

It is submitted that the discharge of this function after incorporation is in furtherance to the Section 7(1)(a) of CAMA 2004 as it relates to "supervision" ands "regulation" of companies as this power enables the Commission to find out if the company's affairs is being carried out properly in line with CAMA or otherwise. With this, it dispenses its statutory functions and precluding company directors (and shareholders) from complaining that the Commission is delving or interfering into the internal management of the company.

3.6.1 **The Procedure for Investigation**

Pursuant to Section 7(1)(C) of CAMA, the Commission carries out this investigative directives by appointing inspectors to undertake this investigation. For ease of reference we shall reproduce the Sections.

Section 314

> *(1) The Commission may appoint one or more inspectors to investigate the affairs of a company and to report on them in such a manner as it may direct.*
> *(2) The appointment may be made-*
> *(a) in the case of a company having a share capital on the application of members holding not less than one-quarter of the class of shares issued;*

(b) in the case of a company' not having a share capital) on the application of not less than one quarter in number of the persons on the company's register of members; and

c) in any other case, on application of the company.

(3) The. application shall be supported' by such evidence as the commission may require for the purpose of showing that the-applicant or applicants have good reason for requiring the investigation.

Section 315

(1) The Commission shall appoint one or more competent inspectors to investigate-the affairs of a company and report on them in such manner as it directs, if the Court by order declares that its affairs ought be so investigated.

(2) The commission may make such an appointment if it appears to it that there are circumstances suggesting that-

(a) the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in a manner which is unfairly prejudicial to some part of its members; or

(b) any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose or;

(c) persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or

(d) the company's members have not been given all the information with respect to its affairs which they might reasonably expect.

(3) Subsections (l) and (2) of this section shall be without prejudice to the powers of the Commission under section 322 of this Act and the power conferred by subsection (2) of this section, shall be exercisable with respect to a body corporate notwithstanding that it is in course of being voluntarily wound up.

(4) Reference in subsection (2) of this section to a company's members includes any to the following persons-

(a) the personal representatives of a deceased member; and

(b) any personal to whom shares have been transferred or transmitted by operation of law.

From the wordings of Section 314(1), (2) & (3), it appears that only shareholders may apply to the Commission with supportive evidence. This section seems to shut out inspection on the basis of public policy as it did not take cognizance of the procedure for complain based on public interest.

It is our respectful view however that Section 314(1), (2) & (3) does not abrogate the powers of the Commission under Section 7(1)(C) to investigate where the interest of public so demand because Section 314 regulates how shareholders may petition. It does not foreclose petition from the public.

Further, it submitted that the Commission on the strength of Section 7(1)(C) of CAMA which states thus

Undertake such activities as are necessary or expedient for giving full effect to the provision of this Act

May accept complaint or petition from the public and thereafter investigate such a company. For instance, a complaint was made to the Commission on a particular wonder bank in Lagos that was defrauding members of the public with jumbo interest rate. Upon investigation, it was discovered that the company was registered and the promoters of the company were arrested and prosecuted. The Commission did not

refuse to accept the complaint because it was not from the shareholders of the company. Obviously, the decision to investigate was based on public interest.

The commission commences the process of investigation by appointing one or more competent inspectors to investigate the affairs of a company. The power of investigation may be invoked in the case of shareholders, by:

(a) Holders of not less than one-forth of the class of shares issued in a company having share capital.

(b) Holders of not less than one-forth of members in a company not having share-capital.

(c) The Company upon on application filed to that effect.

(d) The order of court declaring that the company's affairs be investigated.

(e) The Commission *suo moto*.

The requirement of one quarter of members has generated divergent views as to the propriety of same or otherwise. Most writers are of the view that the requisite requirement is ideal and fair, whilst some hold a contrary view. Among them is Professor Okonkwo who opined, with respect to the one forth membership requirement thus:

> *It is thought that the required minimum number of applicants here is high and this impedes effective utilization of the process of investigation. Shareholding in most Nigerian Companies is widely dispersed in small holding. It is no mean task to marshal up to one forth in order to fight a course. Under the Ghanaian Draft companies*

> *Code Bill the application is to be brought by not less than 100 members or by members holding not less than one-tenth of the issued shares or being not less than one-tenth in number of the total members.*

The position of the learned writer is obviously correct as it seems difficult to muster 25% membership to apply to the Commission. This provision may look herculean and thereby render impossible compliance by aggrieved members of a company due to their inability to garner the requisite 25%. One is tempted to suggest an amendment of the section to reduce the 25% requirement to about 10% in conformity with what was obtainable in other jurisdictions like Ghana as pointed out by Professor C.O Okonkwo[35].

However, inspite of the above suggestion, it is respectfully submitted that the provision of Section 314 should not be seen as sacrosanct as aggrieved members can still under Section 7(1)(C) of CAMA, petition if they are less than 25% on the basis of public interest without strict compliance with Section 314 requirement, provided the compliant is on the issue of public interest, the Commission can invoke its investigative powers.

To drive this point home, one could paint the following scenario. An incorporated company with an object of manufacturing of plastics has shareholders who hold 99% of the company shares. After some years, the 99% shareholders decided to venture

[35] Comments on Draft Companies Bill in Ghana, S 220(1). See Okonkwo, C.O op.cit at 22

into bomb manufacturing, the 1% shareholder has every right to complain about the new object of the company. The Commission would not refuse to act because the Complainant has less than 25% shares in the company as the Commission can on the basis of the complaint of the 1% shareholder, order an investigation on the basis of public interest.

However, in respect of Section 314 & 315 of CAMA, 2004, the application for investigation by shareholders must be supported by evidence to enable to the Commission order for an investigation[36].

The above basis for evidence will avert situations of frivolous and misguided application; or where unnecessary complains will emanate from shareholders based on individual differences with the majority shareholders.

The Commission exercises this investigative power in the following circumstances:-

1) Where the company affairs are being or had been conducted with interest to defraud its creditors or the creditors of any other person, or that in a manner which is unfairly prejudicial to some or part of its members.
2) Where any actual or proposed act or omission of the company (including an act or Commission on its belief) is or would be so prejudicial or that the company was formed for any fraudulent or unlawful purpose.

[36] Section 314(3) of CAMA 2004

3) Where persons concerned with the company formation or the management of its affairs has in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members.
4) Where the company members have not been given all the information with respect to its affairs which they might reasonably expect[37].

3.6.2 **Appointment of Investigators**

The Commission has powers to appoint investigator(s) in furtherance to its investigative powers. The inspectors have power to conduct the investigation into the affected company and thereafter report to the Commission based on its terms of reference[38].There is no statutory requirement for investigators as to whether the inspectors are members of the Commission or non members.

However, it has been argued by seasoned authors in cases of serious complaints, Senior Advocates of Nigeria and Chartered Accountants should be used as it is the practice in London, while members of the Commission may be used when the complaint is not serious[39] while some others have argued that there are numerous

[37] Section 315(2) (a-d) of CAMA 2004
[38] Section 314(1) & 315(1), 326 of CAMA 2004
[39] Okonkwo, C.O. opcit at p25

good non Senior Advocates capable of exhibiting the requisite skills for investigation[40].

It is our humble view that the issue of investigation is not whether the investigator is a Senior Advocate or Chartered Accountant, rather persons who have in-depth knowledge of company matters, good reputation and are incorruptible should be appointed investigators to avoid a situation where the persons complained against would want to sway them in their favour. Further, after investigation, a panel should be inaugurated within the Commission of about 3-5 persons to deliberate over the recommended actions of the investigator(s) to ensure the assignment was properly carried out before implementation of the recommended actions.

It is important to note that the proceedings of this investigation is conducted in private to avoid publicity to the image of the company. This proceedings of investigators are not judicial proceeedings[41], rather they could be rightly termed Administrative proceedings upon which further decisions may be taken by the Commission.

[40] Dominic Asada & Olong Matthew, The Corporate Investigative Powers of Corporate Affairs Commission in the Promotion of Corporate Governance in Nigeria.
[41] Re: Gresvano West Ent Railway & Co. 1987

Accordingly Lord Denning in **Re Pergamon Press Ltd**[42] – in explaining the nature of proceedings of investigation in Section 165(h) of English Companies Act which is akin to that in Section 315(2) of CAMA postulated as follows:-

> *They are not even quasi judicial, for they decide nothing, they determine nothing. They only investigate and report. Their report may have wide repercussions. It may contain finding off acts which are very damaging to those named. They may accuse some, condemn others and they may ruin reputations or careers. Their report may lead to judicial proceedings, may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company and be used itself as materials for the winding Up.*

Evident in his lordships observation is that inspector's investigative powers are purely administrative and therefore falls short of the requirement of the rules of natural justice.

Also in **Maxwell Vs Dept. of Trade, Mason J.**[43] had an opportunity to comment on this duly to act fairly in proceedings during an Australian Law Conference in this well articulated prose:

> *Now the duty to act fairly is one which accommodates itself to the particular situation. It does not without more carry an obligation to imitate judicial procedure. It will be sufficient if the party who may be affected by the investigation and any decision subsequently reached is given an opportunity to answer, to explain his position. That certainly in many cases will be sufficient. But in other cases, more may be required. Thus it is evident that even if there is a legal duty to act fairly imposed upon the inspectors, they are under no obligation to accord the rights that are customarily involved in court hearing. The procedure by way of inquiry and report is quite different from the traditional common law adversary system. It does not involve the*

[42] (1971) Ch. 388 at 389
[43] (1974) Q.B 523

> *formulation of a case against a party, the right of cross examination by the party of those in tresses who speak against them, the right to examine evidence presented against him, the right to present evidence in support of his own case. Nor does it involve the right of address.*

His Lordship continued:

> *.... the adversary system is singularly inappropriate when the task is not that of deciding issues between contending parties but is one of investigating a matter of public interest.*

It is submitted however that considering the adverse repercussions which the inspectors report may have on their victims, there is the need for a change of attitude in the position of the law, more so where the matter being investigated is that of public interest whose adverse effect may cause incalculable damage to parties under investigation. The scope of the duty to 'act fairly' needs to be properly defined. The duty is vague and elusive.

3.6.3 Powers of Inspector

The Act has bestowed on the investigators enormous powers to enable them exercise their investigative powers namely:

(1) The power to investigate related complains[44]

(2) Powers to call for director's bank account

(3) The power to order for production of document and evidence.

[44] Section 316 of CAMA 2004

Furthermore, when an inspector is appointed all officers of the company and persons that have business to do with the company investigated are duly bound to:-

a) produce to the inspectors all books and documents relating to the company that is in their custody.
b) attend the inspectors proceeding if need be.
c) give all necessary assistance to the inspector as required[45]

It is germane to emphasis that the persons that the powers to produce document refer to include all persons that had anything to do with the company in the past or present, solicitors, bankers, past staff[46].

In exercise of its powers, if an investigator has reasons to believe that a director (past or present) in the company being investigated maintains or had maintained a bank account with any third party that was paid into or out of which there has been paid:

a) Emolument or past of emolument of his office and was not disclosed within a financial year.
b) Money used in financing an undisclosed transaction, arrangement or agreement.

[45] Section 317 (1) (a) (b) (c) of CAMA 2004
[46] Section 318 (1) (a) (b) (c) of CAMA 2004

c) Any money which has been in anyway connected with an act or omission or series of acts, or omissions which on the director constituted misconduct towards the company or its members.

The investigator will require the director to produce all the documents in director's possession, or control relating to the said bank account[47].

In exercise of the investigative powers, a non company member or agent of the company may be cited for contempt of court[48]. After the investigation, the inspectors have powers to make an interim report to the commission, based on their findings. The essence of the report is to indicate if the investigation discloses a *prima facia* case. It is also empowered to make final report in printed form. The categories of people who are entitled to the report are

(1) The court, when the investigations are ordered by the court.

(2) Members of the company investigated.

(3) Members that their conduct was referred to in the report.

(4) The company's solicitor.

[47] Section 317 (4) of CAMA 2004
[48] Section 329 (4) of CAMA 2004

(5) Any person whose financial interest appears to the Commission to be affected by the matters dealt with in the report whether as the companies' creditors or otherwise[49].

3.6.4 Issues Arising from Investigators Report.

After the report of the inspectors is considered, it may form basis for either civil or criminal proceedings depending on the nature of the report[50].

In the same vein where it appears that persons are guilty of any criminal act pertaining to the affairs of the company investigated, the report shall be sent to the Attorney General of the Federation for the purpose of directing the prosecution of the offender[51].

In the respect all the agents of the company with the exception of the accused i.e the indicated parties have a responsibility to assist in the prosecutor of the indicted officers.

3.6.5 Expenses of the Investigators

The expenses incurred for investigation are borne by the Government and the cost defrayed from the consolidated Revenue Fund[52]. However, the following persons may be made liable to make a repayment:

[49] Section 329 (4) of CAMA 2004
[50] Section 321 & 322of CAMA 2004
[51] Section 321 (1) CAMA 2004
[52] Section 322 (2) of CAMA 2004

a) Persons convicted as a result of prosecution.
b) Company in whose name proceedings are investigated shall be liable to the extent of amount/sums or property recovered during the proceedings.
c) Applicants for investigation under Section 314 shall be liable to such extent as the Commission directs.[53]

From the above, it seems the Act did not take cognizance of the fact that making the Applicants to pay for investigation may dissuade an impecunious shareholder or company member from petitioning to the Commission.

It is humbly submitted that the provisions be amended to reflect the non payment of prospective petitioners to the Commission to encourage such shareholders/members to apply to the Commission for investigation especially where the evidence is weighty to occasion an investigation by the Commission in compliance with Section 314 of CAMA, 2004.

Apart from the civil and criminal prosecution hitherto mentioned, the Commission may in exercise of its functions, after investigation do the following:-

[53] Section 324 (1) of CAMA 2004

a) The Commission is empowered to strike out the names of companies from the register of the Commission where it has reasonable cause to believe that it is not carrying on business or in operation[54].

b) The Commission in pursuant to investigation may commence a winding up procedures to wind up the company if it thinks just in the circumstance to so do[55].

c) The Commission can bring an application petition for the following grounds after investigation by the investigators.

   (a) by the Commission in a case where is appears to it in exercise of its powers under the provisions of this Act or any other enactment that

      (i) the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or member or in a manner which is in disregard of the public interest; or

      (ii) any actual or proposed act or omission of the company (including an act or omission on its behalf) which was or would be oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or member or in a manner which is in disregard of the public interests[56].

[54] Section 525 (1) of CAMA 2004
[55] Section 323 of CAMA 2004
[56] Section 311 (2) (c) (i) & (ii) of CAMA 2004

3.6.6 Likely Problems Associated with Investigative Function

Notwithstanding the autonomous nature of the Commission after 2 decades of its existence in Nigeria, it is not without administrative and logistic problems. Some of the problems confronting the Commission in the dispensation of its investigative functions are as follows:-

- The new company legislation did not stipulate what should be the qualification of persons to be appointed as inspectors for the purpose of investigation. The omission here gives the Commission a wide discretion as to who is appointed. The situation is not too good for our own society because the inspectors work is investigative and inquisitorial. A leaf should be borrowed from England as to the appointment of inspectors.
- Despite the provision in the Act establishing the Headquarters in Abuja and the establishment of branch offices across the country, some states do not still have branch offices. This development is like having the Old registry office tied to the apron string of Ministry of Trade in Lagos. And this is not too good for logistic reasons considering the volume of work and the inability of the Commission monitor erring companies before invoking its investigative powers.
- The Commission has abused its powers by striking out the names of companies for their inability to pay annual returns under the guise of invoking its investigative powers.

- The Commission has refused to exercise its investigative powers by allowing companies to carry on business without having company secretaries in contravention of Section 294 of CAMA.
- The requirement for shareholders/members of the Company is too high.
- The payment of the cost of investigation by the applicant to the Commission may serve as a discouragement to prospective applicants.

3.7 Supervisory Power to Impose Restriction on Shares Debentures

By virtue of **S. 329 of CAMA**, where it appears to the commission from investigation of a company under **S. 326 and 328** of **CAMA** that the is difficulty if finding out the relevant information or factors about any Shares (issued or to be issued) and that difficulty is due wholly or mainly to the unwillingness of the person concerned or any of them for assist the investigation, the commissions empowered to impose restriction to the shares. This in effect is to render void any transfer of the shares. Equally no voting right shall be accessible in respects of the shares and no further shares shall be issues in right of these (restricted shares) or in pursuance of any after to the holder thereof. Except in liquidation, no payments shall be made of any sums, sue from the company on these shares whether in respect of capital or other services. Any person aggrieved thus by the commission regarding the imposition of restrictions on shares may appeal to the court and the court may direct that the shares cease to e under restriction by the court lifting such restriction.

Furthermore, by **S. 328 of CAMA, 2004**, the commission could investigate the ownership of Company shares in or debentures of a company for good reasons and could appoint inspectors for that purpose. Failure to give any information required by the commission or giving false information will attract stiff penalties.

3.8 Registration of Charges, Section 197 of the Act

The most important thing here is the delivery or receipt by the Commission of the prescribed particulars, together with the instrument, if any by which the charge is created.

It should be noted that failure to deliver the prescribed particulars of the charge together with the instrument within the prescribed time of 90 days renders the charge unenforceable. It will also deprive the creditor of the security he may benefit in the circumstance.

A charge must be registered within a period of 90 days. By virtue of **Section 197 (3) of the Act**, the court may grant an extension of time beyond the 90 days period.

The following categories of charges should be registered with the Registrar General of the Commission. They are:

(a) Charges for the purpose of securing any issue of debenture.

(b) Charges on uncalled share capital of the company relating to the memorandum or articles of association.

(c) Charges on land irrespective of the place where such a land is situate.

It must be noted that a charge for rent need not be included.

However, the power of the commission to register does not prejudice any contract or obligation for repayment of money secured by the change. The provision of Section 197 of the Act applies to all Companies and not limited companies alone.

The financial institutions are mostly affected by this refusal by the Commission to register Deeds of Mortgage or Debentures. However, the panacea is to obtain an order from **Federal High Court** pursuant to **Section 205 of CAMA** for extension of time within which the Deed can be registered and filed at the Commission.

3.9 Liquidation or Winding Up of Companies

The CAMA further reiterated the winding up process as stated in the old **1968 Act**. In the light of the fact that the winding up process is a legal means of ending the life span of a company without such a process, certainly, a company may have an

immortal life span without legal basis to terminate such where the circumstances arises. Certainly this would be calamitous in corporate governance.

3.9.1 The Winding Up Process:-

The winding up of a company may be effected by:-

1) By the Court
2) Voluntarily
3) Subject to the supervision of the court

3.9.2 Winding Up by the Court

The Section 408 of the Act provides circumstances in which a company may be compulsorily wound up as follows:-

a. the company has by special resolution resolved that the company be wound up by the court;
b. default is made in delivering the statutory report to Corporate Affairs Commission or in holding the statutory meeting.
c. the number of members is reducing below two;
d. the company is unable to pay its debts;
e. the court is of the opinion that it is just and equitable that the company should be wound up.

The application may be made by any of the following:-

a. the Company;
b. a creditor, including a contingent or prospective creditor of the company;
c. the Official receiver;
d. A contributory;
e. A trustee in bank bankruptcy to, or a personal representative of a creditor or contributory;
f. the Corporate Affairs Commission under **section 323 of the Act**;
g. a receiver if authorized by the instrument under which he was appointed;
h. by all or any of those parties, together or separately .

In winding up of a company by the court the liquidator takes into its custody or under his control, all the property and choses in action which the company is entitled to. The powers of the liquidation in a compulsory winding up are as follows:

1. Bring or defend any action or other legal proceeding in the name and on behalf of the company;
2. carry on the business of the company so far as may be necessary for its beneficial winding up;
3. appoint a legal practitioner or any other relevant professional to assist him in the performance of his duties;
4. pay any classes of creditors in full;
5. make any compromise or arrangement with creditors or persons claiming to

be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

6. compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company; and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt. liability or claim and give a complete discharge in respect thereof;

7. sell the property of the company of whatever nature by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels;

8. do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents and for that purpose to use, where necessary, the company's seal;

9. prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance as a separate debt due from the bankrupt or insolvent, and rateably with the other separate

creditors;

10. draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;
11. raise on the security of the assets of the company any money requisite;
12. take out in his official name letters of administration to any deceased contributory, and to do in his official name, any other act necessary for obtaining payment of any money due form a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;
13. appoint an agent to do any business which the liquidator is unable to do himself;
14. do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

3.10 Insider Dealing Prohibition

Insider dealing means using price sensitive information to an advantage by a person who is in possession of such information by virtue of his position or connection with

the company, when buying or selling the company securities under CAMA, such an insider dealing is prohibited. **Section 615 of CAMA** states:-

> *"an individual who is as insider of a company is prohibited from buying, selling or otherwise dealing in the securities of the company which are offered to the public for sale or subscription if he has an unpublished price sensitive information which he holds by virtue of his connection with the company".*

However, the person prohibited is the person who has been connected within six months preceding the date of the information.

There are however exceptions. **Sec 617**

1. *Information used for purpose other than the making of profit or adding of a loss. Thus, a financial journalist may use price sensitive information in relation to company securities.*
2. *Information used by a liquidator, receiver or trustee in bankruptcy.*
3. *Information acquired and used by stockbrokers.*
4. *Information obtained in good faith in the normal course of business which information is also used in good faith, e.g. Investment Analysis.*
5. *Dealings on a recognized Stock Exchange are excluded by virtue of S. 617(2)*

Inspite of the law, no transaction shall be void or voidable by reason only that it was entered into in contravention of the provisions discussed above. (**See 619**)

The consequence for indulging in insider trading is for the party to be guilty of an offence and on conviction, shall be liable to imprisonment for 2 years or a fine of N5,000 or both.

1. The individual may account for benefit to the company or return same to the company.
2. Compensate any person for any direct loss suffered by the individual as a result of the Act.

The persons prohibited are only individuals who is or committed within six months preceding the date of information from the literal inco……..of Section 615 of CAMA. It appears that companies are not affected by the prohibitee. Section subsection (3) of the section prohibits insiders of one company from engaging in insider dealings in another company. Consequently, the directors and officials of the companies are prohibited.

It is germane to mention that the prohibition is restricted to public companies only because such information are usually associated to shares and debenture and the dealing must be based o the knowledge of an unpublished price related service information.

In other words, for one adjudged as contravening Section 615 of CAMA, knowledge of the Sections is an ingredient before the consequences of such information can be visited on such individuals.

CHAPTER FOUR

PRACTICAL APPLICATION OF THE POWER OF THE COMMISSION

4.1 Power to Register Business Names

It must be noted that the provisions of **Sections 35 (I) (d) of the Act** allows the commission to refuse to register a company for, among other reasons, non compliance with the requirements of any other law as to registration and incorporation of a company.

Thus, the commission can refuse to register a company for non-compliance with such laws like the Securities and Exchange Commission[1] **Nigerian Enterprises Promotion Act[2] Immigration Act**.

The registration of business names is administered by the Corporate Affairs Commission which has its headquarters at the Federal Capital Territory, Abuja. In order to assist members of the public, Section 653 of the Act provides that there shall be established in each state of the federation a Registry Office of business names where there shall be kept a register in the prescribed form in which shall be entered such matters as are required by the Act or regulation to be entered in it.

[1] Cap 406 LFN 1990
[2] Cap 303 LFN 1990

The Registrar- General of the commission is the Registrar of Business names. There are assistant registrars who take charge of the state offices[3].

4.2 Procedures for Registration of Companies and Other Allied Bodies

Section 657 (1) of the Act provides that every firm, individual or corporation required to be registered must within 28 days after commencing the business in respect of which registration is required, or within three months of the coming into operation of the Act by 31st March, 1991, furnish to the Registrar, at the register place of business is situate, a statement in the prescribed form.

This present section can aptly be divided into two parts, as its incorporates two sections of the **Registration of Business Names Act**, 1961. **Sub-Section 1 (g)** and section 2 are innovations while **Section 7 (1) (g) 6** requiring a married woman to register with her husband's forenames and surname was excluded in this section.

4.3 Power to Issue Certificate of Registration

The Certificate of Incorporation possessed by a dully registered company is a prima facie evidence that the prescribed formalities for registration has been complied with. However, this presumption is rebuttable where evidence can be led to prove that the

[3] Section 654(2) of CAMA, 1990

requirements of the Act has not been complied with before a company was incorporated.

The provision of 659(1) CAMA provides "*on the registration of any firm, company or individual under this Act, the Registrar shall issue a certificate in certificate in the prescribed form containing the business name together with the distinguishing state identification letters in brackets at the end of the name*"

In the case of **Domingo Vs The Queen**[4] it was held that having regard to the purpose of the registration of Business Names ordinance, unless the Registrar believes the application form to be genuine, he has a duty to refuse to register the business name. Brett F. J succinctly stated the whole purport of the registration of **Business Name Act** when he said:-

> *"We agreed that registration of a business is normally carried out as a matter of course, and that the Registrar accepts no responsibilities for the correctness of the particulars in the statement which he filed. The certificate issued by the Registrar merely certifies that the name contained in it has been registered and contains no further particulars except the serial number of the registration. It has not been suggested that in filling a form containing untrue statements and issuing a certificate of registration the Registrar would be committing a criminal offence, even if he know that the statements were untrue…"*

4.4 Power to Determine What Names Must Be Registered

4

The statutory provision of Section 656 (1) of the Act provides that a business name must be registered

(a) in the case of a firm, if the name does not consist of the true surnames of all partners without any addition other than the true forenames of the individual partners or the initials of such forenames;

(b) in the case of an individual, if the name does not consist of his true surname without any addition other than his true forenames or their initials; in the case of a corporation if the name does not consist of its corporate name without any addition.

A Business Name does not become registrable where the addition merely indicates that the business is carried on in succession to a former owner; or where two or more individual partners have the same surname and the only addition is “S" at the end of the surname, or where the business is carried on by a receiver or manager appointed by the court[5]. In **Ogunmefun Vs Nigeria Airways Limited**[6] It was held that although the plaintiff had failed to establish that he was registered under the **Business Names Act, 1961** to carry out a trade or business under a name other than his real names, that failure did not make the contract of bailment of goods, between the plaintiff and the defendants invalid or unenforceable. **Balogun .J**. in the above case stated quite succinctly that the fact that a person carries out a trade or business in a name under

[5] Section 656(2) of CAMA, 1990
[6] (1979) 7-9 CCHCJ 286

the Registration of **Business Names Act, 1961**, cannot, in his view, have the effect of nullifying any transaction entered into by him with some other party in that name or style.

4.5 Power to Prohibit and Restrict the Registration of Business Names

The Registrar has power to refuse to register the use of certain names, or cancel the registration if he is of the opinion that registration would likely mislead the public, unless the consent of the commission has been first obtained such names are

i. a name which contains the word "National" "Government" "Municipal" "State" "Federal", or any other word which imports or suggests that the business enjoys the patronage of the Federal, State' or Local Government; or

ii. a name which contains the word "Co-operative" or its equivalent in any other language or any abbreviation there of, or

iii. a name which contains the words "Chamber of Commerce" "Building Society" "Guarantee", "Trustee" "Investment" "Bank", "Insurance", or any word of similar connotation or

iv. a name which is identical with or similar to a name by which any firm, company or individual is registered under part B of the Act, or

v. a name which is similar to any trade mark registered in Nigeria.

There is a need to consider **Section 662 (2)** of the Act, which provides that the Registrar shall refuse to register a business name, or as the case may be, cancel its registration where a business name under which a business is carried on:-

i) contain any word which, in the opinion of the Registrar is likely to mislead the public as to the nationality, race or religion of the person by whom the business is wholly or mainly owned or controlled; or

ii) is in the opinion of the Registrar, deceptive or objectionable In total it contains a reference direct or otherwise to any personage, practice or institution, or is otherwise unsuitable as a business name.

In the case of **Niger Chemists Ltd Vs Nigeria Chemists & Anor**[7] it was held that in an action to restrain the defendant from using a business name similar to that of the plaintiff it is not necessary to prove either intent to deception. The plaintiff need only prove that the name used by the defendant is so similar to his own as to be likely to cause confusion in the mind of the public. It was further held that as the name "Niger Chemists" is so similar to the name 'Niger Chemists" as to be likely to cause confusion, the plaintiff is entitled to an injunction retraining the defendants from using that name or any other name closely resembling "Niger Chemists".

[7] (1961) All NLR 181

Similarly, in the case of **OGBENI Vs ODUNAYA**[8] where the parties, said to be friends, carried an electrical business as contractors and suppliers of electrical appliances under separate business names -and at different addresses. The plaintiff trades as "**Ogbeni Electrical Works**", and the dependant as "**Odunya Electrical Works**". Later, the defendant started taking business from the plaintiff under the plaintiff's business name. He went further and registered another name closely resembling plaintiff's namely "**Adewale Ogbeni Electrical Works**". Plaintiff sued for damages for loss of goodwill and profit resulting from the defendant passing off and using plaintiff's business name. The court held that the defendant was liable for passing off his business as plaintiff business, adding that even if the defendant had registered a company under a name similar to that which plaintiff had already registered, he will be prohibited from using that name to pass off his business as that of the plaintiff.

4.6 Effect of Failure to Register a Trade Name

The legal effect of failure to register a trade name cannot be over emphasized. See the case of **Alowonle Vs Bello & Anor**[9] which illustrates the effect of failure to register a trade name which is registrable under this

[8] (1973) 5 CCHCJ 1
[9] (1972) 7 NSCC 53

Act. In that case, the plaintiffs sued the defendant for an account of the profits of a partnership firm of "**Express Record Dealers Association**" of which they were members, and an injunction to restrain the defendant from using the label "**Alowonle Sounds Studio**" or placing order for records under those names and styles. It was established that the firm's name had not been registered, but that the defendant had registered the trade mark "**Alowonle Sounds Studio**" and did so with associates other than the plaintiff. The partnership was dissolved on 7th February, 1967 and hence the action. The trial court acceded to the claims and entered judgment against the defendant who then appealed. Allowing the appeal, the **Supreme Court** said inter alia "*The plaintiffs had registered no trade mark and as such possessed no registered trade mark, the use of which by other persons they could prevent by an order of injunction. Nor was their trade name as required by* ***Section 6 of the Registration of Business Names Act No. 17 of 1961*** *any where registered at any time. It is obvious therefore that the parties, prior to the dissolution of 7th February, 1967, carried on the partnership illegally and could not, as both were "Impari delicto" seek the assistance of the court, to enforce claims which had arisen by virtue of illegal exercise, more so as the remedy sought is to restrain one of their own from exercising right which by law and by virtue of his own registration as he is entitled to exercise*."

CHAPTER FIVE

SUMMARY, FINDINGS AND RECOMMENDATIONS

5.1 Summary

Nigeria which has been much in need of a modern legislation on Corporate Affairs Commission received in January, 1990. One of the distinguishing innovations in the new company legislation is the establishment of a Corporate Affairs Commission. The commission is a statutory creation with perpetual succession and a common seal. It can sue and be sued.

Prior to the enactment of the **Companies and Allied Matters Act Cap 59**, **Laws Federation 1990**, the administration and registration of companies was a responsibility of the Federal Ministry of Trade, through its Corporate Affairs Division.

Officials of the Federal Ministry of Justice were appointed as Registrar and Assistant Registrars of Companies respectively. Career development along corporate lines was not possible for these officers.

The Registry lacked the usual circumspection of business institutions and was highly bureaucratic in nature. The Old Registry was grossly under funded from the votes of the Federal Ministry of Trade.

The above bottlenecks and some others was a clear indication that it could not carry out its supervisory role over the companies it had granted registration.

There was a yearning among corporate Lawyers and the Business Community alike for a change in our corporate life. This gave birth to a reform of **Nigerian Company Law**, attention was focused on a new arrangement for an effective administration of corporate affairs.

The commission is saddled with the responsibilities of monitoring registered companies and other allied bodies. It could exercise its autonomous functions in the areas of registration of companies, receiving and registration of charges created by companies, directing the calling of an Annual General Meeting when default is made.

The commission is a sanctuary today. In time past, a monitoring shareholder could not sue the directors because of lack of sufficient information. However, there is a sigh of relief among minority shareholders who have the right to move the commission to institute an investigation against the Directors of a company provided there are sufficient and reasonable grounds for such an action.

The outcome of the investigation by competent inspectors may cause the commission to take proceedings to correct certain wrongs by the majority shareholders thereby relieving the shareholders of the need to do so. The investigatory processes by the commission serve as a check on errant directors.

5.2 Findings

Notwithstanding the autonomous nature of the commission after a decade of its existence in Nigeria, it is not without administrative and logistic problems.

a. Despite the provision in the Act establishing the Headquarters in Abuja and upon the establishment of branch offices across the country, some promoters still flock Abuja head office to have their companies incorporated. This development is like having the Old registry office tied to the apron string of Ministry of Trade in Lagos. This is not too good for logistic reasons considering the Memorandum and Articles of Association to be scrutinized by the commission.
b. There is a strong possibility that there might be personality clashes between the Registrar-General appointed under **Section 8 of the Act** and the chairman appointed under **Section 2 (a)** by the president. It is not an easy task to circumscribe bounds to the powers of the chairman who must, by reason of his ability, experience or specialized knowledge of corporate, industrial, commercial, financial or economic matters be capable of making outstanding contributions to the work of the commission and that of a Registrar-General who shall be qualified to practice as a legal practitioner in Nigerian and in addition has had experience in company Law practice for not less than 8 years.

c. The office of the chairman is merely ceremonial, for he has neither executive powers nor accounting roles. He is merely required to be someone whose qualifications make it possible for him to make useful contributions to the functioning of the Commission.

d. The only permanent and full time member of the body is the Registrar General. All ex-officio members appointed under **Section 2 (j) of the Act** are not full time member. The chairman is a part-time member.

e. In pursuance of it legislative powers under **Section 525 (1) of the Act**, the commission has the power to check the springing up of mushroom companies. However, there are no sanctions imposed on erring companies whose names have been struck off but still carry on business.

f. Though the chairman shall preside at every meeting by virtue of **Section 5 (2) of the Act**, the method of decision making during such meetings is silent. This is a lacuna capable of setting the progress of the commission aback. There is no Deputy chairman appointed like the chairman.

g. Non disclosure of interest is a bane which ought to be addressed. Members of the commission are just like Civil Servant and so they ought to disclose their personal interest. However, there are no sanctions for non disclosure of interest.

h. The new company legislation did not stipulate what should be the qualification of persons to be appointed as inspectors for the purpose of investigation. The omission here gives the Commission a wide discretion as to who is appointed.

The situation is not too good for our own society because the inspectors work is investigative and inquisitorial. A leaf should be borrowed from England as to the appointment of inspectors.

i. The membership of the Audit Committee is not strictly regulated under CAMA. This allows for controlling shareholders to appoint cronies that are subject to their whims and caprices, thereby not being independent. Further, the Act is silent on the qualification of an Audit Committee member and their liability.

5.3. Recommendations

Hopes are high that the new Commission can still make head way in the management of corporate affairs and other allied bodies in our beloved country not withstanding the present situation.

The following recommendations are suggested;

1. A new **Independent Law Reform Commission** should be set up by the incumbent Attorney General and Minister of Justice in Nigeria to consider the obstacles identified in this chapter militating against the commission. The Reform Commission should comprise of Senior Advocates of Nigeria, trained personnel in Corporate Affairs Management, Chartered Accountants, and Supreme Court judge, serving or retired should head the **Reform Commission**. This will be a

welcome development to review the instances of lacunas in the Act and give them more power.

2. Branch Offices should be located in various states across the country. This will be a sign of relieve as investors and those who deal in company matters including lawyers and promoters alike will no longer continue traveling to Abuja for business registration especially as it is expressly stated that in the Act, that the Commission shall have branches in all states of the Federation.

3. A clear cut power of the Registrar - General and the chairman of the commission must be looked into. Both of them are important personnel that should move the organization forward. In view of this, the powers to be vested on the chairman should be expressly stated in the Act. The powers of the Registrar General already provided for should not conflict with that of the chairman.

   In a similar vein, the office of the chairman should not be a mere ceremonial one. Prominence should be accorded the office. He should possess both executive and accounting powers. The provision of Section 3 (2) of the Act must be amended.

   We must not loss sight of **Section 3 (3) of the Act** which outlines the events, the happenings of which disqualify a member of the body from continuing to hold office. The Act should not import the original notion of bankruptcy as a crime

under English law. A person of impeccable character and of great intellectual ability can become an insolvent such a person can not become unfit to hold office merely on grounds of financial misfortune leading to bankruptcy.

4. The members of the Commissioner who are seconded from the various parastatals under **Section 2(i) and (j)** of the Act are not entitled to any remuneration beyond their entitlements as officers of their various departments. This will not advance the carrier of such persons, and thus, enthusiasm may be lacking.

   Despite the fact that the chairman has the duty to preside at meetings, however, the power of vote or casting vote on him is lacking. By virtue of **Section 5(2)**, whenever the chairman is absent from any meeting, the commission has the power to elect one of their members present to preside at the meeting. The floating provision of **Section 27 (1) (b) Interpretation Act** gives an ad-hoc chairman a casting vote. This is sad because it does not make the position of the chairman any stronger. A Deputy Chairman should be appointed.

5. The Provisions of **Section 5 (4)** of **CAMA** should be checked. It makes provision for the appointment of any of its officers to act as Secretary. Any officer cannot be in the best position to act as such. The position of Secretary of such organization should not be compromised.

6. The Corporate Affairs Commission should be included under **Schedule 2 of the Pensions Act, Cap 346 Laws of the Federation 1990** as an organization declared a public commission under the Act. All officers that work with the commission should be entitled to pension like other Civil Servants. This will improve the zeal at which the officers will work in the establishment. It is optimistic with all sense of responsibility that the commission can still attain the highest level of self-sufficiency, independence and above all, function as a corporate ombudsman if the necessary Reforms are considered in due course. The future of our corporate world is indeed bright having such an autonomous commission in our beloved fatherland. The character and competence of the inspectors must be well considered before appointing them to investigate the affairs of a company. In England, Queens Counsel and Chartered Accountants are appointed. The practice in Nigeria should not be different because the task of investigation is an onerous one: As **Lord Denning** said in **Maxwell V Department of Trade and Industry (1974) Q-B 523**

> "*The inspectors has to do it all himself. He has himself to seek out the relevant documents and to gather the witness. He has himself to study the documents, to examine the witnesses and to have their evidence recorded. He has himself to direct the witnesses to the relevant matters. He has himself to cross- examine them to test their accuracy or their veracity. No one else is there to cross-examine them. Even if a witness says things prejudicial to someone else, that other does hear it and is not there to cross - examine him*":

It would be quite helpful if the Commission is given power to require production of documents for inspection without ordering an investigation and also the power to apply for a warrant to enter premises, search and seize documents which are being withheld.

7. The provision of **Section 525 (6) CAMA** should be considered. The period of twenty years is too much for an aggrieved member of a company whose name has been stuck off from the register. This lacuna should be corrected and at least a period of one or two years should be allowed for any grievances relating to the striking off of Company to be made before the **Federal High Court**.
8. Another recommendation is for the provision of winding up to be reviewed to allow more ground for winding up , e.g.
    1. When there is a complete deadlock in the management of the company.
    2. When the company defrauds public funds

5.4 Concluding Remarks

The role of the Corporate Affairs Commission has really gone a long way to increase confidence of investors and the public at large in corporate governance. However, much is still needed to be done to allow the Commission to be maximally effective and to achieve its aims. There is really need for amendments of several sections of CAMA in line with current corporate best practices otherwise, the problem of the 1968 Act may crop in and we shall have a crying Corporate Affairs Commission.

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