A COMPARATIVE STUDY OF THE NIGERIAN COMPANIES

ACT 1968 AND THE GHANA COMPANY'S CODE 1963

BY

MBAH DANIEL ENOH

A Thesis submitted to the Post-Graduate School, Ahmadu Bello University, Zaria in part fulfilment of the requirements for the degree of:

MASTER OF LAWS (LL.M.)

Department of: COMMERCIAL LAW.

Faculty of: LAW

AHMADU BELLO UNIVERSITY, ZARIA

MAY, 1987

COPYRIGHT: NO PART OF THIS THESIS MAY BE REPRODUCED IN ANY FORM WITHOUT PRIOR PERMISSION.

DECLARATION

I, hereby declare that this thesis has been written by me and that it is a record of my own research work. It has not been presented or published anywhere, at any time by anybody, institution or organisation. All quotations and references are indicated with specific acknowledgments.

Mbah Daniel Enoh
(Candidate)

AHMADU BELLO UNIVERSITY, ZARIA.

MAY, 1987

D E D I C A T I O N

This Thesis is dedicated to my late father Chief Sama Mbah who died barely two months after I had started this Post-graduate Programme.

ACKNOWLEDGEMENTS

I wish to extend my appreciation and thanks to my Supervisor, Dr. G. Tumwine Mukubwa for his inspiration, leadership, guidance and contribution throughout the preparation of this thesis. His total commitment in bringing this thesis to completion leaves a lot in my memory. In times of despair, he gave me encouragement.

Special appreciation is also extended to Dr.I.A. Ayua, Dr. E.H. Ofori-Amankwah (Associate Professor) and Mr. John Samba all of the Faculty of Law, Ahmadu Bello University Zaria for the moral encouragement they gave me in the preperation of this thesis.

Also worthy of mention is Alhaji Abdul Salami Yusuf of No.5 Kaduna Road, Zaria and Sergeant Gabriel Ushie of Chief Magisterate Court, Funtua for their financial assistance especially at the initial phase of this programme when I was financially hard up.

I also wish to thank in particular, Barrister Comfort Sira-Wiwa, Barrister Femi Olufokunbi, Barrister Baba Amartey all legal pratitioners in Zaria and Barrister Peter Tafah of Paul Usoro and Company Kaduna for their invaluable assistance.

My appreciation also goes to my wife Mrs Hannah Mbah of College of Education Akampa, Cross River State and my two sons for patiently bearing my continuous absence from the family throughout this Post-graduate Programme.

I also wish to express my sincere thanks to Mrs. Anna Akobi and Mallam Abubakar Ndakotsu Gbodzu of the Department of Private Law, Faculty of Law, Ahmadu Bello University Zaria, who typed this thesis.

Finally, I would also wish to record my thanks to Callistus Aina Chanbang, a part three student in the Faculty of Law, Ahmadu Bello University, Zaria who assisted in compiling the Table of Cases.

Whatever credit this piece of work deserves is shared by them all and others not mentioned. But I am responsible for the views expressed in it and any of its deficiencies.

PREFACE

Professor Gower, who wrote the final Report of the Commission of Enquiry into the working and Administration of the present Company Law of Ghana on 6th April, 1961 known as the Draft Company's Code Bill, which was unanimously adopted by the Ghanian Parliament in Act No. 179 of 1963, and now called the "Ghana Company's Code 1963" had seriously criticised the Nigerian Companies Act 1968, for its failure to take account of the many developments in England and elsewhere since the English Companies Act 1948 was introduced and also for lacking in originality or African flavour.

Similarly, Olawoyin, the author of the Status and Duties of Company Directors has also criticised those who drafted the Nigerian Companies Act 1968 for uncritically copying some of the provisions of the English Companies Act 1948, notwithstanding the fact that Nigeria had at her disposal the recommendations of the Jenkins Committee to that effect.

It is therefore, in attempt to meet these criticisms that I have specifically chosen to make a comparative study between the Nigerian Companies Act 1968 and the Ghana Company's Code 1963 with emphasis on some of the differences with the view to suggesting reforms in Nigeria.

In the attempt to make this comparative study of some of the differences between the two Laws, I have had to make extensive use of the English

ABSTRACT

A COMPARATIVE STUDY OF THE NIGERIAN COMPANIES ACT 1968 AND THE GHANA COMPANY'S CODE 1963

BY:

MBAH DANIEL ENOH

MAY, 1987

In spite of the historical, social, political, religious, and geographical differences existing between Nigeria and Ghana in pre-colonial times, they shared a lot in common when it came to their commercial activities. The local populations in both countries carried on their commercial activities without any encroachment from foreign powers.

However, with the scramble for and final partition of Africa amongst European powers, Nigeria and Ghana came under British influence. From this period onwards the mode of reception of colonial lawswhich also included company laws in Nigeria and Ghana did not differ, as the introduction of colonial company laws in both countries was at the instance of the colonialist.

This period as well marked the beginning of the introduction of English Company Laws, the Common Law and Principles of Equity into Nigeria and Ghana which have now become part of their laws until such laws were repeal. But after independence, the Nigerian Companies Act 1968, No.51 came into existence on October 1, 1968 to govern the activities of Companies in Nigeria, whilst the Ghana Company's Code 1963, Act 179 of 1963 now controlls the activities of Companies in Ghana.

The aim of this thesis is to make a comparative study of the Nigerian Companies Act 1968 and the Ghana Company's Code 1963, showing how, if at all, the two countries have altered

their laws to suit local circumstances after independence.

In the introductory chapter, an attempt has been made to set out what will be done in the subsequent chapters. The purpose of the thesis and what would be a better position of the law to be adopted and also the method of research to be used.

In chapter two, attempt is made to examine the various types of companies in Nigeria and Ghana. The incorporation of a "one man company" and the advantages of having mature persons appointed directors of private and public companies. Also considered in this chapter is the importance of issuing out no par value shares.

Chapter three examines the position of pre-incorporation contracts in Nigeria, Ghana and Britain. Some form of modifications have been effected in Ghana and Britain. The status quo is however maintained in Nigeria.

Chapter four highlights the purpose of the ultra vires doctrine, its origin and its application in various jurisdictions. Also considered is the fact whether the rule no longer serves any useful purpose in Nigeria.

Chapter five is the core chapter as it examines the fiduciary duties of director; the duties of care and skill; the statutory restraints on directors powers; and the enforcement of members rights with its various exceptions. It is here that the most conspicuous differences between the two laws were found.

In chapter six, an attempt is made to examined miscellaneous differences existing between the Nigerian Companies Act 1968 and the Ghana Company's Code 1963, in

areas such as the extent to which companies may validly make donations to their employees and other charitable organisations; the publication in the gazette of relevant information about a company when it has been newly incorporated and when it has been wound up; the rule that a company cannot purchase and re-issue its own shares. Unlike under the Nigerian Companies Act 1968 which has no such provisions, these areas have specific provisions under the Ghana Company's Code 1963.

Chapter seven is the concluding chapter. It covers a summary of the major discussions and conclusions for reforms are reached.

It must however, be pointed out in this thesis that, although in carrying out this research work, the researcher has not been to Ghana to have an on the spot assessment of how practicable those provisions of the Ghana Company's Code 1963 which he has suggested as reforms to be included into the Nigerian Companies Act, he has had an opportunity to meet in Nigeria, with some Ghanian Company Law lecturers and lawyers with whom he had discussions with on some relevant provisions of the Ghana Company's Code 1963 and he has also extensively reviewed relevant literature.

A more intensive on the spot assessment in Ghana of how practicable those provisions of the Ghana Company's Code 1963 which he has suggested as reforms to be included into the Nigerian Companies Act have proved workable in Ghana is an area for further research.

CERTIFICATION

This thesis entitled: A COMPARATIVE STUDY OF THE NIGERIAN COMPANIES ACT 1968 AND THE GHANA COMPANY'S CODE 1963 by MBAH DANIEL ENOH meets the regulations governing the degree of Master of Laws of Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

(Dr. G. Tumwine Mukubwa)
Chairman, Supervisory
Committee/Internal Examiner
Department of Commercial Law
Ahmadu Bello University
Zaria.

Date:

(Prof. J.O. Fabunmi)
External Examiner
Dean, Faculty of Law
Obafemi Awolowo University,
Ile-Ife.

Date:

(Dr. I.A. Ayua)
Member, Supervisory Committee/
Internal Examiner
Department of Commercial Law
Ahmadu Bello University, Zaria

Date:

(Dr. I.A. Ayua)
Head of Department
Department of Commercial Law
Ahmadu Bello University, Zaria

Date:

(Prof. D.I. Saror)
Dean, Postgraduate School
Ahmadu Bello University,
Zaria.

Date:

TABLE OF CONTENTS

Title Page i
Declaration ii
Dedication iii
Acknowlegments iv
Preface vi
Abstract viii
Certification xi
Table of Contents xii
Table of Cases xvi
Table of Statutes xxii
Abbreviations xxxii

CHAPTER ONE
INTRODUCTION

1.1 Objectives 1
1.2 Scope of the thesis 4
1.3 Organisation of the thesis 5

CHAPTER TWO
FORMATION OF COMPANIES

2.1 Introduction 8
2.2 Classification of Companies 11
2.3 Membership of a company 14
2.4 Minimum Number of members 17
2.5 No par versus par value shares 24

CHAPTER THREE
PRE-INCORPORATION CONTRACTS

3.1 Introduction 32
3.2 The position of Pre-incorporation Contracts in Nigeria 36
3.3 Pre-incorporation contracts in Ghana 40

PAGE

3.4 Pre-Incorporation Reforms in Britain 41

3.5 Section 13 of the Ghana Company's Code 1963 compared with section 9(2) European Communities Act 1972 (U.K.) 43

3.6 General Law Theories Relating to Pre-Incorporation Contracts 46

CHAPTER FOUR
ULTRA VIRES DOCTRINE

4.1 Introduction 51

4.2 Brief historical development of the Ultra Vires Rule 53

4.3 Application of the doctrine 55

4.4 Who may invoke the doctrine 59

4.5.1 Ultra Vires Rule in Ghana 61

4.5.2 Views on the Reform of the Ultra Vires doctrine 63

4.5.3 Reforms of the Ultra Vires Rule in Nigeria 66

4.5.4 Ultra Vires Rule in other jurisdictions 69

CHAPTER FIVE
DUTIES OF DIRECTORS: STATUTORY RESTRAINTS ON DIRECTORS POWERS AND THE ENFORCEMENT OF MEMBER'S RIGHTS.

5.0 Introduction 83

5.1 Director's Duties not codified under the Nigerian Companies Act 1968 ... 89

5.2 Directors as Fiduciaries 92

5.3 Directors duties of care and skill 98

5.4.1 Statutory Restraints on Director's Powers appointment of directors ... 107

5.4.2 Director's Share Qualification ... 111

5.4.3 Loans to Directors 115

PAGE

5.4.4 Purchase and sale of shares by directors 122

5.4.5 Disclosure of Director's transactions with the Company 129

5.4.6 Removal of Directors 134

5.5.1 The Rule in Foss v. Harbottle and enforcement of member's right - application 139

5.5.2 The Limits or Exceptions to the rule 143

5.5.3 Form of minority Actions 146

5.5.4 Oppression on the Minority 154

5.5.5 Misfeasance Summons 161

5.5.6 Investigation by Inspectors 170

5.5.7 Management and Control of Management of Companies under other Systems of Law 178

CHAPTER SIX

OTHER DIFFERENCES BETWEEN THE NIGERIAN COMPANIES ACT 1968 AND THE GHANA COMPANY'S CODE 1963

6.1 Introduction 200

6.2.1 Donations by Companies 203

6.2.2 Early thoughts on Corporate donations 205

6.2.3 New view on Corporate donations... ... 209

6.2.4 Donations by Companies in Nigeria and Ghana 212

6.3 Gazetting on commencement of Business 218

6.4 Periodical Report by the Registrar of Companies 222

6.5 Dealing with the Companies own share 225

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

PAGE

7.1	Conclusion	234
7.2	Recommendations	255
7.3	Bibliography	268

TABLE OF CASES

PAGE

Aberdeen Railway v. Blackie Brothers (1854)1 Macq H.L. 461 ... 130, 190, 194, 241, 259, 265

Abubakri v. Abudu Smith (1973) 6SC (NIG)31 ... 195

Afolabi v. Polymera Industries (Nig) Ltd. (1964) 2 A.L.R. (Comm) 205 ... ... 60, 258, 266

Alexander Ward & Co. Ltd. v. Samyang Navigation Co. Ltd. [1975]2 All E.R. 424 ... 188

Allen v. Hayatt (1914)30 L.T.R. 444 ... .. 94, 195

Anderson v. Bundy 1933 161 Val 117T SE 501 ... 191

Appenteng v. Bank of West Africa (1961)1 Ghana L.R. 196

Archer's Case, Re North Australian Territory Co. [1892]1 Ch. 322 198

Ashbury Railway Carriage Co. Ltd. v. Riche (1875) L.R.H.L. 653 ... ... 59, 79, 195, 230

A.P. Smith v. Barlow 98[A] 2d 581 (1953); 13 N.J. 148 ... ... 215,230,231 232

Attorney-General v. Great Eastern Railway Co. [1880] A.C. 473 79

Atwood v. Merry Weather (1867) L.R. Eq 464 ... 196

Automatic Self Cleansing Filter Syndicate Co. Ltd. v. Cuninghame [1906]2 Ch. 34 84

Bamford v. Bamford [1968]3 W.L.R. 317; [1969] 2 W.L.R. 107; [1969]1 All E.R. 969; [1970] Ch. 212 ... ... 88 ,141,187, 195

Barned's Banking Co. RE (1867)L.R. 3 Ch App. 105 30

Barron v. Potter [1914]1 Ch. 895 182

Beauforte (John) London Ltd. Re [1892]1 Ch. 440 ... ... 60 , 61

Behrens Re(Unreported but noted in 1982 Company Lawyer 71) 79

Bell Houses Ltd. v. City wall Properties Ltd [1962]2 Q.B. 653; [1965]3 All E.R. 427 ... 58, 59

Black v. Smallwood (1966)117 C.L.R.52 ... 37 ,49

PAGE

Blackburn Building Society v. Cunliffe Brooks & Co. (1883) 22 Ch. D. 61 ... ... 60, 61

Brophy v. Cities Services Co. 31 Del Ch. 241 1949 189

Brazillian Rubber Plantations & Estates Re (1911) 1 Ch. 425 ... ... 189 ,190

Briggs v. Spaulding 1891 141 US 132 ... 105,106,191

Bugle Press Ltd. Re (1961) Ch. 270 164

Bushell v. Faith (1969) 2 W.L.R. 1067; (1969) 1 All E.R. 1002 137,194

Caledonial Community Crdit Union Ltd. v. Halimand Feed Mill Ltd (1974)4 D.L.R. 3rd 376 59

Caligara v. Giovani Sartori & Co. Ltd. (1961) 1 All N.L.R. 534 49,265

Cardiff Saving Bank, Marqins Brutes case Re (1892) 2 Ch. 100 189

Castigliones Will Trustee Re (1958) Ch.549 ... 232

Charterbridae Corporation Ltd. v. Lloyds Bank (1969) 2 All E.R. 1182 ... ... 55, 81

City Equitable Fire Insurance Co. Ltd Re (1925) Ch. 407 99,190,265

Cole v. Irving & Co. Ltd. (1971)1 U.IL.R. 314 195

Commissioner of Sewers of the City of London v. Gellaty (1876) 3 Ch. D. 610 196

Continental Chemist Ltd. v. Ifekandi (1961) 1 All N.L.R. 1 58,59,61,81,258,266

Cotman v. Brougham (1918)/A.C. 514 ... 56,57,59, 79

Cotter v. National Union of Seamen (1929) 2 Ch. 58 58

Cunliffe Brooks & Co. v. Blackburn Building Society (1884)/App. Cas 857 81

Dovery v. Cory (1901) A.C. 477 191,265

Duomatic Ltd. Re /1969/2 WLR 114 103,191

East Pant Du United Lead Mining Co. Ltd v. Merry Weather (1864)2 H & M 254 150

PAGE

Blackburn Building Society v. Cunliffe Brooks & Co. (1883) 22 Ch. D. 61 ... ... 60, 61

Brophy v. Cities Services Co. 31 Del Ch. 241 1949 189

Brazillian Rubber Plantations & Estates Re (1911) 1 Ch. 425 .. .. 189 ,190

Briggs v. Spaulding 1891 141 US 132 ... 105,106,191

Bugle Press Ltd. Re (1961) Ch. 270 164

Bushell v. Faith (1969) 2 W.L.R. 1067; (1969) 1 All E.R. 1002 137,194

Caledonial Community Crdit Union Ltd. v. Halimand Feed Mill Ltd (1974) 4 D.L.R. 3rd 376 59

Caligara v. Giovani Sartori & Co. Ltd. (1961) 1 All N.L.R. 534 49,265

Cardiff Saving Bank, Marqins Brutes case Re (1892) 2 Ch. 100 189

Castigliones Will Trustee Re (1958) Ch.549 ... 232

Charterbridae Corporation Ltd. v. Lloyds Bank (1969) 2 All E.R. 1182 ... ... 55, 61

City Equitable Fire Insurance Co. Ltd Re (1925) Ch. 407 99,190,265

Cole v. Irving & Co. Ltd. (1971) 1 U.L.L.R. 314 195

Commissioner of Sewers of the City of London v. Gellaty (1876) 3 Ch. D. 610 196

Continental Chemist Ltd. v. Ifekanda (1961) 1 All N.L.R. 1 58,59,61,81,258,266

Cotman v. Brougham (1918)/A.C. 514 ... 56,57,59, 79

Cotter v. National Union of Seamen (1929) 2 Ch. 58 58

Cunliffe Brooks & Co. v. Blackburn Building Society (1884)/App. Cas 857 81

Dovery v. Cory (1901) A.C. 477 191,265

Duomatic Ltd. Re /1969/2 WLR 114 103,191

East Pant Du United Lead Mining Co. Ltd v. Merry Weather (1864) 2 H & M 254 150

PAGE

Edwards v. Halliwell [1950] 2 All E.R.1065 143,194,195

Elder v. Elder & Watson (1952) SC 49 ... 156,196

English & Colonial Produce Co. Re [1906] 2 Ch. 435 265

Etic Ltd Re [1928] Ch. 861 198

Evens v. Brunner, Mond & Co. Ltd. [1921] 1 Ch. 359 208,230,231

External Sacred Order of Cherubim and Seraphim v. Adewunmi (1969)2 A.L.R. Comm. 273 142

Five Minutes Car Wash Service Ltd Re [1966] 1 All E.R. 242 158,196

Foss v. Harbottle (1843)2 Hare 461 ... ... 140,141,142,143,145,146,149,151,153, 161,164,178,186,190,194,195,197,244, 248,263,266,267

Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480 82

Godwin v. Agassiz 186 NE 659 cited by Olawoyin, Status and Duties of Company Directors (1981) page 56 97,189

Gramophone & Typewriter Ltd. v. Stanley [1908] 2 K.B. 89 162

Grosvendor & West End Railway Terminus Hotel Ltd. Re (1897) 76 L.T. 337... 174,176

Hampson v. Price Patent Candle Co. (1876)24 W.R. 74 208

H.R. Harmer Re [1959] 1 W.L.R. 62 ... 157,160,197

H. & A Logging Co. Ltd. v. Randon Service Corporation Ltd (1967) 63 D.L.R. 2d 6 30

Heyting v. Dupont [1964] 1 W.L.R. 843; [1964] 2 All E.R. 273 195,198

Hogg v. Cramphorn Ltd [1966] 3 All E.R. 420..141,195

Horsley & Weight Re(unreported but noted in 1981 2 Company Lawyer 71) 55

Howard v. Patent Ivory Manufacturing Co. [1888] 38 Ch. D. 156 35

Howden v. Yorkshire Miners Association [1903] K.B. 308 195

PAGE

Hutton v. West Cork Railway [1883] 23 Ch. D. 654 79

Introductions Ltd Re [1969] 1 All E.R. 887.. 56,57

Italcom (Western Nigeria) Ltd Re CCHCJ3/72/7.. 196

Jenkins v. Pharmaceutical Society [1921] 1 Ch. 392 79

Jermyin Street Turkish Baths Ltd Re [1970] 3 All E.R. 57 197

Kelner v. Baxter (1866) L.R.2 Cp 174 ..32,33,38,50

Lindgren v. L. & P. Estates Ltd [1968] Ch. 572 189

Longan (Thomes) Ltd v. Davis (1911) 105 L.T. 419 85

Lucking Wills Trusts Re [1967] 3 All E.R. 729 103,191

Lundie Brothers Ltd Re [1965] 1 All E.R. 667 196

MacDougall v. Gardiner [1875] 1 Ch.13 195

Mahoney v. East Holy Ford Co. (1875) L.R. H.L. 869 82

Marshall's Value Gear Co. Ltd. v. Manning Wardle Co. [1909] 1 Ch. 267 85,161

Meyer v. Scottish Co-operative wholesale Society Ltd (1958) SC (H.L.)40 160

Mills v. Mills (1938) 60 C.L.R. 150 188

Mutter v. Eastern and Midlands Railway Co. [1888] 38 Ch. D. 104 196

National Bank of Wales Ltd Re [1899] 2 Ch. 629 190,265

National land and colonization Co. v. Pauline Colliery & Development Syndicate [1904] A.C. 120 49

National Mail Coach Co. Re [1908] 2 Ch. 515 ... 265

Neese v. Brown 1964 25 ALR 3rd 932 ... 106 ,191

Newborne v. Sensolid (Great Britain) Ltd [1954] 1 Q.B. 45; [1953] 2 W.L.R. 596; [1953] 1 All E.R. 708, 97 SJ 209 ..33,38,42,43,50,237,265

N.I.P.C. Ltd. V. Bank of West Africa Ltd [1962] 1 All N.L.R. 556 39

PAGE

Northumberland Avenue Hotel Re [1886] 3 Ch. D. 16 49

Okotie Eboh v. Okotie Eboh (unreported Suit No. SC/112/1985) 22

Omega Estates Pty Ltd. v. Ganke (1963) NSWR 416 85

Onwaka v. Tayman (1965) LLR 62; (1968)2 ALR (Comm) 313 16

Otto Electrical Manufacturing Co. Re [1906] 2 Ch. 390 49

Parke v. Daily News Ltd [1962] Ch.927 ... ... 72,206,207, 211

Payne (David) Re [1953] 1 All E.R.634 57

Pender v. Lushington [1877] 6 Ch.D.700 195

Percival v. Wright [1902] Ch.421 ... ... 94,97,122,189,240, 265

Pergamon Press Ltd Re [1971] Ch. 388 176

Quin & Extens v. Salmond [1909] A.C. 442 ... ... 87,88, 187

R.v.Board of Trade Exparte St. Martins Preserving Co. Ltd. [1965] 1 Q.B.603 198

Regal (Hastings) Ltd v. Gulliver [1942] 1 All E.R. 378 96,152

Reversion Fund v. Maison Cosway Ltd [1913] 1 K.B. 364 81

Roith (W & M) Ltd Re [1967] 1 WLR 432 206,230

Rolled Steel Products (Holdings) Ltd v. British Steel Corporation (unreported but noted in 1982 3 Company Lawyer 123) 57

Royal British Bank v. Turquand (1856) 6 E & B 327 ... ... 72,79, 82

Salomon v. Salomon [1897] A.C.22; 66 L.J. Ch. 35 10,17,19,29

Sani Bakori & Sons (Nig) Ltd Re (unreported suit No.109/81 Area Court Tudun Wada Kaduna 20

S.B.A. Properties Ltd Re [1967] 1 WLR 799 176

Scott v. Scott [1943] 1 All E.R.582 84,88

PAGE

Scottish Co-operative Wholesale Society v. Meyer (1959)A.C. 324 157

Shaw (John) & Sons (Salford) Ltd v. Shaw [1935]2 K.B. 113 84,187

Shonibare v. Mansour [1963] LLR 1 ... ... 34, 38

Shonowo v. Adebayo (1969)2 ALR (Comm)419 166,191,197,265

Sinclair v. Brougham [1914]A.C. 398 61,81

Spencer v. Kennedy [1926] Ch. 125 192

Starcola (Nig) Ltd v. Adeniji (1972) [illegible] 202; [1972]1 All N.L.R. (Pt 1) 49 49

Steen v. Law [1964] A.C. 268;[1963] All E.R. 770; [1963] 3 W.L.R. 802 117

Steinbery v. Scala (Leeds) Ltd [1923]2 Ch.452.. 15

Stephen v. Buildco (Nig) Ltd (1968)2 A.L.R. Comm. 242 39

Strong v. Repid 1909 213 US 419 97

Sutton's Hospital (1612) 10 Co. Rep. 1a 23a...53,79

Sweng v. Smith (1869) L.R. 7 Eq 324 196

Tamlin v. Hannaford [1950]1 K.B. 18; [1950] A.C. 23 ... ... 9, 29

Tivoli Freeholds Ltd Re (1972) V. R. 445 80

Towers v. African Tug Co. [1904] 558 196

Transbridge Co. Ltd. v. Survey International Ltd (1986) 4 NWLR (Pt 37) 576 39,45,238,265

Travel & Holiday Club Ltd Re [1967]2 All E.R. 606 176

Trevor v. Whitworth [1887]App. Cas 409 15,30,202,225,226,230,232,254,255,266

Wallersteiner v. Moir No.2 [1975]2 WLR 309 ... 196

Wrexham Mold & Connah's Quay Railway Co. (Unreported but noted in Report on the Company Law Committee Cmnd 1749 (1962 Rep. 1973) Para 41 to 42 60

PAGE

S. 12 82,188
S. 15(2) 29
S. 16 ... ... 144;146
S. 22 82
S. 23 163,188,197
S. 26(1) 36, 37
S. 27 226
S. 28 11,12,29
S. 38 - 47 188
S. 55 30,227,230,232,234,255,264
S. 56 226
S. 67 16
S. 68 164
S. 74 163,197
(2) 197
S. 82 188
S. 104 82
S. 107(3) 232
(4) 37
S. 108 188
S. 120 188
S. 122 - 124 188
S. 125 163,197
(5) 197
S. 128 163,197
S. 140 188
S. 157 ... 162,170,172,173,174,175,177,247
(1) 170,247
(3) 171,172
S. 158 170,177,247
S. 159 170,177,247
S. 160 170,177,247
S. 161 170,177,198,247
(3) 154
S. 162 ... ... 170,177, ,247
S. 163 170,177,198,247
S. 166 170,177,247
S. 167 170,177,247
S. 168 ... ... 30, 92,191

PAGE

TABLE OF STATUTES

NIGERIAN STATUTES

Banking Act 1969 No.1 of 1969

S. 11[A] 117,192

Companies Ordinance 1912 9

Companies Act (Cap 37 law of Federation of Nigeria) 21

High Court Law No. 27 of 1955 (Eastern Nigeria)

S. 20(1) 50

High Court (Eastern Nigeria Laws 1961 Cap 61)

S. 15 79

High Court Law No.8 of 1955 (Northern Nigeria)

S. 28[A](1) 50

High Court Law (Northern Nigeria Laws Cap 4a)

S. 28 and 29 79

Interpretation Act (Cap 89)... 50

Interpretation Act No.1 of 1964 Section 28 79

Law of England (Application) Law Cap 60 1959 (Western Nigeria) 50,79

Law (Miscellaneous Provisions) Act (Federal)

S. 45 79

Law (Miscellaneous Provisions) Law (Lagos)

Law 1973 Cap 63 79

Nigerian Companies Act 1968, No. 5 of 1968

S. 1(1) 11,30

S.2 29

S.2(a)(iv) 31,236

S.3 29,164

S.4 29

(b) 29

S.7 82,188

PAGE

S. 12 82,188
S. 15(2) 29
S. 16 ... ... 144;146
S. 22 82
S. 23 163,188,197
S. 26(1) 36, 37
S. 27 226
S. 28 11,12,29
S. 38 - 47 188
S. 55 30,227,230,232,234,255,264
S. 56 226
S. 67 16
S. 68 164
S. 74 163,197
(2) 197
S. 82 188
S. 104 82
S. 107(3) 232
(4) 37
S. 108 188
S. 120 188
S. 122 - 124 188
S. 125 163,197
(5) 197
S. 128 163,197
S. 140 188
S. 157 ... 162,170,172,173,174,175,177,247
(1) 170,247
(3) 171,172
S. 158 170,177,247
S. 159 170,177,247
S. 160 170,177,247
S. 161 170,177,198,247
(3) 154
S. 162 ... ... 170,177, ,247
S. 163 170,177,198,247
S. 166 170,177,247
S. 167 170,177,247
S. 168 ... ... 30, 92,191

PAGE

S. 172(2) 191
S. 173(3) 192
(5) 113
S. 175 155,137,188
(1) 135,162,194
(4) 137
(6) 66,194
S. 176 30,108,191,235
(5) 109
S. 178(1) 30,191
S. 179(1) 30,191
S. 181 116,117,118,120,121
(1) 192
(2) 192
S. 183 114
(2) 194
(3) 192
S. 186 ... ... 123,124,125, 188,260
(1)(2)(5)(6) 193
S. 187 132,194
S. 189 193
S. 190 130,188,194
S. 194 82
S. 197 164
S. 200 164
S. 201 154,155,158,159,161,245,262
S. 210 156,159
(5) 169
S. 211(1) 166
S. 310 165,167,168,169,246
(1) 166

TABLE A

Article 76 116
" 77 112,113
" 80 83,85,87,187,194,197
" 95 199
" 99 85
" 107 131
" 113 85

PAGE

Nigerian Immigration Act 1963 No.6 of 1963
S. 8 17

Nigerian Enterprises Promotion Act 1977 No. 3 of 1979 67

OTHERS

American Bar Association's Model Business Corporation Act 1971

S.7 74,76,82

American Business Corporation Act 1970

S. 144 104,105,259

Articles of Incorporation Iowa Business Corporation Act 1969

S. 49 76,77,82

Canadian Business Corporation Act 1975... ... 26

S. 13(2) 31

S. 15 76

S. 15(1) 76,77,79

S. 16 76

S. 16(2) 76,77

(3) 77

Companies Act of New South Wales 1967

S. 16 232

English Companies Act 1862

S. 56 175

S. 56 - 61 175

English Companies Act 1948
(11 & 12 Geo. 6 C. 38)

S.52 65

S. 183 199

S. 184 137,194

S. 190 116,120

PAGE

S. 209 164

S. 210 ... .155,156,158,159,161,245,262

S. 212(3) 29

S. 245(3) 215

S. 451... 222

English Companies Act 1967, 1967 C. 81

S. 25 193,266

S. 26 193

S. 27 193,266

S. 28 193,266

S. 29 .. .. 124 193,266

(3) 193

(7) 193,266

(10) 193,266

S.30 193,266

S.33 193,266

S.34 266

S.68 128

English Companies Act 1976, 1976 C. 47

S.25 193

S.26 266

English Companies Act 1980, 1980 C. 22.... 13

S.1(2) 29

S.11 266

S.35(1) 266

S.49 120

S.52 120

S.53 120

S.68 128

PAGE

S. 69(2) 193,266
S. 70 193
S. 72 193
S. 74 231
(4)(7) 215
S. 75 159,160,161,246,262,266
S. 75(a) 197
S. 75(3) 197
(4) 197,215
S. 209 264

English Companies Act 1985

S. 19 253,266
S. 20 253,266
S. 35(1) 70,265
(2) 42,48,238,263
S. 139 255
S. 171 254
S. 305(1) 243
(4) 265
S.320 243
S.321 266
S.330(1) 265
S.711 253
(1) 252,266
S. 719 266
S. 720(1) 266
S. 723 253
S. 727 265

PAGE

S. 729 253,266

S. 743 266

English Married Women Property Act 1882 (45 & 46 Vict. C. 75).. 15

S.1 30

English Married Women's Property Act 1893 (56 & 57 Vict. C. 63) 15

European Communities Act 1972

S. 9(1) 61,69,70,71,72,73,74

(2) 37,42,43,44,237,238

Ghana Companies Ordinance 1907 29

Ghana Company's Code 1963, Act 179 of 1963

S. 7 188

S. 8 30,256

S.9 29

(3) 12

(5) 29

S. 13 41,43,46,238,258

(1) and (2) 40,43

S. 21 146

S.24 212,214

S.25 ... ... 6,62,63,75,81,82,253 265

S.27 219

(4) 230

S. 28(1) 220

S. 30 15

S.40(1) 31

S. 59 16,230,232,264

S. 62 233

	PAGE
S. 63 (5)(6)(7)	233
S. 65	226
S. 74	226
S. 118	61
S. 123	224
S. 124	224
S. 125	224
S. 126	224
S.127	224
S. 128	224
S. 129	192 ,224
S.130	24
S. 141	62,81,265
S. 173(5)	113
S. 180(1)	30
S. 182(1)	30
(a)	31,109,257
(b)	257
(c)	191,257
S. 183	113,114,118,191
S. 185	135,162
(1)	135
S. 186(1)	191
S. 194	132,133,262
(4)	131
S. 202(1)(c)	213,214
S. 203	96,103,167
(2)	103,105,191,259
(3)	265

PAGE

S. 205 169,240
(a) 95,96,97,259
S. 206 95
S. 207(5) 130
(10) 194
S. 209 167
S. 210 165,167,168,245,246,263
(b) 169
(3) 167
(5)... 169,198
(6) 198,247
S. 212 133
(3) 194
S. 214 96
S. 215 124,125
(4)(5) 193
S. 217 165
S. 218 156
(1)(a) 158
(1)(b)... 155
(2)... 156
S. 219 172,224
(2)... 172
S. 220 162,170,171,172,173,175
(1) 171
(3) 174,198
S. 221 170
S. 222 170
S. 223 170
S. 224 170
(3) 177
S. 225 170
S. 226 170
S. 227 170
S. 228 170
S. 260(1)... 230
S. 300 135,138,162
S. 301 117,121
(2) 192
(3) 119,120

PAGE

S. 324 152,167,168
(4) 196
(5) 153
S. 338 223,224,230,251,252,253,264
(2) 224,231,232,266

Sched. Four (part)11
Paras 13 - 38 26

Michigan Company Law 1948

S. 204 232

Ontario Business Corporation Act 1970

S. 144 105,191,262

LIST OF ABBREVIATIONS

LAW REPORTS

A.C.	Appeal Cases
A.L.R. (Comm) ...	African Law Reports (Commerciel Law Series)
ALL E.R.	All England Reports
ALL N.L.R.	All Nigeria Law Reports
APP. Cas.	Law Reports, Appeal Cases
C.C.H.C.J.	Certified Copies of the High Court judgments - Lagos
CH.	Law Reports, Chancery
Co. Rep.	Coke's Reports
Crim. App. R. or C.A.R.	Criminal Appeal Reports
D.L.R.	Dominion Law Reports (Canada)
E.& B.	Ellis and Blackburn's Queen's Bench
E.R.	English Reports, Reprint
F.S.C.	Selected judgments of the Federal Supreme Court of Nigeria
G.L.R.	Ghana Law Reports
H.L. Cas.	House of Lord's Cases (Clark)
K.B.	Law Reports, King's Bench
L.J. Ch.	Law Journal Chancery
L.L.R.	High Court of Lagos Reports
Macq H.L.	Macqueen (SC)
N.L.R.	Nigeria Law Reports
N.W.L.R.	Nigerian Weekly Law Reports
Q.B.	Law Reports, Queen's Bench
S.C.	Judgments of the Supreme Court of Nigeria
T.L.R.	The Times Law Reports
U.I.L.R.	University of Ife Law Reports

U.S.	United States Supreme Court Reports
W.L.R.	Weekly Law Reports
W.R.	Weekly Reporter

JOURNALS

A.B.U.L.J.	Ahmadu Bello University Law Journal
Camb. L.J.	Cambridge Law Journal
Harv. L. Rev. ...	Harvard Law Review
Int. Comp. L.Q. ...	International and Comparative Law Quarterly
L.Q. Rev.	Law Quarterly Review
Mod. L.Rev.	Modern Law Review

CHAPTER ONE

INTRODUCATION

This thesis will attempt a Comparative study between the Nigerian Companies Act 1968 and the Ghana Company's Code 1963 with special emphasis on the differences with the view of suggesting reforms.

In examining some of these differences under the two laws, maximum use would be made of the various English Companies Acts together with English judicial pronouncements on the relevant selected areas since they form the basis on which Company Law developed in Britain and was later introduced in the two countries.

Also, an attempt will be made to show how, if at all, the two countries have altered their laws to suit local circumstances after obtaining their Independence. Efforts will also be made to show whether Nigeria should still continue to maintain some of the provisions copied from English Companies Acts, when these provisions have either been modified or have become obsolete and they have been deleted from English statute book.

Now fully aware of these differences between the Nigerian Companies Act 1968 and the Ghana Company's Code 1963, it is intended to examine them critically with the view of what will be a better provision so as suggesting reforms.

As already stated, the above topic is covered extensively by the Nigerian Companies Act 1968 and the Ghana Company's Code 1963 and I have specifically chosen

..../2

it because of the enormous differences existing between both laws and for the following reasons:

First, the mode of Reception of Colonial Company Law in Nigeria and Ghana did not differ. For the introduction of Colonial Company Laws in both countries was at the instance of the colonialist. Therefore, the local population had no option as to whether they could accept or reject the particular laws infavour of some other system of laws. In otherwords even though these Ordinances or Acts were enacted by a Council which was legally a local legislature, the indigenous people had little or no choice as whether to accept the laws or not.

Secondly, Nigeria was for a brief period ruled collectively with Ghana by the British from Cape Coast. And the Privy Council presided as a sort of an Appeal Court for the two countries which undaoubtedly mean that English decisions had become part of the case laws of both countries. Even after obtaining their Independence from Britain, such decisions still continued to be part of their legal systems, for instance, decisions delivered by the West African Court of Appeal which are still binding in both countries until there were changes in the law through legislative reforms. In otherwords, British Company Law, the Common Law, and principles of Equity have been introduced into both countries while they were Colonies under the British and had become part of their laws until such laws were repeal.

...../3

Thirdly, Nigeria and Ghana even after independence have continued to remain members of the Commonwealth of Nations. This means that they still share the same Economic Co-operation with Britain, and perhaps may still be having Britain as one of their biggest trading partners.

Finally, I have also observed that some of the provisions in the Nigeria Companies Act 1968 and many of the judicial pronouncements by the Nigerian Courts are not in line with decisions of other jurisdictions covering the same selected areas and that they are inappropriate for the effective administration of Company Law in Nigeria. The reasons being that some of the provisions of the Nigerian Companies Act 1968 were either uncritically copied from the English Companies Act 1948 or in some circumstances they have proved completely inapplicable in Nigeria since they have never been made use of, to mention just a few of the shortcomings.

I therefore intend to examine the adequacy or otherwise of the relevant provisions of the Nigerian Companies Act 1968 inrespect of the selected areas which form the basis of this thesis so as to compare them with what applies in Ghana and other jurisdictions in order to show the position adopted so far by the Nigerian Courts and also the views of legal writers in Nigeria. Furthermore, after examining the shortcomings

...../4

in the application of the selected provisions under the Nigerian Companies Act 1968, I will make recommendations for legislative reforms. Bearing in mind the fact that most of the judges at the higher cadre of the judiciary in Nigeria, have been trained in English law and are well acquainted with English Statutes and decisions, and, therefore, in the absence of any Nigerian legislation or decisions the Courts are readily prepared to follow English judicial precedents when faced with similar problems. In otherwords, nothing short of legislative intervention can change the law in Nigeria as it stands today in the selected areas.

This thesis is not intended to cover every conceivable difference between the Nigerian Companies Act 1968 and the Ghana Company's Code 1963. For reasons of both practical convenience and intellectual modesty, this research will be considerably limited to some selected areas of differences. These selected areas as contained in the table of contents, include inter alia; the formation of Companies in Nigeria and Ghana, which includes membership of a Company and the issue of par and no par value shares. Pre-incorporation contracts and the ultra vires doctrine. The duties of directors, statutory restraints on director's powers and the enforcement of individual members rights against the directors and the Company. It also includes the extent to which Companies in Nigeria and Ghana may validly make donations to their employees and other charitable organisations, periodical reports on the activities of Companies and whether Companies should

...../5

be allowed to purchase their own shares.

The research will largely depend on published books, relevant statutes and articles by prominent scholars on the selected areas, together with my own personal experience.

In this chapter, an attempt is made to set out what will be done in the subsequent chapters. The purpose of the thesis and what will be a better position of the law to be adopted and the method of research to be used.

In the second chapter, we shall focus attention on the formation of Companies in Nigeria and Ghana with special emphasis on membership of the Company and the importance of having par and no par value shares. The incorporation of a "one man Company" and also the advantages of having mature persons being appointed directors of private and public Companies.

Chapter three examines the position of pre-incorporation contracts in Nigeria, Ghana and Britain. Taking into consideration the fact that a lot of activities usually take place before a Company is finally incorporated. And the various reforms that have taken place in Ghana and Britain in regard to pre-incorporation contracts. And whether anything short of legislative reforms could alter the law as it affects pre-incorporation contracts in Nigeria today.

Chapter four highlights the purpose of the ultra vires doctrine and its application in various jurisdictions.

...../6

The modification of the rule by Section 9(1) of the European Communities Act 1972 and by Section 25 of the Ghana Company's Code 1963. Also taking into consideration the fact that some jurisdictions have completely abolished the rule, and whether the ultra vires rule any longer saves any useful purpose in Nigeria.

Chapter five is the core chapter as it covers the fiduciary duties of directors, the duties of care and skill and also the statutory restraints on directors powers while managing the affairs of the Company. It also examines the rule that the majority have the right to manage the affairs of the Company in the way they think fit and the various ways by which the minority may enforce their individual rights against the Company or on its behalf. It also covers the investigative powers of the Inspectors to investigate the affairs of any Company and whether all these measures are s sufficient enough to curb the increasing powers of the modern Company directors.

Chapter six examines miscellaneous differences existing between the Nigerian Companies Act 1968 and the Ghana Company's Code 1963. This includes the extent to which Companies may validly make gifts to its employees, charitable organisations and the general public. It will also examine the rules which prevent a Company from subscribing for or purchasing its own shares. Whether such rules should still be strictly followed in Nigeria when there are now provisions in the Ghana Company's Code 1963 and the English Companies Act 1985 which provide or allow a Company to deal in its own shares under certain stringent conditions. The issue

of publisation in the Gazette of relevant information about a Company when it has been newly incorporated and when it has been wound up will also be examined, and whether it is essential for the Registrar of Companies to cause to be publish a periodical Report on the activities of Companies at any given point in time so as to inform the business Community and the public.

Chapter seven is the concluding chapter. It covers a summary of the major discussions and conclusions for reforms are reached.

CHAPTER TWO

FORMATION OF COMPANIES

2.1 INTRODUCTION

Strictly speaking, the idea of forming Companies was first introduced in Nigeria and Ghana by the British, the former Colonial master. This was due to the fact that Companies which were incorporated in Britain were allowed to carry on Commercial activities freely in the colonies controlled by Britain which also included Nigeria and Ghana. During this early period Nigerians and Ghanians worked in these Companies merely as employees with scarcely anybody holding top managerial positions. But as time went on, this concept of forming Companies became popular and after independence, many indigenous Companies sprang up in the two countries.

Today, in Nigeria and Ghana, Companies may be broadly classified under two groups, statutory and registered Companies. Statutory Companies are formed by Special Acts of Parliament. This method of forming Companies had earlier been used by the British in their former colonies to set up pulic utility Companies. Such as electricity, water and railways as these undertaking needed special powers.

To ensure that there was uniformity in the regulations controlling such corporations, various Acts were enacted in these countries containing general corporate powers and duties. They were deemed to be incorporated under private enactments, unless the Acts provided to the contrary.

For all practical purposes after independence, these public utilities were nationalised and their functions

were taken over by public corporations in the two countries. This was done in order to enable the public utilities to conform to the economic policy of the new governments of the two countries.

However, when the public corporations were in financial trouble, the entire nation came to their rescue. As Denning L.J., rightly pointed, out in Tamlin v. Hannaford:[1]

> "The significant difference between public Corporations and other Corporations is that there are no shareholders to subscribe the capital or to have any voice in its affairs. The money which the Corporation needs is not raised by the issue of shares but by borrowing; and its borrowing is not secured by debentures but by guarantee by the Treasury, if it cannot repay, the loss falls on the consolidated funds ....that is to say : on the taxpayer. There are no shareholders to elect the directors or to fix their remuneration....if it should make losses and be unable to repay its debts, its property is liable to execution, but it is not liable to be wound up at the suit of any creditor. The taxpayer would, no doubt be expected to come to its rescue before the creditors stepped in".

This situation, however, does not apply to private Corporations as the money must be raised from subscribers, and its borrowing is secured by debentures so that if it cannot repay, the Company may be wound up in order to settle its liabilities.

In any case, it must be pointed out here that, public Corporations fall outside the scope of this thesis because large and important branches of Company law do not apply to them.

Generally speaking, in Nigeria, as far as registered Companies are concerned, the Companies Ordinance 1912, first provided a procedure for the incorporation of

Companies.[2] Similarly, the first Companies Ordinance in Ghana[3] also provided a similar machinery whereby Companies could be formed through registration after delivery of the necessary documents to the Registrar of Companies.

Furthermore, the concept of a limited liability Company and its advantages as the most favoured vehicle for enterprenours wishing to invest sizeable amount of money in any Company or to engage in activities involving sophisticated technology and know-how, has been accepted in Nigeria and Ghana. Thus, a Company limited by shares is one which consists of a number of persons united together for carrying on business or undertaking with a view to making profits and having their liability limited. The reasons advanced for the preference of these types of Companies in both countries are very obvious.

First, a limited liability company is regarded in law as a legal entity or person, separate and distinct from its members.[4] It, therefore, follows that where the Company is indebted and cannot settle its liabilities, the Company can only call for the unpaid amount subscribed by its shareholders to settle this outstanding debts and no more. Therefore the law requires that a shareholder should only pay for the amount subscribed in the Company's shares when the Company is being wound up. This principle of the Company being a separate legal entity, distinct from its members was first laid down in the famous case of Salomon v. Salomon.[5]

Secondly, it has perpetual succession and also the parties (especially creditors), feel reassured in dealing

with an abstract and artificial body. But this may not always be the case as some Companies are formed for a particular purpose and after that they may be wound up. However, it must be noted that investors also feel assured in investing in joint stock enterprises because they are fully aware that their liability in the event of winding up is limited to the extent of the unpaid portion of their shares. But it has to be pointed out that a limited liability Company being a man made creature, constrained by the lack of human intellect, rationality and reproductive capacity, it can only operate through human agencies.[6]

2.2 CLASSIFICATION OF COMPANIES

The provisions dealing with the classification of Companies under the Nigerian Companies Act 1968[7] are similar to those also found under the Ghana Company's Code.[8] They both provide that an incorporated Company may either be a Company limited by shares, a Company limited by guarantee or an unlimited Company. It may be private or public. Section 1(1) of the Nigerian Companies Act 1968 provides that a private Company could be registered with at least a minimum of two persons and the maximum number of members is fixed at fifty excluding past and present employees who are members.[9] Section 28 of the same Act goes further to define a private Company as that which restricts the right to transfer its shares, limits the number to fifty as well as prohibiting any invitation for public subscription. A public Company in Nigeria, therefore is any Company which is not private, with at least a minimum of seven members without any restriction as to it's share transfer and may make a public subscription. This definition of what a public Company should be was arrived at by concluding that

any Company which does not fall within the accepted defined meaning of Section 28 is a public Company.

However, the position in Ghana is slightly different. As Section 9(3) of the Ghana Company's Code provides that a private Company is one which by its Regulations restricts the right to transfer its shares and also limits the total number of its members and debentureholders to fifty. In any case this does not include persons who are bona fide in the employment of the Company or persons who were formerly in the employment of the Company and have continued after the determination of that employment to be members or debentureholders of the Company. The provisions of Section 9(3) of the Ghana Company's Code further restricts a private Company from making any invitation to the public to acquire any shares or debentures of the Company. Any other Company which does not fall within these provisions is a public Company. Therefore, by virtue of Section 8 of the Ghana Company's Code, both private and public Companies can validly be registered in Ghana with one single member.

Furthermore, when these provisions dealing with the classification of Companies are carefully examined under the two laws, certain differences emerge. The Ghana Company's Code[10] requires that a Company limited by guarantee should not be registered with a share capital and should not create or issue shares. While under the Nigerian Companies Act 1968, a Company limited by guarantee may be registered with or without share capital. The question now to be answered is why should the Ghana Company's Code insist that a Company limited by guarantee should not create or issue shares? The reason is that if a Company limited by guarantee has a share capital, its members

have dual liabilities.

First, the members have to pay the issue price of their shares and secondly, they must honour their guarantee in the event of the Company being wound up.[11] Hence there is no benefit to the Company in having such dual liability. Therefore, in practice, Companies limited by guarantee with share capital are not formed. The device of the guarantee Company is only used where no share capital is to be issued but the members of the Company wish to limit their liability to contribute towards the Company's debts and liabilities. It is also worth noting that the Jenkins' Committee[12] found that Companies limited by guarantee with a share capital were rarely registered in Britain and suggested in its recommendations that the Act should no longer provide for them. The Committee unanimously agreed that if a Company is formed with the intention of making pro rata distribution of profits to its members, it seems inappropriate that it should be registered as a Company limited by guarantee. This recommendation was included in the English Companies Act[13] 1980. In view of the fact that Companies limited by guarantee with share capital are seldom registered in Nigeria, this provision is obsolete and serves no useful purpose and should be deleted from the Companies Act.

Secondly, the Ghana Company's Code[14] provides that an unlimited Company must be registered with a share capital. However, this is not the position under the Nigerian Companies Act 1968.[15] As the Companies Act 1968 provides that an unlimited Company may be registered with or without share capital. But unfortunately, no such Companies have been registered in Nigeria without share capital. In

support of the view that an unlimited Company must be registered with a share capital, Gower,[16] argues that the previous existing Companies Ordinances in Ghana which allowed an unlimited Company to be registered without share capital did not lead to the incorporation of such Companies. He further argues that such a provision was not useful and should be deleted.[17] In the light of the above discussion, it is clear that there is no need to have such a provision in the Nigerian Companies Act as it fulfils no economic need. Therefore, in the interests of simplicity the different types of Companies should be kept to a minimum and it is submitted that since no unlimited liability Company has been registered in Nigeria without a share capital, an unlimited Company without a share capital should not be allowed to be registered in Nigeria.

2.3 MEMBERSHIP OF A COMPANY

The general rule in Nigeria[18] is that any person may become a member of a Company by subscribing his name to the memorandum or to its regulations under the Ghana Company's Code.[19] Therefore, an infant may become a member of the Company and hold shares accordingly unless the articles or the regulations, as they sometimes do, forbid an infant to do so. When an infant becomes a member of a Company, he has the general legal disabilities of an infant.[20] For instance, he may repudiate the shares anytime before 21 years of age or within a reasonable time thereafter. If he so repudiates, he cannot recover the money paid for the shares unless there has been a total failure of consideration. Such as where the shares have never had any value. A good illustration on this point

is found in the case of Steinberg v. Scala Leeds Ltd.,[21] where an infant took some shares and paid for them. Although no dividends were paid, the shares had some market value. The infant brought an action to recover the money paid and for a declaration that he was not liable to pay for future shares. It was held that since the shares once had a market value, the money paid for the shares was not recoverable but that he was not liable to pay future calls.

The position of married women in Nigeria is governed by the Married Women's Property Act of 1882 as amended by the Married Women's Property Act 1893, except that her contractual liability remains solely of a proprietory nature, and attached only to her separate property at the time of the contract.[22][23] In any case, in Ghana, the position of married women is not very clear and by virtue of Section 30 of the Ghana Company's Code, every person who agrees with the Company to become a member of the company and whose name is entered into the register of members shall be a member of the company.

A Company may be authorised by its memorandum or Regulations to become a member of another Company, by subscribing its name and paying for its shares.[24] But it cannot become a member of itself and a provsion purporting to authorise such acquisition of shares is ineffectual. In Trevor v. Whitworth,[25] a Company which was authorised by its articles to purchase its own shares purchased them from a member. The Company went into liquidation before

it paid the price and the member sought to prove in the liquidation but it was held that he must fail since the Company could not purchase its own shares. The reason advanced for this prohibition is to ensure that the Company does not "traffic" in its own shares thereby influencing the price of the shares in an unhealthy manner and that it does not indirectly reduce its share capital without complying with, for example, the provisions of Section 67 of the Nigerian Companies Act 1968. However, although the Ghana Company's Code does not allow a Company to become a member of itself, Section 59 of the Company's Code, allows Companies to purchase and re-issue their own shares which is not permissible under the Nigerian Companies Act 1968.[26(a)]

Also in Nigeria, an alien can only validly become a member of a Company, if he obtains the Minister's consent. In Onwaka v. Taymani,[26(b)] the first defendant who was normally resident in Ghana purported to subscribe to the memorandum of association of a Company. One of the issues for determination was whether or not the first defendant was a member of the Company. It was held that as there was no evidence that the minister's consent was obtained for the purpose of enabling any interest in shares to be created in his favour or any shares to be taken by or issued to him, no shares of the Company could validly be taken by him or allotted or issued to him. Any purported issue or allotment, being tainted with illegality, was void.

The decision in the above case seems to suggest that no alien acquires any interest in a Company in

Nigeria without the minister's consent. An alien can, therefore, only become a member of a Company if he obtains the minister's consent. This approach is in line with Section 8 of the Nigerian Immigration Act 1963, which provides that:

> "No person other than a citizen of Nigeria.... shall on his own account or in partnership with any other person....practice a profession, or establish or take over any Company with limited liability for any purpose without the consent in writing of the minister.....".

Perhaps, the reason for restricting membership is to preserve Foreign Exchange.

2.4 MINIMUM NUMBER OF MEMBERS

Under the Nigerian Companies Act 1968, a statutory minimum of two members for a private Company or seven in the case of a public Company may form a Company with or without limited liability. This is not however, the position in Ghana, as the Ghana Company's Code[28] provides that one or more persons may form a Company. It can, therefore, be concluded from the two provisions, that more persons are required in order to form a Company in Nigeria than in Ghana. The question often asked in many circles is why should the Ghana Company's Code contain a provision allowing the incorporation of a one man Company? Gower,[29] argues that it has long been recognised since Salomon v. Salomon,[30] that there is nothing improper in forming a "one man Company" in which one person is the beneficial owner of all the shares in the Company.

Therefore, it has only become necessary that other persons should join him in preserving the fiction that a Company is an association of persons. He further argues that this unnecessary fiction must be got rid of as it fulfills no useful purpose. He outrightly rejects that the former requirement in Ghana that a pulbic Company should have seven members had not certainly resulted in the association of seven traders; it had merely deterred people from incorporating and had led to abuses whereby the other members are barely nominees of the mainshareholder. He finally concludes that it is also equally pointless since there is no way of ensuring that the seven members will be active partners in the concern.[31]

Therefore, the best may of ensuring that business survives and grows so that ultimately outside capital is introduced and other enterpreneurs join will be to allow the incorporation of a one man company. This he submits, will encourage businessmen to incorporate by the elimination of pointless requirements. This cannot be accomplished by fixing the minimum number of "nominal members".[32]

On the other hand, the incorporation of a one man company has been criticised. The strongest argument put forward against the one man company is that, what is needed in Ghana is for the individual traders to pool their resources and associate together in large business and that the open recognition of such a provision will discourage the pooling of such resources and thereby lead to under capitalization of the company.

Gower,[33] holds the view that this argument is fallacious and untenable. He argues that the mainshareholder may still subscribe for all or a substantial part of the needed capital while others are merely nominees for him holding only one share each. This is exactly what took place in Salomon v. Salomon,[34] where seven shares were subscribed in cash by members and the rest were held by Salomon himself, the mainshareholder who had 20,001 out of the 20,007 shares issued and each of the remaining six shares were held by members of his family apparently as nominees for him. Here one agrees with Gower, that a statutory minimum number of members fixed at two or seven will not result in an association of traders as is presently required under the Nigerian Companies Act 1968, since there is no way of ensuring that the two or seven members will be active partners in the company or that the provision, will not be circumvented.

Although Gower, allows companies to be formed in Ghana with only one member, he however, insisted that every company must have at least two directors. Thus the Ghana Company's Code[35] and the Nigerian Companies Act 1968[36] all provide that there must be two directors in every company be it private or public. This implies that the first two subscribers to the Memorandum and Articles of Association or in the regulations of the company as it applies under both laws may become its first directors in the absence of any contrary view. But it must be pointed out that a person cannot become a director of a company in Ghana unless he attains the age of eighteen years. However, the only limitation as to age in Nigeria, is that no person above the age of 70 years may be appointed

a director of a public Company or a private Company which is a subsidiary of a public Company unless the articles otherwise provide or his appointment was made or approved by the Company in general meeting of which a special notice has been given.[38] It therefore implies that in the absence of any other restriction, the first subscribers to the memorandum of association of a Company in Nigeria may become its directors not withstanding their ages.[39]

One may argue that the usual practice in Nigeria amongst private Companies is that the first director who may be the mainshareholder is generally the managing director, and chairman with a casting vote. While the second director may be his infant son or daughter who is still young or may be attending school or pursuing further studies. As a result of this, the Company's affairs are completely left in the hands of the mainshareholder who is the first director. If the proprietor is incapactitated or suddenly dies, the Company's affairs come to a standstill and may even lead to a close down or liquidation as the second director is still young or may still be attending school. Even when he discontinues his studies and opts to manage the Company, he lacks the experience to effectively manage the Company's affairs and to cope with the problems of modern Companies. This argument can be supported by two practical situations that actually took place in Nigeria.

The first situation which illustrates this point did come up in the case of Sani Bakori & Sons (Nig.) Ltd.[40(a)] In this particular instance, Alhaji Sani Bakori in

1969 had incorporated a group of companies under the Nigerian Companies Act 1968. He was the first director, mainshareholder and Managing Director in all these companies. He appointed his infant sons and daughters as second directors in these companies. He had absolute control over these companies. Unfortunately, he became sick and suddenly died. His children who had been made second directors in these companies were still young and as such could not take over the effective management over the affairs of these companies. Petty family quarrels soon arose and the properties of these companies were shared up amongst family members in accordance with Islamic Law of inheritance. The business, therefore, could not survive after the death of the founder.

Similarly, late Chief Festus Okotie-Eboh, had incorporated twenty seven private companies under the repealed Companies Act (Cap. 37 Laws of the Federation of Nigeria 1958) which now has a similar provision under the Nigerian Companies Act 1968. He was the mainshare-holder, first director and Memaging Director in all these companies. He had also appointed his young children and other relations of tender ages as second directors in all these companies. When he was suddenly killed during the 1966 Coup in Nigeria, these companies were virtually left with no mature directors to effectively manage them and they had to be wound up. Even presently, there are lots of quarrels amongst his children and wives as to who should own which property. This has led to a series of cases been filed at the Lagos High Court. And

it has also led to the filing of motions and counter motions at the Supreme Court as can be seen from suit No. SC/112/1985 between Victoria Okotie-Eboh v. Adolo Okotie-Eboh & Ors.[40(b)] Even when the substantive matter has not been decided at the lower court. The simple reason being that the repealed Nigerian Companies Act, as mentioned above did not specifically include a provision which requires persons to be appointed directors of Companies to be of mature age as required under other laws, for instances, the Ghana Company's Code.[41]

On the other hand, it may also be argued that the courts in the two instant cases mentioned above ought to have intervened by appointing the personal representatives of the deceased mainshareholders to take over the management of those Companies, in place of the second directors who were still of tender age. But then, this argument fails in view of the fact that the Court has no inherent powers to do this on its own, until an action has been initiated by a person who has the locus standi to do so. Therefore, where members of the deceased mainshareholders family are in total disagreement or they are interested in sharing the Company's properties, there is very little chance of any action being brought to the Court.

Gower,[42] however, concedes to the fact that during the life time of the mainshareholder or proprietor, it is certainly true that he will effectively control the affairs of the Company so as to make or render the second director a little more than an impotent dummy during the life time of the proprietor. But nevertheless, if the second director was of mature age, he would have at least

familarised himself with the business and be ready to offer useful advice at board meetings. Therefore, it is only in the event of the proprietor's death or incapacity that the second director comes into effective control of the Company and performs his vital role so as to ensure that the affairs of the deceased mainshareholder are regularised and a personal representative appointed.[43]

Having examined the advantages and the disadvantages of having provision for the incorporation of a "one man Company" in Ghana and making sure that the directors are of mature age, the advantages of having such a provision far outweighs the disadvantages and it is submitted that a similar provision should be included in the Nigerian Companies Act for the following reasons:-

First; since Nigeria's Independence in 1960, a significant change has taken place in the field of Company formation. For instance, between 1960 and 1974, a total of 10,867 Companies were incorporated and most of these Companies were private.[44] A close study of these private Companies reveal that the mainshareholder or proprietor hold almost all the shares while the remaining shares were held by nominees for them. This completely leaves the entire control and management of such private Companies in the hands of proprietors which may not be in the best interest of the Company, as a single director cannot effectively perform the functions of two directors as required by the Companies Act or the Regulations.

Secondly, the death or incapacity of the proprietor may lead to a halt in the Company's business especially in

private Companies where the second director who is still young and lacks the experience to take over the immediate control of the Company and managed its affairs effectively until the personal representative of the deceased proprietor is appointed to dissolve the board of directors and appoint new ones. Even where a member of the family assumes control of the Company, this may lead to family quarrels and the abandonment of the Company. Thereby creating room whereby family members may rush to take over the Company's property on the flimsy excuse that they are entitled to a share in the deceased proprietor's assets.

2.5 NO PAR VERSUS PAR VALUE SHARES

The Nigerian Companies Act 1968 provides that all shares created or issued must be given a fixed nominal value.[45] While the Ghana Company's Code[46] provides that all shares created or issued must all be shares of no par value and further makes it mandatory on all Companies to adopt no par value shares. Gower,[47] argues that the advantages of having no par value shares outweigh that of par value. And he supports his view with the following reasons:-

First, that no par value shares makes it clear to the investor that a share is simply a share in the fluctuating value of a business and not a piece of paper worth the value endorsed upon it. Therefore, no par value shares render the true nature of shares more intelligible and do not prevent unsophisticated people from being mislead.[48]

Secondly, where the rate of interest is liable to considerable changes over relatively short periods, par value shares may be misleading to the uninitiated

investor. For instance, if 4 per cent £G2 preference shares are issued at par and the market rate of interest then rises to 6 per cent, the market value of the shares will be substantially less than par and the amount of return to the investor buying at a later date will correspondly be greater than 4 per cent.

Thirdly, that a Company may wish to issue blocks of no par preference shares at different dates (when different rates of interest are ruling) which may all rank pari passau. Here no par preference shares offering £G10 per annum can be issued at £G200 (with priority for £G200 in winding up) when the market rate of interest is 5 per cent and say £G190 (with priority for £G200) when the rate of interest has risen. This is a clear indication that over a period of years, a Company is able to issue at different prices, a single class of no par preference shares instead of a series of classes of par value preference shares carrying different returns. This is not only convenient for the Company but also brings the advantage of a bigger total issue, and a wider market in the shares to the shareholder.[49]

However, there are others who hold the view that the issue of no par value shares is not without some disadvantage. The Gedge Committee[50] thought that a fixed dividend must have relation to the sum on which it is paid and that, as well as the payment of a fixed sum in a winding up, is out of keeping with the concept of no par value shares. But Gower,[51] dismisses this argument by stating that it is a further illustration of the confusion which par value shares have created. He argues that a share dividend is not "paid on

a sum", it is paid on a share. That it is true that under value, the share is given an arbitrary value and the dividend (preference or otherwise) expressed (often with highly misleading results as a per centage of the value. But it could also just be as well, indeed be far better expressed as a fixed sum of £G1, £G5, etc.) per share. And the preferred repayment on a winding up can equally be expressed as a fixed sum of £G1, £G5, £G10 etc) per share.

Secondly, another criticism raised by the same Committee[52] on the rejection of the introduction of no par value shares was in connection to the contents of balance sheet. It was strongly argued that the introduction of no par value shares will make it difficult for Companies to produce accurate balance sheets since profits and loss accounts cannot easily be ascertained when shares are not given a value. However, to surmount this criticism, Gower has suggested some recommendations which when adhered to will clear away any difficulty when balancing accounts dealing with no par value shares.[53]

No par shares have also been introduced in other countries. In America,[54] many States have for several years permitted the issue of no par value shares. The undertaking is however, divided into a certain number of shares representing a fraction of the whole share capital. The value of which will fluctuate with the value of the whole undertaking without being obscured (as with par value shares) by the attachment of a nominal par value.

Similarly, the Canadian Business Corporation Act,[55] 1975 also contains a provision whereby Companies could either adopt the par or no par shares. This therefore

means that in America and Canada, the two methods are both applicable depending on whatever method a Company may wish to adopt. In any case, it must be pointed out that despite the fact that these countries have adopted the two methods of issuing out shares in their various Companies Acts, it is still optional. For instance as each company is free to choose one or may even adopt both methods of issuing out shares. It is only in Ghana that no par value shares have been introduced and made mandatory for all Companies.

Following the above discussion on the advantages and disadvantages of having no par shares, I take the view that the earlier reasons given for requiring shares to be given a nominal value are merely historical. Since it was though to be the only convenient device for measuring the members liability at a time when shares were of a large nominal value, of which a substantial proportion will be left uncalled. In view of the fact that it is now customary for shares to have a low nominal value of ₦1.00 or less and for the whole to be called up shortly after issue, and frequently, for the issue price to be greater than par, it becomes pertinent with these changes, that par value shares have outlived whatever usefulness they may have had as the only method of issuing out shares.

It is submitted that in view of the advantages to be derived from the introduction of no par shares[56], they should be introduced in Nigeria and at the sametime be made compulsory for all companies to adopt. Otherwise the two greatest advantages of such reform; simplicity

and comprehensibility will be sacrificed. This is because in a country like Nigeria, where there are hundreds of thousands of Companies with millions of par shares, a sudde.. and complete switch to no par shares may be hardly practicable if it is left optional for Companies to choose whether to adopt it or not.

FOOTNOTES

1. Per Denning L.J. in Tamlin v. Hannaford [1950] 1 K.B.18 A.C. 23.

2. In 1912, 29 Companies were registered in Nigeria and all the 29 Companies were foreign.

3. Ghana Companies Ordinance 1907. This Ordinance virtually unamended remained the only statute law relating to Companies until the Company's Code came into existence in 1963.

4. S. 15(2) Nigerian Companies Act 1968, No. 51 of 1968.

5. Salomon v. Salomon [1897] A.C. 22 p. 51, where the House of Lords held that "The Company is in law a different person altogether from the subscribers to the memorandum; and although it may be that after incorporation the business is precisely the same as it was before, and the same persons are Managers, and the same hands receive the profits, the Company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act".

6. Actual authority may be expressed or implied, those powers which are reasonably incidental to the proper performance of the agents duties will be implied unless expressly excluded and an agent who on previous occasions has been allowed by the principal to act in excess of authority may thereby have acquired an implied authority to continue to act.

7. SS. 2-4 Nigerian Companies Act 1968, No.51 of 1968.

8. S. 9 Ghana Company's Code 1963, Act 179 of 1963.

9. S. 28 Nigerian Companies Act 1968, No. 51 of 1968.

10. S. 9(5) Ghana Company's Code 1963, Act 179 of 1963.

11. S. 212(3) English Companies Act 1948, 11 & 12 Geo 6C 38.

12. Comnd. 1749 para. 23.

13. S. 1(2) English Companies Act 1980, 1980 C22.

14. Supra note 10.

15. S. 4(b) Nigerian Companies Act 1968, No. 51 of 1968.

16. L.C.B. Gower, Nineth Comment on Section 9 of the Final Report on Ghana Company Law (1961) p.28.

17. Ibid.

18. S. 1(1) Nigerian Companies Act 1968, No. 51 of 1968.

19. S. 8 Ghana Company's Code 1963, Act 179 of 1963.

20. See, Cheshire and Fifoot, Law of Contract (English Language Book Society Butterworths 7ed 1969) p. 367

21. [1923] 2 Ch. 452.

22. S. 1 English Married Women's Property Act 1882 (U.K.).

23. Supra note 20 Ibid p. 395.

24. Re Barned's Banking Co. (1867) L.R. 3 Ch. App. 105.

25. Trevor v. Whitworth [1887] 12 App. Cas. 409.

26(a) S. 55 Nigerian Companies Act 1968, No. 51 of 1968.

26(b) [1965] L.L.R. 62; 1968(2) A.L.R. Comm. 313.

27. Supra note 18.

28. S. 8 Ghana Company's Code 1963, Act 179 of 1963.

29. L.C.B. Gower, First Comment on Section 8 of the Final Report on Ghana Company Law (1961) p.25.

30. [1897] A.C. 22 at p. 51.

31. Supra note 29, second comment.

32. Ibid.

33. Supra note 30.

34. [1897] A.C. 22 at p. 51.

35. S. 180(1) Ghana Company's Code 1963, Act 179 of 1963.

36. S. 168 Nigerian Companies Act 1968, No. 51 of 1968.

37. S. 182(1)(a) Ghana Company's Code 1963, Act 179 of 1963.

38. S. 176 Nigerian Companies Act 1968, No. 51 of 1968.

39. The Nigerian Companies Act 1968, No. 51 of 1968 prohibits certain persons from holding the office of directors. These are insolvent and fraudulent persons. See Sections 178(1) and 179(1).

40(a) This is an unreported case which never even reached the High Court. (suit No. 109/81) Tudun Wada Area court Kaduna.

40(b) The death of the Sole Proprietor late Chief Festus Okotie-Eboh led to the filing of suit No. LD1035/81 at the Lagos High Court. It also led to the filing of motions and counter motions at the Supreme Court as evident in Suit SC/112/85 even when the substantive matter has not been decided.

41 Besides the fact that the Ghana Company's Code prohibits insolvent and persons with criminal records from holding the office of directors, section 182(1)(a) prevents persons below the age of 18 years from acting as directors of Companies.

42. D.C.B. Gower, Fifth Comment on Section 8 of the Final Report on Ghana Company Law (1961) p.26

43. Ibid.

44. See, the directory of incorporated (Registered) Companies in Nigeria (2nd ed.) Vol. III of 1976.

45. S. 2(a)(iv) Nigerian Companies Act 1968, No. 51 of 1968, requires the amount of share capital with which the Company proposes to be registered and the division thereof into shares of a fixed amount.

46. S. 40(1) Ghana Company's Code 1963, Act 179 of 1963.

47. L.C.B. Gower, First Comment on Section 40 of the Final Report on Ghana Company Law (1961) at pp.53 & 54.

48. Ibid.

49. Comnd 1749 para. 33.

50. Ibid para. 32.

51. L.C.B. Gower, Fifth Comment on Section 40 of the Final Report on Ghana Company Law (1961) p.53.

52. The T.U.C. representative on the Gedge Committee had dissented.

53. See, Fourth Schedule, Ghana Company's Code 1963, Act 179 of 1963 dealing with balancing of accounts.

54. L.C.B. Gower: Principles of Modern Company Law. (Stevens & Sons, London 4th ed. 1979) p. 238.

55. S. 13(2) Fraser's Handbook on Canadian Company Law (Carswell Company Limited, Toronto, Canada Sixth ed. 1975) p. 84 provides that:

> "in the absence of other provisions in the **letters patent, supplementary letters patent** or by laws shares without par value may be allotted and issued for such consideration as may be fixed by the directors acting in good faith and in the best interests of the Company."

56. Cmnd. 1749, paras. 32-34.

CHAPTER THREE

PRE-INCORPORATION CONTRACTS

3.1 INTRODUCTION

A lot of activities usually take place before a limited liability company is finally incorporated. Such activities include the preparation of the memorandum and articles of association, the payment of registration fees and even acquiring property on behalf of the proposed company. These activities are carried out prior to its incorporation so that when the company is formed, it may commence business immediately without further waste of time. But unfortunately judicial pronouncements have shown that a company cannot ratify pre-incorporation contracts and most contracts are entered into by promoters they are void.

The Courts have consistently held the view that a company only becomes a separate legal entity when it has been incorporated. That until it is incorporated, it cannot contract or undertake any act which has legal consequences. Therefore, the company cannot after its incorporation be bound by such contracts even if the articles purport to enforce it, for ratification is not possible when the ostensible principal did not exist at the time the contract was made.

The earliest well known case on this subject is Kelner v. Baxter.[1] In that case Kelner sold wine intending to sell to a company which was still to be formed. The contract showed that it was agreed to be sold to certain persons who were the proposed directors of the company which was coming into existence.

The proposed directors agreed to buy. And the contract clearly showed that the directors agreed to buy the wine on behalf of the Company but the Company had not yet come into existence at the time the contract was made or when the goods were delivered. The directors, however, took delivery of the goods. It was held that as they had contracted on behalf of a principal who did not exist they must, having received the wine, pay for it.

The Court reached this decision on the basis that:-

> "If the Company had been in existence, the defendants would have acted as agents, but since the Company was not in existence, the documents in which the agreement was set out would be inoperative unless it were a contract between the plaintiff and defendants. If there is no existing principal, such a contract binds the persons professing to be agents"[2]

It therefore flows from Kelner v. Baxter,[3] that the Court assumed that the parties contemplated that the persons signing the contract would be personally bound. Since the defendants had no principal who was bound originally or who could become one by subsequent ratification were themselves personally bound.

The next important case which illustrates the attitude of the Courts towards pre-incorporation contract is Newborne v. Sensolid (Great Britain) Ltd.[4] In this case the contract was alleged to be signed by a Company which was not yet incorporated and followed by the name of Newborne who was the promoter, as director. The Court held that Newborne had qualified his signature. He had by the form of his signature made it clear that he was not undertaking

personal liability. On the other hand, where the contract purports to be entered into by the company and the promoter merely authenticates by signing his name, he cannot be liable, nor can the proposed company, for the contract is a nullity.[5] But it is the same if the other party had attempted to enforce the contract as was held in Black v. Smallwood.[6]

Furthermore, in Shonibare v. Ali Mansour.[7] The plaintiff entered into a contract to purchase property comprising of land and buildings for £120,000 on behalf of a company that was in the process of being formed. The defendant wrote to his tenants informing them that from a given date the Company would be their new landlord. Subsequently the defendant refused to transfer the property. The Court held that there was no contract.

Some writers also share the view that if a person contracts ostensibly as agent for a none existent principal as for example, a company which is not yet incorporated, he can be held to be himself personally liable. Bowstead,[8] argues that where a person professes to contract on behalf of a principal and the principal is fictitious or non-existent person, the person so professing to contract is presumed to have intended to contract personally. Unless the contrary intention is proved, and where the contract is in writing such intention cannot be proved by parol evidence but must appear from the terms of the contract form and the surrounding circumstances.

From the above discussion, it follows that a principal cannot ratify or adopt a contract by his agent if the principal had no contractual capacity at the time when the agent made the contract. Nevertheless, a contract may be implied from

the way in which the company acts after its incorporation. But such acts of the Company after incorporation must be unequivocally referrable to the said contract to be implied.[9] Even where the acts are expressly referable to the contract, they amount only to an offer to be bound and no more.[10] The mere performance of the pre-incorporation contract by the Company is not enough to amount to an offer, particularly if it is based on the belief that the contract is binding so that performance is necessary in order to avoid legal liability.[11]

The offer however, must be accepted by the other party. In Howard v. Patent Ivory Manufacturing Co.,[12] where an action was brought by Howard, one of the debenturcholders on behalf of himself and others to test the validity of the debentures, the Court held:-

> "The pre-incorporation contract did not bind the Company, but by taking possession of the premises and offering to give debentures to the vendors, the Company had made a fresh offer after incorporation which the vendors had accepted and the contract was to that extent good".

Pennington,[13] seems to share the same opinion with the judicial attitude towards pre-incorporation contracts. He argues that only the company's express agreement or acts done by it which are expressly referable to making an agreement would have to be proved by very strong, cogent and convincing evidence. Accordingly, an act by the company which is necessarily referable to a susposed new contract does not of itself bring such contract into existence. It may be interpreted merely as an offer, and then, unless there is acceptance by the other party, to the pre-incorpotion contract, there is no new contract.[14]

3.2 THE POSITION OF PRE-INCORPORATION CONTRACTS IN NIGERIA

Pre-incorporation contracts in Nigeria may broadly be classified into two groups. Those pre-incorporation contracts which are statutorily binding between the Company and its members and those between the Company with third parties.

As far as pre-incorporation contracts which are statutorily binding between the company and its members are concerned, Section 26(1) of the Nigerian Companies Act 1968 provides:-

> "The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registeration shall be entered as members in its register of members".

Therefore, since subscription to the memorandum takes place before the company is finally incorporated, these are pre-incorporation contracts which are in effect made binding between the Company and its members by the statute. The only condition being that the person has become a member and this has been accompanied by the entry of his name on the register of members to make the contract binding on the company.

But the question which often arises is whether the entry of a members name on the register of members is conclusive proof of his membership? The Courts have held that if a proper register is kept, the register is prima facie proof that the person whose name is on the register is a shareholder.[15] However, Dr. Mukubwa takes the view that where there is no register or where the register is so defective as to be inadmissable in evidence, other additional

evidence may be adduced to prove that a person is a shareholder and therefore a member.[16] It, therefore follows that any person who can prove that he was a subscriber to the memorandum is free to sue the company to have shares allotted to him in accordance with his subscription.

At this juncture, it is important to make a distinction between contracts contained under Section 26(1) and Section 107(4) of the Nigerian Companies Act 1968 respectively. Thus Section 26(1) deals merely with contracts made between the Company and its members prior to its incorporation while Section 107(4) deals with provisional contracts entered into by a public Company between the date of its incorporation and the date of issue of a trading certificate. The effect of Section 107(4) is that a company cannot be sued on such contract until the certificate is issued.[17] Accordingly, these are not pre-incorporation contracts because the Company has already been incorporated but is still under a temporally legal incapacity to enter into any binding contract until a trading certificate is issued. However, the issue of a trading certificate immediately removes this incapacity and the company is free to enter into contracts which it can now sue and be sued upon.

The second category of pre-incorporation, now to be considered are those entered into by the Company and third parties. The position in Nigeria is same with that which existed in Britain prior to the introduction of Section 9(2) of the European Communities Act 1972. Therefore, under the Nigeria Companies Act, 1968 a promoter of a company is not competent to contract on behalf of a Company

ponding its incorporation with third parties. In other words a Company cannot ratify acts done by its promoters prior to incorporation. This is clearly illustrated by a number of decided cases.

In Shonibare v. Ali Mansour,[19] the Court held that there was no contract. Sowemimo J. concluded his judgement by saying:-

> "It might be unfortunate that the defendant considering the fact that he had received a large amount of money of over £70,000 should by certain legal defect have the benefit of not only enjoying the money which he has received but also the properties which it was alleged to have sold. It is with some reluctance that I have come to the conclusion that the claims of the plaintiff would have to be dismissed, but that seems to be the legal position and the legal consequences would follow".[20]

Dr. Mukubwa,[21] argues that the judge did not properly apply the case of Kelner v. Baxter[22] and Newborne v. Sensolid Great (Britain) Ltd.,[23] on which he relied to reach his conclusion. The case before him was clearly distinguishable from the Cases of KELNER and NEWBORNE. He submits that in these cases no party was left unjustly enriched. Therefore, the Court should have distinguished them on that basis. He further argues that under the present state of the law, there was no contract. Nevertheless, the Court could have decided in favour of the plaintiff on the basis of a quasi contract.

He finally submits that in SHONIBARE'S[24] Case the court could have invoked the provision to the reception clauses as justification for refusing to follow English cases. The reception of English law, he contended, is subject to local jurisdiction and local circumstances.[25]

But surprisingly, the Supreme Court of Nigeria in the absence of any legislation on pre-incorporation contracts has uncritically applied the law as stated in English decisions.[26] Thus in Stephen v. Buildco (Nig) Ltd.,[27] the Court held that:-

> "A company is not bound by and cannot ratify an agreement entered into before its incorporation, even though the parties to the agreement intended it to bind the Company and became directors of the Company and its only shareholders".

It was further held in N.I.P.C. LTD v. Bank of West Africa Ltd.,[28] by the same Supreme Court that:-

> "The registeration of ownership of lands or lease held under the Registeration of titles Act, in the name of a Company which was not incorporated at the date of such registeration was void and of not effect".

The above judicial pronouncements by the Supreme Court which is the highest court in Nigeria clearly point to the inevitable conclusion, that pre-incorporation contracts in Nigeria cannot be adopted or ratified.

Furthermore, the issue of whether or not equitable remedies were available to an aggrieved party where the Court holds that there was no contract has now been finally settled in Nigeria. In Transbridge Co. Ltd. v. Survey International Ltd.,[29] where the issue was whether a company is entitled in equity to enforce, after its incorporation, an agreement made on its behalf by its promoters before its incorporation, the Supreme Court held that, a company cannot be bound by or seek to ratify a contract entered into on its behalf before it was incorporated either under the principles of

Common Law or the doctrines of equity. Secondly, the legal right in a contractual obligation cannot be abolished by equity, neither can equity create a legal contractual right where none exists. Thirdly, a person calling in aid the application of the principles of equity to a transaction must be a party to the transaction, since equity neither acts in vain nor assists a volunteer. It therefore follows that once the Court has declared that there is no contract, there are no equitable remedies available to any of the aggrieved party.

3.3 PRE-INCORPORATION CONTRACTS IN GHANA

The position of pre-incorporation contracts in Ghana is different from what prevails in Nigeria. As the Ghana Company's Code allows ratification by a Company of a contract entered on its behalf by a promoter prior to its incorporation.

Section 13(1) of the Ghana Company's Code provides that:

> "Any contract or transaction purporting to be entered into by the Company prior to its incorporation may be ratified by the Company after incorporation".

Furthermore, Subsection (2) of the same Section provides that:-

> "Prior to ratification by the Company the person or persons who purported to act in the name or on behalf of the Company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof".

The effect of the above two provisions of section 13 is that any ratification by the Company of a pre-incorporation contract makes the Company bound and entitled to the benefits and liabilities as if it had been in existence at the date of such contract and had been a party thereto. If the contract is not ratified by the Company after incorporation, the promoter in the absence of any express agreement to the contrary remains personally liable.

However, it is not stated whether the Company must ratify the contract after incorporation. In view of this, the promoter is left in a difficult position where he fails to express any contrary agreement in the contract. He therefore becomes personally liable for the contract as he is not in a position to compel the company to ratify the contract or indemnify him. Even a third party will not be in a position to force the company to ratify or adopt the contract if the company exercises its option not to ratify the contract. This leads to the conclusion that where the Company exercises its option not to ratify the agreement, the promoter and the third party are left to sort out things for themselves.

3.4 PRE-INCORPORATION REFORMS IN BRITAIN

The unsatisfactory position of pre-incorporation contracts in Britain led to the Jenkins Committee recommending a legislation under which a Company when formed could validly adopt pre-incorporation contracts by unilateral act, which unfortunately never became law.[30]

However, with the entry of Britain into the European Community, a change became inevitable and a provision was introduced into the European Communities Act, 1972 which is now an equivalent of Section 35(2) of the English Companies Act 1985 to that effect.

Section 9(2) of the Act 1972 provides that:[31]

> "where a contract purports to be made by a Company, or by a person as agent for a Company at a time when the Company has not been formed, then subject to any agreement to the contrary, the contract shall have effect as a contract entered into by the person purporting to act for the Company or agent for it, and shall be personally liable on the contract accordingly".

It therefore seems clear from the above provisions of Section 9(2) of the European Communities Act, 1972 that there will be a contract on which the promoter will be liable and which he will be entitled to enforce unless there is an express agreement to the contrary. Even the formula employed in executing the contract is irrelevant. As a result of this new provision, Newborne v. Sensolid (Great Britain) Ltd.[32], has been over-ruled.

In any case, it must be pointed out that Section 9(2) of the European Communities Act, 1972 does not give the Company any right to ratify a pre-incorporation contract. Nor does it even impose liability on persons purporting to act on behalf of the Company as such liability could conveniently be excluded by contract. In otherwords, the agreement to the contrary may provide that the promoter should not be liable or that he should not be entitled to enforce the contract, but in that event, presumably, there would only be a unilateral obligation which cannot be

enforceable unless entered into under seal.

A more likely agreement is that the promoter should cease to be liable if and when the Company, after its incorporation, entered into an agreement in like terms and this presumably is what the Act envisaged.[33] But the question still left to be answered is what should happen if the company after its incorporation exercises its right of option not to enter into the agreement in like terms? Again, the promoter becomes personally liable for the contract.

3.5 SECTION 13 OF THE GHANA COMPANY'S CODE 1963 COMPARED WITH SECTION 9(2) EUROPEAN COMMUNITIES ACT, 1972(U.K.).

By way of contrast, Section 13(1) of the Ghana Company's Code expressly provides that a company when formed can validly ratify a pre-incorporation contract. And Section 13(2) makes it clear that those who acted ostensibly for a company without any express agreement to the contrary shall be bound by the transaction unless and until the company ratifies. This section according to Gower,[34] abolishes the highly technical and inconvenient rules made in Newborne v. Sensolid (Great Britain) Ltd.[35] Whereas, the provision of Section 9(2) of the European Communities Act, 1972 makes pre-incorporation contract a personal one by the promoter, with no provision for his ceasing to be liable in the absence of any agreement to the contrary. Furthermore, the section does not make any provision for adoption or ratification by the company. It is therefore my considered view that Section 13 of the Ghana Company's Code is a better provision than Section

9(2) of the European Communities Act 1972(U.K.).

Although pre-incorporation reforms have taken place in Ghana and Britain, it is submitted that these reforms have not completely resolved the vexed problem of pre-incorporation contracts as they have not provided for all possible situations that may arise as a result of contracts entered into or behalf of a Company prior to its incorporation. Therefore, since each case has to be viewed on its own facts and special circumstances, the bulk of the work is left to be decided by the Courts, through judge made law in the absence of any statutory provisions to that effect.

As earlier pointed out in this chapter, the position of pre-incorporation contract in Nigeria remains that which existed in Britain prior to the introduction of Section 9(2) of the European Communities Act, 1972. And today there seems to be divergent views on the question of pre-incorporation contracts in Nigeria. Some writers argue that the issue needs immediate reforms. While others hold the contrary view that the issue does not pose any serious problems in Nigeria at present. Prominent among those who subscribe to this view is Dr. Ayua.[36] He argues that the question of pre-incorporation contracts is not yet of great importance in Nigeria at the present moment.

> "That when the subject becomes important, our Courts should allow Companies after incorporation to take-over the liability of contracts entered into their names or on their behalf".

With due respect to the learned author, this

suggestion does not provide a good answer to the unresolved problem of pre-incorporation contract in Nigeria for the following reasons:-

First, taking into consideration the most recent decision in Transbridge Co. Ltd. v. Survey International Ltd.[37], where the Supreme Court has expressly stated that contracts entered into on behalf of a Company by its promoter prior to its incorporation cannot be ratified and that once there is no contract there are no equitable remedies available to any of the aggrieved party.

Secondly, a lot of economic activities usually take place before a Company is finally incorporated and people have a right to be informed as to their rights and obligations as to pre-incorporation contract. Thus laws are not made immediately a situation arises, but are made in advance so that people know the consequences of their activities and actions before certain things are done.

Thirdly, this argument seems no more tenable in view of the present economic measures taken by President Babangida's administration to intensify Nigeria's economic links with ECOWAS Nations and other neighbouring countries for a more meaningful Regional intergration. This new Economic policy will encourage more businessmen from other areas to come and invest in Nigeria. To do so, they will need to know whether transactions entered into by them on behalf of their

incording Companies would be valid before they finally incorporate them.

Fourth, in the light of increased cases on pre-incorporation contracts coming up before our Courts, we cannot any longer sit down and fold our hands without doing something to ameliorate the present situation.

And finally, it would be unrealistic to leave the question of pre-incorporation contracts to be decided entirely by our courts, knowing fully well that since most of our judges are English trained and are accustomed with English legal tradition, they are only too ready to follow English decisions when similar cases do come up before them in our Courts in the absence of any Nigerian Legislation on pre-incorporation contracts.[38]

It is submitted that a provision similar to Section 13 of the Ghana Company's Code be included into the Nigerian Companies Act. This will allow Companies to ratify contracts entered into on their behalf prior to their incorporation. And will also ensure that those who acted expressly for the company shall be personally bound by the transaction unless the company ratifies the contract.

3.6 GENERAL LAW THEORIES RELATING TO PRE-INCORPORATION CONTRACTS

To get rid of the difficulties confronting promoters in the formation of Companies as they affect pre-incorporation contracts, some general law theories have been evolved in which the position of the promoters may be safeguarded in the absence of any legislation.

First, he may incorporate the company before he makes contracts, in which case the problems relating to pre-incorporation contracts do not apply. There is no reason why a promoter should not take this course since the expenses of incorporation are not prohibitive, although they have considerably increased in the last few years.

Secondly, he may settle a draft agreement with the other party so that when the Company is finally incorporated, it enters into a contract on the terms of the draft, but the parties are not bound other than morally by the draft, and unless the Company and the other party make the contract after incorporation, there is no legal redress. The promoter is not liable because there is no contract with him.[39]

Thirdly, the promoter may make the contract himself and "assign" the benefit to the company after it has been incorporated. But since English law does not allow a person to assign the burden of his contract, the disadvantage of this method is that the promoter remains personally liable for the performance of his promise in the contract after the assignment.[40] Therefore, it is desirable for the other party to the contract to agree that the promoters shall be released from their obligation if the company enters into identical contract with the other party after incorporation. They should ensure that the company makes such a contract with the other party and so procure their own relief.

Fourth, where the promoter is purchasing property for the Company, he may take an option for at least three months. When the company is formed, and it wishes to take over the property, the promoter can assign the benefit of the option to the Company or enforce the option personally for the company's benefit. If the company does not wish to take the property, the promoter is not personally liable to take and pay for. The best he can lose is the sum of money he had agreed to pay for the option.[41]

FOOTNOTES

1. (1866) L.R. 2 C.P. 174.
2. Ibid per Erle C.J. at p. 183.
3. Supra note 1
4. [1954] 1. Q.B. 45, (1953)2 W.L.R. 596, 97SJ. 209; [1953] 1 All E.R. 708 (C.A.).
5. J. Ola Orojo: Nigerian Company Law and Practice (Sweet & Maxwell)(1976 ed.) p. 79.
6. Black v. Smallwood (1966) 117 C.L.R. 52 per Barwick C.J. Kitto, Taylor & Owen J.J.
7. [1963] L.L.R.1 where Sowemimo J. (as he then was) adopted para. 824, p. 425 of volume 6. Halsbury laws of England (3rd ed.) and hold that a pre-incorporation contract of a promoter cannot be enforced by or against the Company, nor can the Company when formed adopt or ratify the contract'
8. Bowstead on Agency (12th ed.) article 121, reported by Dr. G. Tunwine Mukubwa "Pre-incorporation Contracts" unpublished work) Faculty of Law, A.B.U., Zaria June (1986) p. 5.
9. National Land and Colonization Co. v. Pauline Colliery & Development Syndicate [1904] A.C. 120.
10. Ibid.
11. Re Northumberland Avenue Hotel Co. [1886] 3 Ch. D. 16.
12. [1888] 38 Ch. D. 156.
13. Pennington Company Law (Butterworths, London 3rd ed. 1973) p. 88.
14. Ibid. Contrary to Transbridge Co. Ltd v. Survey International Ltd (1986)4 NWLR 576 (Nig.) S.C.
15. Stercole (Nig.) Ltd. v. Adeniji (1972) 1 S.C. 202, [1972] 1 All N.L.R. (Part 1) 49 "Where the right of a promoter to become a subscriber was considered by the Supreme Court of Nigeria."
16. Dr. G. Tunwine Mukubwa, "Pre-incorporation Contracts" (unpublished work June 1986) Faculty of Law, A.B.U., Zaria at p. 18.
17. Re Otto Electrical Manufacturing Co. [1906] 2 Ch. 390.
18. Caligara v. Giovani Sartori & Co. Ltd. [1961] 1 All N.L.R. 534.
19. [1963] L.L.R.1.
20. Ibid p. 9.

21. Dr. G. Tunwine Mukubwa, "Pre-incorporation Contracts" (unpublished work June 1986) Faculty of Law, A.B.U., Zaria p. 7.

22. Supra note 1

23. [1954] 1 Q.B. 45.

24. Op.cit note 21 at pp. 9 & 10.

25. Ibid see footnote 45(a)which refers to the Interpretation Act (Cap. 89, Federation) S.45(2) High Court Law No. 27 of 1955 (Eastern Nigeria S. 20(1) , High Court Law No. 8 of 1955 (Northern Nigeria) S. 28A(1). This limitation does not appear in the Law of England (Application) Law Cap. 60 of the former Western Nigeria.

26. Supra Kolner v. Baxter, Newborne v. Sensolid.

27. (1968)2 All L.R. Comm. 242.

28. [1962] All N.L.R. 556.

29. (1986) 4 N.W.L.R. 576 (Nig) S.C.

30. Per Para. 44.

31. J. Ola Orojo, Nigerian Company Law and Practice (Sweet & Maxwell Press 1976) p. 80.

32. Gower, Principle of Modern Company Law (Stevens & Sons, London, 4th ed. 1979) 336.

33. Ibid.

34. Gower, Final Report on Ghana Company Law (1960) p.32. See Second Comment.

35. [1954] 1. Q.B. 45.

36. Dr. Ayua, Nigerian Company Law (Graham Burn Press Bedfordshire U.K. 1984). p. 38.

37. Supra note 29.

38. Supra note 7.

39. J.F. Northey, Introduction to Company Law in New Zealand, Wellington Butterworths (1976) p.37.

40. J. Ola Orojo, Nigerian Company Law and Practice (Sweet & Maxwell Press (1976) P.80.

41. Ibid Pages 80 - 81

CHAPTER FOUR

4.1 INTRODUCTION

This chapter will attempt to examine the purpose of the ultra vires doctrine and to state a brief historical development of the rule. The rigidity in the application of the rule and the inconsistencies that have arisen in the application of the doctrine in Britain. And will also examine the reforms that have taken place in Britain, Ghana and other jurisdictions on the rule with the view of what will be a better provision so as to suggesting reforms in Nigeria.

The doctrine which is basically a product of English Case Law applies in Nigeria and Ghana by virtue of the various reception laws which allow the Common Law, doctrine of equity and statutes of general application to apply in these countries respectively. For instance, the various reception laws which allow those laws in force in England on 1st January, 1900 to be applied in Nigeria.[1]

However, after independence, Ghana has modified the ultra vires doctrine to some extent as the Ghana Company's Code has completely abolished the doctrine of constructive notice. Whereas, the doctrine is still being applied in Nigeria in its entirety, notwithstanding the recent developments that have taken place in Britain and other jurisdictions on the rule. Thus in this chapter, the application of the doctrine will be examined as it applies in Nigeria and Ghana, showing how it has been differently applied and whether the doctrine can still be considered

to be useful as a legal tool in company law in Nigeria. In some cases the doctrine has been completely abolished.[2]

At this point, it will be necessary to state first, the purpose of this doctrine and secondly, a brief historical development of the rule and how businessmen have tried to circumvent the rule. Even how the Courts have striven to preserve the doctrine from further disfigurement but to no avail.

PURPOSE OF THE DOCTRINE

The purpose of the ultra vires doctrine is that it restricts an incorporated company under the Companies Act and also under the Ghana Company's Code[3] only to the pursuit of the objects outlined in its registered Memorandum of Association[4] and the exercise of powers expressly conferred upon it by the Memorandum or which are reasonably incidental to the achievement of its stated objects.[5]

In the words of Lord Parker of Waddington[6], the purpose of the company's objects in the Memorandum is firstly to give:

> "Protection to the subscribers who learn from it the purpose to which their money is applied and secondly protects persons who deal with the Company and can infer from it the extent of the Company's powers".

In other words, the memorandum of a company defines its objects and a company's objects are limited to those expressly mentioned and such as are ancillary to the expressed objects. A contract made by the directors upon a matter not within the ambit of the Company's

objects is ultra vires the company, and, therefore, beyond the powers of the directors. This principle is intended to protect both those who deal with the Company, and its shareholders.[7]

CONSTRUCTIVE NOTICE

The Memorandum and articles of association of a Company are regarded as public documents. Therefore, all persons dealing with the company are deemed to have notice of the limitation of the Company's powers contained in the Memorandum. If unfortunately they fail to ascertain the extent of such limitation, they enter into transactions with the company at their own risk. The validity of a contract may depend on the particular activity of the company with reference to which it was made. The third party will be porcluded from enforcing the contract if he had actual or constructive notice that the transaction was ultra vires the powers of the company.[8]

4.2 BRIEF HISTORY OF THE ULTRA VIRES RULE

The early case of SUTTON'S HOSPITAL[9] has been generally taken to establish a landmark that a chartered corporation has all the powers of a natural person in so far as an artificial entity is physically capable of exercising them; if it misuses its powers by exceeding the objects in the charter, it may be that proceedings in the nature of quo warranto could be taken to restrain it or in the nature of scire facias to forfeit the charter, but in the meantime its actions will be effective.[10]

But the actual application of the ultra vires rule took a drastic turn in England only after the limited

liability concept of 1856 had been introduced into English Company Law. It became necessary to protect creditors of the company so that the Company's properties are not used for unauthorised purposes since they look upon the assets of the Company which constitute a trust fund for them; as an action for the recovery of their debts could only be brought against the company and not against the owners, as the case applies under partnerships.

This development ushered in two important documents that is the Memorandum and Articles of association to replace the deed of settlement. From that period the doctrine applied strictly and any act done outside the scope of the objects was ultra vires the powers of the Company and therefore null, void and of no legal effect. Even the unanimous votes of all the members of the general meeting cannot ratify an ultra vires act, for ratification was legally impossible if the contract or act was beyond the scope of the Memorandum.[11]

It must, however be pointed out that in the above case, for the first time, the Court clearly distinguished between acts merely ultra vires the directors because it was beyond the powers delegated to them by the articles and acts ultra vires the company's powers in the Memorandum which did not permit it.

Although the dual purpose of the ultra vires rule was for the protection of both investors and creditors of the company, it seems creditors appear normally to have no locus standi to sue to restrain a company from entering into an ultra vires transaction unless, perhaps,

they have a change of the company's undertaking.

Furthermore, it was earlier thought that the Ultra Vires rule extends to a position where regardless of what the objects clause provides, an act of the company which is not bona fide aimed at benefiting the company is ultra vires.[12] However, this view has been rejected by Pennycuick J. in Charteridge Corporation Ltd. v. Lloyds Bank.[13] And this approach has recently been affirmed in Re Horsely & Weight.[14]

4.3 APPLICATION OF THE DOCTRINE

Businessmen with their business accumen soon realised the hardship the rigidity of the ultra vires doctrine was causing them and did not simply want to rely on the liberal decisions of the Courts but went on to specifically create ways of circumventing the doctrine. The first device was to set out in the Memorandum extremely wide, diverse and imprecise objects and powers covering every conceivable activity which the company might wish to undertake either immediately or at a future time. This it was considered, at least makes it less hazardous to enter into transactions with the company, for the likelihood of their being ultra Vires is remote. Hence Memoranda have come to contain statements of some twenty to thirty objects and ancillary powers which might be needed to accomplish them.

The second attempt of by-passing the doctrine was to include in the object clause, clauses whose aim was to ensure that none of the enumerated objects would be construed or interpreted restrictively, by for example,

being read to other objects. Nevertheless, a similarly worded clause in Cotman v. Brougham[15] was held effective for purposes of the ultra vires rule so as to render intra vires for Essequibo Rubber Company to under write shares in Anglo-Cuban Oil Bitumen Company in exercise of a general p wer given under the objects clause to underwrite.

The third method by which the doctrine has been rendered worthless has been the practice of describing what merely used to be powers as objects of the company. This practice also received judicial approval in Cotman v. Brougham.[16] Lord Parker also made favourable comments in this respect.[17]

Notwithstanding the above decision, an attempt was made to limit the efficacy of such widely drawn object clauses by the application of the main objects rule. Thus in Re Introductions Ltd.,[18] where the issue arose as to whether the company had an independent power to borrow money. The English Court of Appeal held that the Company had no power to borrow except for the purposes of effecting or perpetuating its objects.[19]

While this decision attempts directly to put a limitation on the practice of specifying powers as objects, it has been criticised in Australia as being contrary to the actual decision and reasoning of the House of Lords as laid down in Cotman v. Brougham.[20] In view of the fact that it is a lower court's decision in comparison to Cotman v. Brougham, it may be argued that the law on this point is still as laid down by the House of Lords. It therefore follows that the practice of specifying powers as objects drawn up a

multifarious objects clause and insisting that each clause in the objects clause should be independently interpreted have become acceptable in Law. Nevertheless, the view in Cotman v. Brougham, however, may still create doubts in view of the earlier decision in Re David Payne & Co. Ltd.[21] While the decision seems to support the view in Cotman v. Brougham that a power to borrow can exist on its own independently of the other objects of the Company, the remarks made by Buckley J. appear to support the reasoning in Re Introductions.[22]

Further attempts at limiting the practice of specifying powers as objects by clearly distinguishing what are powers and objects properly so called which is evident from the reasoning both in Re Introductions and Re David Payne[23] appears to have been followed in the relatively more recent case of Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation[24], where Vinelott J. stated that:

> "Provisions though described as "objects" can be seen on Construction of the Memorandum of Association as a whole and notwithsatnding a 'Separate object Clause' to be powers to be exercised in the furtherance of (the) purposes and to, or may in some circumstences limit the powers that would otherwise be implied as reasonably incidental to them".

One will therefore, agree with the views of Dr. Bekibinga[25] that the treatment of a company's powers as an object for the purposes of the ultra vires doctrine in Cotman v. Brougham, Re Introductions and Re David Payne & Co. Ltd.,[26] clearly shows inconsistency at each level of the English Court's hierarchy.

The most conspicuous attack on the effectiveness of the doctrine is the practice of inserting objects clause

authority to the company itself or its directors to determine the limits to which the Company's objects may from time to time be extended. A practice regarded by Gower[27] as the "high point in this point in this development and it is clearly found in Bell Houses Ltd v. City Wall Properties Ltd.[28] In this case the plaintiff relied on sub-clauses 3(c) of the Memorandum which stated:

> "To carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the Company inconnection with or ancillary to . . . the general business of the Company".

At the lower Court,[29] Mocatta J. upheld the defendant's plea of ultra vires, but this decision was reversed by the English Court of Appeal which held that clause 3(c) gave the company the necessary power. A remark which virtually destroyed the doctrine of ultra vires.[30]

It can be safely concluded that the effect of leaving to the directors the sole discretion to determine what may be regarded as within the company's objects is to allow companies virtually to carry on any business which the directors may think of.

However, it should be noted on this point that the law in England is different from what applies in Nigeria. The position in Nigeria is laid down in the Supreme Court case of Continental Chemist Ltd. v. C.A. Ifekendu.[31] The main issue in this case was whether a pharmarceutical Company could validly carry on the busines of running a hospital. The Supreme Court held that the words:

> "To enter into any business which the directors think will increase the profits of the Company are indefinite and useless".

And that it did not give power to the Company to run a hospital. To this extent a clause like the one in Bell Houses and the Ifekendu case may be ineffective in Nigeria for the purpose of the ultra vires rule.

4.4 WHO MAY INVOKE THE DOCTRINE?

The ultra vires doctrine as already observed from the cases of Ashbury Railway Carriage v. Riche and Cotman v. Brougham[32] was designed to give protection to the members and Creditors by confining the company to the objects stated in the Memorandum of Association. The issue now to be considered is whether the doctrine should only be invoked by the company or whether a third party dealing with the company may also plead the doctrine. It has been held by Megarry J. in Bell Houses v. City Wall Properties[33], that if a third party or defendant in this case were to be sued by the company on a transaction, he is entitled to plead that the contract on which he is being sued is ultra vires the company. It therefore follows that the effect of the Ultra Vires doctrine is that it does not only operate against the interest of other parties, but also that of the Company. This approach is in line with the decision in Continental Chemist Ltd v. Ifekandu[34], where the Court accepted the defendants plea of ultra vires. This view is a contrast with the position in the Canadian case of Caledonia Community Credit Union Ltd. v. Halimand Feed Mill Ltd.[35], where it was held that a borrower cannot allege that a loan made by a company to him was ultra vires the lender.

The question now to be examined is whether the third party has any rights and remedies on an ultra vires transaction in which a purported tranfer is made. It has been

held in Blackburn Building Society v. Cunliffe Brooks & Co.,[36] that if a company has borrowed money ultra vires it, then the lender is entitled to have the loan treated as valid in that the money is applied to discharge the company's legal debts and obligations.

While in Re Jon Beauforte,[37] where the issue arose as to proof of a debt lodged in the liquidation of the company for the supply of Coke to the company, and Counsel for the supplier of the Coke argued that the claimants were unaware of the purpose for which the Coke would be used and that it was possible that the Coke could be used for an intra vires purpose. The plea failed because the Coke had been ordered on note headed "Veneered Panel Manufacturers". The decision would not have been otherwise in view of the fact that all persons dealing with the company are presumed to have notice of the limitation of the Company's powers as contained in the Memorandum. The approach in this case finds support in Re Wrexham, Mold & Connah's Quay Railway Co.[38]

The Nigerian stand on this point is very clear from Afolabi v. Polymera Industries (Nig) Ltd.,[39] which seem to suggest that if a person contracting with a company or its representatives makes a Contract, which to his knowledge, actual or constructive is ultra vires the company, he cannot enforce it. This is an approach which is in line with Re Jon Beauforte Ltd. It may, however, be safely concluded that as far as a claim for restitution is concerned, the position taken by the Courts in Blackburn Building Society Case and in Re Jon Beauforte have not been consistent.

Nevertheless, Sinclair v. Brougham[41], thus appears to be a compromise between the position taken by the Courts in Blackburn Building Society Case and Re Jon Beauforte Ltd.[42] In that case, the House of Lords said that a lender in an ultra vires transaction cannot bring an action in contract or quasi contract for the repayment of the money lent. But he may claim restitution of money which can be identified by a tracing order either at law or in equity. Whereas, in the Ifekandu's Case[44], the Supreme Court of Nigeria accepted the defendant's plea of ultra vires without saying whether there were any equitable remedies available to the aggrieved company.

4.5.1 ULTRA VIRES DOCTRINE IN GHANA

The Ghana Company's Code provides that a company can carry on any business authorised by its Regulations and should not exceed the powers conferred upon it by its Regulations or the Code. Thus shareholders and debenture-holders are allowed to bring actions to restrain the Company from carrying out Ultra Vires transactions. This provision also enjoins the Courts to protect third parties where the contract remains executory and action is taken by a member or debentureholders to restrain the company from performing it so as to reach a just conclusion without having to engage in tortuous reasoning[46].

The Code[47] finally abolishes the doctrine of constructive notice as it relates to public documents, except as required by Section 118 of the Code relating to particulars in the register of charges.

This Section modifies the ultra Vires doctrine as suggested by the Cohen Committee to some extent. What

then is the extent of this reform in Ghana?

Section 25 of the Ghana Company's Code does not in any way invest in the Company all the powers of a natural person and therefore does not completely abolish the Ultra Vires rule but merely restricts its operation. Companies are not free to carry out any business outside their objects, as a shareholder or debentureholder of the company can still bring an action to restrain a proposed ultra vires transaction.

Secondly, Section 25 of the Company's Code does not wholly exclude the possibility that third parties may be affected if the contract remains executory, as an action may be brought by either a shareholder or debentureholder to enjoin the company from performing its own part of the contract.

Thirdly, Sections 25 and 141 of the Ghana Company's Code may be stated thus:-

(i) The Code has provided the same legal status to the Company and third parties as individuals in contractual relation. But as far as the objects clause are concerned, they continue to operate between the company and its shareholders or debentureholders as to the powers of the directors.

(ii) Where the contract is executed, no shareholder or debentureholder can afterwards bring an action that the transaction was Ultra Vires the powers of the directors.

(iii) Where harm will be caused to the third party where the contract remains executory and an action is

brought by a shareholder or debentureholder to restrain the company from performing it, the Courts are given powers to award compensation for any damage or loss sustained by reason of setting aside or prohibition.

(iv) Section 25 does not modify the law of agency as it applied to companies in view of the fact that a company can only be bound by the acts of its directors where they have authority to enter into the transaction, and as long as the doctrine of constructive notice does not apply to public documents, the third party is fully covered.

The net effect of these provisions in the Ghana Company's Code seem to be the restoration of the ultra vires rule to its original purpose, that is the protection of the shareholders and creditors of the company. In addition to protecting the unwary third party to whom in a typical African country like Ghana, the idea of actual or constructive notice is observed as a luxury because of the non-challence, naivety in business transactions and the high rate of illiteracy.

4.5.2 VIEWS ON THE REFORM OF THE ULTRA VIRES DOCTRINE

The muddled up nature of the rule, its inconsistency and apparent unworthiness of its application has called for either its modification or its total abolition. The Cohen Committee[48] regarded the doctrine as serving:

> "No useful purpose but is a ... source of unnecessary prolixity and vexation".

The Committee, therefore, recommended that as to third parties, a company should have all the powers of a natural person and that the Memorandum should operate

purely as a contract between the Company and its members as to the powers exercisable by the directors.

However, the Jenkins Committee[49], on the other hand has cogently argued that the total abolition of the ultra vires rule would mean giving to the Company, all the powers of a natural person as regards third parties. What this means ineffect is that all the wide powers to be invested in the Company would be exercisable in their entirety by the directors. The Committee therefore, considered that this would be a retrograde step in view of the present desire that members should be given greater and more effective control over the activities of directors. Accordingly, they recommended that the ultra vires doctrine should be retained, but that actual knowledge of the contents of the Memorandum and articles should not deprive a third party of his right to enforce the contract if he:-

> "Honestly and reasonably failed to appreciate that they had the effect of precluding the Company (or any director or other person on its behalf) from entering into the contract in question".[50]

They also recommended that the constructive notice rule should be abolished.[51]

While Gower comments favourably on the Jenkins Committee recommendations that if implemented the sting would have been removed from the Ultra Vires doctrine,[52] Pennington regards them as being quite unsatisfactory.[53] He submits that:

> "instead of getting rid of the unnecessary complexities in the Law ... the (Jenkins) Committee would allow them to continue and would simply add to them by creating additional ways of enforcing an Ultra Vires contract against the Company".[54]

Pennington, therefore subscribes to the view that the Ultra Vires doctrine should be completely abolished. In his own words:-

> "A more speedy way of achieving justice would be to abolish the Ultra Vires rule altogether as a ground for invalidating contracts and dispositions of property. It would then operate only within the Company as between directors and shareholders, by enabling shareholders to restrain directors from entering into proposed Ultra Vires contracts, and enabling the Company to recover damages for losses sustained as a result of the Ultra Vires acts already carried out".[55]

In line with the recommendations of the Cohen Committee, Section 52 of the English Companies Act 1948 was enacted to enable companies to alter their objects in certain circumstances, provided certain conditions were fulfilled. Similar provisions are also contained in the Nigerian Companies Act 1968 whereby companies are allowed to alter their Memorandum and Articles of Association by passing a special resolution to that effect.[56] This to some extent has mitigated the harshness of the rule.

However, as it has been rightly pointed out by Professor Gower that:-

> "Making it easier to alter objects or other provisions in the Memorandum does not protect third parties or the Company unless steps are taken before an otherwise Ultra Vires transaction is entered into."

4.5.3 REFORMS OF THE ULTRA VIRES RULE IN NIGERIA

Following the recommendations of the Cohen Committee as first suggested that the Ultra Vires doctrine should be totally abolished in Britain, Dr. Bakibinga[57] and Dr. Ayua[58] have also strongly advocated for the total abolition of the Ultra Vires doctrine in Nigeria as the most realistic solution to the stigma and dilemma posed by its continued existence.

Dr. Ayua,[59] while subscribing for the total abolition of the Ultra Vires doctrine, seems to realise the danger this will pose to the company as this will leave the destiny of the company absolutely in the hands of its directors. He has therefore, suggested certain safeguards against this danger which he thinks will effectively check the excessive powers of the directors.

(i) That in a limited company, a provision should be made in the Memorandum making the director's liability unlimited, this being subject to the articles by a Special Resolution[60] and their written consent.[61]

(ii) That an action could be brought against the directors for breach of warranty of authority to recover any loss.

(iii) Dismissal of the directors by an ordinary resolution requiring special notice.[62] But regretably such dismissal must not deprive a person removed of his compensation or damages payable to him in respect of the termination of his appointment as director under Section 175(6) of the Nigerian Companies Act 1968.

It is submitted with due respect to the learned author that these suggestions are not convincing enough to require the complete abolition of the ultra vires rule from the Statute book in Nigeria for the following reasons:

First, a provision in the Memorandum which makes the liability of directors of a Limited Liability company unlimited will go a long way to discourage many people from accepting the post of directorship of a company. Since many prospective directors will not want their personal money or properties to be used to settle the company's debts whenever the company incures liabilities and is unable to settle them.

Secondly, such a provision will discourage Nigerians from incorporating companies and will thereby have an adverse effect on the Nigerian Enterprises Promotion Decree, 1977 popularly known as the "INDIGENISATION DECREE" which seeks to encourage Nigerian businessmen to invest in large scale businesses and thereby become masters of the economic destiny of their own country.

Thirdly, it may be argued that the dismissal of a director for entering into such unauthorise transaction on behalf of the Company will not solve the problem. This is in view of the fact that the company may not afford to dismiss every director who enters into such unauthorised transactions on its behalf as this will involve huge compensation being paid to such directors where they hold a service contract with the company. As such payment of compensation may cripple the company.

Finally, the proliferation of the rule of Ultra Vires has no doubt brought enormous difficulties to the investors, creditors and third parties dealing with the company at one time or the other. The attempt by businessmen to circumvent the rule and the futile attempts by the Courts to preserve the doctrine has made the application of the ultra vires rule more inconsistent and vulnerable to abuses. What is presently required is reforms and not its complete abolition. Although the few reforms that have been implemented and those contemplated have not gone a long way to rescue it from further disfigurement, those jurisdictions that have abolished the doctrine completely, may have done it out of frustration due to the inconsistency of its application not because they are unaware of the originality of the rule and the consequences of abolishing the rule.

It is however, submitted that the noble objectives that the doctrine sought to protect originally should be restored. Any meaningful legislative reforms as far as Companies are concerned must take care of the investors, the creditors and third parties dealing with the Company.

It is only twenty six years since Nigeria had her Independence and company Law and its management are still at their experimental stages when compared with Britain and America where company formation has been in existence for the past two hundred years or more. We must learn to walk before we learn to run in this aspect of the law.

To abolish the Ultra Vires doctrine completely will have the effect of liberalising the company to participate

in any type of contemplated or conceivable business which the directors may think of and this is pregnant with social problems. We are however, not unaware of cartels, trusts and syndicates in the United States of America and their obnoxious activities all having their origin in companies that carry on unlimited activities and have become so powerful that they can sometimes control and initiate the policy of their governments. This is evident by the on going anti-trust legislation and probes in America.

The best alternative for Nigeria will be a modification of the ultra vires rule by going back to the recommendation of the Cohen Committee[63] which sought to prevent losses accruing to the investors and the creditors, and at the same time to save the third party from the trap that he often innocently falls into through the enforcement of this doctrine. Thus the Ghana Company's Code[64] is the only legislation that has entrenched this provision and it is hoped that other African countries will follow same.

4.5.4 ULTRA VIRES RULE IN OTHER JURISDICTIONS

The Jenkins Committee as earlier mentioned recommended the complete abolition of the constructive notice rule as it applied to third parties dealing with the Company. But regretably, this was not included in subsequent English Company Acts. It was only after Britain was admitted into the European Economic Community that the European Communities Act Section 9(1) took one of the rule of constructive notice. Section 9(1) of the

European Communities Act, 1972 now has an equivalent provision under Section 35(1) of the English Companies Act 1985.

Section 9(1) of the European Communities Act 1972 stipulates that:-

> "In favour of a person dealing with the Company in good faith, any transaction decided on by the directors shall be deemed to be one which it is within the capacity of the Company to enter into, and the power of the directors to bind the Company shall be deemed to be free of any limitation under the Memorandum or articles of association, and a party to a transaction so decided on shall not be bound to enquire as to the capacity of the Company to enter into it or as to any such limitation on the power of the directors, and shall be presumed to have acted in good faith unless the contrary is proved".

What can be deduced from the provisions of Section 9(1) of the above Act, is that it does not in any way invest in the company all the powers of a natural person and therefore does not abolish the ultra vires rule but merely restricts its operation. Companies are not free from lack of capacity to do acts outside their objects; a shareholder can still restrain a proposed ultra vires transaction; and directors may still be liable where they misapply the Company's property via an ultra vires transaction.

Secondly, a third party may still plead Ultra Vires by way of defence. The Section may be expressed thus:-

(i) The person must have been dealing with the Company in good faith; good faith is not defined by the Act but it is for the company to establish that the third party

was not dealing with it in good faith. The burden on the company will be discharged if it establishes that the party was put on notice of the agent's want of authority or of facts that would vitiate the contract or transaction. Once the Company discharges this onerous burden, then the Ultra Vires rule applies. But if the Company falls short of discharging this burden, it loses its defence and,in favour of the party, the transaction will be deemed to be one which is within the capacity of the Company to enter. It may be pointed out that Section 9(1) does not expressly state the position where the third party has read the Company's Memorandum or articles but does not appreciate their signifance. This however, was covered by the Jenkins Committee recommendation that actual knowledge of the contents of the Memorandum and articles should not preclude a person from enforcing a contract if he honestly and reasonably failed to appreciate that they had the effect of precluding the company or its agent from entering into the contract in question.

(ii) He must be dealing with the company. There is no distinction made of 'insiders and outsiders' and therefore, of shareholders dealing in their capacity as such and in their capacity not as shareholders. Nothing in the Act limits to outsiders the advantages of the provisions, but a person who is in a position to have actual knowledge of the contents of the public documents may be held to be in breach of good faith where he deals with the company outside its objects. It would seem that "dealing with" limits Section 9(1) to commercial transactions only so that the gratuitous payment cases, such

as in Parke vs. Daily News Ltd.[65], would not be decided differently applying Section 9(1).

(iii) That the transaction was decided on by the directors:- The third party may lose protection if the Company established that the directors lacked authority to bind the company. It may be argued that the directors can only mean directors acting as a board since the board would normally be required to confirm acts within the powers it delegated to individuals. Moreover Section 9(1) does not say decided on by or on behalf of the director's. There will be no protection to the third party if the board does not ratify or confirm the transaction.

It is submitted that it would be absolutely difficult for the other party to know whether a transaction he engaged in with the company has been to the board and approved unless of course he demands for a certified copy of the resolution of the board. This means he will be dabbling into the company's internal arrangement which the rule in Royal British Bank vs. Turquand[66] relieves him of the need to do. If the directors have decided on a particular policy, an act done by a corporate official in pursuance of that policy ought to be one decided on by the directors. This, it is submitted, covers the situation where the directors, though not properly elected are exercising powers of the directors.[67] Again, once the directors have determined on a particular policy, any action by a corporate official implementing that policy should be treated as a 'transaction decided on by directors'

This must be noted does not refer to a corporate objective but will afford greater protection to persons dealing with Companies and also give some effect of Section 9(1).

Finally the effect of Section 9(1) of the European Communities Act, 1972 has been very encouraging for the following reasons.

Firstly, the provision does not affect the Ultra Vires rule as far as it relates to internal corporate affairs. Hence a shareholder could still enjoin a Company from entering into an Ultra Vires transaction or from making an ultra vires distribution of the property. But such relief would only be available where the Company has not entered into any binding contractual relationship. Also if directors enter into any ultra vires transaction they would remain in breach of their duty to the Company.

Secondly, Section 9(1) does not stop a member from sueing to restrain a Company from entering into an Ultra Vires transaction, nor does it protect the directors who entered into the ultra vires transaction - they still remain in breach of their duty to the Company.

Thirdly, Section 9(1) does not modify the law of agency as it applied to Companies, since a Company can only be bound by the acts of its directors where they have authority to enter into the transaction, and as long as the doctrine of constructive notice applies to the Memorandum and Articles, the third party may not be fully covered. The point would be clearer if public documents were referred to in place of the Memorandum and Articles

of Association so as to abolish constructive notice in relation to all transactions.

From the above discussions on Section 9(1) the cumulative effect is that the provision only partially curtails the effect of the ultra vires rule as it affects third parties acting in good faith and when dealing in authorised transactions by the directors. The vistages of this doctrine still continue to exist in Britain today..

Also in America, Section 7 of the Model Business Corporation Act[68], provides that:-

> "No act of a Corporation and no transfer of real or personal property or by a Corporation shall be invalid by reason of the fact that the Corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity may be asserted".

(a) By a shareholder bringing an action against the Corporation to restrain it from performing its own part of the contract where it still remains executory and the parties to the contract are the same parties to the proceedings. Thus if the Court deems it necessary it may set aside the performance of such contract on equitable grounds and award compensation for the loss or damage sustained by either of them which may result from the action of the Court in setting aside the performance of such contract.

(b) By the Corporation bringing an action whether acting directly or indirectly or through a receiver,

trustee, or other legal representatives, or through shareholders in a representative suit, against the incumbent or former officers or directors of the Corporation.

(c) By the Attorney-General bringing an action as provided in this Act, to dissolve the corporation or restraining the Corporation from the transaction of unauthorised business.

This provision in the Model Business Corporation Act,[69] does not seem to give the company all the powers of a natural person. It fully maintains whatever protection to the members the Ultra Vires rule may provide, while at the sametime preserving it from causing hardship to third parties. Where a contract remains executory, action may be taken by a shareholder, or the Attorney-General to enjoin a company from performing it while the Courts are enjoined to award compensation to third parties where they are affected in order to reach a just conclusion.

Thus a company under this provision has as regards third parties the same powers as an individual but the objects clause continue to operate as a contract between the Company and its members to the powers exercisable by the directors.

It seems that this provision in the Model Business Corporation Act is similar to Section 25 of the Ghana Company's Code 1963, in that it partially abolishes the Ultra Vies rule as it affects third parties but it continues to operate between its members and the company. Where the ultra Vires rule will cause hardship to the third party,

the Courts are enjoined to award compensation for damages or loss resulting from the setting aside of the performance of such contracts so as to reach a just conclusion.

The only difference between the Ghana Company's Code, 1963 and Section 7 of the Model Business Corporation Act, is that both shareholders and debentureholders are allowed to bring actions to restrain the company from carrying out the ultra vires transactions under the Ghana Company's Code. Whereas under the Model Business Corporation Act this right is given only to shareholders.

The most far reaching changes in the ultra vires doctrine have taken place in Iowa and Canada. Section 49 (Articles of Incorporation) Iowa Business Corporation Act, provides:

> "That articles of incorporation shall set forth .... 3. Either
>
> (a) the purpose or purposes for which the corporation is organised;or
>
> (b) that the corporation shall have unlimited power to engage in, and to do any lawful act concerning, any or all lawful business for which corporations may be organised under this Act".

In the same vein, Section 15(1) of the Canadian Business Corporation Act, 1975 (Ontario) provides that a corporation has the capacity, rights, powers and privileges of a natural person.

Furthermore, Section 16(2) of the same Act provides that:

> "No act of a Corporation is invalid by reason that the act ... is contrary to its articles or this Act".

The partial curtailment of the ultra vires doctrine in Ghana may be contrasted with the far reaching measures taken in Canada and Iowa.

Section 15(1) of the Canadian Business Corporation Act 1975 and Section 49 of Iowa Business Corporation Act, 1969 have effectively abolished the ultra vires rule in so far as it applied to Canadian Federally incorporated companies and corporations in Iowa respectively. These Sections provide that a corporation has the capacity, rights, and privileges of a natural person. Although Subsection (2) of Section 16 of the Canadian Business Corporation Act, provides for restrictions on powers in the corporation's articles and stipulates that those restrictions shall not be contravened, subsection (3) of the same Section undermines the effects of such contraventions by providing:-

> "No act of a Corporation ... is invalid by reason only that the act or transfer is contrary to its articles or this Act".

It is therefore clear that the effect of the Canadian and Iowa Business Corporation Acts, though recognising the need to check corporate capacity is to abolish the Ultra Vires doctrine while maintaining a remedy for interested parties to enforce any existing articles or by-laws of the corporation. The grant to corporations in these two jurisdictions of natural capacity has the effect of eliminating the need for multiferious objects clauses.

This is unlike in Ghana where the ultra vires rule still operates between the company and its shareholders or debentureholders in the bid to get rid of transactions being declared ultra vires and thus limiting the powers of the company.

FOOTNOTES

1. See Law (Miscellaneous Provisions) Act (Federal) S. 45, the Interpretation Act, 1964 (No. 1 of 1964) S. 28, Law (Miscellaneous Provision) Law (Lagos Laws 1973 Cap. 63), Law of England (Application) Law (W.R.N. Laws Cap. 60 1959) High Court Law (N.N. Laws 1963 Cap. 49) SS. 28, 29 High Court (E.N. Laws 1963 Cap. 61) S. 15.

2. See S. 15(1) of the Canadian Business Corporation Act, 1975.

3. Nigerian Companies Act 1968, No. 51 of 1968, Companies Acts 1948 to 1976 (United Kingdom); Ghana Company's Code 1963, Act, 179 of 1963.

4. Ashbury Railway Carriage Co. Ltd. v. Riche (1875) L.R. 7 H.L. 653.

5. A.G. v. Great Eastern Railway [1880] App. Cas. 473. H.L.

6. Cotman v. Brougham [1918] A.C. 514, 520 H.L.

7. Cohen Committee report para 11, cited by the Jenkins Committee (1962) para. 35.

8. Royal British Bank v. Turquand (1856) 6E & B. 327; 25 L.J. Q.B. 317.

9. Sutton's Hospital Case (1612) 10 Co. Rep. 19, 23a.

10. Jenkins v. Pharmaceutical Society [1912] 1 Ch. 392.

11. Supra note 4, for a brief history of the rule see Gower: Principles of Modern Company Law, Stevens & Sons, London 4th ed. 1979) pp. 162 - 165.

12. Per Bowen L.J. in Hutton v. West Cork Railway Co. [1883] 23 Ch.D. at p. 673.

13. [1969] 2 All E.R. 1185, where it was held that an act of the Company which is within its express objects is intra vires the Company whether or not it benefits the Company.

14. Note Fitzigerald "Clarifying the tests laid down in Re Brehens" where Buckley L.J. indicated that a limitation on powers expressly provided for in a Company's objects, to the effect that they must benefit or promote the prosperity of the Company was irrelevant. (30th July, 1980 unreported) noted in 1981 2 Company Lawyer 71.

15. Supra note 6.

16. Ibid.

17. Ibid p. 520, where Lord Parker stated in this respect: "... experience soon showed that persons who transact business with Companies do not like having to depend on inference when the validity of a proposed transaction is in question. Even a power to borrow could not always be inferred, much less such a power as that of underwriting shares in another Company. There thus arose the practice of specifying powers as objects, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be specified".

18. [1969] All E.R. 887 C.A.

19. Ibid. p. 889, Harman L.J. stated that "... a power or an object conferred on a Company to borrow cannot mean something in the air; borrowing is not an end in itself and must be for some purpose of the Company and since this, borrowing was for an Ultra Vires purpose that is an end of the matter".

20. Supra; See Re Tivoli Freeholds Ltd. (1972) V.R. 445, 465.

21. [1904] 2 Ch. 698 Ch.D. & C.A., where Buckley J. held that the lending Company in this case was entitled to enforce the repayment of the loan even if the purpose was improper.

22. Supra note 18.

23. Supra.

24. (1982) 3 The Company Lawyer 123 at p. 125.

25. Dr. D.J. Bakibinga: "The Utility of the Ultra Vires Doctrine in Company Law: An Appraisal of the Anglo Nigerian Position". (1983) 1 A.B.U. L.J. at p. 114.

26. Supra.

27. L.C.B. Gower, Principles of Modern Company Law. (Stevens & Sons, London 4th ed. 1979) p. 166.

28. [1967] 2 All E.R. 674 C.A.,See also Wedderburn (1966) 29 M.L.R. 673. The case has been followed in Canada in H. & A Logging Co. Ltd. v. Random Service Corpon Ltd. (1967) 63 D.L.R. (2d) 6.

29. [1957] 3 All E.R. 427. Q.B.D.

30. [1967] 2 All E.R. 674 at p. 687 C.A.

31. [1967] 1 All N.L.R. 1 (Nig) S.C.

32. Supra.

33. Supra note 29. Note that the plea of Ultra Vires by a third party was raised without objection in Charterbridge Corporation Case, Supra Note 13.

34. Supra note 31

35. (1974) 4 D.L.R. 3 (d) 376.

36. [1882] 22 Ch. D. 61 C.A.

37. [1899] 1 Ch. 440 C.A. (47); [1914] A.C. 398 H.L (48)

38. Report on the Company Law Committee (Comnd 1749, 1962 Rep. 1973) Para 41 to 42.

39. (1964)(2) A.L.R. Comm. 205.

40. Supra note 37.

41. Report of the Cohen Committee on Company Law Reform (Cmnd 6659) (1945) Para. 12.

42. Supra note 36

43. Supra note 37

44. Continental Chemists Ltd. v. Ifekandu [1965] 1 All N.L.R. 1 (Nig) S.C.

45. S. 25 Ghana Company's Code 1963 Act 179 of 1963.

46. Cunliff Brook & Co. vs Blackburn Benefit Society [1883] 22 Ch. D. 61; Reversion Fund v. Maison Cosway Ltd [1913] 1 K.B. 364 C.A; Sinclair v. Broughem [1914]. A.C. 398 H.L.

47. S. 141 Ghana Company's Code 1963, Act 179 of 1963.

48. H.M.S.O.. Cmnd 6659 (1945) Para 12.

49. H.M.S.O. Cmnd. 1749 (1962) Para. 35 - 42

50. Ibid.

51. Really, if a transaction is Ultra Vires, it is void ab initio because the Company lacks the legal capacity to enter into such a transaction. Knowledge or ignorance of the legal incapacity is irrelevant because the invalidity is in no way at all affected by the state of the mind of the parties. To this extent the constructive notice rule is a Superfluous one and should therefore be abolished.

52. Gower: Principles of Modern Company Law, (Stevens & Sons London, 3rd ed. 1969) p. 98.

53. Pennington: Company Law (Butterworths London 3rd ed. 1973) p. 107.

54. Ibid.

55. Ibid.

56. SS. 7 and 12 Nigerian Companies Act 1968, No. 51 of 1968.

57. Dr. D.J. Bakibinga: "The Utility of the Ultra Vires Doctrine in Company Law. An Appraisal of Anglo - Nigeria position" (1983) Vol. 1 A.B.U. L.J. 110 at 121.

58. Dr. I. Ayua: Nigerian Company Law (Graham Burn Press Bedfordshire U.K. 1984) p. 49.

59. Ibid.

60. Ibid.

61. S. 194 Nigerian Companies Act 1968, No. 51 of 1968.

62. Ibid S. 22.

63. H.M.S.O. Cmnd 6659 (1945) Para 12.

64. S. 25 Ghana Company's Code, Act 179 of 1963.

65. [1962] Ch. 927.

66. Royal British Bank v. Turquand (1856) 6E & B327.

67. Mahoney v. East Holy Ford Co. (1875) L.R. 7 H.L. 869; See also Per Diplock J. in Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B. 480 at 506.

68. S. 7 of the American Bar Association's Model Business Corporation Act 1971.

69. Ibid.

70. S. 49 (Articles of Incorporation) Iowa Business Corporation Act 1969.

CHAPTER FIVE

DUTIES OF DIRECTORS: STATUTORY RESTRAINTS ON DIRECTORS POWERS AND ENFORCEMENT OF MEMBER'S RIGHTS

5.0 INTRODUCTION

The aim of this chapter is to examine briefly provisions in the Nigerian Companies Act 1968 and the Ghana Company's Code 1963 to ascertain whether director's fiduciary duties are owed only to the company alone or they also apply to the individual shareholders. It is also intended to examine the directors duties of care and skill under the two laws.

Furthermore, to examine the extend to which both the Nigerian Companies Act 1968 and the Ghana Company's Code 1963 have attempted to control the activities of directors while managing the company's business.

Finally, to examine the extend to which individual members may enforce their rights either against the company or on its behalf. And also to examine new changes that have taken place in other jurisdictions in regard to corporate management.

An important feature of corporate form of business is that a centralised management composed of directors represent the collective interest of all the members. Thus the directors are generally charged with the responsibility of managing the business of the company under an article similar to Article 80 of table A.[1] However, judicial decisions and experts on company law have failed to reach

a concensus on the issue. We are not directly concerned with the final outcome of the debate in this thesis but it will suffice to briefly state the views on the issue.

Professor Gower,[2] subscribes to the majority view that,

> "the modern rule, therefore, is that under an article in the terms of Article 80 of Table A, the members in general meeting cannot give directions on how the company's affairs are to be managed, nor can they over-rule decisions come to by the directors in the conduct of its decisions".

This view is supported by the judicial decisions in Automatic Self Cleaning Filter Syndicate Company Ltd v. Cunninghame,[3] where the court held that where the management of the company is vested in the directors it is the directors who can exercise these powers. And also in Shaw (John) & Sons Salford Ltd v. Shaw,[4] where the court expressly stated that:

> "if powers of management are vested in the directors, they and they alone can exercise these powers. They cannot themselves usurp the powers which by the articles are vested in the directors anymore than the directors can usurp the powers vested by the articles in the general body of shareholders".

Similarly, in Scott v. Scott[5] where the relative powers had been delegated by the articles to the directors, it was held that resolutions of a general meeting which may be interpreted either as directions to pay interim dividend or as instructions to make loans were nullities. That until the powers were taken away by an amendment of the articles, the members in general meeting could not interfere with their exercise.

Furthermore, in Omega Estates Pty Ltd. v. Ganke,[6] the court also held that article 80 type of article vests power exclusively in the board.

However, the minority view is that article 80 of Table 'A' does not place such wide powers in the hands of directors. The members can still, even in a company with a similar article to article 80 of table A, interfere with the management of the affairs of the company. This view is based on the decision in Marshall's Valve Gear Co. Ltd. v. Manning Wardle Co.,[7] Where Neville J. held that the majority shareholders on the basis of the articles Marshall had the right to control the actions of the directors and thereby bring the action. Dr. Mukubwa,[8] takes the view that this case is limited to its special facts. That when a provision like article 80 applies and the directors will not start, proceedings for a wrong done to the company, the residual power to do so reverts to the general meeting.

Furthermore, the minority view also seem to find support in a dicta in Longan (Thomas) Ltd. v. Davis.[9(a)] In that case Warrington J. said that the company had reserved the right in a general meeting to tell the directors what to do. Dr. Mukubwa,[9(b)] takes a contrary view, He argues that in that case the actual court's decision was left out. According to him, in that case article 99 gave the directors powers to appoint one of their body to be the sole managing director of the company. By article 113 the business of the company was to be managed by the directors who might

exercise all such powers and do all such things as might be exercised or done by the company and were not by statutes or those articles directed or required to be exercised or done by the company in general meeting subject to the provisions of the statutes and those articles and such regulations as might be from time to time prescribed by the company in a general meeting. At an extraordinary general meeting of the company a resolution was passed that a named person should be appointed as sole managing director but the directors appointed a different person from the board as sole managing director. The court held that the powers of the directors subject to the resolution of the company related to the general management of the affairs of the company and not to the appointment of managing director or other matters especially placed under the control of directors by the articles and therefore the appointment of a different person as managing director was valid. However, he concedes to the fact that if the articles make the directors delegates of the general meeting, then the company would have reserved to themselves the right to tell the directors what to do.

Sullivan[10] a strong exponent of the minority view argues that there is nothing in the cases to support the majority view. In otherwords, the shareholders can tell the directors what to do in the management of the company. And refuses to agree with Lord Loreburn's interpretation of article 80

of table A as being less persuasive. But unfortunately he finds great difficulty in explaining away the case of Quin & Extens v. Salmond[11(a)] where article 75 of the articles provided that the business of the company should be managed by the directors and may exercise all the powers of the company subject to such regulations (being not inconsistent with the provisions of the articles) as may be prescribed in general meeting. The article stated that no resolution of the meeting of directors having its objects, inter alia, the acquisition or letting of certain premises should be valid if either Salmond or Extens dissented. The directors resolved to acquire and put to let various properties but Salmond dissented. An extraordinary general meeting was then held at which the shareholders by a majority passed similar resolution. The House of Lords, upholding the Court of Appeal, held that the shareholders resolutions were inconsistent with the articles and granted an injunction restraining the company from acting on them.

Having carefully considered the various cases cited and views expressed on both sides of the argument, it is my considered view that where an article similar to article 80 vests the powers of management in the directors, it is only the directors who can exercise these powers and cannot be told what to do by the shareholders in the general meeting for the following obvious reasons:

First, the minority view that article 80 of table A was not intended to give the directors exclusive powers in the management of companies has been disputed by most leading text books on the subject.[11(b)] Secondly, the supporters of the minority view have found great difficulty in explaining away cases like Quin & Extens v. Salmond[12] and Scott v. Scott[13] as carefully analysed by Plowman J. in Bamford v. Bamford.[14] His views of the cases were endorsed by the Court of Appeal.[15] Thirdly, while accepting that the members as shareholders own the company, determine what its constitution shall be by their statutory power to alter the memorandum and articles[16] and can remove its directors from office,[17] the directors once appointed in office exercise power delegated to them exclusively by the articles. They are not to be controlled by the members in general meeting nor subject to instructions from that source as to how they should manage the company. However, in exceptional situations where the articles confiding power over a certain matter to the directors exclusively of the general meeting and where the board is unable to act, the residual power to do so may revert to the general meeting.

Such situations may arise where the directors are in conflict amongst themselves as to be a deadlock and incapable of exercising the power[18] or where the number of directors has fallen below the number required for a quorum and the power of appointing new directors is given by the articles to the board. This residual

power of the company may also be used by the general meeting to authorize or ratify proceedings to enforce the company's rights where no directors had been appointed. In anycase, these exceptional circumstances should not be taken to mean that the directors and the general meeting have concurrent powers to manage the affairs of a company where the articles vest this power exclusively in the directors.

However, the directors in performing their duties are required to observe certain rules so that their personal interests do not conflict with those of the company thus causing loses to the company and unjustly enriching themselves.

5.1 DIRECTORS DUTIES NOT CODIFIED UNDER THE NIGERIAN COMPANIES ACT 1968

The most important difference between Nigerian Company Law and that of contemporary Ghana can be be seen in the duties of directors. Ghana Company's Code, codifies the duties of directors. But in Nigeria these duties have not been enacted into a single document.

Accordingly, the duties of directors in Nigeria have to be extracted from the Common Law and Principles of Equity which are applicable in Britain and those countries that have modelled their company Acts on the British System.

Olaweyin,[20] argues that it is widely accepted that there is a lack of precision in the definition

of directors duties. As the Companies Act expresly lays down certain duties on directors but it is by no means exhaustive in this aspect, the larger part of their duties and responsibilities having been determined by exhaustive and complex case law which does not find expression in the Act. Therefore, the codification of these duties is considered impracticable, as it would be very difficult to have statutory provisions in a comprehensive form cabable of covering every conceivable set of circumstances. This argument fails in view of the fact that France and those countries oriented in French Company Law have codified the duties of directors. It is therefore not impracticable to codify these duties.

Furthermore, enlightened opinion is generally against all attempts to produce an exhaustive definition of directors' duties, mainly because of the difficulties likely to be encountered were such an exercise to be undertaken. Therefore, any attempt to define the duties of directors more clearly would involve the risk that, since it would be impossible to define such duties exhaustively, there would be inevitable lacuna which might well make it more difficult to determine in any particular set of circumstances what these duties were.[21]

However, this objection did not influence Gower when he drafted a company's code for Ghana which also included the directors duties, He took into consideration the then proposed union between Ghana, Guinea and Mali, and thought it would be useless to expect that

those states with French-type Acts would ever contemplate adopting an English type Act which makes no sense without the further adoption of vast-body of English case law,[22(a)] Therefore, he suggested a Code for Ghana which would ensure uniformity of the laws in this field which he thought would be of enormous economic value to the African States. And moreover, French trained lawyers are accustomed to dealing with codes. Accordingly, if the law could be codified and made readily accessible and reasonably intelligble, uniformity would not be unattainable.

It is submitted that although directors duties have been enacted into a single document as the case now applies in Ghana, these duties can also be easily extracted from other laws by legal practitioners and judges.[22(b)] Even where these duties have been enacted into a single document, the Ghanian judges will still look up at English decisions and statutes for a more meaningful interpretation and guidance when faced with similar situations before them.[23] Be that as it may, the only slight difference is when it comes to the issue of laymen.

A layman in Ghana can easily pick up the Ghana Company's Code, go through the relevant provisions so as to ascertain what these duties are. This is not the same with his Nigerian counterpart who has to read the whole Nigerian Companies Act 1968, the articles of association and some relevant cases and

statutes before he can have a faint idea of what the directors duties are.

5.2 DIRECTORS AS FIDUCIARIES

Section 168 of the Nigerian Companies Act 1968 provides that every company registered on or after the commencement of the Act[24] must have at least two directors, but a company cannot have a sole director who is also the secretary to the company. This means that where the directors have been appointed, either by the articles or by casual vacancies they stand in a fiduciary relationship to the company. First, to exercise their powers bona fide for the purpose for which they have been delegated and for the benefit of the company as a whole. Where a decision of the directors is bound to benefit some members while affecting others adversely, the directors will have to consider what is fair between the two.[25] Secondly, they must not put themselves in a position in which their duties may conflict with their personal interests. As a director must not, without the consent of the company, make any profits out of his position in the company, beyond his agreed remuneration. Furthermore, a director is precluded from dealing on behalf of the company with himself and from entering into arrangements in which he has a personal interest conflicting, or which may conflict with the interests of those whom he has a fiduciary duty to protect unless the company affirms or adopts his acts, provided that such affirmation or adoption is not brought about by unfair or improper

means.[26] If he unjustly enricheds himself in breach of his duty, the company may bring an action for restitution to recover the amount involved.[27]

The legal position in Nigeria is that the duties of directors can be gathered from three different sources. The statutory duties imposed on directors are rather too numerous and detailed to enumerate here. It will be sufficient to mention that they relate to the keeping of registers and books of accounts,[28] making returns to the Registrar of Companies,[29] duties relating to meetings and notices[30] and duties relating to prospectus and issue of shares.[31] There are penalties[32] for their breach and, in certain instances, a breach will also create a personal liability. For this reason statutory duties act as a powerful restraining influence on the activities of directors. Similar duties are also found in the Ghana Company's Code.

The managerial duties of the directors include some of which have been imposed by the Nigerian Companies Act 1968. Such duties include transactions with the company,[33] dealing in company securities, purchase and sale of shares by directors.[34] Thus the managerial duties of directors in Nigeria and Ghana will be discussed under two heads, the fiduciary duties of loyalty and good faith and the duties of care and skill.

As earlier stated the law is that the directors once their appointments take effect[35] are fiduciaries and must therefore display the utmost good faith

towards the company in their dealings with it or on its behalf. This fiduciary duties are owed by each director to the company not withstanding the fact that a director cannot bind a company by his individual acts. The duties are owed to the company and the company alone not to the individual shareholders or the public. This common law principle is well illustrated by the much criticised decision in Percival v. Wright.[36] Here Swinfen Fady J. stating the policy for the decision had this to say:[37]

> "I am ... of the opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiation which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interest of the company..."

A careful examination of the above decision points to the fact that directors of a company owe no duty to the individual shareholders. The effect of the decision is that a director who has by reason of his office acquired in confidence a particular piece of information materially affecting the value of the securities of his company (or any company in the same group) will incur no liability to the other party if he buys or sells such securities without disclosing that piece of information.

However, this decision in Percival v. Wright[38] was criticised by the Cohen Committee[39] and has been rejected by the Jenkins Committee.[40] But in Allen v. Hyatt,[41] where the directors acted on behalf of the

shareholders, the court held that an agency has been created and granted a remedy.

This common law position that directors owe no fiduciary duty as such to the individual shareholders is capable of being abused and could easily work hardship on unsuspecting shareholders. Moreover, it is one which opens the way to directors who are so business minded to take advantage of their strategic position to unjustly enrich themselves at the disadvantage of the shareholders. And judging by past experience it is safe to assume that the Nigerian Courts are likely to follow English Courts in adhering to the principle without giving much thought to its flaws.[42]

Unlike the position in Nigeria, in Ghana this common law fiduciary duty has been specifically provided in the Ghana Company's Code. Under the code directors fiduciary duties are owed to the company and also to the individual shareholders. This is contained in section 205(a) of the Ghana Company's Code. The section states:

> "Not withstanding any provision in the Company's Regulations, a director shall not without the consent of the company in accordance with section 206, place himself in a position in which his duty to the company conflicts or may conflict with his personal interests or his duties to other persons, and in particular, without such consent a director shall not:
> use for his own advantage any money or property of the company or any confidential information or special knowledge obtained by him in his capacity of director".

Flowing from the above Ghanian provision, care has been taken of circumstances like those in Regal (Hastings) Ltd. v. Gulliver[43] that had the directors obtained the consent of the company in general meeting they could have retained the profit. Even where directors have received the consent of the general meeting, this will not bar recovery if the directors have broken their duties under section 203 to act bona fide for the benefit of the company. This means that where they have misappropriated the company's property or have acquired property for themselves when it was their duty, in the interests of the company to acquire it for the company or to give the company an opportunity of acquiring it, they must restore the property to the company together with any profits they may have made and ratification by the general meeting is ineffective.

Further, section 205(a) of Ghana Company's Code also takes care of situations like those in Regal (Hastings) Ltd v. Gulliver,[44] where there has been no misappropriation of corporate property or a corporate opportunity but merely use of corporate property or special information which has enabled the directors to make a profit.

Another possible area would be where directors, having learnt confidentially of a proposed take-over bid for the company's shares, buy up as many shares as they can at lower market price. Section 214

of the code gives the sellers of such shares a right to rescind the sale. They would have none at common law as seen in the case of Percival v. Wright.[45] Even where shareholders do not choose to exercise it, the company, unless it ratifies, can recover any profit which the directors may have made.[46]

The provisions of section 205(a) of the Ghana Company's Code are identical with the American approach designated as the 'special facts doctrine'. A doctrine described by Gower as the quodam federal rule flowing from Strong v. Repid.[47]

It has to be pointed out, however, that the doctrine does not extend to transactions entered into between directors and shareholders through the medium of a Stock Exchange. This is because it will be very difficult for the other party to establish that he was transacting with a director due to the method of settlement. Moreover, it may also be difficult for the other party to establish a case.[48] Thus in Godwin v. Agassiz,[49] where the directors of a company purchased the shares of a shareholder through brokers on the Boston Stock Exchange, the plantiff's argument that the purchase of his shares without disclosure to him of certain information known to the directors was a wrong against him was rejected by the court for lack of proof.

It is respectfully submitted that a provision similar to section 205(a) of Ghana Company Code which is identical with the American 'special facts doctrine' be included in the Nigerian Companies Act.

This will fill a serious gap in the law relating to directors fiduciary duties. The fact that each case has to be considered according to its own particular facts and circumstances will not only give the court a great deal of room in which to manoeuvre, but will also act as a pointer to any director who, by devising some new subtle means towards the achievement of that end, may be tempted to use his advantageous position at the expense of a shareholder.

5.3 DIRECTORS DUTIES OF CARE AND SKILL

It is with the directors' duties of care and skill that one finds the short comings of many directors rather shocking because many of them are ill equiped to tackle difficult problems of the modern companies. It has been observed that the interests of the shareholders are jeopardised not intentionally but out of mere ignorance.[50]

The power to appoint directors lies with the members and they are free to appoint anyone as a director, provided such a person is not legally disqualified. The Nigerian Companies Act 1968 and the Ghana Company's Code do not specify what qualifications a person should possess before he is appointed a director. And the result is usually that people are appointed directors not for any special qualification or business experience they may possess. In actual fact it is not unknown for people to be appointed directors even though it is clear that they have only the vaguest idea of the business

of the company.[51] As instances do occur where the real purpose of the appointment is to confer upon a child, wife or some other relations of the man who really runs the business some additional income by way of directors fees.[52] Sometimes it is for political connections.

But the legal position is that a director is liable to his company for negligence in conducting the affairs of the company on broadly the same principle under which an agent is liable to his principal for failure to exercise reasonable care in performing the agency.[53] Hence, today one of the most outstanding formulations of directors duties of care and skill is to be found in the leading case of Re City Equitable Fire Insurance Co. Ltd.[54] where Romer J. reduced the directors duties of care and skill into three propositions.

First, a director is expected to show no greater degree of skill than may reasonably be expected from a person of his knowledge and experience. This test is partly objective (the standard of a reasonable man), and partly subjective as ultimately everything boils down to the directors own personal knowledge as a yardstick. This does not gives solace to the shareholders at all.

Secondly, a director is not bound to give continous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings. Professor Gower,[55] takes the view that this proposition is

directed solely to holders of non-executive directorships from whom nothing is expected than attendance at meetings. Although it is said they ought to attend these meetings when ever they can, a director is under no duty to attend board meetings. Therefore if the day-to-day running of the company is in the hands of a managing director, the other directors are not under a duty to supervise his actions.[56] This situation is not satisfactory as shareholders may lose as a result of the absence of their opinions on business matters. In anycase, the only option left to the shareholders is to refuse to re-appoint such absentee directors whenever they seek re-election.

It, nevertheless appears that when ever directors attend, they must be attentive so that they can follow up and take active part in the discussions. Where a director was a party to a discussion where a particular line of action was taken, it may be possible to show that this led directly to the loss by the company as his acts can be specifically pleaded.[57] But it will be absolutely difficult to to show that had he attended, the action would have been different. Therefore the position is that while the law does not compel directors to attend meetings, it imposes a duty on them to be attentive at such meetings, with a view to ensuring that they contribute to the decisions on the management of the company.[58]

Thirdly, that in normal business practice, if the articles permit delegation to employees, a director, in the absence of grounds for suspicion,

is justified in trusting that official to perform such duties honestly. This means that although directors are not required to possess any special qualification, on the other hand if they do possess special knowledge they are expected to use it in the affairs of the company.[59] However, taking into consideration the fact that the successful running of a business requires some amount of skill, ignorant directors will obviously rely on expert officials. Moreover as the directors are not required to give continious attention to the affairs of the company, this proposition makes the dirrectors rely more on experts. It is therefore settled that directors can trust junior officers in the performance of their various duties. But directors are not responsible vicariously for their wrong doings.[60] They are however only liable if they have been grossly negligent. One will therefore agree with Wedderburn,[61] that as far as the duty of care is concerned, "if directors act foolishly,

> however ridiculous and absurd their conduct might seem, it was the misfortune of the company that they chose such unwise directors

Should they, however, fail to come expected of reasonable persons of their experience, the duty of care owed the company is broken.[62]

Following the above discussion on the standard of care and skill required from directors in the management of the affairs of the company, one can safely say it is comparatively low when compared

with those of a fiduciary nature.[63(a)] There is, therefore no assurance of good management by the directors which shareholders can comfortably rely on with confidence for the following reasons:

First, because the courts have pretended to lay down certain principles relating to director's duty of care which in present day circumstances are absolutely outmoded and unrealistic.[63(b)] Since they have consistently held that the directors in the management of the affairs of the company are not liable for all the mistakes they may have made, although if they had taken more precaution, they might have avoided such mistakes.[63(c)] In otherwords a director does not owe his company a duty, to take all possible care.[63(d)]

Secondly, the courts also seem to recognise that there is a duty of care and skill expected from directors who conduct the management of the affairs of the company. On the other hand they are reluctant to intrude in matters of business and commerce.[63(e)] Nevertheless, it is generally accepted that where there is a duty there must be a corresponding right to enforce this duty. But why then should the courts decline to enforce this right when there is a duty is a question yet unanswered.

Thirdly, this subjective tests have absolved the directors on most occasions from liability. It is only in two isolated instances that the courts have held the directors liable for their breaches.

Such instances did come up in two cases. In Re Duomatic Ltd.,[63(f)] where the directors of a company were held liable for the payment of £4,000 as compensation for loss of office to one of their colleagues who had been constantly in default in the performance of his duties and had no contract of service with the Company, a fact which would have greatly weakened his bargaining position in any move to rid the company of him. And also in Re Lucking's Wills Trusts,[63(g)] where L, a trustee and a director was held liable to pay to the plaintiff £3,000 being one quarter of the decrease in the value of her shares in the trusts shareholding, for failure to take ordinary prudence in his duty as trustee to halt the second director "D" from continuing to withdraw such monies from the trust funds when he first came to know of it but still encouraged it by signing more blank cheques which "D" the second director used to withdrew further monies which he could not refund to the company because he had become bankrupt.

Apart from the above two mentioned cases where the courts have held the directors liable in breach of their duty of care to the company, no other known case exists, It therefore follows that nothing short of legislative reforms can change the law.

This is exactly what has taken place in Ghana. As section 203(2) of the Ghana Company's Code provides that:

> "a director shall act at all times in what he believes to be in the best interests of the company as a whole so as to preserve

> its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinary skilful director would act in the circumstances".[64]

Professor Gower, commenting on subsection (2) of section 203 of the Ghana Company's Code says that a director in addition to his duties of good faith must display some degree of care and skill. According to Gower, under the existing common law, this is a very lowly degree.[65(a)] He however concedes that the formulation under the above subsection is not intended suddenly to raise the required standard of care and skill. But it is intended to allow the courts to develop standards based on an objective yardstick - that of the ordinary skilful and conscientious director.

It is submitted that the provisions of section 203(2) of the Ghana Company's Code tightens the standard of care and skill required from the directors in the management of the companys' affairs. As it calls for the application of an objective test and it appears to displace the lenient common law subjective test of knowledge and experience of a particular director which also apply in Nigeria.[65(b)]

However, it can be pointed out that the provisions of section 203 (2) of the Ghana Company's Code are similar to the provisions of section 144 of the Business Corporation Act 1970.[66] The section provides that:-

> "Every director and officer of a corporation shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interests of the coporation, and in connection there with shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

It is therefore clear from the provisions of section 203(2) of the Ghana Company's Code and section 144 of the Ontario Business Corporation Act 1970, that the community's expectations as to the qualities to be possessed by directors have risen and care must be exercised when relying on old cases.

Considering the common law position in regards to directors duties of care and skill, the American approach is far ahead of the common law position which apply in Britain and Nigeria. Thus in Briggs v. Spaulding,[67] a leading case on the question of liability of corporate directors for negligence in permitting mismanagement or defalcations by officers or employees, the Supreme Court of the United States of America declared a number of rules that have since been frequently followed, cited, distinguished, or criticised by the courts in considering this subject. Among the rules announced, the court established the standard that Corporate Directors must exercise ordinary care and prudence, and that this includes the duty of reasonable supervision of officers and employees. It then said that directors ought not to be shielded from liability for ignorance of mismanagement or defalcations by such officers and employees, if their ignorance was the result of a want of that ordinary care the court had just required of them, if that ignorance is the result of gross in attention. However, since the majority of the court in this case absolved the directors of the bank from liability, over a strong dissent by four members of the court, the case must be found to represent the 'gross negligence rule'

despite its declarations as to the ordinary care and skill required of directors.

Further, as times have changed, the necessity of adequate supervision on the part of the directors has become increasingly apparent and it has become necessary to tighten the rule laid down in Briggs v. Spaulding[68] Thus in Neese v. Brown,[69] the court held directors of a corporation to a higher standard of duty than was formerly the case, a stricter rule having become necessary by a growing inclination on the part of the officers and directors of large corporations to consider their personal interests and profits to the exclusion of the rights and interests of a large and uninformed body of shareholders. It was also held that the test as to whether or not a director is liable depends upon whether or not he used reasonable care and diligence in carrying out his duties, and what amounts to ordinary care or lack of it depends upon the facts of the particular case.

It is therefore submitted that a provision be included in the Nigerian Companies Act which will require directors to exercise such care and diligence as can reasonably be expected of a prudent director in the circumstance. This will go a long way to ensure that directors properly manage the company's affairs and this will also enhance the aspirations of the shareholders. Furthermore, such a provision will ensure that before a person is appointed as director of a public corporation, he should have obtained some general understanding of the business. Such a director will now be aware that a higher standard

of care and skill would be required from him, he will do his best in that office and thereby avoiding losses to the company and its shareholders.

5.4 STATUTORY RESTRAINTS ON DIRECTORS POWERS

The normal management of the day to day business of a company is usually entrusted to the directors by the articles. To ensure that the directors do not exceed their powers when carrying out their duties, or that they do not unjustly enriched themselves to the disadvantage of the other members of the company, certain statutory duties have been imposed on the directors. The aim here is to examine statutory provisions restraining the powers of company directors in Nigeria and Ghana and the extend to which these statutory provisions differ in their application in the two countries.

At this juncture, we now turn to examine provisions under the Nigerian Companies Act 1968 and the Ghana Company's Code dealing with appointment of directors.

5.4.1 APPOINTMENT OF DIRECTORS

Common sense will clearly reveal that not every person in the society is fit and proper to be appointed a director of a company. Therefore, both the Nigerian Companies Act 1968[70] and the Ghana Company's Code 1963[71] restricts insolvent and fraudulent persons generally from managing companies. Although there are some similarities in the provisions dealing with the appointment of directors under both laws, there are also differences when those provisions are carefully examined.

First, under the Nigerian Companies Act 1968, no person can be validly appointed as a director of a public company or a private company which is a subsidiary of a public company who is above the age of seventy.[72] However, where the articles contain a provision that person above the age of seventy may be appointed a director, this can only be done by giving a special notice and such appointment may be approved at the general meeting by a simple majority. If such appointments do take place, the person so appointed is required to give notice of the fact that he is over that age limit to the company! In anycase, where he fails to do so or where he acts as director when the appointment is terminated or invalid, he is liable to a fine of ₦10 for each day during which the default continues.[73] Whereas, under the Ghana Company's Code, there is no similar provision restricting persons over seventy years of age from being appointed directors of Public Companies or a Private Company which is a subsidiary of a public company.

It is submitted that the provisions of section 176 of the Nigerian Companies Act 1968 are unnecessary. As failure to give sufficient time for a special resolution to the company for the re-appointment of such a person above that age limit may render his re-election by a simple majority of the members at the general meeting invalid. This will deprive the company of men with long years of business experience from continuing to manage the affairs of the company. If the members in the general meeting feel that a particular director above the age of seventy is still

physically and mentally alert, they should be allowed to do so without strictly following the provisions of section 176(5) of the Nigerian Companies Act 1968.

Secondly, the Nigerian Companies Act 1968 merely provides that every company registered on or after the commencement of the Act must have at least two directors.[74] It does not specify any age limit on such appointments. The only exception is that persons above the age of seventy cannot be appointed directors of a public company or a private company which is a subsidiary of a public company unless the articles otherwise provide so.[75] This means in the absence of any express provision, an infant can validly be appointed a director even of a public company. Whereas, this is not the position under the Ghana Company's Code. As section 182(1)(a) of the Ghana Company's Code clearly restricts the appointment of persons below the age of 18 years to the office of a director. What then is the justification for this restriction under the Ghana Company's Code? The justification for this limitation may be that persons below the age of 18 years may be too young or may still be attending school and cannot actively participate in the management of the company. In other words they lack the experience or business expertise to do so. Therefore the appointment of infants or young persons will serve no useful purpose as they are merely inactive nominees of the main shareholder and may virtually hold all the shares for him. Even if they do have

the resources to contribute to the capital of the company, they still lack that maturity to effectively manage a company.

It is submitted that the provision "any person" in the Nigerian Companies Act 1968 or in the articles should be deleted and a limit of eighteen years should be imposed as that contained under Ghana Company's Code. Such a provision in the Nigerian Companies Act will go a long way to ensure that only mature persons are appointed as directors. As such persons may render useful services to the company in time of need. This provision will be very useful especially in a private company where the first director who is usually the main shareholder is incapacitated or suddenly dies. The second director may be able to take over the management of the company and handle it effectively until the personal representative of the main shareholder is appointed. This will help to prevent petty family disputes and thus prevent members of the decease' main shareholder's family from dividing the assets of the company amongst themselves and thereby allow the company to continue to function as a going concern.

Thirdly, the Ghana Company's Code[76] prohibits the appointment of a body corporate from acting as a competent director of another company. Whereas, there is no such restriction under the Nigerian Companies Act 1968 or even under the English Companies Acts. However, this prohibition on corporations may be controversial.

But Gower,[77] argues that the justification for this is that it is not unusual for directors to be other than natural persons, although this is occasionally done. For instance, when one company is a subsidiary of another, the holding company sometimes appoints itself director of the subsidiary as a method of maintaining complete control over it. His objection to corporate directorship is that:

> "having no soul to be saved or body to be kicked, they should not be entrusted with tasks involving personal duties of good faith and discretion".

The effect of this prohibition is that if any body corporate acts as a director or allows itself to be appointed a director, the body corporate and every officer who knowingly permitted it to act or to be appointed will be liable to a fine not exceeding £G300.[78]

Finally, in the absence of any expressed provision in the Nigerian Companies Act 1968 or the articles restricting the appointment of corporate bodies from acting as directors of other companies, corporations in Nigeria are free to appoint themselves directors of other companies without incuring any criminal or civil liability.

5.4.2 DIRECTORS SHARE QUALIFICATION

The earlier view was that directors were required to take up share qualification so as to induce them to manage the company's affairs deligently so as to ensure the company's progress.

This was at a time when many public companies were promoted and it was thought that eminent persons appointed as part time directors should have a personal stake in the company.[79] However, a director is not required by law to hold shares in his company but articles or regulations often require him to do so. It therefore follows that if the articles or regulations do not specifically provide or make it compulsory for any person to take up and pay for his qualification shares within a prescribed period, his appointment without share qualification is valid. On the other hand if they provide that a director should take up qualification shares and pay up for these shares, a director is duty bound required to do so otherwise his appointment as director will not be valid.

Similarly, under the Ghana Company's Code[80] and under Table "A" article 77 which applies to companies in Nigeria, share qualification for directors may be fixed by the general meeting. Until it is so fixed, no qualification shares will be required. It therefore implies that where share qualification has been fixed in the general meeting, a director will be required to take up and pay for this share qualification within two months after such appointment. A director who fails to obtain his qualification shares within two months after his appointment or such shorter period as may be fixed by the articles or regulations will be required to vacate his office. This also applies where a director parts with his shares.

In anycase, it has to be pointed out that both under the Nigerian Companies Act 1968,[81] and under Ghana Company's Code,[82] where a director who fails to obtain his qualification shares vacates office, he cannot be re-appointed until he has obtained them.

Although article 77 and section 183 of the Ghana Company's Code do not specifically provide that a director must hold share qualification in his own right, sometimes the articles or regulations may require a director to do so. Where such a provision is found, a director is expected to have a personal beneficial interest in the company in view of the purpose of provisions for share qualification. And also in view of the fact that a director does not obtain his share qualification until he is registered in the register of members in respect of them.[83] It therefore, follows that a director must be entered on the company's register as the holder of his qualification shares. However, he may acquire them by transfer from other persons. Furthermore, he need not hold them beneficially and could for example, hold them in trust for others so long as his name appears on the register of members in respect of those shares. One can therefore safely say that there is no way of ensuring that a director is the absolute unfettered owner of the shares once they have been registered in his name in the Company's Register.

director who fails to obtain his qualification shares but continues to act as a director. This provision does not prescribe that the office is vacated by his failure to do so, and he does not cease to be a director unless the articles specifically provide. Whereas, under section 183 of the Ghana Company's Code, no liability is imposed on any director who fails to obtain qualification shares within two months and continues to act as a director. The only alternative left to the company may be to bring an action to restrain such a person from further continuing to act as a director.

Professor Gower,[84] commenting on section 183 of the Ghana Company's Code had this to say:

> "This seems to me to place greater importance on share qualification than they desire, modern practice recognises that they are of little value and I envisage that most companies will be content with the general rule expressed in subsection (1) of section 183 of the Company Code".

Following the above discussion, since there is no way of ensuring that a director is the true beneficiary owner of his shares, the provision that directors must take up and pay for their qualification shares saves no useful purpose. It should therefore be made optional and not compulsory. Furthermore, nowadays executive directors are more common and there is little point in requiring them to hold qualification shares if their careers are linked with the company's progress. This will allow professional managers with wide business experience who have no money to take up and pay for qualification

shares to be appointed directors. It will also give such directors an opportunity to purchase shares of the company whenever they are in a better position to do so.

5.4.3 LOANS TO DIRECTORS

The general rule is that a company should not make loans to its directors. This rule developed as a result of the fact that if the directors are allowed to make loans to themselves, they are likely to abuse the power. For instance, they could possibly make loans to themselves at less than the prevailing rate of interest or a loan may be made without adequate security. Therefore, the Cohen Committee[85] in the United Kingdom thought it undesirable that a director should borrow from his company: If he could offer good security, it would be no hardship to borrow from other sources; if he could not offer good security, it is undesirable that he should obtain from the company credit which he would not be able to obtain elsewhere.

This strong disapproval of loans to directors by their companies led the committee to recommend that it should be made illegal for any loan to be made by a company or of its subsidiary companies or by any other person under a guarantee from or on security provided by the company or by any of its subsidiary companies to any director of the company.[86]

These provisions were later enacted in section 190 of the English Companies Act 1948, which now constitutes the source of section 181 of the Nigerian Companies Act 1968 dealing with loans to directors. However, an examination of the provisions of section 181 of the above Act clearly indicates that a company may validly make loans to its directors under the following exceptional situations. First, where the loan is made by a subsidiary to a director who is its holding company. This exception is designed to assist companies within the same group in the pursuit of their normal transactions which not infrequently involves the making of loans by one company to another within the group. And thus facilites inter-group loans. Secondly, where the loan is made for the purpose of enabling the director to properly perform his duties or which or while it is made to meet expenditure incurred or to be incurred on the company's behalf. This second exception to the general rule makes it possible for directors and other officers to negotiate business matters on behalf of their companies with the financial support or security necessary to ensure the success of such negotiations. In any case, Gullick[87] takes the view that this second exception is not of much practical importance because a company is generally authorized by its articles (for example Table A, Article 76) to pay, as a company expense, the director's expenses. It can then advance money to the directors as agents of the company on the basis that they will account in due course for the company's money in their hands.

He submits that this is not a loan to the director personally if the expenditure for which the advance is made is covered by the articles.[88] Thirdly, where the ordinary business of the company includes the lending of money. This third exception is meant to exclude banks and other financial houses from the prohibition under section 181 of the Nigerian Companies Act 1968. As its inclusion within the prohibition would constitute unnecessary restraint on the normal pursuit of their every day business. Lending of money must however, be the object of the company. And a true meaning to this exception was extensively discussed by the Privy Council in Steen v. Law,[89] where it pointed out that a mere power in a company to lend is not enough, lending must be the ordinary business of the company and this predicates money lending, as a bank or registered money lender.

This third exception is not foolproof as it appears however. For section 11[A] Banking Act of Nigeria 1969[90] as amended now provides that no loans should be granted to its directors either directly or indirectly. And makes any one who contravenes the sections both criminally and civilly liable, It therefore implies that directors of banking companies in Nigera are completely prohibited from obtaining loans from their own banks. In any case they are free to seek and obtain loans from otherbanks as the restriction only applies to restrict them from obtaining loans from their own banks. However, when section 181 of the Nigerian Companies Act 1968 is compared with the provisions of section 301 of

the Ghana Company's Code dealing with loans to directors, some slight differences seem to emerge.

First, section 181 of the Nigerian Companies Act 1968 generally prohibits the granting of loans to directors of both private and public companies. But allows loans to be granted to directors under exceptional circumstances as stated under the Companies Act 1968.[91] In any case this does not apply to directors of banking companies. Whereas section 183 of the Ghana Company's Code only prohibits granting loans to directors of a public company or to a director of an associated company which is a subsidiary of a holding public company. This clearly indicates that there is no restriction on loans to directors of private companies in Ghana. What is required from private companies in Ghana is that such loans should be shown in the particulars of amounts due from officers of the company.[92] The question now to be answered is why should the Ghana Company's Code omit to place restrictions on the granting of loans to directors of private companies? Ford,[93] takes the view that where a company is so small that the directors are the only shareholders there is no objection to the board lending the company's funds to directors provided the loans are not ultra vires the company. He further argues that many family investment companies operate as part of tax - reducing plans and the making of loans to directors may be an essential part of the plan.[94]

Another possible reason is that many private companies usually operate as small concerns and because the company may lack adequate security to enable it obtain loans from the banks, the directors usually act as personal grantors to the company before such loans are given to the company. It, therefore, means that where such a small company fails to repay the loan the directors are held jointly and severally liable and have to indemnify the company by re-paying the loan out of their personal assets. It is here that the idea of limited liability breaks down in private companies as the directors who usually act as personal guarantors for loans to be given to the company become personally liable when such small companies are unable to re-pay such loans. Therefore, if the directors abuse their office and make fantastic loans to themselves, no person is liable to be prejudiced as they can quickly be called upon to indemnify the small company.

The second possible area of difference is that the Nigerian Companies Act 1968[95] only requires any person who authorised the granting of such loans or provided the guarantee to indemnify the Company for such loss or damages jointly and severally. Whereas, under the Ghana Company's Code, any officer or director in default of the provisions of section 301(3) of the Code is not only made to indemnify the company for the loss arising from the grant of such loans, but is liable to pay a fine of £G100.

Professor Gower,[96] commenting on section 190 of the English Companies Act 1948 which is identical to the provisions of section 181 of the Nigerian Companies Act 1968 take the view that:

> "this English section provides no penalties for breach of the provision. This seems to be a serious omission which is corrected by subsection (3) of section 301 of the Code".

Happily, this omission has now been corrected by section 52 and 53 of the English Companies Act 1980 which now provides criminal and civil liabilities for contravention of section 49 dealing with loans to directors.

The third area of difference is that there is no provision under section 181 of the Nigerian Companies Act 1968 which restricts the amount of money that can validly be given out by way of loans to directors within a prescribed period. It therefore follows that any amount may be validly given out to directors by way of loans once this has received the blessings of the shareholders in the general meeting. And such loans need not be made out only from profits but from any source which the company can lawfully obtain. The Ghana Company's Code prohibits the grant of loans or entering into any guarantee or providing of any security, unless the total amount lent, guaranteed and secured in respect of loans to such persons does not exceed one per cent of the net assets of the Company in any given year.[97]

Finally, the provisions of section 301 of the Ghana Company's Code dealing with loans to directors of public companies have some advantages over the provisions of section 181 of the Nigerian Companies Act 1968. First, according to the provisions of section 301 of the Ghana Company's Code, money can only be validly given out by way of loans to directors of Public Companies only out of profits. This means that where a company is not making profits, no loans can be given out to directors as this will affect the assets of the company which may go to reduce the capital yardstick. Secondly, the maximum amount of money which a public company in any given year can give out by way of loans to its directors is fixed at one percent of the net assets of the company.[98] Any money given out by way of loans above this ceiling is in contravention of the section. Even where a company has made more profits during a prescribed period, it cannot exceed this limit and this leaves part of the profits either to be ploughed back into the business or it may be shared as dividends to the members as the company may deem fit. Thirdly, the provisions of section 301 of the Ghana Company's Code has the added advantage in that besides requiring any person or director who had authorised the making of such loans or guaranteeing the security to indemnify the company for the loss or damages, it imposes a fine of £G100 on such persons which acts as deterrent to others.

It is submitted that the advantages to be derived from section 301 of the Ghana Company's Code are highly impressive as the provisions prevent

unnecessary grant of loans to directors of public companies out of the assets of the company. And thereby preventing and protecting the dissipation of the Company's Capital. It is therefore my considered view that a similar provision be introduced into the Nigerian Companies Act. This will go to prevent public companies not to grant loans to its directors out of borrowing and the maximum amount that could validly be given out by way of loans should be fixed at one percent of the profits in any given period.

5.4.4 PURCHASE AND SALE OF SHARES BY DIRECTORS

The general law is that directors are not precluded from having interest in the securities of a company. And they may hold shares as well as debentures. In the same vein directors position as regards to the buying and selling of shares in their own company does not differ in any material respect from that of any other person. But there are possibilities that business minded directors are likely to be tempted to take advantage of inside information which should not be used for their own personal benefit and will escape liability because the rule in Percival v. Wright[99] weighs much in their favour.

However, in any case, to prevent directors from carrying on transactions with the company's shares which are likely to lead to abuse and unjust enrichment of the directors and cannot readily be justified on other grounds, there are provisions both in the Nigerian Companies Act 1968 and Ghana Company's Code which control directors dealings with shares of their company.

An examination of these provisions under the two laws will reveal some differences.

First, the Nigerian Companies Act 1968 requires every company to keep a register of directors shares or debentures of the company or any other corporate body, being the companys subsidiary or holding company, or a subsidiary of the companys holding, which are held by or in trust for him or of which he has a beneficiary right to become a holder.[100] And further provides that where there is a change in a directors transaction in shares, the register shall also show the date and the price or other consideration for the transaction.[101] Accordingly, there is no provision under section 186 of the Nigerian Companies Act 1968 which imposes a time limit within which a director must inform the company of any changes in his share dealings with the company. This seems to be a lacuna. As a consequence of the absence of such a provision, a director who is so business minded can legally make a fortune by purchasing the shares of other members at low prices and selling them quickly at higher prices without informing the company. It is therefore possible for a director to escape liability under the Nigerian provision.[102] Whereas, under the Ghana Company Code, a director is required to inform the company within twenty eight days of any changes in his share dealings with the company.[103] Thus under the above Ghanian provision, a director who is business minded can also still possibly buy shares at low prices and

with a ready market depose them at higher prices before the expiration of the prescribed period of twenty eight days without informing the company and may escape liability too. He may however incur liability where he buys the shares and cannot dispose them before expiration of the prescribed period. Here there is something to be learnt from the English experience. As section 29 of the English Companies Act 1967 requires that the company must maintain a register of directors' interests and dealings and, within three days, must enter thereon the information received.[104] This provision makes it mandatory on directors to inform the company within three days of any changes in their share dealings with the company. It is submitted that the provisions of section 186 and section 215 of the Nigerian Companies Act 1968 and Ghana Company's Code respectively are totally inadequate to restrain an unscrupulous director who sees an opportunity of making a quick profit which he is unwilling to reveal.

Secondly, under the Nigerian Companies Act 1968,[105] the register of directors shares is opened to members and debentureholders of the company for a period being fourteen days before and ending three days after the annual general meeting within official working hours.[106] The above provision does not include former members and debentureholders of the company. The effect of this provision is that the number of persons required to inspect the register of directors share dealings is curtailed.

Whereas under the Ghana Company's Code,[107] the register of directors shares is required to be opened for inspection to shareholders and debentureholders including former members and debentureholders of the company for at least two hours every day during official working hours.

It is submitted that the provisions of section 215 of the Ghana Company's Code are wider in scope than those found under section 186 of the Nigerian Companies Act 1968 for the following obvious reasons. First, under the Ghana Company's Code, the register is open for inspection by present or former members or debentureholders, and to the auditor and Registrar of Companies at anytime. Whereas, under section 186 of the Nigerian Companies Act 1968, the register can only been seen by the Commissioner for trade or any person acting on behalf of the Commissioner at any time. While present members and debentureholders are only allowed to examine the register fourteen days before or three days after the annual general meeting. Secondly, section 215 of the Ghana Company's Code requires disclosure of all securities held by directors or in which directors are beneficially interested. Thus under the Ghana Company's Code, the register must show securities held (whether beneficially or not) and any securities in which a director has any beneficial interest whether directly or indirectly including an option. These are limitations which have largely destroyed the value of the provisions of section 186 of the Nigerian Companies Act 1968.

Invariably, the above provisions dealing with the purchase and sale of shares by directors in Nigeria and Ghana can be compared with the far reaching ones found under the English Companies Acts of 1967 and 1980. Under the English Companies Act 1967,[108] a director, his spouse or infant child are prohibited in dealing with share options of his own company unless the latter had no reason to know that he was a director. Further, under the same Act,[109] directors are required to inform the company in writing within five days of any interest or dealings in the shares or debentures of his company or subsidiary. And such notice must be comprehensive so as to include details regarding the transaction, including the price. It is mandatory for the company to maintain a register of directors' interests and dealings and, must within a period of three days enter the information received. Furthermore, under the English Companies Act 1967,[110] the register is required to be opened during business hours, to members without charge and by others on a payment of a small token fee and copies may be obtained. In any case where a company receives notice of a transaction related to listed securities it must endevour to notify the stock exchange not later than the end of the next working day.[111]

However, this restriction on purchase and sale of company securities do not only apply to directors. All other persons or any class there of who own or have acquired more than five percent of the voting shares in a quoted company are required

to give notice to the company of this information.[112] The above provisions are designed to restrain and regulate the practice whereby it is possible for a person to conceal his beneficial ownership of shares and his control of the votes attached to them by causing his shares to be registerd in the name of some other person as his nominee.

In any case, these provisions under the English Companies Act 1967, deal only with a small part of the much wider problem of abuse by directors and 'insiders' of confidential information about the company's affairs which directors and others may exploit to their own personal advantage.[113] Accordingly, the English Companies Act 1980 now draws a rigid distinction between dealings on the stock exchange and other private dealings off the market.[114] However under both situations, information obtained either directly or indirectly which may likely affect the value of shares is prohibited and attracts criminal liability.[115] A person is deemed to be connected only if he is an employee or officer or interested in more than five percent of the equity share capital of the company or of a related company.[116]

The English Companies Act 1980[117] goes even further and prohibits abuse information obtained in official capacity by present or former government servants.

It is provided that.[118]

> "This section applies to any information which is held by a government servant or former government servant by virtue of his position or former position as a government servant or is knowingly obtained by an individual(directly or indirectly) from a government servant or former government servant who knows or has reasonable cause to believe held the information by virtue of any such position;
> It would be reasonable to expect an individual in the position of government servant or former government servant not to disclose except for proper performance of the functions attaching to that position, and the individual holding it knows is unpublished price sensitive information in relation to securities of a particular company (relevant securities)".

The above provisions, amongst other things, gives the state a right to carry out criminal proceedings against any defaulting present or former government servant who contravens the provisions of section 68.[119]

It is submitted that the provisions found in the English Companies Acts of 1967 and 1980 respectively dealing with the purchase and sale of shares by directors are more comprehensive and far reaching than those provided under the Nigerian Companies Act 1968 and the Ghana Company's Code respectively. They are highly commendable and it is my considered view that such provisions should be included in subsequent Nigerian Companies Acts. If the purchase and sale of shares by directors are to be effectively controlled. Furthermore, the prohibition of present and former officials of the Stock Exchange markets from illegally disclosing any information which may directly or indirectly influence the value of company securities and making it a criminal offence to disclose such vital

unpublished information will help to prevent the abuse of"inside information" now going on in the Stock Exchange markets in Nigeria today.

5.4.5 DISCLOSURE OF DIRECTORS TRANSACTIONS WITH THE COMPANY

Companies do often benefit from transactions between them on one side and the directors on the other. Therefore, if the courts were to impose a total embargo on dealings between the directors and their companies, there is no doubt that in many cases companies would not likely gain by such a move.[120] Because such a rule will completely prohibit directors from dealing with the company in all cases. Even to lend it money when in need upon the most reasonable terms. However, the present position is that to make sure that companies are properly managed and that trust in corporate enterprises is built up, the activities of those who manage it must be sufficiently and adequately disclosed to shareholders and debentureholders of the company.

At this point, we are however, concerned only with those provisions under the Nigerian Companies Act 1968 and the Ghana Company's Code which differ with disclosure as to directors dealings with transactions with the company. Such as contracts, service agreements and take over bids. First, under the Nigerian Companies Act 1968,[121] directors are required to disclose to the board of directors of any interest which they may have in any contract or dealings with the company.

If there is any interest it has to be disclosed even if it is too small to be material.

This principle of disclosure of directors interest in contracts with the company received its clearest expression in Aberdeen Rly v. Blackie Brothers,[122] where the court hold that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect.

Furthermore, the principle applies even where a fiduciary makes no gain from the improper transaction. It is therefore wider in scope as to render a director's transaction, voidable by the company even against a third party regardless of whether the director has made any profit or not. However, under the Ghana Company's Code,[123] disclosure is only necessary if the interest is 'material' and a mere holding in a public company of debentrues or of not more than two per cent of any class of shares is not a material interest for the purposes of the provision.

Unlike section 190 of the Nigerian Companies Act 1968 which deals only in situations where contracts are considered when they do come up before the board of directors and more commonly they will be required to be entered into by an officer, for instance such as the managing director without reference to the board, under section 207(5) of the Ghana Company's Code, the officer must refer the matter to the board if he himself is personally interested or if he knows

that any other director is interested.

Secondly, under the Nigerian Companies Act 1968,[124] a director may hold some other position as a servant of the company in which case he is entitled to a salary for his services. However, where Article 107 applies and a director is to be paid remuneration as the board of directors may determine in the service contracts, this should be disclosed in the accounts laid before the company in general meeting. The effect of this provision is that although directors may still be able to vote themselves highly remunerative and long term service agreements, they can no longer conceal details of this from their members. Where the members in general meeting are dissatisfied with the high remuneration of a director or of the terms in the service agreements, they are placed in a hopeless position. And the only alternative left for the members against any aggrieved director is to remove him and this is not without prejudice to his entitlements.[125] Whereas, under section 194(4) of the Ghana Company's Code, where a director holds any office or place of profit under the company, the terms of his appointment into that office must first be approved by an ordinary resolution of the company. It is therefore left for the board of directors to make the appointment and to decide the terms in the service agreement. But if the holders of the office are to be entitled to remuneration additional to directors fees the terms of appointment must first be approved by the members in a general meeting. The effect of this provision is that directors in Ghana cannot afford to place themselves on high remunerations

without approval from the general meeting.

A close look at the provisions of section 187 of the Nigerian Companies Act 1968 and section 194 of the Ghana Company's Code dealing with directors service contracts will clearly reveal that the Ghanian provision is more preferable to the Nigerian provision for the following reasons. First, under the Ghana Company's Code the members of the Company have an early opportunity to examine the terms of the service agreement and the remuneration before any approval is given. Where the members in the general meeting are not satisfied with the terms and remuneration of the director, that is the end of the matter. Secondly, once the service agreement has been approved and the director begins work, there is little opportunity of his removal unless there are strong, cogent and convincing reasons to require his removal and thereby avoiding unnecessary litigation which will waste the Company's money. Thirdly, the provision is also advantageous in that it has prevented one of the most common abuses, namely running companies for the sole benefit of the directors who may take away every thing by way of remuneration leaving nothing for the share-holders. In any case since the terms of appointment and remuneration now require approval and the reasonableness of the remuneration may well depend on the duration of the service agreement. Fourthly, once the terms of the appointment have been approved by the general meeting, they bind the company so long

as the appointment lasts. This security of appointment will greatly help to attract skilled managers from other areas to take up appointments in Ghana.

It is submitted that the advantages to be derived from the provisions of section 194 of the Ghana Company's Code are highly commendable and it is my considered view that a similar provision be included into any subsequent Nigerian Companies Act.

Thirdly, another possible area of difference between the Nigerian Companies Act 1968 and the Ghana Company's Code on directors transactions with the company is on provisions dealing with take-over bids. Under the Nigerian Companies Act 1968,[126] any extra payment made to the directors in the form of golden "handshakes" in the event of take-over bids are only recovereable and no penalty is imposed on defaulters who contravene the provisions. The best that a company can do is to bring an action for restitution to recover the amount involved. Whereas, under section 212 of the Ghana Company's Code, any payment made to directors in connection with take over bids must be adequately disclosed and agreed to by the shareholders and failure to do so, both the director and the bidder are liable to a fine not exceeding £G500. However, this is not without prejudice to the fact that the company may bring an action for restitution to recover the extra amount involved in the transaction.

It is submitted that the above provisions under the Ghana Company's Code which makes both the director and the bidder liable for none disclosure of material facts in the case of take-over bids is highly commendable as it does not only provide for restitution of the amount involved but has the added advantage in that it also acts as a deterrent to force bidders to disclose all material facts. As failure to do so may render them liable to suffer double losses.[127] First as bidders, they have to lose the amount they have given out to the directors by way of tips and secondly, they still have to pay a fine of £G50 for failure to disclose all material facts for the takeover bid.

5.4.6 REMOVAL OF DIRECTORS

The general principle is that he who has the power to employ should also have the power to fire. This basic principle is not new, since the Companies Acts and the Articles of Association customarily provide for the removal of directors. Therefore, the provisions in the Nigerian Companies Act 1968 and Ghana Company's Code which provide for the removal of directors are necessary as they greatly increase the degree of control which shareholders may exercise over directors who manage the company's affairs. And it is also essential that a company should have power to remove a director with whom it is dissatisfied. This democratic principle is adopted in most Companies Acts,[128]

Although sections 175 of the Nigerian Companies Act 1968 and section 185 of the Ghana Company's Code all deal with the removal of directors, a close examination of the two provisions under both laws will reveal some differences in the wordings which are capable of having different interpretations.

First, under section 175(1) of the Nigerian Companies Act 1968, a company may by ordinary resolution remove any director from office before the expiration of his tenure of office. This is regardless of the way in which he was appointed and not withstanding anything in its articles or in any agreement with him. In any case, this power does not extend to the removal of a director in a private company holding office for life on the commencement of the Companies Act 1968,[129] whether or not subject to any age limit under the articles or otherwise. Whereas, when section 185(1) of the Ghana Company's Code is read subject to the provisions of section 300 of the Code, a private company in Ghana may by ordinary resolution at the general meeting remove from office all or any of the directors not withstanding anything in its Regulations or in any agreement with any director. It is submitted, that in Ghana a private company is free to remove all its directors by ordinary resolution if it so wishes. Also in Nigeria the same situation applies but subject to the proviso to section 175(1) of the Companies Act 1968 as stated above, which is to the effect that if a director of a private company is appointed for life, he cannot be removed by ordinary resolution.

Secondly, under the Nigerian Companies Act 1968,[130] special notice of twenty eight days must be given to the company of the intention to move any such resolution for the removal of a director. Whereas, the Ghana Company's Code provides that a resolution to remove any director from office shall not be moved at the general meeting unless notice of the intention to move has been given to the company not less than thirty five days before the meeting at which it has to be moved. Why then is there disparity in the length of notice under the two laws? The extra seven days required under the Ghana Company's Code above that required under the Nigerian Companies Act 1968 is because of the special importance attached to Special notices in Ghana. This is because special notices are required to deal with fundamental issues involving the company's affairs and it is considered that within thirty five days all notices will have got to the various addressees. Furthermore, the communication net work in Ghana may not be very effective and thus it was thought by those who drafted the Company's Code that if an extra seven days is added to the time of special notices, there is a likelihood that they will reach the various addressees and also give them time to think on what to do during this special meeting. However, under the two laws the director concerned is allowed to put his case to the members by circulation of his representation with the notice of the meeting. If his representations are received

too late for this purpose, they are to be read out at the general meeting.

Thirdly, the major difference between the Nigerian Companies Act 1968 and the Ghana Company's Code as far as removal of directors from office is concerned is with public companies. As earlier stated the same procedure for the removal of directors of private companies also applys to public companies in Nigeria. That is by an ordinary resolution. However, weighted voting rights may render the provision ineffective. This was clearly indicated in the case of Bushell v. Faith,[131(a)] where the House of Lords held that the provisions of section 184 of the English Companies Act 1948 which are identical to the provisions of section 175 of the Nigerian Companies Act 1968 did not prevent companies from attaching special rights to certain shares for certain occasions, for instance, the directors shares on a resolution at the general meeting for the removal of a director. Therefore, if the device employed in Bushell v. Faith[131(b)] is upheld in Nigeria, it will mean the articles override the Companies Act 1968. Since draftmen can easily evade the provisions of section 175 of the Companies Act 1968 by entrenching against alteration of the articles confering the special rights with regard to section 175(4) resolution which will render section 175 nugatory. In any case, despite the unhappy decision in Bushell v. Faith, which makes section 175 worthless if the above decision is applicable in Nigeria, it still remains the shareholders' important weapon for its effect is that the mere

fact that there is a free power to remove the directors not withstanding anything in the articles or in any agreement for no cause is sufficient to deter directors against mismanaging the company for they will not like to lose their posts.

Whereas, under section 300 of the Ghana Company's Code, in the case of a public company which has adopted cumulative voting for directors, a director cannot be removed by a simple majority as now applied under the Nigerian Companies Act 1968. This is because he can only be validly removed by the highest number of votes cast in favour of his removal. Moreover, the whole purpose of cumulative voting would be defeated if a simple majority could then remove the directors appointed by the minority.

It is submitted that in view of the fact that the highest number of shares in public companies at this point in time in Nigeria are held by foreigners, an introduction of cummulative voting will mean that foreign directors will continue to retain their positions as directors of public companies in Nigeria in the absence of any contrary provision. Taking into consideration that Nigerian shareholders are widely scattered and hold only a small proportion of the total shares in these public companies, they may never be able to canvass sufficient votes to secure the removal of foreign directors from office through this system of cumulative voting.

5.5 THE RULE IN FOSS V. HARBOTTLE AND ENFORCEMENT OF MEMBER'S RIGHTS

In any company, other than one in which all the shares are held beneficially by one person, there is a possibility of conflict between the members. If this occurs in a Company whose shares are listed on a stock exchange a holder of those shares can ordinarily withdraw his investment from the company by selling the shares. But the situation is different in a company whose shares are not listed and a conflict arises, a member may have difficulty in departing from the company with the full value of his shares. Accordingly, most complaints of abuse of power or oppression which come before the courts arise out of small companies whose shares are not listed. Even in a large public company an act of a majority of the members is capable of depreciating the value of a class of shares held by a minority group to such an extent that the minority seek protection in the courts.[132]

The legal position is that if a breach of duty has occurred following some wrong doing by directors, the company is the proper plaintiff to bring an action in respect of such breach. In this kind of situation, the company is usually represented by the directors normally invested with the power of management.[133] As one would expect, directors are not likely under normal circumstances to sue on behalf of their company in respect of breaches of their duties. Hence the device of action by shareholders, who normally have no locus standi, to enforce directors

duties has been allowed by the courts in order to avoid what might have been a most unsatisfactory situation. Accordingly, suits by minority shareholders may in certain circumstances be brought to enforce the duties of their directors. This qualified right of minority shareholders to sue in respect of breaches of duties by their directors is the result of the principle formulated by Wigram, V.C. in Foss v. Harbottle.[134] A principle which inspite of its simplicity is generally recognised as having raised some of the most difficult problems in the field of company law.[135]

5.5.1 THE RULE IN FOSS V. HARBOTTLE AND ITS APPLICATION

> " The proper plaintiff in an action inrespect of a wrong alleged to be done to a company or association of person is prima facie the company itself.[136] Further if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."[137]

First, what can be gathered from the above rule is that in proceedings to enforce or to protect the rights of a company, the company is the proper plaintiff, and that a decision whether the company should sue at all is to be taken by voting in a general meeting or on the alternative by the directors if the power of decision has been delegated to them.

Secondly, that where an irregularity capable of ratification has occurred in the management of a company, the court will insist that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly.[138] However, the decisions in Hogg v. Cramphorn Ltd[139] and Bamford v. Bamford[140] have introduced some sort of qualification into this general statement in the sense that in those cases the courts had allowed minority actions, even though the wrong or irregularity which occurred could have been ratified by the company. Olawoyin,[141] after an analysis of the above two cases takes the view that both cases have made a desirable, but yet unexplained, in road into the rule in Foss v. Harbottle, since in both cases the improper actions of the directors of the companies concerned were ratified by the Companies in general meetings; yet the aggrieved minority shareholders were allowed to maintain actions in respect of the impropriety. While Ford[142] discussing Bamford v. Bamford[143] takes the view that in many cases the purported ratification will be equivalent to a resolution by the majority not to direct proceedings in the company's name in which the majority is controlled. In other words, where an irregularity capable of ratification has occurred in the management of a company, and the majority would not ratify it, a minority shareholder will be allowed to bring a deriviative action.

Thirdly, a person who becomes a member of a company is presumed to accept the fact that decisions supported by the majority are those of the company

notwithstanding his personal prejudices or strong feelings to the contrary. Therefore, if he attempts to bring legal proceedings on behalf of the company, his right to do so is likely to be questioned and his action dismissed.

Fourthly, that to grant permission to institute action in every case where a minority shareholder feels that a wrong has been done to his company or that some irregularity has occurred in the management would throw wide open the door to blackmailing actions by minority shareholders, thereby possibly causing a company not only grave embarrasment but also financial loss. Accordingly, the rule is designed not only to enable the affairs of companies to be free from oppression by the minorities within them but also to discourage multiplicity of suits and the institution of embarrassing, groundless actions.[144]

Fifth, that irregularities which occur in a company relating to its internal management, the courts are contented to leave it to the majority to take what action it pleases. It may be argued that the right conceded to the majority of the shareholders in a company to manage its affairs and deal with its problems in the way they see it fit justifies the existence of the rule.[145]

This principle in Foss v. Herbottle has been accepted in Nigeria and Ghana and adumbrated in a number of decisions. For instance, in External Sacred Order of Cherubjum and Seraphim v. Adewunmi & 3 others,[146] the plaintiffs brought an action against the defendants for a declaration that they were no longer

members of the organisation, an injuction and the return of money and property. The defendants objected on the basis that there was no authority to institute proceedings in the company's name. It was held that the proper plaintiff is the company itself, and the question whether there was authority to institute proceedings in the name of the company was not one to be raised by way of defence but upon a preliminary objection. And also in the Ghanian case of Apperteng & Others v. Bank of West Africa Ltd,[147] where in an action brought by shareholders of a company claiming damages suffered as a result of negligent financial advice given by defendant bankers to the company, it was held that a company is a distinct personality having an exsistence separate from its shareholders. The shareholders cannot sue in respect of a wrong done to the company, unless it was shown that the wrong is against the individual rights of the shareholders as distinct from the corporate rights of the company. This decision was expressly approved on appeal.[148]

5.5.2 THE LIMITS OR EXCEPTIONS TO THE RULE

It has to be pointed out that to follow strictly the rule established in Foss v. Harbottle will no doubt occasion injustice in some circumstance. It is therefore gratifying that the rule admits exceptions which are considered more important. And the best attempt to explain the exceptions was made by Jenkins L.J. in Edwards v. Halliwell.[149]

First, the rule applies only to cases arising as a result of the invasion of the rights of a company.

In other words any matter relied upon by a defendant as constituting a cause of action to which the rule applies must be one which properly belongs to the general body of members of the company in question as opposed to a cause of action which some individual member asserts in his own right.[150] For instance, if a member is alleging a breach of contract between himself and the company as stipulated in section 16 of the Nigerian Companies Act, 1968 the exceptions are that in cases where the act complained of is ultra vires the company or association, the rule has no application because there is no question of the transaction ever being ratified by the majority or even by a unanimous decision of all the members.

Secondly, where the approval of the action which is the subject of the dispute requires special procedure, such as a special majority and not a simple majority, an ordinary resolution passed by a simple majority of votes is not a valid decision and does not prevent an individual member from suing. This is because the special procedure has not been followed and the decision has not been taken by a special majority.[151] The reason of restricting the scope of the rule is to avoid situations in which the directors of the company may justifiably invoke the rule to absolve themselves after having acted without a special resolution, although that would have been the only valid course of action open to them.

Thirdly, where the majority defraud the company or a minority of its members they cannot by their voting control approve their own act or prevent

a minority from bringing an action in the courts against them. In any case, to maintain an action under this heading, it is not only necessary to show that there has been fraud but also that the wrong doers themselves control the company, thereby making it impossible for any action to be taken against them if the famous rule in Foss v. Harbottle were to apply. To deny the minority shareholders the right to maintain an action will mean their grievance would never reach the court since the wrong doers themselves are in control and would not allow the company to sue.[152]

Fourth, the rule does not deprive a member of his personal rights arising under the constitution of the company. Thus a shareholder can validly sue if his rights as a shareholder have been infringed or are about to be infringed. Further, the rule does not prevent an individual member from suing to restrain an ultra vires action because the act is not one which can be ratified by unanimous assent of every member,[153] or a plan to misapply the funds of a company contrary to the provisions of its memorandum.[154]

Finally, in any other case where the interest of justice requires that the general rule requiring a suit by the company should be disregarded. For instance, a member's action will be allowed, even though the requirements of the proceeding exceptions have not been met.[155]

5.53 FORM OF MINORITY ACTIONS

There are three types of actions open to shareholders in cases where the rule in Foss v. Harbottle does not apply. Thus an aggrieved shareholder is free to use one or more of these actions will depend largely on circumstances surrounding each particular case. This means a shareholder who is aggrieved by acts of his company directors may, depending on the circumstances is free to bring either, a personal, representative or corporate action to remedy the wrong or default complained of

Personal Actions

A member can validly bring a personal action where his individual rights have been infringed or threatened. Any shareholder has an independent right of action to do so in his own name against the company, or in certain circumstances against the directors. This type of action is directly related to the concept of oppression or non ratifiable breach of duty. Accordingly, under section 16 of the Nigerian Companies Act 1968 and section 21 of the Ghana Company's Code, each member has a personal contractual right to have the company's affairs properly conducted in accordance with the memorandum and articles or the regulations in the case of Companies in Ghana. These sections it can be rightly pointed out, give the members individually the power of control over the management of the affairs of the company through the right to enforce the Company's Regulations.

The situations whereby a member may exercise his personal rights to sue are numerous but it will suffice to state that such situations do come up where the directors commit breaches of the members' contractual rights, it is open to them to institute proceedings against the directors. And where a shareholder who has been induced by the directors of his company to part with his shares to his disadvantage has a personal right of action against such directors. In this situation the directors are in breach of some separate duty owed to the shareholders personally and there is no question of the company being brought into the proceedings.[156] And he may also sue for a final dividend which has been declared but not paid to him. Furthermore, an action to protect a shareholder's personal rights is also available, where a member lays claim to something of the nature of property such as a right to vote.[157] However, according to Professor Pennington,[158] the personal rights of the members are numerous but:-

> "a member is not invested with a personal right to have all the provisions of the memorandum and articles observed."

This statement may however, be true only in cases where any such provision advances only the individual interest of the particular member as against the general interest of every member adhering to that provision. Otherwise, the statement seriously restricts the right of the members to sue on the grounds of violations of their contractual rights as contained in the memorandum and articles or the

regulations as the case may be. However, it has to be pointed out that a shareholder suing to enforce a personal right to himself is not required to use a representative action, unless there exists a common interest between himself and the other members.

Representative actions

Representative actions can broadly be divided into two categories. "True representative actions" do occur when a member sues on behalf of a category of people which includes himself, and which has a common interest in the proceedings. Here the courts have often insisted that since this kind of action is a product of equity, the presence of all parties interested in a suit are necessary to ensure that there may be a true end to the dispute. However, situations do come up when the parties are so numerous that one never could'come at justice,' the rule is accordingly relaxed and a representative suit in which one or more individuals are selected to represent the rest is allowed to be brought.[159] And the plaintiff then sues on behalf of a defined category of people having a common interest in the proceedings. Thus the framing of so personal an action in a representative form is for convenience and to ensure that the category of people represented by the the plaintiff are duly bound by the judgment in the case and thereby avoiding the danger of multiplicity of actions in respect of the same wrong.[160]

Corporate or Deriviative Actions

Corporate or deriviative actions are also

representative actions and in reality it is an action by the company for a wrong done to it. However, since it will not sue as plaintiff, a device is made to enforece the rights of a company that is by allowing a minority t sue on its behalf and not on behalf of the shareholders. Although this exception allows a minority to bring a representative suit on behalf of the aggrieved minority and other shareholders, the action should have been properly brought by the company if it had not refused to do so. Therefore, the action is derived from the right of the company to sue and certain conditions have to be satisfied before a plaintiff is allowed to maintain this sort of action.

First, it must be shown that the wrong complained of is one that comes within the exceptions to the rule in Foss v. Harbottle and cannot be ratified by the general meeting. If the breach of duty or misconduct by directors can be ratified the reasoning behind the rule is directly applicable, and an action by an individual shareholder may be outvoted by a subsequent decision to ratify by the general meeting.

Secondly, evidence must be sufficiently adduced to show that the alleged wrong doers control the company and will not allow the company to sue.[161] That nobody else will do so, as the wrong doers themselves happen to be in effective control of the company. However, it is unnecessary to convene a meeting of the company so as to ascertain this fact provided it can be inferred from the circumstances.

Thirdly, it is also imperative that the company be made a defendant to the action so as to make sure that it is bound by the judgment obtained. Failure to make the company defendant, a deriviative action cannot proceed. This is in view of the fact that in an earlier action brought in East Pant du United Lead Mining Co. v. Merry Weather,[162] was dismissed on the technical point that the minority were suing on behalf of the company without having its authority.

Fourth, the plaintiff must sue on behalf of himself and all the other shareholders, except the defendant wrong doers. This is to ensure that multiplicity of actions is avoided as all the shareholders are bound by the judgment or order of the court.

Fifth, a shareholder in any case will not be allowed to bring an action where he had participated in the wrong of which he now complains of. In this situation, his conduct is bound to disqualify him.[163] As Equity requires that a plaintiff shareholder must appear before the court with clean hands. In any case, his having participated in the wrong may not preclude him from suing if his aim is to prevent future wrongs.

However, it must be pointed out that not every wrong done to the company will justify a'deriviative' action to remedy it. The wrong complained of must be such as to involve a fraud on the minority which cannot be validly waived by the company in the general meeting. In the words of Professor Pennington,[164] situations in which deriviative actions have been allowed

against directors are:-

> "for misappropriating the Company's Property, to compel such directors to account to the company for profits made by appropriating for themselves a business opportunity which the company would otherwise enjoyed; to rescind an allotment of shares made by such directors to themselves and their nominees in order to preserve their majority voting power at general meetings, and to compel such directors to make a call of their shares equal to a call which they had made on other shares of their members. Likewise, deriviative actions have been permitted against promoters who were, in control of the company to rescind contracts made between them and the company, when they had been guilty of misrepresentations or had failed to disclosed a secret profit which they obtained from the transaction and in such actions the court ordered the promoters to repay to the company all money received by them under the contracts".

It can be observed from the above situations that deriviative actions involve either misappropriation of property or some element of fraud in the sense of an improper motive or business advantage. However, many textbook writers and commentors would like the ambit of the deriviative action to be extended to include mere breaches of directors fiduciary duties.[165]

The above discussion was generally based on the common law exceptions to the rule in Foss v. Harbottle. We now turn to discuss some differences in the application of these exceptions as they apply to representative actions in Nigeria and Ghana.

The Nigerian position is the same as that which applies under the common law exceptions to the rule in Foss v. Harbottle.

That is a representative action may be brought by a minority member in his own name. If the plaintiff shareholder loses, then he must not only pay his own costs but also costs of the defendant directors. In the same vein the plaintiff alone seems to retain primary control over the action and can therefore discontinue it if he thinks fit. Whereas, under section 324 of the Ghana Company's Code, a member is allowed to bring a representative action in his own name and to bear both costs if he loses the action. However, in any case, he is not allowed to discontinue the action after it has been instituted without the approval of the Court.[166] This will mean that if the plaintiff who has instituted the action wishes to discontinue, the court will require that notice be given to all the members of that class. This is so because the result binds all members of the class and it is important that other members should be protected against the possibility of collusion between the party having the conduct of the action and the defendants. It is therefore a great weakness of the English practice that there is no comparable provision.

Furthermore, under the existing law in Nigeria, any restoration has to be made to the company to whom the directors' duties are owed. Restoration to the company may, as in Regal (Hastings) Ltd v. Gulliver,[167] merely mean that someone who has bought the shares in the company obtains an entirely unmeritorious reduction of the price he has agreed to pay.

Whereas, under section 324(5) of the Ghana Company's Code, the courts are allowed to meet this danger by recognising that when justice so requires, restoration may be ordered in favour of members or former members. Thus if the court decides for instance, that the directors should restore a secret profit of £G5000, instead of ordering that this should be paid to the company itself, may order, if that is necessary in order to do justice, that the 'whole or part of it' shall be divided among the present members and former members.[168]

It is submitted that the Common Law exceptions to the rule in Foss vs. Harbottle as they apply to representative actions are inadequate following the above discussion. In such situations there is something to be learnt from Ontario select Committee recommendations on Company Law.[169]

First, that a shareholder of a company should have the right to maintain a representative action for himself and other members of the company suing for and on behalf of the company, to enforce any rights, duties or obligations owed to the company which could be enforced by the company itself or to obtain damages for the breach of these. This is because the judgment or award is to be in favour of and for the benefit of the company.

Secondly, that in order to prevent abuse of this right by the members, there should be a provision to the effect that the intended plaintiff must make

an application to a judge of the High Court designated by the Chief Justice of the High Court for an order permitting the plaintiff to commence the action. Here the court will require the member to establish that he is acting bona fide and that it is prima facie in the interests of the company or its members that the representative action be brought.

Thirdly, that a representative action once brought should not be discontinued or compromised or settled without the approval of the courts. As this will inevitably avoid the incidence of 'secret' settlements.

These recommendations are highly commendable as they go a long way to ensure that shareholders have the control of administration of the company by investing in them the right to bring an action against erring directors. It is my considered view that these recommendations be included into the Nigerian Companies Act.

5.5.4 OPPRESSION ON THE MINORITY

Section 201 of the Nigerian Companies Act 1968, provides that any member of a company who complains that the affairs of a company are being conducted, in a manner oppressive to one or more members (including himself) may apply to the court for relief. This power is also given to the Registrar to petition to the court under section 161(3) of the same Act. These provisions were enacted to provide an additional remedy for oppressed

minority shareholders who would otherwise have been without remedy unless they were prepared to resort to the rather unattractive petition for the winding up of their company.

However, section 201 of the Nigerian Companies Act 1968 is a replica of section 210 of the English Companies Act 1948. And judging by the English experience, a petition by an oppressed director,[170] debenture holder or creditor cannot be sustained as the section postulates oppression qua members only.[171] The fact that the oppressed director, creditor or debenture holder is oppressed in those other capacities is also a member of the company is not a sufficient ground to enable him benefit from the section. This restriction is unfortunate since it is not uncommon to oppress a minority shareholder in a small company by excluding him from participating in the company's affairs. For instance by removing him from his directorship. Whereas, the position under section 218(1)(b) of the Ghana Company's Code is different. As the provisions cover situations where there has been a disregard of the proper interests of the members or debentureholders whether in their capacity of members, debentureholders or officers. Accordingly, the provisions of the section covers oppressive acts which affect a shareholder in his capacity as creditor or officer of his company.[172]

In order to obtain redress under section 201 of the Nigerian Companies Act 1968, the petitioner is required to establish that the facts of the case

would justify the winding up of the company under the just and equitable ground.[173] Thus the provision is unnecessarily tied up with winding up of a company; as the petitioner must first adduce sufficient facts to show that a winding up order may be made but winding up would unfairly prejudice the members being oppressed. Whereas, under section 218 (2) of the Ghana Company's Code, where an action is brought for "oppression," if the court is satisfied that a case has been made, may make such orders as it thinks fit. Thus section 218 of the Ghanian provision is wider than section 201 of the Nigerian Companies Act 1968. This is because it does not require proof of facts which would justify the making of a winding up order. It merely requires that for some obvious reason, the court is free to make an order under the section.

The meaning of "oppression" as used under both laws can be gathered from English decisions based on the interpretations of section 210 of the English Companies Act 1948. Thus in Elder v. Elder and Watson,[174] Lord Cooper, held that:

> "the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely".

From the above quotation, it therefore appears that for an act to be termed oppressive within section 210 of the English Companies Act 1948,

some element of unfairness is required to be shown. Furthermore, in the same case, Lord Keith thought that for oppression to come within the same section, some element of lack of probity or unfair dealing to a member in the matter of his proprietary rights must be involved.[175]

Also in Scottish Co-operative Wholesale Society v. Meyer,[176] the controlling shareholders had delibrately killed the company in order that they themselves may carry on its business. Viscount Simonds summed up the meaning of oppression to be that conduct which is "burdensome, harsh and wrongful" to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs.

In any case the above formulation suggest that lack of probity is an element required in addition to unfairness but there are other definitions which make it clear that probity and unfairness are alternatives. Thus in Re H.R. Harmer Ltd[177] the controlling shareholder had ignored the decisions of the board of directors and treated the business as if it belonged to him alone. It was established that his actions constituted an infringement of the regulations of the company, which was itself an unlawful thing.[178] However, in each of the three cases discussed above, some element of unlawfulness was present.

But from the facts emerging from Re Five Minute Car Wash Service Ltd,[179] based on section 210 of the English Companies Act 1948, no act will amount to oppression unless it is unlawful. In that case the petitioner alleged acts of gross inefficiency and omissions against the managing director and chairman of the company, who, inspite of the petitioner's repeated warnings on the consequences of these actions, showed no inclination to alter the unsatisfactory way in which the affairs of the company were being conducted. Notwithstanding the seriousness of the chairman's misconduct, Buckley J. held that the alleged unwise, inefficient and careless mismanagement did not amount to a case of oppression.[180] This decision certainly shows that section 210 of the English Companies Act 1948 or any other similar provision indentical to it does not extend to cases in which the acts complained of fall short of actual illegality.

Considering the above cases, an application under section 201 of the Nigerian Companies Act 1968 is only intended to provide a remedy where there is a course of oppression or abuse and not where some isolated act of misfeasance has occurred in the past.[181] A Similar provision is also found under section 218(1)(a) of the Ghana Company's Code.

In any case, it must be pointed out that there is no express provision either under section 201 of the Nigerian Companies Act 1968 or under section 218 of the Ghana Company's Code which allows personal

representatives and others to whom shares are transmitted by operation of law to present a petition under the sections. It therefore follows that personal representatives, trustees in bankruptcy, and others to whom shares were transmitted by operation of law, but who were themselves not registered as members are not allowed to petition under the above sections. Even though the refusal by directors to register personal representatives of deceased shareholders was to compel them to sell to the directors their shares at an inadequate price.[182] which is a common instance of oppression in private companies. This is a lacuna under section 201 of the Nigerian Companies Act 1968.

When the provisions of section 201 of the Nigerian Companies Act 1968 are examined with the provisions of section 75 of the English Companies Act 1980 which now replaces the more restrictive provisions under section 210 of the 1948 Act now repealed, there is much to be learnt.

As the present legal position in England is that in order to obtain redress under section 75 of the English Companies Act 1980, the petitioner must now show that he is a person entitled to relief, that grounds exist on which the court may in its discretion order relief. He must also clearly indicate what remedy he seeks. Thus under the section,[183] it is no longer necessary to show that there are grounds for compulsorily winding up on the just and equitable ground and that the petitioner now seeks an alternative relief.

If the court in any case is satisfied that the petition is 'well founded' it may make such order as it thinks fit for giving relief.[184]

Further, without limiting the generality of the court's discretionary powers, it is expressly empowered to make an order. This order may take different forms depending on the particular circumstances and the facts in each case. First, the court may make an order to regulate the conduct of the company's affairs in future as it did in Re H.R. Harmer.[185] Secondly, the court may require the company to refrain from doing or continuing an act complained of or to remedy an omission. Thirdly, the court may make an order to authorize civil proceedings to be brought in the name and on behalf of the company. Fourth, the court may make an order for purchase of member's shares by other members as it did in Meyer v. Scottish Co-operative Wholesale Society,[186] or on the alternative by the company itself and in this case to order a reduction of the company's capital.[187]

Under section 75 of the English Companies Act 1980, an action may be presented by a member of the company, or by any person to whom shares have been transferred (but who has not become a member by registeration of the transfer) or by a personal representative or trustee in bankruptcy of a member to whom his shares have been transmitted by operation of law.[188]

It is submitted that the provisions of section 75 of the English Companies Act 1980 are wider in scope than the provisions of section 201 of the Nigerian Companies Act 1968, which is identical to the obsolete section 210 of the English Companies Act 1948 now repealed. They are highly commendable. It is therefore my considered view that similar provisions based on section 75 of the English Companies Act 1980 be included in the Nigerian Companies Act.

5.5.5 MISFEASANCE SUMMONS

The present position under the rule in Foss v. Harbottle[189] suggest that proceedings to enforce rights owed to the company which includes the directors duties should prima facie be brought by the company and by the company alone.[190] But obviously, unless there is a change in the constitution of the board, it is unlikely that the directors will ever institute proceedings against themselves. This is clearly illustrated in Marshall's Valve Gear Co. Ltd. v. Manning, Wardle and Co. Ltd;[191] where the court held, that under the articles the majority of the shareholders at the general meeting had a right to control the action of the directors, except in a direction contrary to any provisions of the articles which bound the company. Hence it has been recognised that the general meeting may validly resolve to institute proceedings.

In any case this means the minority shareholders are usually unable to enforce the duties of their directors while such directors are at the helm of affairs. As it appears from the decsion in Gramophone and Type Writer Ltd. v. Stanley,[192] the fact that one person holds beneficially all the shares in a company does not itself make the company agent of the controller or make the company's business the business of the controller. Even where the provisions of section 175(1) of the Nigerian Companies Act 1968, apply for the removal of a director before the expiration of his tenure of office, this may not be applicable to a director of a private company holding office for life after the commencement of the Companies Act 1968.[193] Whereas, in Ghana, when section 185 is read subject to section 300 of the Company's Code, a company may by an ordinary resolution in the general meeting remove all the directors or any of them notwithstanding anything in its regulations or in any agreement with the directors,

Furthermore, the restrictive provisions under section 157 and section 220 of the Nigerian Companies Act 1968 and the Ghana Company's Code respectively gives only a discretionary power on the minister or Registrar of Companies to appoint inspectors to investigate the affairs of any company complain of upon an application by one quarter and one tenth of the members entitled to attend and vote. These provisions may be compared with the far reaching ones found under other provisions under the Nigerian Companies Act 1968.[194]

The powers of the majority shareholders to alter or add to the articles of association are subject to statutory restraints. Thus section 23 of the Nigerian Companies Act 1968 allows any condition in a Company's memorandum which may lawfully have been contained in the articles of association instead of in the memorandum to be altered by a special resolution. But allows a minority shareholder to bring an application to cancel the alteration if they are dissatisfied. In the same vein section 74 of the same Act authorises the variation of rights attached to any class of shares in the company but allows a minority to bring an action if dissatisfied for cancellation within 21 days.[195] Also section 125 of the Nigerian Companies Act 1968, makes it imperative for the directors of a company to convey an extraordinary general meeting on requisition by one tenth of the members. And further provides that if the directors fail to convey the meeting within the stipulated 21 days, then any of them representing more than one half of the requisitionist may convene the meeting.[196]

While section 128 of the Nigerian Companies Act 1968, empowers the court on its own motion, or on the application of any director of the company or any member of the company who is entitled to vote at the meeting, to order a meeting of the company to be called, held and conducted in such manner as the court thinks fit.

Apart from the above provisions in the Nigerian Companies Act 1968, which preserves minority rights in certain situations, the majority members are allowed to make certain alterations under sections 3, 68, 197 and 200 of the same Act. In any case these alterations are subject to the court's confirmation. And where the procedure has not been strictly adhered to, the minority shareholders are free to bring an action to set aside the alteration. The court will therefore examine reasons for such alteration and see if they were made in the best interest of the company before such alterations are confirmed. Thus in Re Bugle Press Ltd.,[197] where a minority shareholder sought a decalration that notwithstanding the approval of nine-tenths of the shareholders, the new company was not entitled to acquire his shares on the terms offered, and filed evidence showing that the offer was below the value of the shares. The court held that special circumstances had been shown why the court should exercise its discretion and not sanction expropriation of the minority under section 209 of the English Companies Act 1948.

Harman L.J. said:

> "In my judgment this is a barefaced attempt to evade that fundamental rule of company law which forbids the majority of shareholders, unless the articles so provide, to expropiate a minority".

In any of the above provisions discussed, a minority shareholder is no longer handicapped by the rule in Foss v. Harbottle and the court may refuse to confirm any alteration it thinks fit to do so.

However, besides the above statutory restraints, on the majority powers to alter the memorandum or the articles or a variation of the shares or to requisition for an extraordinary meeting by the minority shareholders, another way of preserving minority rights is contained under section 310 of the Nigerian Companies Act 1968 and under sections 210 and 217 of the Ghana Company's Code which all deal respectively with misfeasance summons.

Although these provisions under both laws look similar, a close look will reveal some differences. This may be as a result of the wordings of the provisions or because of the manner in which they have been applied in the two countries. The first noticeable difference is that section 310 of the Nigerian Companies Act 1968 is directly connected with the winding up of the company. Once a liquidation has begun, then, whatever the type of winding up, the section provides a summary and effective remedy for certain past breaches of duty owed to the company. Thus section 310 applies where any promoter, director, manager or officer of the company or the liquidator himself has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company. It therefore implies that a misfeasance summons cannot be brought under this provision when liquidation proceedings have not been instituted against the company. Whereas, under section 210 of the Ghana Company's Code, a single act or omission can be brought under the provision without necessarily waiting for liquidation proceedings

to be instituted against the company. Furthermore, under the above Ghanian provision, the company or any member of the company may institute the action. In the same vein, proceedings may also be instituted by the company on the authority of the board of directors or of any receiver and manager or liquidator of the company.

Another noticeable area of difference is that section 310(1) of the Nigerian Companies Act 1968 provides that if in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or guilty of any misfeasance or breach of duty in relation to the company which will involve civil liability at the suit of the company, the company may, on application of the official receiver, or of the liquidator, or of any creditor or contributor, investigate the conduct of the person in question and compel him to repay the money or property or any part there of respectively with interest, or pay compensation as the court thinks just. Accordingly, the section covers two categories of delinquency, that is both misfeasance and non-feasance. Thus in Shonowo v. Adebayo,[198] the failure of the directors of a company to keep true accounts as required by the company's articles and thereby occasion loss to the company, was held to render them liable under section 211(1) of the

Nigerian Companies Ordinance.[199] Whereas, section 210 of the Ghana Company's Code applies to enforce civil liabilities for breach of duty referred to under sections 203, 205 or 209 or on the alternative to restrain a threatened breach of any duty under the above sections to recover from any director of the company any property of the company. Thus the section covers only misfeasance but not non-feasance. Accordingly, under this provision an action is not permissible where what is compleined of is a mere negligence rather than fraud.[200]

Furthermore, in order to suc for a relief under section 310 of the Nigerian Companies Act 1968, the petitioner must establish that the company whose right is sought to be enforced under the provision has actually suffered some loss as a result of the misfeasance or breach of trust of the director.[201] Olawoyin,[202] takes the view that this requirement seems to be qualified by the fact that proceedings can be brought under the section to recover a secret profit from a director even when the company has suffered no loss from the transaction, since the profit is regarded as the property of the company for which a director has become liable or accountable.[203] Whereas, the position is different under Ghana Company's Code. As the provisions of sections 210(3) and 324 of Ghana Company's Code when jointly read, tend to suggest that the petitioner or applicant suing need not prove that the company whose right is sought to be enforced under the

sections has suffered actual loss as a result of the misfeasance or breach of trust. This may mean that any aggrieved member is free to bring an action and on application of the defendant, the court if it thinks fit may stay proceedings and order such a member to give security for payment of costs. Once this procedure has been followed, the court can now proceed to hear the action and to determine the case on its merit.

It is submitted that the procedure under sections 210 and 324 of the Ghana Company's Code are more preferable to those contained under section 310 of the Nigerian Companies Act 1968, As what is required under the code is simply that an aggrieved shareholder when required by the court to provide security, may do so and the court then proceeds to hear the suit. Thereby reducing the burden of first establishing that a wrong had been committed against the company. The above provisions under the Ghana Company's Code may also proof very useful in Nigeria, considering the fact that an aggrieved member may not be able to establish the wrong due to circumstances beyond his control. For instance, he may not be able to lay hands on the relevant documents to establish the claim or wrong. Moreover, the aggrieved party may be an illiterate and may not know how to go about the whole matter. This means that the law as it stands in Nigeria, if there is no change, such an aggrieved member may never establish such a claim and redress a wrong done to the company.

A further difference is that the provisions of section 310 of the Nigerian Companies Act 1968 suggests to the fact that any money recovered under the section will go into the compay's coffers and not to the aggrieved members or class of members affected in the action. Whereas, this is not the position in Ghana. As the provisions of section 210(5) of the company's code clearly provides that the court shall have power when justice so requires, to order that any money found to be payable by any defendant should be restored, either in whole or in part to the member or former members instead of the company.[204]

Finally, there is no provision under section 310 of the Nigerian Companies Act 1968 which prevents a plaintiff, be it the company or member, from discontinuing or compromising the action after it has been instituted. This gives rise to serious possibilities of collusion. As the directors may lay off the plaintiff in total disregard of the rights of the company and its members.[205] In any case, this obscure and unsatisfactory position under the present law in Nigeria has been adequately taken care of under the Ghana Company's Code. As section 210(6) makes it imperative that the court's approval must first besought and obtained before there can be any valid discontinuance or compromise of the action. Accordingly, notice must be given to the Registrar and all the members who are entitled to be heard.

5.5.6 INVESTIGATION BY INSPECTORS

If shareholders do not find any of the above measures satisfactory, there is yet another alternative open to them as it is possible for inspectors to be appointed to investigate the company's affairs under sections 157 - 167 of the Nigerian Companies Act and under sections 220 to 228 of the Ghana Company's Code respectively. However, in Nigeria, the appointment is made by the minister who may direct the Registrar to make such appointments. Whereas, in Ghana, the court may direct the Registrar or the Registrar may on his own motion appoint one or more competent inspectors to investigate the affairs of a company and to report thereon.

At this initial stage, it is necessary to state clearly that it is not intended in this thesis to examine all the provisions under the Nigerian Companies Act 1968 and those contained under Ghana Company's Code dealing with investigations of companies by inspectors. But it will suffice to deal only with those provisions where there are differences between the two laws for the purposes of comparing them. And also to examine the weight attached to inspectors report.

Under section 157(1) of the Nigerian Companies Act 1968, an appointment may be made on the application by members not holding less than one-quarter of the shares or in a company not having shares by not less than one-quarter of the number of persons on the Company's Register of members.

Furthermore, applicants must also satisfy the minister that they have a proper ground for the application and may be required to give security not exceeding ₦200 for payment of cost of investigation. Whereas, under section 220(1) of the Ghana Company's Code, the Registrar may appoint one or more competent inspectors on an application of members not less than one hundred or of members not holding less than one-tenth of the issue shares. And in a company without shares by not less than one-tenth of the total number of members. Under this same provision, the court may also require the applicants to give security of amount not exceeding ₵G200 for payment of costs of the investigation.

My objection to the above two provisions found under both laws lies on the fact that the power to appoint inspectors is discretionary, even when proper grounds have been established for such appointments. As this may not be in the best interest of the members who may urgently need the appointment of inspectors to investigate the affairs of the company. Thus the Jenkins Committee[206] recommended that this provision should be repealed and replaced by a mandatory duty to appoint inspectors if so requested by the members after establishing the genuineness of their case.

Secondly, under section 157(3) and section 220 of the Nigerian Companies Act 1968 and Ghana Company's Code respectively, the minister or registrar as the case may be, shall direct such appointment of inspectors if the company by special resolution declares that its affairs

should be investigated. Under these provisions it becomes mandatory that inspectors must be appointed. As the Registrar can be compelled by an order of mandamus to appoint an inspector if he refuses to appoint one following a special resolution by a company that an investigation is necessary.[207]

Thirdly, under section 157(3)(2) of the Nigerian Companies Act 1968 and section 219(2) of the Ghana Company's Code, the minister or Registrar may direct the appointment of inspectors if it appears first, that there are circumstances suggesting that the business is being or has been conducted with intend to defraud its creditors or otherwise for a fraudulent or unlawful purpose or in a manner oppressive on any part of its members, or that it was formed for any fraudulent or unlawful purposes. Secondly, that persons concerned with its formation or management have been guilty of fraud, misfeasance or other misconduct towards its members. Thirdly, that its members have not been given all the information with regard to its affairs which they may reasonably expect. This is the most important of all the proceeding provisions, as it can be effectively used by the members who are well informed to enforce the duties of the directors. However, unlike section 157 of the Nigerian Companies Act 1968, all applications made under section 220 of the Ghana Company's Code are required to be heard in chambers and fourteen days notice must be given to the company to enable it give evidence and call witnesses if it wishes to do so.[208]

From the above discussion on the two provisions found under the two laws, it is obvious that certain differences exist between the provisions. First, under section 157 of the Nigerian Companies Act 1968, inspectors can only be appointed on application of one quarter of the membership. Whereas, under section 220 of the Ghana Company's Code, the appointment is made on application of one-tenth of the members. This means that minority shareholders in Nigeria will have to solicit for more members to join them than their counterparts in Ghana before inspectors can be appointed to investigate the affairs of their company. It is submitted that the one-quarter pre-requisite membership required under the Nigerian provision makes it even more difficult for the minority members to obtain the appointment of inspectors whenever they genuinely feel aggrieved. Thus it is my considered view that a provision be included in the Nigerian Companies Act making it mandatory on the minister to appoint inspectors to investigate the affairs of a company on the application by one-tenth of the members of any class of shares. This will prove more practicable and less burdensome than the one quarter membership which is still being required under the Nigerian Companies Act 1968.

Another noticeable difference is that section 220 of the Ghana Company's Code makes it mandatory for the courts to hear applications brought under the provision in chambers instead of in the open court as

it applies in Nigeria. The section further provides that fourteen days notice must be given to the company to enable it be represented at the hearing so as to give evidence if it wishes to do so. Whereas, there is no similar provision under section 157 of the Nigerian Companies Act 1968. The reason why the Ghana Company's Code requires such applications to be heard in chambers rather than in the open court is to avoid undesirable publicity and thereby preventing applications being used for black-mailing purposes. This is elementary justice that the company should be allowed to oppose the application.[209]

It is submitted that a provision similar to section 220(3) of the Ghana Company's Code be included in the Nigerian Companies Act. This will make it mandatory upon the courts to hear and determine such applications in chambers rather than in the open court. This will prevent undesirable publicity and thereby prevent damage to the company's future image. Furthermore, since the credit of a compay in Nigeria can be undermined by reports made with out the company or its directors having an opportunity to present their defence, the section should include a provision giving the company at least fourteen days notice to enable it to be represented at the hearing and to give evidence if it so wishes.

Finally, it was earlier thought that the inspector's report arising from the investigation of the activities of the company had no legal effect and could not be used as evidence in a court of law against anyone. As in Re Grosvenor and West End Railway Terminus Hotel Co. Ltd,[210]

the case was heard on the terms of section 56 of the English Companies Act, 1862 which gave the Board of Trade power to appoint an inspector to examine the affairs of any company on an application made by the members of a company. (A similar provision is now contained in section 157 and section 220 of the Nigerian Companies Act 1968 and the Ghana Company's Code respectively) considering the legal effect of the inspector's report as a result of such examination, Lopes L.J. said:

> "... the inquiry before the inspector is not a judicial proceeding at all, can it be said that this inquiry is in any respect a judicial proceedings? Section 56 to 61, inclusive, of the Companies Act 1862 appears to me to embody a certain scheme or code for obtaining information by means of the inspectors appointed by the Board of Trade. It is to be observed that all that the inspector can do is to make a report to the board. The board cannot do anything when it has received the report. The report itself is not evidence of anything contained in it... It is clear to my mind that this cannot be said to be a judicial proceeding".

It therefore implies that since the proceedings before the inspectors are not judicial, the report itself is not a legal decision, but merely evidence of the opinion of the inspectors. Accordingly, it has no binding effect on anyone, even including the company. Therefore, if the idea of the law by providing for the investigation of the affairs of a company by the inspectors is to furnish the members with information about the company, there is no reason why the court should not accept the inspectors report as evidence to be relied on, unless such a report has been contested.

Thus in Re S.B.A. Properties Ltd.,[211] the court held concerning the auditors report that it was admissible in a court of law as evidence unless challenged and specifically refused to be prohibited from so doing by the decision of the Court of Appeal in Re Grosvenor and West End Railway Hotel Co. Ltd.[212] Again, in Re Pergamon Press Ltd,[213] Lord Denning M.R. held that proceedings of the inspectors are not judicial proceedings:-

> "They are not even quasi-judicial, for they decide nothing, they determine nothing. They only investigate and report".

Accordingly, the first decision above seems to suggest that the inspector's report can be relied on by the court as evidence provided the report has not been challenged. This view is in line with the decision in Re Travel & Holiday Club Ltd.,[214] where the judge had before him a report made by two inspectors acting in a statutory fact finding capacity, held that, as far as the admissibility of the report was concerned, the court must be entitled to look at it and act upon it, unless it is challenged.

However, the Nigerian Companies Act 1968 has settled this ambiguity.[215] Thus apart from prosecuting any officers of the company who have committed offences against the company, the Act further provides that the inspectors report authenticated by the company's seal whose affairs have been investigated, shall be admissible in any legal proceedings as evidence of the opinion of the inspectors in relation to any matter which it contains.[216]

Whereas, section 224(3) of the Ghana Company's Code provides that a copy of each report authenticated by the seal of the Registrar shall be admissible in any legal proceedings as evidence of the opinion of the inspectors in relation to any matter contained in the report. Thus sub section (3) of section 224 of the Ghana Company's Code is identical with section 163 of the Nigerian Companies Act 1968, except that the words authenticated by the Registrar's Seal has been substituted for authentication by the company's seal.

On the whole, the increasing powers given to inspectors to investigate the company's affairs under sections 157 to section 167 of the Nigerian Companies Act 1968 will undoubtably improve the lot of the members. As these investigations will provide the members with sufficient information with which to challenge the directors. Shareholders now armed with such relevant information should be in a better position to dismiss the directors for their wrongful acts, or to wind up the company and thereby bringing oppression by the directors to an end. And on the alternative to control the activities of any recalcitrant directors. But unfortunately no investigation has so far been ordered or carried out under the Nigerian Companies Act 1968 or the Act repealed by it[217] and it is doubtful whether they will ever be used.

5.5.7 MANAGEMENT AND CONTROL OF MANAGEMENT OF COMPANIES UNDER OTHER SYSTEMS OF LAW

The idea that shareholders can effectively control a company by supervising the board of directors has been shown to be false in large companies with widely dispersed shareholders. Many shareholders are apathetic and do not attend company meetings so long as dividend cheques are received. Large institutional investors with their investment expertise might be expected to give warning of decline through mismanagement may prefer to sell their holdings and invest else where. Only after the compay fails to pay dividends will the smaller shareholders come together and then the collapse may not be remediable.[218]

Although a member or shareholder of a company now has an impressive array of remedies at his disposal, especially where fraud or unfairness is alleged, an effective sanction against breach of the controlling directors duties of care and skill are still lacking for the rule in Foss v. Harbottle will normally bar an action at the suit of the minority, and it is not clear that any of the remedies will be available to a minority. The relative laxity of these duties, in comparison with the duties of loyalty, is reflected, whether or not as a matter ofdebiberate policy in the procedural sphere.

Thus, the major development in recent years have been a greater readiness on the part of the courts to intervene to correct unfairness or abuse of majority

power, which can still be able to do more effectively under the improvements in the remedy alternative to winding up which at last may be about to take place, and the increase in the inquisitorial powers of the Registrar of companies.

This latter use of administrative techniques to supplement judicial remedies is an attempt to solve one of the major problems - that of expense which has proved an excessive deterrent to adequate legal enforcement of managerial duties.[219] Thus no matter how available these remedies may be to check the increasing powers of the directors and controlling shareholders, Tom Hadden[220] takes the view that they do not provide adequate safeguards to shareholders, in relation to directors or others in de facto control of the company for the following obvious reasons.

First, the final resort for the shareholders or group of small shareholders dissatisfied with the policies or performance of their company is the annual general meeting at which lines of policy are supposed to be open to discussion. Shareholders may wish, for instance to raise the desirability or morality of certain company activities or to question directors on any statements which they have made on such matters only to be told by the chairman that such items are not on the agenda. In small companies these provisions are of little use to external shareholders, taking into consideration that the general meetingis usually dominated by the voting powers of the directors themselves.[221] Furthermore, the wide

distribution of share ownership in quoted companies means that a relatively small concerted block of voting shares will generally be sufficient to control the general meeting. Since in normal circumstances the large majority of small and medium shareholders are unlikely to exercise their voting rights at all, if they do act in a concerted way. Thus a block of votes amounting to little as one out of ten or twenty may be sufficient to ensure control. As a survey of shareholding in large British companies have shown that the twenty or so largest holdings do typically account for a much larger proportion of the total voting power than any other managerial group.[222] As long as this controlling group acts in a concerted way its position is virtually impregnable.

Secondly, the management of the company is in a position to utilize the provisions for proxy voting to consolidate its position. As it is the standard practice for management to send to all shareholders open proxy cards offering themselves as proxies. This is further buttressed by the fact that the stock exchange now requires all quoted companies to send out proxy cards in a two way form which permits the recipient to vote for or against any resolution to be proposed.[223] But management can usually count on a sufficient number of general proxies authorising them to act on their discretion to counteract any attempt by an opposing group of shareholders to dispute any important resolution. Thus, even if an opposing group does exercise its rights to propose critical resolutions the well established

inertia of ordinary shareholders when faced with a request for actual involvement in the affairs of their companies by exercising their votes in a specific way removes any serious threat to the position of management.

Thirdly, there is no way in which a dissatisfied shareholder may insist on a satisfactory answer, or indeed an answer at all, to a question which he wishes to raise and discuss. As there is no legal obligation on directors to answer at all, to a question , though they normally seek at least the appearance of doing so. Where a shareholder wishes to persue an issue in any depth, however, they will usually take refuge in the general principle that the day to day administration of the company's affairs is a matter for the directors and not the shareholders. Alternatively; the chairman may rule that any discussion of an issue which is not directly relevant to a resolution which has been duly circulated is out of order. However, it is only where the majority of the shareholders present wish to pursue an issue that there is any effective pressure on directors to deal with it in detail. Even then the directors may refuse to reveal the facts on the grounds of confidentiality or the absence of any legal obligation to do so.

Finally and perhaps most important of all, the directors are usually able to secure that there is no serious question of contest over the election of new directors or the re-election of existing directors.

And it is usual for the articles or the regulations of a company to provide for the retirement of directors by rotation,[224] so that in theory the general meeting is required to give its attention to the matter. In practice the board will normally arrange for any retiring director to resign in mid-term, and make use of the power to co-opt new directors to make any new appointment.[225] In this way the general meeting is rarely given an opportunity to do other than confirm those members of the existing board who retire by rotation. Furthermore, if any opposing candidates are actually put up the existing board will usually be able to muster sufficient votes in the manner just described to defeat the attempt. The only serious contest, however, which are likely to arise is over the election of directors in quoted or public companies are those arising out of contested take-over bids in which large blocks of shareholders are accumulated by opposing groups.

The above discussion points to the inevitable conclusion that managers have now taken advantage of their controlling position in the company for their personal advantage. This means therefore that one cannot realistically talk of shareholders control despite the provisions in the various Companies Acts and the Ghana Company's Code. It therefore appears now, that the most important control on management will be imposed outside the framework of company law. For instance, the pressure of trade unions and government

policies such as the extensive inquisitorial powers given to the board of trade or the Registrar of Companies will obviously reduce managerial independence. The regulation of money supply, credit import licences and government expenditure will imposed some limit on managerial independence. And it may be that in future, the management of companies will depend on the division of power between the management, government and the trade unions.

Happily, this is exactly what has taken place in West German law[226] the "system of co-determination". Here most German Companies have two boards. A supervisory and executive management boards of directors. The day to day management of a company is committed to a group of executives called the board of management(the vorstand) and they are answerable to the board of supervision (the aufsichtsrat) which appoints them and which can terminate their appointment. The executive management board must have one worker as a director. While the supervisory board is also made up of workers and shareholders directors.

However, assuming that the company has eleven directors in the coal mine and steel industries. The composition will be as follows, five directors will be appointed by shareholders and the other five workers directors will be appointed by the workers council and they must be workers or employees of the individual company.

For instance, two are proposed by the workers council and two are delegated by the trade union represented in the undertaking after consultation with workers council and one has to be nominated by the umbrella German union. Whereas, the eleventh member who is supposed to be neutral is appointed by mutual agreement between workers directors and shareholders directors and he is generally the chairman with a casting vote.

In other industries the shareholders appoint two thirds while the remaining one-third is appointed by workers or employees. The supervisory board which meets four or five times a year has certain statutory powers. First, it appoints the management board, scrutinizes the annual accounts and is responsible for the major decisions. For instance, such as mergers, take-overs and important labour organisation schemes. Secondly, the supervisory board may remove a director at any time for important reasons, such as if a director has been in breach of his duty or is incompetent to manage the company's business or has lost the confidence of shareholders or the workers. Thirdly, the supervisory board also fixes remuneration of directors which can be reduced at any time if the company's financial position deteriorates. The only option to the affected director is to resign by given one week's notice.

At present, under the 1975 reforms introduced in West Germany, there is now no difference between the coal and steel companies and other companies,

as any company which now employs more than two thousand workers must now have a supervisory board of directors. This is composed of equal number of workers and shareholders representatives and generally ten from each group. Out of the ten workers representatives, seven must be chosen from the shop floor and three out of the company and are usually trade union oificials. It is however, interesting to note that this German system has been copied and modified in Belgium, Poland, Luxemburge, the Netherlands, Denmark and Sweden. And in England, the Bullock Committee[227] on industrial democracy recommended the introduction of the modified German system. As it recommended that companies employing more than two thousand workers should be required to appoint a new board of directors on which there will be an equal number of shareholders and workers representatives. While a third group will be appointed by mutual consent of both parties. Such a board will have a statutory and non delegatable and exclusive authority for submitting proposal to the general meeting of the shareholders on five important issues. First, on the winding up of the company, secondly, recommendations for changes in the memorandum and articles of association. Thirdly, for declaration of dividends. Fourth, on the issue of shares, take overs and mergers. And finally, they could also have powers to the disposal of substantive parts of the company's property. Further, it may also have the powers which it can delegate in regards to the appointment of management and allocation of resources

in the company.

In conclusion, it is my considered view that since the exceptions to the rule in Foss v. Harbottle and the various statutory provisions in the Nigerian Companies Act 1968 are not adequate to check the increasing powers of directors in de facto control of the company's affairs, the recommendations of the Bullock Committee[228] should be adopted and incorporated in the Nigerian Companies Act so as to effectively control the activities of company directors in Nigeria.

FOOTNOTES.

1. Article 80 Table A provides that the Company in general meeting may make regulations in general meeting to restrict the directors powers but not as to invalidate with retrospective effect what they have already done. It is clear that this does not empower the general meeting to instruct the directors by the passing of ordinary resolutions. The intention of the provision may be that the general meeting can by special resolution alter the articles so as to reduce for the future the powers delegated to the directors.

2. L.C.B. Gower, Principles of Modern Company Law (Stevens & Sons, London 3rd. ed. 1969) p.139

3. (1906) 2 Ch. 34 (C.A.)

4. Per Green L.J., in Shaw (John) & Sons Salford Ltd v. Shaw [1935] 2 K.B. 113 p.134

5. [1942] 1 All E.R. 582 p. 584

6. (1963) N.S.W.R. 416 Cited by Dr.G. Tumwine-Mukubwa, Department of Commercial Law, Ahmadu Bello University Zaria. "Apportionment of Company Powers between management and general meeting. An analysis of the debate and cases". Unpublished work 1986.

7. [1909] 1 Ch. 267

8. Dr. G. Tumwine-Mukubwa, Department of Commercial Law, Ahmadu Bello University Zaria. "Apportionment of Company powers between management and general meeting: An analysis of the debate and cases" (unpublished work 1986) p.12

9(a) (911) 105 LT 419

9(b) Gwyn. Note 8 p.9.

10. G.R. Sullivan "The Retationship between the Board of directors and the general meeting" (1977)93 L.Q.R. pp 575 - 576

11(a) [1909] A.C. 442

11(b) Pennington's Company Law p.500; Palmer's Company Law p.632; Gower, Principles of Modern Company Law (3rd ed. 1969) p.132

12. Quin & Extens v. Salmond [1909] 1 Ch.311 C.A., [1909] A.C. 442 (H.L.)

13. [1943] 1 All ER 582

14. Bamford v. Bamford [1968] 3 W.L.R. 317

15. [1969] 2 W.L.R. 1107

16. SS. 7, 12 and 23 Nigerian Companies Act 1968, No.51 of 1968

17. Ibid S. 175

18. Barron v. Potter [1914] 1 Ch. 895

19. Alexander Ward & Co. Ltd. v. Samyong Navigation Co. Ltd. [1975] 2 ALL E.R. 424

20. G.A. Olawoyin: Status and Duties of Company Directors (University of Ife Press Ile-Ife 2nd ed. 1981) p.32

21. See Jenkins Report, Para.87 on this subject see also Jenkins report, Para 99(a) and Gower's report on Company law of Ghana section 203 of the draft company's code (1961)

22(a) See para. 17 of the Final Report on Ghana Company Law (1961).

22(b) See section 7 of the Ghana Company's Code which saves the common law and principles of Equity.

23. See para 18 of the Final Report on Ghana Company Law (1961). Ghanian judges and accountants have been trained in English law and tradition and have become familiar with it.

24. No. 51 of 1968

25. Mills v. Mills (1938) 60 C.L.R. 150, per Lathan C.J., at p. 164

26. J. Ola Orojo, Nigerian Company Law and Practice (Sweet & Maxell London 1976 ed.) p. 271

27. Ibid. p. 272

28. SS. 108 and 140 Nigerian Companies Act 1968, No.51 of 1968

29. Ibid. S. 120

30. Ibid. SS. 122 - 124

31. Ibid. SS. 38 - 47 and 82

32. Ibid SS. 44 and 45

33. Ibid S. 190

34. Ibid S. 186

35. Lindgren v. L. & P. Estates Ltd. [1968] Ch. 572 (C.A.), which rejected the argument that "directors elect" are fiduciaries.

36. [1902]/2 Ch. 421

37. Ibid. p. 426

38. Percival v. Wright [1902]/2 Ch. 421

39. H.M.S.O. Cmnd 6659 paras. 86 and 87, cited by Dr. I. Ayua, Nigerian Company Law. (Graham Burn Press Beforeshire U.K. 1984) 175

40. H.M.S.O. Cmnd 1749 para 89

41. (1914) 30 L.T.R. 444 (P.C.)

42. G.A. Olawoyin: Status and Duties of Company Directors (University of Ife Press Ile-Ife 2nd ed. 1981) p. 125. See note 1

43. [1942]/1 All E.R. 378 (H.L.)

44. Ibid.

45. Ibid.

46. Brophy v. Cities Services Co. 31 Del. Ch. 241(1949)

47. (1909) 213 U.S. 419, cited by Gower, Principles of Modern Company Law, Stevens & Sons, London 3rd ed. (1969) p. 544. See note 9.

48. Supra note 40

49. Godwin v. Agassiz, 186 N.E. 659 reported by G.A. Olawoyin, Status and Duties of Company Directors (University of Ife Press Ile-Ife 2nd ed. 1981) p. 56

50. Re Brazilian Rubber Plentetions and Estates Ltd. [1911]/1 Ch. 425. In that case, Neville J. stated that the care which a director is required to take is reasonable care" to be measured by the care an ordinary man might be expected to take in the circumstance on his own behalf.

51. G.A. Olawoyin, Status and Duties of Company Directors. (University of Ife Press Ile-Ife 2nd ed. 1981) p. 36. See note 3.

52. Re: Cardiff Saving Bank, Marqins Brutes case [1892]/2 Ch. 100 where Marqins Brute the heir to the mainshare holder of a bank was made one of its directors but he hardly attended board meetings but recieved remunerations by way of directors fees.

53. H.A.J. Ford, Principles of Company Law (Butterworths Sydney Melbourne Brisbane 1st ed. 1974) p.349

54. [1925] ch. 407

55. L.C.B. Gower, Principles of Modern Company Law Stevens & Sons, London 3rd ed. 1969) 551

56. Ibid. L.C.B. Gower, (4th ed. 1979) p.605. See note 29. one observes how in Re City Equitable case, Specific losses were pleaded as flowing from particular acts or omissions.

57. Ibid. p. 605

58. Ibid.

59. Re Brazilian Rubber Plantations and Estates Ltd. [1911] 1 ch. 425 at p.437

60. Employees or officials of the company are agents and servants of the company but not agents and servants of the directors.

61. K.W. Wedderburn; "Shareholder's rights and the rule in Foss v. Harbottle" (1957) C.L.J. p.98

62. Ibid. p. 99. see also note 74

63(a) Aberdeen Railway v. Blackie Brothers (1854) 1 Macq (H.L.) 461 reported by G.A. Olawoyin, Status and Duties of Company Directors (University of Ife press Ile-Ife 2nd ed. 1981) p.68. The principle established in this case is not only confined to English Company Law. It is also applicable in other jurisdictions in view of its immerse importance. As it safeguards and protect the interests of companies and other beneficiaries. Thus a company will not be held bound in a transaction or contract entered into by its director or through its directors as an agent of some other person. If the directors position is such as to prejudice, or likely to prejudice, the honest and full discharge of his duties. However, the duty may within limits be waived or modified by provisions in the company's articles.

63(b) See the three tests postulated by Romer J. in Re City Equitable Fire Insurance Co. Supra.

63(c) Re National Bank of Wales Ltd [1899] 2 Ch. 629

63(d) Re City Equitable Fire Insurance Co. Supra. Ibid p. 407 at 428

63(e) e.g. Coker J.S.C., in Shonowo & Ors v. Adebayo & Ors (1969)2 A.L.R. Comm. 419 at 430; Halsbury, L.C. in Dovey v. Cory [1901] A.C. 477, p. 487

63(f) Re Duomatic Ltd. [1969] 2 W.L.R. 114

63(g) Re Luckings Wills Trusts [1967] 3 All E.R. 726

64. Underlining are mine which will come at a later stage.

65(a) L.C.B. Gower, Seventh Comment on the duty of care and skill of directors on Final Report on Ghana Company Law (1961) p.136.

65(b) H.A.J. Ford, Principles of Company Law (Butterworths - Sydney Melbourne Brisbane 1st ed. 1974) p. 352 "where the provisions of section 144 of the Ontario Business Corporation Act 1970 are identical to the provisions of section 203(2) of the Ghana Company's Code 1963.

66. Ibid. p. 351

67. Briggs v. Spaulding (1891) 141 U.S. 132; 35L Ed. 662; 11 Sct 924.

68. Supra, Briggs v. Spaulding was discussed in Anderson v. Bundy (1933)161 Val; 171 S.E. 501.

69. Neese v. Brown (1964) 218 Tenn 686; 405 SW 2d 577, 25 A.L.R. 3d 932.

70. SS. 178(1) and 179(1) Nigerian Companies Act 1968, No. 51 of 1968.

71. S. 186(1) Ghana Company's Code 1963, Act 179 of 1963.

72. S. 176 Nigerian Companies Act 1968, No. 51 of 1968.

73. Ibid. S. 172(2)

74. Ibid. S. 168

75. Ibid. S. 176

76. S. 182(1)(c) Ghana Company's Code 1963, Act 179 of 1963

77. L.C.B. Gower, fourth Comment on section 182 of the Final Report on Ghana Company Law (1961) p.130.

78. Supra. note 76

79. H.A.J. Ford, Principles of Company Law (Butterworths - Sydney Melbourne Brisbane 1st ed. 1974) p.300

80. S. 183 Ghana Company's Code 1963, Act 179 of 1963.

81. S. 173(3) Nigerian Companies Act 1968, No.51 of 1968.

82. Supra note 80. See section 183(3)

83. Spencer v. Kennedy [1926] Ch.125 "where it was held that in the special articles, qualified person meant a person qualified by holding the requisite number of shares and that 'F and G' did not hold their shares until the transfers to them had been actually registered".

84. L.C.B. Gower, third comment on section 183 of the Final Report on Ghana Company Law(1961) p.131.

85. H.A.J. Ford, Principles of Company Law, Butterworths - Sydney Melbourne Brisbane 1st ed. 1974) 135.

86. G.A. Olawoyin, Status and Duties of Company Directors (University of Ife press Ile-Ife 2nd ed. 1981) p.231. See note 5.

87. J.H. Gullick, Ranking and Spicer's Company Law (HFL publishers Ltd. U.K. twelfth ed. 1981)p.283.

88. Ibid. p. 284

89. [1964] A.C. 287; [1963] 3 All E.R. 770; (1963)3 W.L.R. 802.

90. S. 11[A] Banking Act of Nigeria, No. 1 1969

91. S. 181(1) Nigerian Companies Act 1968 No.51 of 1968.

92. S. 129 of the Ghana Companys Code 1963, Act 179 of 1963 requires amount due from all officers of the company to be disclosed in the amounts.

93. H.A.J. Ford, Principles of Company Law (Butterworths - Sydney Melbourne Brisbane 1st ed. 1974) p. 316

94. Ibid.

95. S. 181(2) Nigerian Companies Act 1968, No.51 of 1968.

96. L.C.B. Gower, Sixth Comment on section 301 of the Final Report on Ghana Company Law(1961). P.215.

97. "Net assets mean the assets less the liabilities of the company as shown in the last audited balance sheet of the company.

98. S.301(2) of the Ghana Company's Code 1963, Act 179 of 1963.

99. /1902/2 ch.421 "where it was held that since directors owe no fiduciary duty to the shareholders of the Company, the law does not prohibit them from purchasing member's shares even when they fail to disclosed certain information which materially affects the value of the shares.

100. S. 186(1) Nigerian Companies Act 1968 No.51 of 1968.

101. Ibid. S.186(2)

102. Ibid. S.186(2) Although section 189 requires every director to give the company all such particulars of himself as may be necessary for making up the register.

103. S. 215(5) Ghana Company's Code 1963, Act 179 of 1963.

104. L.C.B. Gower, Principles of Modern company Law (Stevens & Sons London, 4th ed. 1979)p.633

105. S.186(5) Nigerian Companies Act 1968, No.51 of 1968.

106. Ibid. S. 186(6), in computing the 14 days and 3 days, Saturdays, Sundays and Public holidays are completely excluded

107. S. 215(4) Ghana Company's Code 1963, Act 179 of 1963.

108. SS. 25 and 30 English Companies Act 1967, 1967 C 8.

109. Ibid. SS. 27 - 29

110. Ibid. S. 29(7) nd(10)

111. Ibid. S. 25 English Companies Act 1976, 1976 C 47

112. Ibid. S. 33 English Companies Act 1967.

113. Ibid. S. 26

114. Ibid. S. 70 English Companies Act 1980, 1980 C 22.

115. Ibid S. 72

116. L.C.B. Gower, Principles of Modern company law (Stevens and Sons, London 4th ed. 1979) p. 636

117. S. 69(2) English Companies Act 1980, 1980 C.22

118. Ibid.

119. Supra note 115.

120. G.A. Olawoyin, Status and Duties of Company Directors (University of Ife Press Ile-Ife 2nd ed. 1981) p.61. See also note 1.

121. S. 190 Nigerian Companies Act 1968, No.51 of 1968 requires disclosure to be made to the board of directors only. However, it is unfortunate that very few contracts ever do reach the board of directors.

122. Aberdeen Rly v. Blackie Brothers (1854)2 Eq Rep 1281 at p. 1286., J.M. Gullick, Ranking & Spicer's Company Law (HFL Publishers Ltd. U.K. twelfth ed. 1981) p.300

123. S. 207(10) Ghana Company's Code 1963, Act 179 of 1963.

124. S. 187 Nigerian Companies Act 1968, No.51 of 1968.

125. Ibid S. 175(6)

126. Ibid S. 183(2)

127. S. 212(3) Ghana Company's Code 1963, Act 179 of 1963

128. See for example S. 184 English Companies Act 1948, 11 & 12 Geo 6C 38.

129. See the proviso to Section 175(1) of the Nigerian Companies Act 1968, No.51 of 1968

130. J. Old Orojo, Nigerian Company Law and Practice. (Sweet & Maxwell, London 1976 ed.) p.297

131(a Bushell v. Faith /1969/ 2 W.L.R. 1067; /1969/ 1 All E.R. 1002

131b) Ibid

132. H.A.J. Ford, Principles of Company Law, Butterworths Sydney Melbourne Brisbane 1st ed. 1974)p.384.

133. Article 80 Table "A"

134. (1843)2Hare 461

135. L.C.B. Gower, Principles of Modern Company Law (Stevens & Sons, London 3rd ed. 1969) p. 584; Wedderburn "Shareholders rights and the rule in Foss v. Harbottle". (1957) Camb. L.J. 194

136. per Jenkins, L.J. in Edwards v. Halliwell /1950/ 2 All E.R. 1054 at p.1066.

137. Per Mellish L.J. in MacDougall v. Gardiner [1875] 1 Ch. D. 13 at p. 25

138. Abubakri & ors v. Abudu Smith & ors. (1973) (Nig.) 6SCR. 31 at p. 44

139. Hogg v. Cramphorn Ltd. [1966] 3 All E.R. 42

140. Bamford v. Bamford [1969] 1 All E.R. 969 (C.A.)

141. G.A. Olaoyin, Status and Duties of Company Directors. University of Ife Press Ile-Ife 2nd ed. (1981) pp. 275 - 278 at p. 279.

142. H.A.J. Ford, Principles of Company Law, (Butterworths - Sydney Melbourne Brisbane 1st ed. 1974) p. 394.

143. Bamford v. Bamford [1970] Ch. 212

144. G.A. Olawoyin, Status and Duties of Company Directors (University of Ife Press Ile-Ife 2nd ed. (1981) p. 262. See also note 2.

145. Ibid. p. 263; see note 3.

146. (1969)2 A.L.R. Comm. 273

147. (1961)1 Ghana L.R. at p. 196

148. (1971) G.L.R. 153

149. [1950] 2 All E.R. 1064

150. Ibid.

151. Cotter v. National Union of Seamen [1929] 2 Ch. 58, per Jenkins L.J. in Edwards v. Halliwell [1950] 2 All E.R. 1064 at p. 1067,

152. Supra. Edwards v. Halliwell at p. 1067

153. Ashbury Railway Carriage & Iron Co. v. Riche (1875) L.R. 7. (H.L.) 653

154. Howden v. Yorkshire Miners Association [1903] 1 K.B. 308; Cole v. Irving & Co. Ltd. (1971) U.L.L.R. 314.

155. Heyting v. Duport (1964)1 W.L.R. 843, "where Russel and Harman L.J. would like a more flexible approach to the exceptions to Foss v. Harbottle.

156. Allen v. Hayatt (1914) 30 T.L.R. 444

157. Pender v. Lushington [1877] 6 Ch. D. 700

158. Per Lindley L.J., in Hutter v. Eastern and Midlands Rly. Co. (1888/38 Ch. D. 104

159. Commissioners of Sewers of the City of London v. Gellaty (1876/3 Ch. D. 610 at p. 615

160. Per Romilly, M.R. in Sweny v. Smith (1869) (1869) L.R. 7 Eq. 324 at p. 333

161. Atwool v. Merry weather (1867) L.R. Eq. 464 n.

162. 1864 2 H & M. 254. cited by G.A. Olawoyin, Status and Duties of Company Directors (University of Ife Press Ile-Ife 2nd ed. 1981 p. 285. See note 2.

163. Towers v. African Tug Co. (1904/71 Ch. 558

164. Pennington, Company Law, (Butterworths, London 3r ed. 1973) p. 570

165. L.C.B. Gower, Principles of Modern Company Law (Stevens & Sons London 3rd ed. 1969) pp. 554 - 589; Supra. Pennington p. 570; Wedderburn (1958) Camb. L.J. pp. 96 - 105; D. Surgarman (1975) L.Q.R. 482, 483 - 485 where the decision in Wallerstainer v. Moir (No.2) 1975 2 W.L.R. 309 in which a minority shareholder was allowed to bring a derivictive action involving fraud has been interpreted as allowing such action when ever any breach of a directors fiduciary duty is proved.

166. S. 324(4) Ghana Company's Code 1963, Act 179 of 1963.

167. (1942/1 All E.R. 378 (H.L.)

168. L.C.B. Gower, Seventh Comment on section 210 of the Final Report on Ghana Company Law (1961)p.153.

169. Dr. I. Ayua, Nigerian Company Law, (Graham Burn Press Bedfordshire U.K. 1984) p. 206

170. Re Five Minutes Car Wash Service Ltd. (1966/1 All E.R. 242; Re Lundie Brothers Ltd. (1965/1 All E.R. 667 and Elder v. Elder & Watson (1952/ S.C. 49.

171. Ibid. Elder v. Elder & Watson

172. Re Lundie Brothers Ltd. Supra and Elder v. Elder & Watson Ltd. Supra are no longer good law in Ghana.

173. Re Italcom (Western Nigeria) Ltd. CCHCJ/3/72/7

174. (1952/ S.C. 49 at p. 55

175. Ibid. p. 60; G.A. Olawoyin, Status and Duties of Company Directors. (University of Ife Press, Ile-Ife 2nd ed. 1981) p. 293

176. [1959] A.C. 324 at p. 343

177. [1959] 1 W.L.R. 62

178. [1958] 3 All E.R. pp. 704 and 706

179. [1966] 1 All E.R. 242

180. Ibid p. 247

181. Per Jenkins L.J. in Re Hermor Ltd (1958) 3 All E.R. 689 p. 1098; Pennycuick J in Re Jermyn Street Turkish Baths Ltd. (1970) 3 All E.R. 57 at p. 67; See also Jenkins report para. 202.

182. Jenkins Report Cmnd 1749. para 205

183. S. 75 English Companies Act 1980, 1980 C. 22

184. Ibid. S. 75(3)

185. [1959] 1 W.L.R. 62

186. [1958] S.C. (H.L.) 40

187. S. 75(4) English Companies Act 1980, 1980 C. 22

188. Ibid. S. 75(a)

189. Supra. Foss v. Harbottle

190. Article 80 Table A

191. [1909] 1 Ch. 267

192. [1908] 2 K.B. 89 at pp. 105 - 106

193. October 1, 1968

194. SS. 23, 74, 125 and 128 Nigerian Companies Act 1968, No. 51 of 1968

195. Ibid. S. 74(2)

196. Ibid. S. 125(5)

197. [1961] Ch. 270

198. Per Coker J.S.C. in Shonowo v. Adebayo (1969) 2 A.L.R. Comm. p. 419 at 431.

199. Cap 37 (Laws of the Federation of Nigeria) 1958)

200. L.C.B. Gower, first comment on section 210 of the Final Report on Company Law (1961) p.152.

222. Sargant Florence, Ownership, Control and Success of Large Companies 1961, cited by Tom Hadden, Company Law and Capitalism (Willmer Brothers Limited, Birkenhead U.K. 2nd ed. 1977) at p. 324

223. Ibid. Listing agreements (1976) version para 5 also cited by Tom Hadden at p. 324

224. S. 183 English Companies Act 1948, 11 & 12 Geo 6 C. 38

225. Table "A" article 75

226. Stock Corporation Laws (1965) 38. 76 - 118 vagts 80 H.L.R. 23 cited by H.A.J. Ford, Principles of Company Law(Butterworths Sydney, Melbourne Brisbane 1st ed. 1974) p. 412

227. Cmnd Papers 6706 (1977) "Report of the committee on industrial democracy" cited by L.C.B. Gower Principles of Modern Company Law (Stevens & Sons London, 4th ed. 1979) p. 73. See also (1977) 40 M.L.R. 323.

228. Ibid.

201. Heyting v. Dupont [1964] 2 All E.R. 273 at 277; Re Etic Ltd. [1928] Ch. 861, pp 872 - 873

202. G.A. Olawoyin, Status and Duties of Company Directors (University of Ife Press Ile-Ife 2nd ed. 1981) p.314

203. Re North Austrian Territory Co., Archer's Case (1892) Ch. 322. See, especially Lindley, L.J. at pp. 338 - 339.

204. S. 210(5) Ghana Company's Code 1963, Act 179 of 1963

205. In America, this possibility is recognised and guarded against by provisions similar to section 210(6) of the Ghana Company's Code 1963, Act 179 of 1963.

206. H.M.S.O. Cmnd 1749 Paras 216 and 218 (a) and (b)

207. R. v. Board of Trade Exparte St. Martins Perserving Co. Ltd. [1965] 1 Q.B. 603, where it was held that the term affairs of the company includes its good will, its profits, losses, contracts and assets including all its investments or other property interests and its control of a subsidiary company, and also transactions of a receiver and manager of the company appointed by debenture holders. See especially pp. 613 and 618.

208. S. 220(3) Ghana Company's Code 1963, Act 179 of 1963.

209. L.C.B. Gower, Sixth Comment on section 220 of the Final Report on Ghana Company Law (1961) p.165.

210. (1897) L.T. 337

211. [1967] 1 W.L.R. 799

212. Supra note 210

213. [1971] Ch. 388

214. [1967] 2 All E.R. 606

215. S. 161 Nigerian Companies Act 1968, No. 51 of 1968

216. Ibid. S. 163

217. J. Ola Orojo, Nigerian Company Law and Practice (Sweet & Maxwell London, 1976 ed.) p.324

218. H.A.J. Ford, Principles of Company Law (Butterworths Sydney Melbourne Brisbane 1st ed. 1974) p.411

219. Ibid. p. 411

220. Tom Hadden, Company Law and Capitalism (Willmer Brothers Limited, Birkenhead U.K. 2nd ed. 1977) pp. 324 - 327.

221. Ibid. Chapters 4 and 5

222. Sargant Florence, Ownership, Control and Success of Large Companies 1961, cited by Tom Hadden, Company Law and Capitalism (Willmer Brothers Limited, Birkenhead U.K. 2nd ed. 1977) at p. 324

223. Ibid. Listing agreements (1976) version para 5 also cited by Tom Haddon at p. 324

224. S. 183 English Companies Act 1948, 11 & 12 Geo 6 C. 38

225. Table "A" article 75

226. Stock Corporation Laws (1965) 83. 76 - 118 vagts 80 H.L.R. 23 cited by H.A.J. Ford, Principles of Company Law(Butterworths Sydney, Melbourne Brisbane 1st ed. 1974) p. 412

227. Cmnd Papers 6706 (1977) "Report of the committee on industrial democracy" cited by L.C.B. Gower Principles of Modern Company Law (Stevens & Sons London, 4th ed. 1979) p. 73. See also (1977) 40 M.L.R. 323.

228. Ibid.

CHAPTER SIX

OTHER DIFFERENCES BETWEEN THE NIGERIAN COMPANIES ACT 1968 AND THE GHANA COMPANY'S CODE 1963

6.1 INTRODUCTION

This chapter examines miscellaneous differences existing between the Nigerian Companies Act 1968 and the Ghana Company's Code 1963.

The first area to be examined is to the extent to which Companies in Nigeria and Ghana can validly make donations to their employees and other charitable organisations. It is also intended here to look at other jurisdictions to see the extent to which these companies may make such valuable contributions to their employees, charitable organisations and the society. However, it must be noted that even though there is no provision in the Nigerian Companies Act, 1968 which permits companies to make such donations, companies in Nigeria have been making valuable contributions by way of donations. It is therefore feared that in the absence of such a provision in the Nigerian Companies Act, 1968 such gifts may be made invalid by the courts.

The second area to be considered in this chapter is the publication in the Gazette of relevant information about a company when it has been newly incorporated and when it is wound up as it is the practice in continental countries to do so. This practice is necessary because it makes it possible for people wishing to do business with the company to look up at these Gazettes to find out some relevant

facts about a particular company, rather than calling at the Companies Registry whenever such relevant information may not easily be ascertained. This practice saves time and prevents people from making unnecessary journeys to the Companies Registry only to find out minor facts about a particular company. But unfortunately, there is no such provision in the Nigerian Companies Act, 1968 when compared with the Ghana Company's Code, 1963.[1]

In the same vein, it is also the practice in continental countries and Ghana[2] for the Registrar of Companies to publish in the Gazette the name of any company which has been wound up either voluntarily or by an order of the court. This publication is done in order to warn the public that the company is no longer doing business. And also to prevent unscrupulous former officers of the company from using the company's name to do business with the public with the sole aim of defrauding them. But surprisingly, there is no such provision in the Nigerian Companies Act, 1968. As such whenever a company is wound up in Nigeria and the Registrar is informed, he is only required to enter such information in the register and to cancel the name of that particular company from the list of companies still operating business in Nigeria. Once this has been done, that is the end of the matter. Thus such material facts are only known to the Registry and not to the generality of the people. It is therefore intended here to examine provisions in other jurisdictions which make it mandatory upon

the Registrar to publish the name of any company which has been wound up in the Gazette.

Furthermore, the third area to be considered in this chapter is the provision which makes it also mandatory on the Registrar to publish periodical reports on companies. The reason for doing this is to enable the public to have some insight facts about the activities of companies. The Ghana Company's Code[3] contains such a provision which makes it mandatory for the Registrar of Companies in Ghana to publish a comprehensive report on the activities of companies every three years. Whereas, there is no such provisions under the Nigerian Companies Act 1968. The absence of such a similar provision in the Nigerian Companies Act, 1968 has made so many people not to know exactly the number of companies carrying on business in Nigeria. There is a likelihood that such a provision in the Nigerian Companies Act will go a long way to make it mandatory on the Registrar of Companies to ensure that files are properly kept up to date so that Companies in Nigeria may not default in filing their returns. Such prompt filing of returns will also assist the Registrar to compile his periodical reports easily whenever they are due.

Finally, the last area to be examined in this chapter is the rule that a company cannot deal with its own shares. This is the rule laid down in Trevor v. Whitworth[4] which prohibits a company from subscribing for or purchasing its own shares.

As such acquisitions are deemed dangerous as they may result in the reduction of the capital yardstick. This rule has been strictly followed in Nigeria and a company cannot purchase and re-issue its own shares.[5] Meanwhile this rule has not been followed in Ghana. Perhaps, this may be due to the absence of Stock Exchange Markets, that companies in Ghana under certain safeguards are allowed to purchase and re-issue their shares to the public.[6]

6.2.1 DONATIONS BY COMPANIES

The general consensus amongst businessmen,[7] politicans[8] and judges[9] in this century towards donations by companies to its employees and charitable organisations is that a company is a corporate citizen and as such the business sector has a duty to the society as a whole, apart from its shareholders who also belong to the society. This doctrine of corporate social responsibility emphasizes the fact that extensions of government power into the private sector may not be in the best interest of the society and that by judicious exercise of its responsibility, the business sector can reduce the need for such extensions of governmental power, leaving the government free to persue its legitimate functions of regulating and policing society according to the pre-set rules of conduct.[10] Thus the corporate sector should take upon itself to be an instrument of social justice and over all economic development in addition to building up its own resources.

In otherwords, the directors while performing their legal duties in the best interest of the company, should in addition take the interests of its employees and the society to heart and strife to strike a good balance between both interests for the overall good of the society. Therefore, profit maximization should not be the sole aim of operating companies.

In practice, the doctrine of corporate social responsibility or donations by companies have been embraced and applied in Nigeria and Ghana in several instances. This is because most of these expenditures although strictly are non-commercial can safely be justified on these grounds. For instance, building of cantcens to provide the employees with food during working hours as it is practised by Peugeot (Nig) Ltd and other companies, providing medical facilities to its workers, refreshments for shareholders before a general meeting, donations for educational purposes such as the building of Ali Akilu Hostel for the Institute of Administration, Ahmadu Bello University Zaria, by the Bank of the North (Nigeria) Limited. This may all be of long term benefit to the company in creating attracting working conditions for employees, and also in promoting a better understanding of the company's activities by shareholders and the public at large.

Furthermore, the company may even use its funds to train some persons in higher institutions in courses relevant to the company's business so as to increase the supply of well trained personnel.

Therefore an incorporated company is restricted to the pursuit only of the objects outlined in its registered memorandum of association and the exercise of powers expressly conferred upon it by the memorandum or which are reasonably incidental to the achievement of its stated objects.

Similarly, Tom Hadden,[13] takes the view that if a company is about to be wound up or even to be absorbed by another company, it is no longer possible in strict legal sense for the long term benefit of the company and any shareholder who will participate in the eventual distribution of the company's assets may legitimately object to such largesse.

Another case in point is Re W & M Roith Ltd.,[14] where a company covenanted with its Managing Director (who was its controlling shareholder) to provide a pension for his widow. It was held that the covenant had not been entered into bona fide for the benefit of the company, but with the real aim of providing for the widow because here was no reason to suppose that the service agreement was necessary in order to retain his services.

Furthermore, in Parke v. Daily News Ltd.,[15] where on the winding up of the News Chronicle in 1960 the controlling directors of the company proposed to apply the balance of the sum to be paid to the Daily Mail for the company's good will, one of the shareholders objected to the proposal on the grounds that all the remaining assets should be distributed

to the shareholders. The objection was upheld, the directors' motives however laudable and however enlightened from the view of industrial relations were such that the law does not recognise as a sufficient justification. The above decision demonstrates how little scope there is for the board of a company which is going out of business to make voluntary provision for its employees.[16]

Therefore, the only legitimate expenditure that the company may incur is that which is expressly authorized in its constitution, which is either directly or indirectly incidental to carrying out its authorised objectives or which otherwise contributes to the profitable exercise of its business. The law takes a broad view of these matters as it is clear from the following leading statements of principle as interpreted by Parke v. Daily News Ltd.[17] First, that the company's funds cannot be applied in making ex-gratia payments as such. Secondly, the court will inquire into the motives actuating any gratituitous payments and the objects which is intended to serve. Thirdly, the court will uphold the validity of gratituitous payments but only if after inquiring, it is established the transaction is reasonably incidental to the carrying out of the company's business or if it is done bona fide for the benefit and to promote the prosperity of the company's corporators. This seems equally true in the present context in Parke v. Daily News Ltd.[18] Fourth, that the onus of upholding the validity of such payments lies on those who assert it (directors).

Perhaps, only a few cases may pass these stringent tests. In Hampson v. Price's Patent Candle Co.[19], it was held that the company might lawfully pay gratituitous money for their servants because that kind of liberal dealing with servents reduces the friction between master and servant and it is in the end a benefit to the company.

Sometimes it seems that there are some other policy considerations that the courts will take into consideration. In Evans v. Brunner Mould & Co. Ltd.[20], a shareholder challenged the validity of a resolution of a general meeting of a chemical company authorizing distribution of £100,000 by the directors to such universities or other scientific institutions in the United Kingdom as they may select for the furtherance of Scientific education and research. It was held that the proposed distribution was incidental and conducive to that object. That this was so even though the company was not aiming at the education of Scientists as specialists in its business but was seeking to encourage men who would cultivate the Scientific attitude of mind in the company's hope that men so trained would be forthcoming to assist in maintaining the company's business there being confidence that they would readily adapt themselves to the work of the company. At this juncture, one may safely submit that even where the doctrine of ultra vires has been either abolished or watered down, it still retains significant importance when it comes to engaging in non-profitable activities

like making charitable contributions.

6.2.3. NEW VIEW ON CORPORATE DONATIONS

In recent decades many business relationships have been depersonalized by such developments as automation, mass production, and large scale method of distribution. Consequently, many people now believe that the company must serve not only the interests of its shareholders but also the well-being of employees, consumers, suppliers, creditors and the community.[21] This view is shared by many modern managers. Mr George Goyder subscribes to the view that a responsible company is one where there is complete identity of interest between the interest of the company and the interests of the community.[22] In otherwords, a responsible company is one where in, there is complete identity of interests between the interest of the society comprising the elements that actually work with the company and contribute to its success, namely, the employees, shareholders, creditors, consumers and the state.

Similarly, Mr Young[23] is also of the view that a company should not only do business honestly and properly but also that it should meet its public obligations and perform its public duties, that is, it should be a good citizen. But surprisingly, when it comes to businessmen one has to be very cautious of what they say and should not take things at their face value. For instance, the General Electrical Corporation laid off 64,000 workers in Britain between

In America, the Committee for Economic Development has aptly summarized corporate social responsibility. It provides that:-

> "The modern professional manager ... regards himself, not as an owner disposing of personal property as he sees fit, but as a trustee balancing the interests of many diverse participants and constituents in the enterprise, whose interests sometimes conflict with those of others. The chief executive of a large corporation has the problem of reconcilling the demands of employees for more wages and improved benefit plans, customers for lower prices and greater values, vendors for higher prices, government for more taxes, stockholders for higher dividends and greater capital appreciation - all within a framework that will be constructive and acceptable to society".[27]

The law has also changed to accommodate the changing view of the role of corporation in society. The modern view is that corporate non-profit activities is justified for reasons of public policy. The New Jersey Supreme Court eloquently expressed the underlying rationale as follows:-

> "When the wealth of the nation was primarily in the hands of individuals they discharged their responsibilities as citizens by donating freely for charitable purposes, with the transfer of most of the wealth to corporate hands and the imposition of heavy burdens of individual taxation, they have been unable to keep pace with the increased philanthropic needs. They have therefore, with justification, turned to corporations to assume the modern obligations of good citizenship in the same manner as humans do."[28]

Many states in America have amended their corporation statutes to authorize non profit activities. In these states such activities of management are shielded from shareholder attack unless the activities are arbitrary or in bad faith.[29]

6.2.4 DONATIONS BY COMPANIES IN NIGERIA AND GHANA

The legal position is that the responsibilities which every company has, are set out in the objects which establishes the company. One would, therefore, expect that in Nigeria the Companies Act 1968, the memorandum and articles of association of a given company, prima facie, regulate its modus operandi when making donations to its employees and to charitable organisations. But regretably, there is no such provision in either the Companies Act 1968 or in the memorandum and articles of association of the companies. This, it seems in my view a lacuna apparent in the present Nigerian Companies Act.

In any case, no one is alleging that companies in Nigeria in the absence of such provisions do not make donations to its employees and to other charitable organisations. But the fear generally is that in the absence of any statutory provisions, such socially desirable gifts may be declared invalid by the courts on the grounds that they are ultra vires.[30]

The position in Ghana is however, different as section 24 of the Ghana Company Code provides that if a company adopts regulations in lieu of the memorandum and articles of association, it shall have for the furtherance of its objects and of any business carried by it and authorised in its Regulations, all the powers of a natural person of full capacity. This may seem at a glance to suggest that companies in Ghana are free to carry on whatever type of business they may choose and may make donations or contributions to any extent they may deem fit. However, Gower,[31]

makes it emphatically clear that the provision makes for brevity and simplicity and probably produces greater certainty. Nevertheless, he concedes to the fact that it will still be necessary to scrutinize carefully this list of powers and doubts would inevitably arise on whether a particular activity was authorised or not.

Gower,[32] commenting on the extent to which companies in Ghana may make gifts to its employees and to other charitable bodies, suggest that the validity of such gifts will thereby depend on whether they can fairly be regarded as made for the furtherance of any (authorised) business carried on by it. This test seems ineffect to be that laid down by the existing case law.[33] In any case, this is the old judicial view that donations or contributions must be of either direct or indirect benefits to the company which is no longer the law as earlier discussed.

Perhaps a better provision is that contained under section 202(1)(c) of the Ghana Company's Code. It is provided that:-

> "The directors of a company may make voluntary contributions to any charitable or other funds, other than pension funds for the benefit of employees of the company or any associated company. But such amount must not exceed £G1,000 or two percent of the income surplus of the company at the end of the immediately proceeding financial year, whichever is the greater".

Following the above provision, certain conclusions may be drawn. First, that the directors are empowered to make gifts to the company's employees or to charitable

bodies to the tune of ₵G1,000 in any given year, provided such donations are made out of the income surplus of the company without approval from the general meeting. Secondly, that even where donations above ₵G1,000 have been made without approval of the general meeting, since it is still intra vires the company, the general meeting can still ratify such gifts or donations and until it is ratified the directors remain personally bound to account for such monies to the company. Thirdly, taking into consideration the provisions of sections 24 and 202(1)(c) of the Ghana Company's Code, a company can validly resolve to make gifts to its employees and other charitable bodies to any extent provided such gifts have been approved by an ordinary resolution at the general meeting even if it does exceed two percent of the income surplus of the company in any given year. Fourth, that any gifts or contributions which are not made out of the income surplus of the company will be declared ultra vires. Even the unanimous vote of all the members infavour of such gifts would not preclude challenge on this ground. And any dissatisfied or aggrieved shareholder may challenge such a proposed gift on the ground that it is ultra vires the company. In any case, a completed gift cannot be recalled on the ground that it was ultra vires the company.

Thus, the old judicial view that gifts or donations by the company must be in the interest of the company is slightly an anachronistic and cynical approach as infact companies do not seem to find it unduly restrictive.[34]

Happily, this old judicial view in Britain has been watered down. As the English Companies Act 1980[35] now allows a company to make payments to its employees on the cessation or transfer of business notwithstanding the fact that its exercise is not in the best interest of the company. Further, section 74(4) of the English Companies Act 1980 provides that:-

> "On the winding up of the company (whether by the court or a voluntary winding up) the liquidator may, subject in the case of a winding up by the court to section 245(3) of the 1948 Act as applied by subsection(7) make any payment which the company has, before the commencement of the winding up, decided to make under subsection(3) above."

The effect of the above provisions is to allow a company to make payments to its present or former employees without the courts declaring such payments as ultra vires the company. It is therefore clear from our discussion, that the earlier decisions on gifts to the company's employees which were declared ultra vires seem no longer to be the law in Britain.[36]

The English position and what prevails in some commonwealth countries can be compared with the American position. In the United States of America as earlier mentioned in this chapter, the courts have been very bold in the sphere of donations to educational institutions as illustrated in the case of A.P. Smith v. Barlow[37]. The courts view such donations by large corporation as their major, though unwritten corporate duty and even in the court's opinion a solemn duty as public benefactors.

Therefore, the ordinary rule that a company may carry on any activity within the scope of its objects which can reasonably be held to contribute to the long term profitability of the company is no more tenable in Britain and America, however distasteful that activity may be to the individual shareholders who still maintain the belief that the company is solely for financial gains and no more.[38] In any case, an aggrieved shareholder is free to raise the issue at the companys general meeting, though this is unlikely to prove effective when it comes to litigation as such gifts or donations would be held valid by the courts.

Furthermore, some jurisdications have completely altered their laws to allow donations to charities and they omit any requirement that the donation must be one which is likely to benefit the company in the long run. For instance, the Companies Act of New South Wales[39] provides that the powers of the company shall include power to make donations for patriotic or charitable purposes. Similarly, the Michigan Law[40] allows corporations to contribute for public welfare.

This modern view that a company has social responsibilities implies that it should not be its sole or perhaps even its primary aim to make profits for shareholders but also recognises the need for a public company to accept social responsibilities over and above what the law requires, in regard to such matters as the enviromental and social consequences of its business activities.

These objectives may pose difficulties for the directors and managers whose over-riding legal duty is still to act bona fide in what they consider to be in the best interest of their company, which at present is translated by English Law as the long term interests of their shareholders.[41] Nevertheless, the law's treatment of corporate activity has reflected continually changing perceptions of the role of the company to reflect society's changed perceptions of their role. Therefore, a company can only be a continuing institution if its chief executives act in the joint interests of both investors, employees, the consummers and the community as a whole. In other words, the corporate sector should take upon itself to be an instrument of social justice and overall economic development in addition to building up its own resources.

Finally, having examined provisions in the Ghana Company's Code and similar provisions in other jurisdictions relating to corporate donations, it is respectfully submitted that provisions similar to those found under the Ghana Company's Code be included into the Nigerian Companies Act for the following reasons:

First, company law is still at its experimental stage in Nigeria. Therfore a provision which would limit the extent to which directors may make voluntary contributions for charitable purposes to the tune of ₦2,000 without the approval of the general meeting will limit the amount which directors may make in

any given year by way of donations. It will also ensure that the company's funds are not dissipated in unauthorised manner without the approval of the shareholders who own the company. But such payments must only be made out of the income surplus of the company.

Secondly, a provision should be included into the Nigerian Companies Act which will allow the general meeting upon an ordinary resolution to make contributions or donations to its employees or charitable organisations to any amount provided this is made out of the income surplus of the company in any given financial year. But any monies paid out by way of donations without such approval and which is not out of the income surplus of the company should be recovered from such person or persons who authorised such payments on the application of an aggrieved shareholder.

6.3 GAZETTING ON COMMENCEMENT OF BUSINESS

It is a customary requirement in the continent of Europe to publish information about a company in the Gazette when it has been incorporated and before it commences business.[42] This condition is designed to ensure that the company has raised sufficient funds by the issue of its shares to commence business for which it was formed. Thereby preventing under-capitalization which is the major cause of business failures; and people should not carry on business with limited liability unless they are prepared to put a minimum of assets into the business to meet its debts.

The position in Nigeria is that upon the receipt of the certificate of incorporation, a private company may commence business by entering into contracts, borrowing money and generally trading. However, this is not the case with a public company with a share capital as it has to wait for a further certificate, declaring that the company is entitled to commence business.[43] This certificate is not issued until the company has filed a propectus or a statement in lieu of prospectus with the registrar, together with a statutory declaration signed by a director or the secretary. Once the certificate is issued, it is conclusive evidence that the company is entitled to commence business. But regretably, there is no provision in the Nigerian Companies Act 1968 which makes it mandatory on the registrar to register the said return and cause a copy thereof to be published in the Gazette.

Notably, the position under the Ghana Company's Code is different. Section 27 of the Ghana Company's Code provides that a company shall not transact any business, exercise any borrowing powers or incur any debt until it has delivered to the Registrar a return in duplicate of its particulars for incorporation. Further, under the same provision, the company must not commence business unless a prescribed minimum capital has been raised. And makes it mandatory for the Registrar to publish certain relevant data about a company in the gazette.

The question now to be answered is why should the Ghana Company's Code make it mandatory upon the Registrar to publish such relevant data about a company in the Gazette whenever it has been duly incorporated and before it commences business? Several reasons may be advanced as justification for this provision. First, section 28(1) of the Ghana Company's Code insists that a company should not carry on any business unless it has paid to the issue of its shares consideration to the value of at least £G500 of which £G100 should have been paid in cash. Furthermore, that the company has delivered to the Registrar a declaration in the prescribed form verifying that such payments have been received. This requirement of minimum paid up capital is prescribed almost universally but applies in England and those countries with Companies Acts based on the English model only to public companies. Therefore such a provision will go a long way to encourage business confidence. But if they are encouraged to do business without being required to give the company some sort of financial backing as the situation applies with private companies in Nigeria, there is grave risk of wide spread scandals which may lead to complete loss of confidence and the idea of incorporation falling into disrepute.

Hence, it becomes imperative that after fulfilling this requirement, the Registrar should make a publication in the gazette stating that the company is now free to commence business.

Secondly, when such information about a company has been published in the gazette, it will not only appear at the Companies Registry but will be widely known to the generality of the people. Such publication will assist many more people to know some salient facts about companies without wasting time and money to go down to the Companies Regisry to check up. Moreover, taking into consideration the fact that such gazettes are usually not expensive, many companies and legal practitioners will afford to buy them whenever they are published and can easily advice their clients whenever they are in need of such minor facts without any waste of time.

Thirdly, since printed copies of the memorandum and articles of association of companies are usually limited in supply, it will be difficult for every one wishing to do business with a particular company at any point in time to be given a copy of the regulations. Therefore, the publication of certain information and other data in the gazette about each company before it commences business will provide easy access to such relevant information and thereby prevent people wishing to find out minor facts about companies from over crowding themselves at the Companies Registry. This will curtail the number of people going down to the Companies Registry every time, as only when people wishing to know more about a particular company will take pains to call at the Companies Registry in order to obtain such vital information which were not available in the Gazettes.

of the reasons which have led the Board of Trade to grant any waiver. The result is that no one has any idea of the sort of reasons which the Board regards as adequate, or any means of checking that the power is not being abused.

However, regretably, under the Nigerian Companies Act 1968, there is no such provision which requires either the Minister of Trade or the Registrar of Companies to publish a periodical report on the activities of companies in Nigeria. The effect of this is that nobody can exactly tell the number of public or private companies carrying on business in Nigeria. Even the number of companies that have been registered but are dormant. This is a serious lacuna under the Companies Act 1968.

But, section 332 of the Ghana Company's Code makes it mandatory upon the Registrar to publish a periodical report on the activities of companies in Ghana every three years.

It is provided that[44]

> "In such report the Registrar shall, in addition to giving general statistical information relating to the registration and dissolution of companies, report on the exercise by him of his powers under the code, and in particular, shall refer to all cases in which he has, under the powers conferred by the code waived compliance or modified any of the normal provisions of the code, and shall state in each case his reasons for so doing".

Therefore, following the above provisions, the Registrar will for instance, give information at three yearly intervals about the exercise of his powers of

investigations under section 219 of the Ghana Company's Code. But, as the wordings of the provisions indicate, the report will go further than this. As under sections 123 to 130 of the Company's Code, for instance, the Registrar is given fairly wide powers to waive compliance with certain accounting provisions.

Further, under section 338(2) of the Ghana Company's Code, the Registrar is required to mention all instances without necessarily naming the companies concerned, and will also indicate the exact concessions granted and give reasons why they have been granted.

Gower,[45] subscribes to the view that if this is done a body of doctrine will grow up for general guidance and it would be a valuable safeguard against abuse. He however, submits that the Registrar should be subject to the restraint imposed by disclosure just as companies themselves are. And that the above provision will go a long way to strengthen the position of the Registrar if he is able to point out to companies that they must advance reasons which will not only persuade him but which will also stand up to public scrutiny.[46]

It is therefore submitted that the provisions of section 338 of the Ghana Company's Code are highly commendable and that similar provisions be included in the Nigerian Companies Act for the following reasons:-

First, at present certain documents like the Memorandum and Articles of Association and Annual Returns are to be kept at the Companies Registry which

can be inspected by the public. But regretably, there are many companies today in Nigeria which are many years in arrears of filing their annual returns and nothing has been done to bring these defaulting companies to book. This laxity can be attributed to the Registrar who does not care to see that files are properly kept up to date, so that companies may default in filing their returns for so many years. It is only when such companies want, for instance, to change their Memorandum of Association that they will be asked to make good their arrears. This is a rather clumsy method of enforcing the law, particularly now that there is a tremendous increase in the number of companies being incorporated as a result of the Indigenisation Policy.[47] Therefore, such a provision in the Nigerian Companies Act will compel the Registrar to perform his duties and thereby put an end to this care free attitude to work now going on at the Companies Registry in Lagos.

Secondly, a provision in the Nigerian Companies Act making it mandatory upon the Registrar of Companies to publish a periodical report on the activities of companies at intervals of three years will force the Registrar to see that files are properly kept and that companies file their annual reports and other relevant documents on time as this will assist him to compile his reports easily whenever they are due to be published.

6.5 DEALING IN THE COMPANIES OWN SHARES

The case of Trevor v. Whitworth[48] lays down the rule that a company cannot subscribe for, or purchase

its own shares. Such acquisitions are deemed dangerous not only because they may result in the reduction of the capital yardstick to the disadvantage of creditors but also because, if the company paid more than the true worth of the shares, it would dilute the value of the remainder and may be used by the directors to enhance the value of their shareholdings. Such purchases may also be used by the directors to maintain themselves in control.

In any case, the latter abuse can equally well occur if nothing is paid for the shares by the company but someone acquires them as trustee for the company. Yet under the present law this has been held to be legal.[49]

Surprisingly, however, it is worth noting that the general rule laid down in Trevor's Case has not been strictly adhered to and companies are allowed to some extent to deal with their shares. Thus when sections 65 and 74 of the Ghana Company Code are compared with section 27 and 56 of the Nigerian Companies Act 1968, they all provide similar situations when a company may validly deal with its own shares.

First, Redeemable preference shares have been introduced under the Nigerian Companies Act 1968 and also in the Ghana Company's Code. Such shares may be redeemed subject to certain stringent safeguards which should not lead to a reduction of the capital yardstick.

Secondly, a subsidiary company may acquire shares in its holding company only when the subsidiary

company is concerned as personal representative or trustee.

A more difficult question often posed is whether a company should have wide powers to buy and sell its own shares? Thus, despite all objections in the United States of America that Companies should not be allowed to buy their own shares, this practice still persists.[50]

Gower, takes the view that there is a strong case for allowing companies in Ghana to purchase and re-issue their shares. And such a provision has been included into the Ghana Company's Code.[51] This is a big contrast to what prevails under the Nigerian Companies Act 1968.[52] As section 55 of the Companies Act 1968, makes void for illegality any form of financial assistance to purchase the company's shares or those of its holding company and any security given by or to the company in respect of that assistance. And makes officers of the company responsible for such illegal transaction liable to compensate the company for any such losses incurred.

Gower,[53] argues that it would also greatly facilitate the introduction of schemes for share participation of employees. That at present, if shares are issued to employees, they will have no means of disposing them and are therefore forced to put all their eggs into one basket with no means of extracting them from that basket. Therefore, if companies could purchase shares from employees, it will at least

mean that there was one possible buyer when the employee wished to get out.

Gower,[54] further argues that such power will also prove highly advantegeous when one member of a private company wishes to retire. He can sell his shares to the company and the company may later resell them.

However, those opposed to the idea that a company should not be allowed to purchase its own shares have strongly argued that this will lead to a reduction of the capital yardstick and will also give directors a freehand to manoeuvre with shares to pepertuate themselves in control of the company.

In view of the above criticisms, Gower,[55] has recommended the following stringent safeguards which will minimize the undoubted dangers of giving companies the general power to purchase and re-issue shares. First, that no votes are exercisable or dividends payable in respect of the above shares as long as they remain in the company's treasury.[56] Secondly, the company must not retain more than fifteen percent shares in its treasury of the issued shares of any class (other than redeemable preference shares) or the total issued shares.[57] Thirdly, full details about share dealings by the company must be made available to members and the general public.[58]

Having highlighted the advantages of allowing companies in Ghana to purchase and re-issue their shares, it is submitted that such a similar provision

will serve a useful purpose in Nigeria. This is in view of the fact that there are only three Stock Exchange Markets in Nigeria, located at Lagos, Porthar-court and Kaduna, while there are hundreds of thousand of Companies operating in Nigeria. Therefore, if Companies are allowed to purchase and re-issue their shares in Nigeria, it will encourage many more people to buy shares in these companies and will also give them the opportunity to sell these shares to the company whenever they wished to get out and the company may later resell them. Furthermore, it would also greatly facilitate the introduction of schemes for share participation of employees in Nigeria.

FOOTNOTES

1. S. 27(4) Ghana Company's Code 1963, Act 179 of 1963

2. Ibid S. 260(1)

3. Ibid. S. 338

4. Trevor v. Whitworth/1887/ 12 A.C. (H.L.)

5. S. 55 Nigerian Companies Act 1968, No. 51 of 1968

6. S. 59 Ghana Company's Code 1963, Act 179 of 1963

7. See, for example, the observations of the chairman of Imperial Chemical Industries Ltd. in announcing at the general meeting, June, 17 1954, a profit sharing scheme for the Employees; ESSO Petroleum Co. Ltd. published a news paper advertisement consisting of a statement of the Company's obligations "to those who have associated themselves with the company's business as suppliers of capital or labour, to the community at large and finally to the company itself" These obligations were set out in a kind of Bill of Rights eloquently recognizing such matters as the employee's rights to religious and political freedom and the company's obligations to conduct its business in such a way as to further the social and economic progress of the community. 53 The Listener 47 (1955).

8. See, for example, the speech of Mr. Anthony Crossland, member of parliament. 52 The Listener 347(1954). He referred to the recognition that it was not the sole purpose of public companies to make profits for their shareholders, which after all is rather an absurd idea, but that they had a wider social duty to workers, consumers, the community at large, as well as to the shareholders: that industry in other words was a joint co-operation undertaking in which no party had exclusive right.

9. Per Justice Jacobs in A.P. Smith Co. v. Barlow 98A 2d 581 (1953); 13 N.J. 148.

10. J.A.M. Agbonika, "Social Responsibilities of Companies in Nigeria" (1983)1 A.B.U. L.J. at p.54

11. L.C.B. Gower, Principles of Modern Company Law; (Stevens & Sons, London, 4th ed. 1979) p.22. See also note 2.

12. Ashbury Railway Carriage Company v. Riche (1875) L.R. 7 (H.L.) 653.

13. Tom Hadden, Company Law and Capitalism (Willmer Brothers Limited, Birkenhead U.K. 2nd ed. 1977) p.318.

14. Re W & M Roith Ltd./ 1967/1 W.L.R. 432

15. Parke v. Daily News Ltd /1962/ Ch. 927

16. H.A.J. Ford, Principles of Company Law. (Butterworths Sydney Melbourne Brisbane 1st ed. 1974) p.52

17. Supra note 15

18. Ibid.

19. (1876) 24 W.R. 74

20. Evans v. Brunner Mould & Co. Ltd. /1921/ 1 Ch. 359.

21. Blackburn, J.D. & Others. Legal Environment of Business: Public Law and Regulation, Richard D. Irwin Inc. Homewood, Illinois (1982) page 581

22. See, "Responsible Company", by George Goyder published by Basil Bleckwell, Oxford (1961)

23. Quoted in Sears, The People's Place of Stockholders p. 209

24. Counter information service "Anti Report on General Electrical Corporation Ltd." (1972)

25. J.W. Katende,"Social Responsibilities of the Companies Revisited"(unpublished work 1971).

26. See, Gool R.K. (ed.) Proceedings of the All India Company Law Seminars. (1968) pp 143 - 144

27. Blackburn, J.D. & Others. Legal Environment of Business: Public Law and Regulation, Richard D. Inc. Homewood, Illinois (1982) page 582.

28. A.P. Smith v. Barlow 13 NJ. 148; 98^{A}2d 581 (1953) cited by Blackburn, J.D. & Others. Supra page 582

29. See, the various legislative provisions summarized in Andrews, Corporate Giving (1952)

30. However, since Company Law is not wholly codified, where there is a lacuna in the Act, principles of common law and equity are often evoked.

31. L.C.B. Gower, Final Report on Ghana Company Law (1961) p. 41, See fifth comment on section 24.

32. Ibid. sixth comment at p. 42

33. Supra Evans v. Brunner Mould & Co. Parke v. Daily News Ltd.

34. Supra A.P. Smith v. Barlow; Tom Hadden, Company Law and Capitalism (2nd. ed. 1977) p. 319

35. S. 74 English Companies Act 1980, 1980 C22

36. Supra note 33.

37. A.P. Smith v. Barlow 13 N.J. 148; 98A 2d 581(1953)

38. Supra note 35

39. S. 16 Companies Act New South Wales (1967)

40. S.204 Michigan Company Law 1948

41. Cmnd 1749 para. 52(1962) The Jenkins Committee certainly thought that the practice of making contributions to charities which were of no direct interest to the company's business would be acceptable to the courts as a means of creating or preserving public good for the company.

42. L.C.B. Gower, Final Report on Ghana Company Law (1961) p. 44. See first Comment on section 27

43. S. 107(3) Nigerian Companies Act 1968, No. 51 of 1968

44. S. 338(2) Ghana Company's Code 1963, Act 179 of 1963

45. L.C.B. Gower, Final Report on Ghana Company Law (1961). P.238. See Gower's first comment on section 338.

46. Ibid

47. Dr. I. Ayua, Nigerian Company Law. (Graham Burn Press Bedfordshire U.K. 1984) p.12; The Nigerian Entqrprises promotion Act 1977 increased the investment opportunities in the country. As indeed, two Stock Exchange Markets were established in Kaduna and Portharcourt) in addition to the existing one in Lagos which enabled people all over the country to buy shares in quoted companies.

48. Trevor v. Whitworth /1887/ 12 A.C. 409 (H.L.)

49. Re Castigliones Wills Trustee /1958/ Ch. 549

50. In the U.S.A., the common law devcloped differently and purchases are permitted, subject now to legislative safeguards in most states;Purchases as opposed to subscription are also permitted with safeguards by article 18 of the second directive of the E.E.C.

51. S. 59 Ghana Company's Code 1963, Act 179 of 1963.

52. S. 55 Nigerian Companies Act 1968, No.51 of 1968

53. L.C.B. Gower, Final Report on Ghana Company Law(1961) p.66. See seventh comment on sections 59 - 63.

54. Ibid

55. S. 59 Ghana Company's Code (1963) Act 179 of 1963.

56. Ibid.

57. Ibid. S. 62

58. Ibid S. 63(5)(6) and (7)

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 CONCLUSION

From our previous chapters, as already examined, nothing seems to appear very much in common between Nigerian Company Law and that of its sister country Ghana in the selected areas which form the basis of this thesis.

This is conspicuously seen when it comes to directors duties, statutory restraints on director's powers and the enforcement of members rights.

To begin with, the various provisions dealing with the formation of companies have been examined under both laws. And certain differences have been highlighted. It was clearly shown that the Nigerian Companies Act 1968 allows companies limited by guarantee and unlimited companies to be registered with or without share capital. While the Ghana Company's Code prohibits a company limited by guarantee from being registered with a share capital and insist that an unlimited company must be registered with a share capital. It was therefore pointed out that in view of the fact that companies limited by guarantee and having a share capital have been seldom registered and no unlimited company has been registered in Nigeria without share capital, these provisions serve no economic purpose and should be deleted from the statute book.

Both the Nigerian Companies Act 1968 and the Ghana Company's Code do insist that every company

must have at least two directors. But in the absence of any limitation on the ages of directors except that provided under section 176 of the Companies Act 1968, which restricts the appointment of persons above the age of seventy as directors of Public Companies or Private Companies which are subsidiaries of public companies, any person who is sane, solvent and with no criminal records may be appointed a director in Nigeria not withstanding the age. The effect of this provision is that the main shareholders of Private Companies in Nigeria who are themselves the first directors do make sure that to have absolute control of the affairs of their companies, they usually appoint their young sons or daughters as the Second Directors. The result is that since these second directors are still of tender ages and may still be attending school, they are usually in experienced and lack the ability to cope with the problems of modern companies. Therefore, if the first director dies or is incapacitated, there is usually no person in the position of the second director to take up immediate control of the company and manage the affairs of the company until the personal representative of the deceased first director who is the main shareholder is appointed. This may lead to family members scrambing to share the company's assets on the flimsy excuse that they are entitled to a share of the property. Therefore to make sure that the company is not wound up on the death of the sole proprietor and that business continues as a going concern, if the second director was of a mature age, he would come on his own and perform this vital role to see that the

company survives. This "perpetual succession" is one of the great advantages of incorporation and it is of the utmost importance in Nigeria. It is therefore necessary that an age limit be placed on directors in Nigeria to keep to the true intent and spirit of the Act to have directors who can actively participate in the management of the company.

The advantages and disadvantages of par and no par shares have been examined in chapter two. It was pointed out that no par share renders the true nature of a share more intelligible and would prevent unsophisticated people from being misled by the unscrupulous.[1] The significance of having no par shares motivated the Gedge Committee to recommend in favour of the legislation of no par equity shares,[2] and the Jenkins Committee recommended legislation of no par shares for all types of shares.[3] Thus no par value shares have been introduced in North America, Belgium and Canada and have also been introduced in Ghana and made mandatory upon all companies to adapt.[4] But regretably section 2(a)(iv) of the Nigerian Companies Act 1968 still provides that all shares created or issued must be given a fixed nominal value. Neither is there any provision which provides as in other laws that no par shares should be introduced along side with par shares. Even if those who drafted the Nigerian Companies Act 1968 had taken into consideration the Jenkins recommendations of including no par for all types of shares in Nigeria, it would have made little point in introducing them unless they had been made compulsory.

The position of pre-incorporation contracts in Nigeria and Ghana have been discussed. This also includes the position in Britain prior to the introduction of section 9(2) of the European Communities Act 1972. It has been shown from the line of decided cases that the courts have consistently held that unless and until a company is incorporated, it cannot enter into any legal contract and therefore any prior acts done by the promoters on behalf of the company are null, void and of no legal consequences. This has led to many companies in certain situations benefiting from the performance of services under pre-incorporation contracts without having to pay for them.[5] It was further pointed out that the Nigerian judges have strictly adhered to the doctrine of precedents in the absence of any legislation on pre-incorporation contracts without applying the law to suit local circumstances. And in certain situations where they ought to have distinguished the English cases, they failed to do so and thereby uncrictially following English decisions.[6]

Therefore, following the attitude of the courts and judicial precedents, reforms may only come from legislative intervention. Thus section 9(2) of the European Communities Act 1972 applicable in Britain, only partially ameriolate pre-incorporation contract by making it a personal affair as it abolishes the rule in New Borne v. Sensolid[7] but does not give any option for ratification of pre-incorporation contract by the company. In any case, it must be pointed out that section 9(2)

of the European Communities Act 1972, now has its equivalent provision under section 35(2) of the English Companies Act 1985 which now makes the provision a municipal Law in Britain.[8] In Ghana, under section 13 of the Company's Code, they have accepted a continuous offer, so that after incorporation, the company is free to accept the offer. This issue of continuous offer does not apply in Nigeria in view of Transbridge Co. Ltd. v. Survey International Ltd.[9], where the Supreme Court held that a company can not be bound by or seek to ratify a contract entered on its behalf before it was incorporated. The effect of the above provision in the Ghana Company's Code is that any act done by the company after its incorporation which is expressly referable to the offer is an acceptance. Therefore, unless and until the company ratifies the contract, any person who acted ostensibly for the company remains personally bound by the contract. Meanwhile, the position of pre-incorporation contracts in Nigeria remains that which existed in Britain prior to the introduction of section 9(2) of the European Communities Act 1972. This situation is pathetic and needs immediate reforms to keep it in line with what prevails in other jurisdictions notably Ghana.

The ultra vires doctrine as it applies in Nigeria, Ghana and other jurisdictions have been examined. Thus the muddle up nature of the rule, its inconsistency and apparent unworthiness of its application has called for either its modification or its total abolition.

But as earlier submitted, the few reforms that have been implemented and those contemplated have not gone a long way to rescue it from further disfigurement. Those jurisdictions that have abolished the doctrine completely, may have done it out of frustration due to the inconsistency of its application, not because they are unaware of the originality and the consequences of their actions. Therefore the noble objectives that the doctrine sought to protect originally should be restored. Any meaningful legislative reform as far as the Companies are concerned must take care of the investors, the creditors and third parties dealing with the company.

To abolish the ultra vires doctrine completely will have the effect of liberalising the company to participate in any type of contemplated or conceivable business which the directors may think of and this is pregnant with social problems.[10]

In any case, the last alternative for Nigeria will be a modification of the ultra vires rule by going back to the recommendations of the Cohen Committee[11] which sought to prevent losses acruing to the investors and the creditors, and at the same time to save the third party from the trap that he often innocently falls into through the enforcement of this doctrine. Thus the Ghana Company's Code[12] is the only legislation that had earlier entrenched this provision. Likewise the English Companies Act 1985 now contains a similar provision.[13]

The duties of directors, statutory restraints on directors powers and the enforcement of individual members rights have been examined under the Nigerian Companies Act 1968 and under the Ghana Company's Code. It is here that the differences between the two laws come out very conspicously.

It is demonstrably clear, that directors as fiduciaries must not place themselves in a position in which there is a conflict between their duties to the comapny and their personal interests.[14] Thus so strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. But the Common Law position in the case of Percival v. Wright,[15] which also applies in Nigeria provides authority for the proposition that no fiduciary duty is owed by a director to individual members of his company, but only to the company itself, and a fortiori, that none is owed to a person who is not a member. The result is that a director in Nigeria who has by reason of his office acquired in confidence a particular piece of information materially affecting the value of the securities of his company or any company in the same group will incur no liability to the other party if he buys or sells such securities without disclosing that piece of information. This seems to me to be wrong. Therefore the provisions of section 205 of the Ghana Company's Code attempts to correct the above anomaly in the Ghanian Company Law by protecting a person - whether or not a member of the company who suffers loss because a director has taker unfair advantage

at his expense of a particular piece of confidential information about the company or any other company in the same group in any transaction relating to the securities of such companies. Unless the company consents, any secret profit made by the directors without disclosure may be recovered from them. It is submitted that the above Ghanian provision supplements the rule in Aberdeen v. Blackie[16(a)] and makes directors as fiduciaries more accountable to the company and to other persons.

Similarly, the Common Law directors duties of care and skill as they apply in Nigeria have also been examined. The courts seem to recognise that there is a duty of care and skill required from directors who conduct the management of the affairs of the company. On the other hand they are reluctant to intrude in matters of business and commerce.[16(b)] Nevertheless, it is generally accepted that where there is a duty, there must be a corresponding right to enforce this duty. But the courts have instead pretended to lay down certain principles relating to directors duties of care and skill which in present day circumstances are absolutely out moded and unrealistic.[17] For the courts have consistently held that the directors in the management of the company's affairs are not liable for all the mistakes they may have made, although, if they had taken more precaution, they might have avoided such mistakes.[18] In other words a director does not owe his company a duty to take all possible care. According to Gower, the standard of care and skill required from the director under the Common Law are totally inadequate

as the degree of care is so low that a director can easily escape liability when the subjective test based on the directors personal knowledge is applied. It is therefore only under the Ghana Company's Code that the law imposes a higher standard of care and skill on the directors[19] while performing their duties.

The above provision calls for the application of an objective test and it displaces the lenient Common Law subjective test of knowledge and experience of a particular director as it applies in Nigeria and Britain. Moreover, it is capable of allowing the Ghanian Courts to develop standards based on the objective yardstick - that of the ordinary skilful and conscientious director and thereby departing from English judicial precedents.

Basically, some of the selected areas examined in the preceding chapters dealing with directors disclosure of interests included the appointments of directors, share qualification, loans to directors, disclosure of directors transactions with the company, removal of directors and also transactions on the Stock Exchange and were found not to be adequately taken care of when compared with what prevails under the Ghana Company's Code. But when it comes to the issue of directors dealings with shares of their own company or shares on the Stock Exchange, the provisions earlier mentioned under the English Companies Acts of 1967 and 1980 are very comprehensive and far reaching than those found either under the Nigerian Companies Act 1968 or the Ghana Company's Code and are therefore highly commendable.

Furthermore, the law in some of the areas in the 1967 and 1980 English Companies Acts have been improved upon with the emergence of the English Companies Act 1985. Some of the changes which are relevant for inclusion in this thesis besides the earlier ones include:

First, on loans, a company is not prohibited from doing anything to provide a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly perform his duties as an officer of the company.[20] This alters the previous situation where such amount was usually advanced as a loan to the director.

Secondly, a general caveat has now been placed on restriction on loans to directors and persons connected with them.[21] Persons so connected with the directors include their spouses and infant children. This implies that the directors can no longer circumvent the law by obtaining loans directly or indirectly through their spouses or children who are not directors.

Thirdly, section 305(1) of the English Companies Act 1985, now requires the names of Directors to be legibly printed on all company correspondences, this includes letter headings and business letters. Any such default attracts civil liability.[22]

Fourth, while section 320 of the English Companies Act 1985 now prohibits directors of the company, or its holding company, or any person so connected with such

a director from entering into any substantial property transactions in which the company acquires or is to acquire one or more non-cash assets of the requisite value from such a director whose value is not less than £1000 - £50,000, unless the arrangement is first approved by a resolution of the company in general meeting.[23(a)]

In view of the fact that the Nigerian Companies Act 1968 places great emphasis on the philosophy of disclosure as a means to increase shareholders control over the directors, it is doubtful whether the above recommendations will have any meaningful effect in the absence of an independent administrative body with statutory powers whose duties will be the protection of the small investors.

The rule in Foss v. Harbottle[23(b)] has been critically examined with all its exceptions and implications as it affects the enforcement of individual members rights in Nigeria and Ghana. Thus it was clearly pointed out that the provisions in this aspect of the law in Nigeria are a replica of the English Companies Act, 1948 and certain defects were enumerated. As to the issue of corporate or deriviative actions, a representative action in Nigeria may be brought by a minority shareholder in his own name. Therefore, if the plaintiff shareholder loses, then he must not only pay his own costs but also costs of the defendant directors. This provision is capable of discouraging the minorities from bringing corporate actions. In the same vein, the plaintiff alone seems to retain primary control over the action and may therefore discontinue it whenever

he thinks fit to do so. The Ghanian provision which prohibits a minority shareholder from discontinuing a representative action once commenced unless with the approval by the court is therefore a better provision. As it prevents the plaintiff, be it the company or a member, from discontinuing or compromising the action and thereby puts an end to serious possibilities of collusion, since the directors can no longer buy off the plaintiff in disregard of the rights of the company and its members.

Furthermore, section 201 and section 218 of the Nigerian Companies Act 1968 and the Ghana Company's Code respectively dealing with oppression on the minority have been carefully examined. Thus the above Nigerian provision provides that any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to one or more members (including himself) may apply to the court for relief. But regretably this provision being a replica of section 210 of the English Companies Act 1948, requires that the petitioner must show that there are grounds for compulsorily winding up on the just and equitable ground and that the petitioner now seeks an alternative relief. The above section is unnecessarily tied up with winding up. Even the provision does not allow a petition to be brought by an oppressed director, debenture holder or creditor as the section postulates oppression qua members only. And it is not uncommon to oppress a minority shareholder in a small company by excluding him from participating in the company's affairs by removing him

from his directorship. Moreover, under the above Nigerian provision, there is no express provision which allows a personal representative or others to whom shares are transmitted by operation of law to present a petition. Section 75 of the English Companies Act 1980 dealing with "oppression on the minority" is therefore a better provision than those found under the Nigerian Companies Act 1968 and the Ghana Company's Code.

An examination of the provisions of sections 310 and 210 of the Nigerian Companies Act and the Ghana Company's Code respectively dealing with misfeasance summons have been carefully discussed. But again, the above Nigerian provision is unnecessarily tied up with winding up of the company. Since an action can only be brought once a liquidation has begun to effectively remedy certain past breaches of duty owed to the company by any promoter, director, liquidator, manager or officer of the company. The defect in this provision is that a misfeasance summons cannot be brought under this provision when liquidation proceedings have not been instituted against the company. Further more, another defect in the Nigerian provision is that the petitioner must establish that the company whose right is sought to be enforced has actually suffered some loss as a result of the misfeasance or breach of trust of a director. This may mean that an aggrieved member may never be able to establish the wrong due to circumstances beyond his control, for instance such as laying hands on the relevant documents to establish his claim or wrong. Even also under the provision, there is

nothing to stop a plaintiff, be it the Company or member from discontinuing or compromising the action after it has been instituted. This it is submitted, gives rise to serious possibilities of collusion as the affected directors may lay off the plaintiff in total disregard of the rights of the Company and of the members. Section 210(6) of the Ghana Company's Code therefore provides a good remedy.

Another alternative remedy open to the minority members to enforce their individual rights against the Company and the directors which is regarded less expensive through administrative procedure is to apply for inspectors to be appointed to investigate the affairs of the Company under Sections 157-167 of the Nigerian Companies Act 1968. But regretably under Section 157(1), the power to appoint inspectors is discretionary, even when proper grounds have been established for such appointment. Moreover, a more limiting factor on the powers of the minority is found in the number of members required to enable inspectors to be appointed. As Section 157 of the Act requires that inspectors can only be appointed on application of one quarter of any class of membership. This however, places an unnecessary hurdle, in view of the fact that membership of a company are widely dispersed all over the country and it may be difficult for a particular minority shareholder who discovers any breach to move round all over the country so as to secure the one-quarter membership envisage by the Act. This is an onerous task which is difficult to be fulfilled and that discourages potential members from

making attempts to see that inspectors are appointed to investigate the affairs of the company whenever they see that things are going on wrongly in the company.

Although, a member or shareholder of a company now has an impressive array of remedies at his disposal, especially where fraud or unfairness is alleged, an effective sanction against breach of the controlling directors duties of care and skill in Nigeria are still lacking. For the rule in Foss v. Harbottle will normally bar an action of the suit of the minority, and it is not clear that any of the alternative remedies will be available. The relative laxity of these rules in comparison with the duties of loyalty, is reflected, whether or not as a matter of deliberate policy in the procedural sphere. This in addition to the fact that there has been no investigation so far carried out either under the Companies Act 1968 or under the repealed Act, it is doubtful whether they will ever be used.[24]

It therefore implies that something additional outside company law must be done to supplement the other alternative measures meant to curb the increasing powers of directors, as the idea that shareholders can effectively control a company by supervising the board of directors has been shown to be false in large Companies with widely dispersed shareholdings.

Provisions dealing with corporate donations have been examined under Nigeria and Ghana Company laws in

the preceding chapters. The old judicial view that a company was merely "an instrument of private property", and solely responsible to private property and therefore the company's activities must be geared directly or indirectly at making profits for its members who are in law the real owners is now completely outdated. As it was previously considered that any act of the directors outside the objects will be regarded as ultra vires and any transaction in respect of such acts would be declared null and void and of no legal effect whatsoever.

Basically, what motivated this changed was the fact that any further rigid attachment of profit maximization by the company will result to friction between the company and its employees as the interests of the latter were being neglected. Thus this friction could have a boomerang effect on the company as the employees would not be prepared to put in their best performance, which ultimately could affect the profit margin of the company. Furthermore, if the company cared less of the Society within which it functions, and derive its profits, particularly in relation to the public, this will not earn it any good will from the public whose support it seriously requires to stay as a going concern.

It is therefore in realisation of these facts that to strike a good balance, emphasis is now shifting from the old and rigid rule that profit maximization shouldn't be the sole aim of operating companies. Hence it is now accepted that a company can only be a continuing institution if management acts in the joint interests of both

investors, employees, indeed of consumers and the entire community as a whole. In other area such as in Britain, this duty of the company to make reasonable contribution to charitable organisations, the entire nation as well as to make provision for the welfare of its employees is now being accepted.[25]

Thus as earlier stated, there are provisions in the Ghana Company's Code which allow directors and shareholders in the general meeting to make donations to its employees and take proper care of their welfare. But unfortunately as earlier conceded, there is no such provision in the Nigerian Companies Act 1968 which empowers the directors or the shareholders in the general meeting to make donations to charitable organisations, or to make donations to employees of the company or to provide for its welfare. This according to my mind, is a lacuna apparent in the present Nigerian company law which needs immediate reforms, since the absence of such a provision may render such gifts made by the companies invalid on the basis that it is ultra vires the Company. Even now Britain has gone a step a head to introduce employees share schemes.[26] This is aimed at encouraging employees to participate fully in the economic activities of the company so as to make them an integral part of the company.

In continental Europe and Ghana, it is mandatory for the Registrar to publicise information about a company in the gazette whenever it has been incorporated and before it commences business. This fact can no longer be over emphasised as it is designed to ensure

that a company has raised sufficient funds to commence the business for which it was formed, thereby preventing under capitalisation which is the main cause of many business failures. In otherwords, it is meant to ensure that people should not carry on business with limited liability unless they are prepared to put a minimum of assets into the business to meet its debts. But regretably, this only applies to public Companies but not to private companies in Nigeria. As a result of this, a Company intending to be public may first be incorporated as a private concern and then later converted into a public company thereby circumventing the provision.

Furthermore, it is also the practice in some jurisdictions notably Ghana, for the Registrar to publish in the Gazette the name of any Company which has been wound up either voluntarily or compulsorily by an order of the Court. This practice is aimed at preventing unscrupulous former officials of the company from continuing to do business in the company's name when it has been wound up with the sole intention to defraud people who are not aware of this fact.

To crown the whole issue of publication of information to the shareholders and the general public, the Board of Trade in Britain is charged with the responsibility to publish a general annual report on the activities of companies in Britain. While Section 338 of the Ghana Company's Code makes it mandatory upon the Registrar to publish a periodical report on the activities of Companies in Ghana every three years. But when the provisions of Section 451 of

the English Companies Act, 1948 is compared with the provisions of Section 338 of the Ghana Company's Code, the Ghanian provision is wider and more comprehensive than those of the English Act. As the Company's Code makes it expressly clear that such a report by the Registrar should in addition to giving general statistical information relating to the registration and dissolution of companies, report on the exercise by him of his powers under the Code[27]. The registrar is therefore enjoined, to refer to all cases in which he has under the powers conferred by the Code waived compliance and shall state in each case his reasons for doing so. He is also required to mention all instances without necessarily naming the companies concerned.[28]

In any case, at this juncture, it has to be pointed out that the English Companies Act 1985 has now introduced some innovations as to the publication of information about the activities of companies to its shareholders and the general public. First, Section 711(1) now requires the Registrar of companies to cause to be published in the Gazette notice of the issue of receipt by him of certain documents (stating in the notice the name of the company, the description of documents and the date of issue of receipt).[29] Secondly, certain companies are now required to publish periodical statements.[30] And further provides that a copy of the statement shall be put in a conspicuous place in the company's registered office, and in every branch office or place where the business of the company is carried on. Every member and creditor of the company is entitled to

a copy of the statement, on payment of a sum not exceeding 2½ pence. Thirdly, the Secretary of State shall cause a general annual report of matters within the Companies Act to be prepared and laid before both Houses of Parliament.[31] Fourth, while copies of the memorandum and articles are to be given to members on request at the cost of 5 pence or at such less sum as the company may prescribe. This also includes altered copies of the memorandum and articles.[32(a)]

It is submitted that the provisions of sections 19, 20, 711, 723 and 729 dealing with publication of information about the activities of companies in Britain under the 1985 Companies Act are wider in scope than the provisions of section 338 of the Ghana Company's Code.

Basically, under the Nigerian Companies Act, 1968, there is no provision which requires the Minister of Trade or the Registrar to publish in the Gazette the name of any Company whenever it has been incorporated and before it commences business. Even to publish in the Gazette the name of any company which has either been voluntarily or compulsorily wound up by an order of the Court. To make things already bad worse, there is no mandatory obligation on the Registrar to publish an annual or periodical report on the activities of Companies in Nigeria as it applies in other jurisdictions. The effect of the absence of any such provisions under the Companies Act 1968, is that nobody except the Registrar knows exactly the number of companies operating in Nigeria. This aspect of the law therefore requires

immediate legislative reforms in Nigeria.

Finally, since Trevor v. Whitworth,[32(b)] laid down the rule that a company cannot subscribe for, or purchase it own shares, Section 55 of the Nigerian Companies Act 1968 has epitomized the rule. As such acquisitions are deemed dangerous, not only because they may result in the reduction of the capital yardstick to the disadvantages of creditors but also because, if the company paid more than the true worth of the shares, it would dilute the value of the remainder and may be used by the directors to enhance the value of their shareholdings. Moreover, such purchases may also be used by the directors to maintain themselves in control of the company.

But from our earlier discussion, companies in Ghana have been allowed to purchase and reissue their shares subject to certain safeguards which are highly commendable. Furthermore, in Britain, there is now a Statutory Prohibition replacing the rule in TREVOR'S Case, against acquisition by the company of its own shares by purchase, subscription or otherwise.[33] Nevertheless a company may (by express exception) forfeit or accept the surrender of its shares, redeem redeemable preference shares and purchase its own shares when ordered to do so by the Court. Such instances do occur when a public Company is converted into a private company[34] and also in order to protect the minority.[35(a)]

Similarly, Section 171 of the English Companies

Act 1985, has now introduced new procedures whereby companies may purchase their own shares out of their capital. Thus a private company can redeem or purchase its own shares out of its capital, if so authorised by its articles. In the same vein, under Section 139, a public company may reduce its capital below the authorised minimum.

In view of the above changes to the rule in Trevor v. Whitworth which have taken place in other jurisdictions which allows companies under certain safeguards to redeem or purchase their own shares out of capital, Section 55 of the Nigerian Companies Act 1968 which still prohibits a company from purchasing and reissuing its own shares is outdated and needs reform.

7.2 PROPOSAL FOR REFORMS

How far can it be said with accuracy that the Nigerian Law relating to the selected areas for comparison is perfect? In other words in which areas of the law relating to the selected areas which form the basis of this thesis can Nigeria improve upon? Taking into consideration Gower's[36] criticisms that the Nigerian Companies Act 1968 is lacking in originality or African flavour "as it fails to take cognisance of the many developments which have taken place in England and other jurisdictions since the 1948 Companies Act came into existence".

It is therefore in the context of the foregoing that the following proposals and recommendations are respectfully being made in addition to those already made in the preceding chapters.

(a) That the Nigerian Companies Act 1968, should be amended to exclude a company limited by guarantee from being registered with a share capital. For if a company is formed with the intention of making pro rata distribution of its profits to its members, it is inappropriate that it should be allowed to be registered as a company limited by guarantee.

(b) That since the provision in the Nigerian Companies Act 1968 which allows unlimited Companies to be registered without share capital has not led to the incorporation of such companies, the provision fulfills no economic need and should therefore be repealed.

(c) That since the requirement in the Nigerian Companies Act 1968 that a company should have two or seven members had not actually resulted in association of two or seven traders and there is no way of ensuring that both the two or seven members will be active partners in the concern, more often than not, one will merely be a nominee of the other, the Nigerian Companies Act 1968 should be reviewed to include a provision for the incorporation of a "one man company" as contain under Section 8 of the Ghana Company's Code 1963.

(d) The provisions of the Nigerian Companies Act 1968 which provide that any person could be appointed

a director of a company except where he attains the age of 70 and this only applies to public companies is inadequate. As directors of private companies in Nigeria who are usually the first directors, the Managing Director, Chairman with a casting vote are capable of circumventing the provisions by the appointment of their infant sons or daughters as the second directors with the sole aim of having absolute control of the company to themselves. If the proprietor suddenly dies or is incapacitated, the company's affairs come to a standstill and may even lead to a close down or liquidation, since the second director is still young and lacks adequate experience to cope with the management and problems of modern companies. Therefore, the Nigerian Companies Act 1968 should be reviewed to include an express provision which permits only persons who are sane, solvent with no criminal records and of mature age to be appointed directors as contained under Section 182(1)(a)(b)(d) and (e) of the Ghana Company's Code.

(e) Similarly, that the Nigerian Company's Act 1968 should be amended to include a provision introducing no par shares. But such a provision should be made mandatory upon all companies to adopt. Otherwise, in a country like Nigeria, in which there are hundreds of thousands of companies with millions of par shares, a sudden and complete switch to no par shares may be hardly practical.

(f) The position of an agent or promoter contracting with a third party on behalf of a company prior to its incorporation in Nigeria as earlier discussed is very

unsatisfactory, since the law does not permit pre-incorporation contracts to be ratified or adopted. Moreover, no equitable remedies are available to an aggrieved party where the law holds that there was no contract. It is therefore proposed that the provisions of section 13 of the Ghana Company's Code which provides a better reform in this aspect of the law be adopted in Nigeria with some modifications.

(g) That the rigid application of the ultra vires doctrine as aptly demonstrated in the Nigerian decisions in the cases of Contintal Chemists Ltd v. Ifekandu[37] and in Polymers Inustries (Nig) Ltd.[38] are unsatisfactory. Since the doctrine provides an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company, as evidenced from the above two cases. Therefore, the doctrine needs immediate reforms, taking into consideration the noble objectives that the doctrine sought to protect originally. In other words any meaningful legislative reform as far as companies are concerned must take care of the investors, the creditors and third parties dealing with the company. It is hereby proposed that a provision similer to section 25 of the Ghana Company's Code, with some modifications to suit local circumstances be included in the Nigerian Companies Act. This provision will therefore allow the courts to treat every case based on the ultra vires rule on its own facts, with little or no reliance on precedents, especially Common Law Precedents.

(h) That the directors fiduciary duties as evidenced in the case of Aberdeen Rly v. Blackie Brothers[39] which also apply in Nigeria are very strict. But the weakness here is that under the Common Law, the directors duties are owed to the company only and not to individual members. The directors may therefore utilised certain special facts known only to themselves to the disadvantage of the company and individual members. Therefore the Companies Act 1968 should be reviewed to include a provision which should prohibit the directors from making use of any special facts or information known to them without first disclosing such facts to the company and members. It is therefore proposed that a provision similar to section 205(a) of the Ghana Company's Code which adequately takes care of such situations be included into the Nigerian Companies Act with some slight modifications.

(i) It is recommended that, in the light of the observations made earlier in the thesis on the low degree of care and skill required of directors under the Common Law, there is need to review the Nigerian Companies Act 1968. It is suggested that a provision be included in the Nigerian Companies Act which should impose some minimum objective standard of care and skill on the directors. Therefore, a provision similar to section 144 of the American Business Corporation Act 1970 which is identical to the provisions of section 203(2) of the Ghana Company's Code be included in the Nigerian Companies Act.

(j) The prescribed provision in the Nigerian Companies Act 1968 that a director must take up and pay for his

qualification shares if so demanded by the articles within two months or vacate office is unnecessary. It is therefore recommended that the provision be amended and made optional and not compulsory so as to allow people with long years of business experience to effectively manage the company without taking up any share qualifications.

(k) The provisions of section 186 of the Nigerian Companies Act 1968 only requires that where there is a change in a directors transaction in shares, the register shall show the date and the price or other consideration for the transaction. It is submitted that the provision is too narrow and inadequate and should be reviewed to include wider and more comprehensive provisions found in other jurisdictions notably Britain. It is therefore proposed that such a provision should require directors:-

(i) to inform the company in writing within five days of any interest or dealings in the shares or debentures of his company or subsidiary company.[40] Such notice must be comprehensive so as to include details regarding the transaction, including the price. It should be mandatory for the company to maintain a register of directors interests and dealings and within a period of five days enter the information received.

(ii) the register should be opened during business hours, to members without charge and by others on a payment of a

small token fee and copies may be obtained.[41]

(iii) where a company receives notice of a transaction related to listed securities it must endeavour to notify the Stock Exchange not later than the end of the next working day.[42]

(iv) a director, his spouse or infant child are prohibited in dealing with share options of his company unless the latter had no reason to know that he was a director.[43]

(v) Restrictions on purchase and sale of company securities should also be extended to all other persons or any class thereof who own or have acquired more than five percent of the voting shares in a quoted company.[44]

(vi) Present or former government officials working on the Stock Exchange Markets should be prohibited from directly or indirectly disclosing information obtained by them which may likely affect the value of shares. Any breach of the provision should attract both civil and criminal liability.[45]

(4) That the normal practice in Nigeria whereby the directors draw up service contracts for themselves and fixed very large salaries for themselves without first seeking approval from the members in the general meeting is highly undesirable. As the members have no say at all in the amount of these salaries and do not even know about them.

At most they later find out from the accounts what the total sum that has been paid to directors. However excessive they may think this sum, there is very little they can do about it. It is therefore proposed that a provision be included in the Nigerian Companies Act making it expressly clear that until and unless directors Service Contracts are approved by the general meeting, they should not be entitled to any remuneration as contained under section 194 of the Ghana Company's Code.

(m) Furthermore, that the provisions of section 201 of the Nigerian Companies Act 1968 which adopted the wordings of section 210 of the English Companies Act 1948(now repealed) with all its defects and inadequacies should be reviewed to include provisions similar to section 75 of the English Companies Act 1980 which adequately deals with oppression.

(n) That the Common Law position which also apply in Nigeria whereby a minority shareholder is allowed to bring a representative action on behalf of the company to redress a wrong done to the company itself and is also free to discontinue the action whenever he feels to do so is undesirable. Therefore, it is suggested that the Nigerian Companies Act 1968 be reviewed to include provisions similar to those made by the Ontario Select Committee on Company Law Reform 1970.[46]

(o) Enacting of specific provisions in the subsequent Nigerian Companies Act providing that a shareholder or minority member should be allowed to bring a misfeasance summons at any time a breach of the directors duties occur.

But the petitioner should no longer be required to establish that the company whose right is sought to be enforced has actually suffered some loss as a result of the misfeasance or breach of trust of the directors. Such provisions should also prohibit a plaintiff, be it the company or member from discontinuing or compromising the action, after it has been instituted without first seeking the courts approval to do so as contain under section 210 of the Ghana Company's Code.

(p) Equally important, although a shareholder of a company now has an impressive array of remedies at his disposal, especially where fraud or unfairness is alleged, an effective sanction against the breach of the controlling directors duties of care and skill are still lacking, for the rule in Foss v. Harbottle[47] will normally bar an action at the suit of the minority, and it is also not clear that any of the remedies will be available to a minority. Therefore, it is proposed that to supplement all other remedies available to the minority to enforce his individual rights against the company, the recommendations of the Bullock Committee[48] for "a two board of directors" for a company be adapted in Nigeria with some slight modifications to suit local circumstances.

(q) The need to include in the Nigerian Companies Act a provision which will allow companies to make donations to its employees, and for charitable purposes is highly desirable. In any case, such a provision should inevitably exclude donations made to political parties. Otherwise multi-national corporations may circumvent such a provision to install any political

party or person at the helm of government in Nigeria who is willing and prepared to dance to their tune so as to have absolute control of the nations economy and thereby reducing Nigeria's Sovereign Status to that of a mere parish.

(r) A reviewing of the Nigerian Companies Act 1968 towards making it mandatory upon the Registrar of Companies to cause a copy of the particulars of a company to be publish in the Gazette whenever a company has been newly incorporated and before it commences business. Furthermore, the Registrar should do same whenever a company is either voluntarily or compulsorily wound up by an order of the court. Such a provision should make it mandatory upon the Registrar to publish in the Gazette a periodical and comprehensive report on the activities of companies in Nigeria as contained under section 338 of the Ghana Company's Code.

(s) The provisions of section 55 of the Nigerian Companies Act 1968 which prohibits a company from purchasing and re-issuing its shares should be relaxed and companies should be allowed to do so under certain stringent safeguards as contain under section 59 of the Ghana Company's Code.

FOOTNOTES

1. L.C.B. Gower, Principles of Modern Company Law. (Stevens & Sons, London 4th ed. 1979) p.238. See also note 63.

2. Cmnd 9112

3. Cmnd 1749, paras 32 - 34

4. S. 141 Ghana Company's Code 1963, Act 179 of 1963

5. Re English & Colonial Produce Co. [1906] 2 Ch 435; Re National Mail Coach Company [1908] 2 Ch 515

6. Caligara v. Giovani Sartori & Co. [1961] All N.L.R. 534

7. See Newborne v. Sensolid (Great Britain) Ltd. [1954] 1 Q.B. 45

8. S. 35(2) English Companies Act 1985

9. Transbridge Co. Ltd. v. Survey International Ltd. (1986)4 N.W.L.R. 576

10. This is evidenced by the anti-trust legislation and probes which occurred in America.

11. H.M.S.O. Cmnd 6659 (1945) para. 12

12. S. 25 Ghana Company's Code 1963, Act 179 of 1963

13. S. 35(1) English Companies Act 1985

14. Aberdeen Rly v. Blackie Brothers (1854)1 Macq (H.L.)

15. Percival v. Wright [1902] 2 Ch 421

16(a) Supra note 14

16(b) Per Coker J.S.C. in Shonowo & Ors v. Adebayo & Ors (1969)2 A.L.R. Comm. 419 at p.430; Lord Helsbury L.C. in Dovey v. Cory [1901] A.C. 477 p. 487

17. See the three test propounded by Romer J; in ReCity Equitable Fire Insurance Co. [1925] Ch.405

18. Re National Bank of Wales Ltd. [1899] 2 Ch 629

19. S. 203(3) Ghana Company's Code 1963, Act 179 of 1963

20. S. 330(1) English Companies Act 1985

21. Ibid. S. 327

22. Ibid. S. 305(4) for purposes of this section, "director" includes shadow director, and "officer" is to be construed accordingly

23(a) For exceptions to the prohibition, see section 321 of the English Companies Act, 1985.

23(b) Foss v. Harbottle (1843)2 Hare 461

24. J. Ola Orojo, Nigerian Company Law and Practice (Sweet & Maxwell Ltd. 1976 ed.) p.324

25. S. 719 English Companies Act 1985.

26. Ibid S.743

27. S.338(2) Ghana Company's Code 1963, Act 179 of 1963.

28. Ibid

29. See, S.711(1) of the English Companies Act 1985 for a more comprehensive list.

30. Ibid S.720(1)

31. Ibid S.729

32(a) Ibid ss. 19 and 20

32(b) Trevor v. Whiteworth [1887]12 A.C. 409.

33. S.35(1) English Companies Act 1980, 1980 C.22

34. Ibid. S.11

35(a) Ibid. S.75

35(b) Supra note 32(b)

36. L.C.B. Gower: "Nigeria and the Companies" West Africa 2, November 1968 at p.1289.

37. Continental Chemists Ltd. v. Ifekandu [1966]1 All N.L.R.1 S.C. (Nig.).

38. Afolabi v. Polymers Industries (Nig) Ltd (1964)2 A.L.R. (Comm.) 205.

39. (1854)1 Macq 461 at p.471 (H.L.)

40. SS.27 - 29 English Companies Act 1967, 1967 C.81.

41. Ibid S.29(7) and (10)

42. Ibid S.25.

43. Ibid SS.25 and 30

44. Ibid. SS 33-4 (1967); S.26 English Companies Act 1976, C.47.

45. S.69(2) English Companies Act 1980, 1980 C.22.

46. Dr. I. Ayua, Nigerian Company Law (Graham Burn Press Bedfordshire U.K. 1984) p. 206

47. Foss v. Harbottle (1843)2 Hare 461

48. Cmnd papers 6706 (1977) "Report of the Committee on industrial Democracy" cited by L.C.B. Gower, Principles of Modern Company Law (Stevens & Sons London, 4th ed. 1979) p.73; see also (1977) 40 M.L.R. 323.

BIBLIOGRAPHY

TEXT - BOOKS

1. Ayua, I.A. (1984) Nigerian Company Law, Graham Burn Press Bedfordshire (U.K.)

2. Blackburn J.B.& Others(1982) Legal Environment of Business: Public Law and Regulation, Richard D. Irwin Inc. Homewood, Illinois.

3. Cheshire, G.C. and Fifoot, C.H.S. (1969) Cheshire and Fifoot's Law of Contract, Butterworths London. (7th edition)

4. Ford, H.A.J. (1974) Principles of Company Law, Sydney, Melbourne Brisbane.

5. Fraser's Handbook on Canadian Company Law (1975) Carswell Company Limited, Toronto, Canada.(Sixth Edition) by Sutherland, H. & Horsley, D.B.

6. Gower, L.C.B. (1969) and (1979) Principles of Modern Company Law, Stevens & Sons London. (3rd and 4th Editions)

7. Gower, L.C.B.(1961)Ghana Draft Company's Code, London School of Economics & Political Science w.c. 2

8. Gullick, J.M. (1981) Ranking and Spicer's Company Law, HFL Publishers Ltd, U.K. (12th Edition)

9. Olawoyin, G.A. (1981) Status and Duties of Company Directors, University of Ife-Ile Ife Press, Nigeria (2nd Edition)

10. Orojo, J.O. (1969) A Guide to Company Law and Practice, Sweet & Maxwell London

11. Orojo, J. O. (1976) Nigerian Company Law and Practice, Sweet & Maxwell London

12. Palmer, F.B., Palmer's Company Law (1976) Stevens & Sons London, (twenty-Second Edition) by Clive, M. Schmitthoff (with Maurice Kay and Geoffrey K.M.)

13. Pennington, R.R. (1973) Pennington's Company Law Butterworths London. (3rd Edition)

14. Powell-Smith, Vicent (1969) The Law and Practice Relating to Company Directors, Butterworths London.

15. Sealy, L.S. (1971) Cases and Materials in Company Law, Cambridge University Press.

16. Sim, R.S. (1971) Case Book on Company Law, Butterworths London (3rd Edition)

17. Tom Hadden, (1977) Company Law and Capitalism, Willimer Brothers Limited Birkerhead U.K. (2nd Edition)

ARTICLES

18. Agbonika, J.A. "Social Responsbilities of Companies in Nigeria". (1983) 1 A.B.U.L.J. Page 52 - 82

19. Bakibinga, D.J. "The Utility of the Ultra Vires Doctrine in Company Law: An Appraisal of the Anglo-Nigerian position" (1983) 1 A.B.U.L.J. Page 110 - 121

20. Boyle, A. "A Liberal Approach to Foss v. Harbottle (1964) 27 Mod. L. Rev. p. 603

21. Goel, R.K. "Delegation of Director's Powers and Duties - A Comparative Analysis (1969) Int. Comp. L.Q. p. 152.

22. Gower, L.C.B. "Nigeria and the Companies" West Africa 'Magazine' 2, November 1968.

23. Gower, L.C.B. "Some Contrasts Between British and American Corporation Law" (1955 - 56) 69 Harv. L.R. p. 1369

24. Horrwitz, D. "Historical Development of Company Law" (1946) 62 L.Q.R. p. 54

25. Katende, J.W. Social Responsibilities of the Revisited (1971) unpublished Article)

26. Mukubwa, G.T. "Pre-Incorporation Contracts" (1985) Faculty of Law, A.B.U. Zaria (unpublished Article)

27. Mukubwa, G.T. "Apportionment of Company Powers between Management and General Meeting: An analysis of the debate and Cases (1986) Department of Commercial Law, Ahmadu Bello University Zaria (unpublished Article)

28. Sullivan, G.R., "The Relation Between the Board of Directors and the General Meeting" (1977) 93. L.Q.R.

29. Wedderburn, K.W. "Ultra Vires and Redundancy" in Parke v. Daily News Ltd. (1962) C.L.J. 141; [1962]3 W.L.R. 566

30. Wedderburn, K.W. "Shareholder's rights and the rule in Foss v. Harbottle (1958) C.L.J. p. 93