CORPORATE CAPACITY AND THE ULTRA VIRES RULE UNDER NIGERIAN LAW

BY

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CORPORATE CAPACITY AND THE ULTRA VIRES

RULE UNDER NIGERIAN LAW

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THE DEPARTMENT OF COMMERCIAL LAW, FACULTY OF LAW

DECLARATION

I hereby declare that this thesis is a record of my own research. The thesis has been written by me, and has not been published or presented in any previous applications for a higher degree. All quotations and references have been indicated and specifically acknowledged.



JOSEPH TSE AESE

CERTIFICATION

This thesis entitled "CORPORATE CAPACITY AND THE ULTRA VIRES RULE UNDER NIGERIAN LAW" by JOSEPH TSE AESE meets the regulations governing the award of degree of Master of Laws of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my mother, **MRS. IGYONKWASE AESE**, and to my Late Father **PA. AESE AKPULO JIIR**, who inculcated in me inter alia, DISCIPLINE and HARDWORK, even as their only son.

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I accept responsibility for any error of judgement, inelegance of style, misconception of law or presentation of arguments, as my shortcomings.

JOSEPH TSE AESE, ESQ.
ZARIA, 2000.

ABSTRACT

Any act of a company outside the Memorandum and Articles of Association of the company or the statute(s) creating the company are Ultra Vires. Traditionally, such acts are VOID and neither the company nor third parties derive any benefits from such transactions.

Attempts to moderate the harsh consequences of the Ultra Vires Rule have failed to yield results that satisfy all the parties in corporate practice.
The result is that, the Ultra Vires Rule is dreaded by many. As a follow up, the company, a potential instrument for investment and development, is equally dreaded by investors and/or creditors or third parties dealing with the company.

This thesis investigates the Ultra Vires Rule and corporate capacity in theoretical and practical terms against the background of connected matters, with a view to arriving at recommendations for further reforms that will attain the best of results for Nigeria.

This work strives to contribute immensely in ridding the dangerous propensities relative to investors and creditors of the company, as to corporate capacity and the Utra Vres Rule. This should render or make companies a more attractive medium for doing business to be fully, freely, and fearlessly embraced by all for speedier development.

The research is basically doctrinal, based on available literature on the subject, and establishes among other things that the Ultra Vires Rule otherwise called, doctrine of limited capacity of companies, does not serve the interest of justice or best interest of all the parties to corporate practice. Rather, the rule is a nuisance to investors and a trap to unwary creditors or third parties. In the same vein the concept of limited liability, and the distinction between the Memorandum and Articles of Association are undesirable. Also, it is

more practicable to treat issues of company law as distinct rather than as logically following from other branches of law, say agency.

The overall implication of findings of the research is that the law as now obtains needs to be reformulated in line with recommendations made in the thesis to attain the best of results for Nigeria.

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TABLE OF ABBREVIATIONS

A. LAW REPORTS

ALL NLR	All Nigeria Law Reports
FRCR	Federal Revenue Courts Reports
NWLR	Nigeria Weekly Law Reports
NSCC	Nigerian Supreme Court Cases
SC	Judgements of the Supreme Court
AC	Appeal Cases
ALR Comm	African Law Reports (Commercial Law Series)
ALL ER	All England Reports
CA	Judgement of the Court of Appeal (England)
CH	Law Reports, Chancery
CH.D	Law Report, Chancery Division
LR. CP	Law Reports, Common Pleas
LR. HL	Law Reports, House of Lords
QB	Law Reports, Queen's Bench
WLR	Weekly Law Reports

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B. JOURNALS/MAGAZINES ETC

A.B.U LJ	Ahmadu Bello University Law Journal
A.B.U News Bulletin	Ahmadu Bello University News Bulletin
Annual Reports and Account B.C.C PLC	Benue Cement Company, Public Limited Company.
JUS	Justice Journal
NCL. REV.	Nigerian Commercial Law Review
NLJ	Nigerian Law Journal

MISCELLANEOUS

CAP	Chapter
Co.	Company
Ibid	Ibiden; in the same place
Ltd	Limited
NLTC	Nigerian Law through the cases
Op. Cit	In the work cited
P.	Page
PP	Pages
Pt	Part

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

In legal fiction, a company once incorporated becomes a body corporate thereby transforming from an aggregate of persons into a corporate personality. The follow up of this transmutation or transformation is that the company becomes a person, an artificial legal personality capable of exercising some rights and owing some duties.

That companies are major instruments in economic development and play vital and unique role in commercial life with attendant economic, political and social contributions is indisputable.

The fiction of corporate personality has however brought with it many practical problems, one of which is whether the scope of corporate capacity or powers and rights endowed on the company as a result of incorporation should be circumscribed or whether companies should be allowed to have all the powers of natural persons of full capacity.

The law endows the corporate personality with lesser capacity than the human being or personality. In other words, corporate capacity is circumscribed by its creators hence the company being a creature of statutes, the extent of its capacity is circumscribed or strictly delineated by the statutes creating the company and the company's Memorandum and Articles of Association.

This takes us to the subject matter of this research which is the Ultra Vires rule, the meaning, origin, and position in corporate practice, of which we shall see shortly[1]. It is enough at this stage to state that a company has powers or capacity to undertake only such businesses as are permitted by the statute creating such a company or the company's Memorandum of Association, and anything outside these is Ultra

Vires(beyond the power of) the company hence basically, cannot be undertaken by the company.

The registered company has played, and will continue to play an ever-increasing role in the development of the economy and is indeed the most important unit of business organisation for modern economic activities. This is due to the attractions brought about by its corporate personality, perpetual succession, the opportunity for investment and for raising of capital, and the strict legal controls and protection of members and creditors.[2]

Nigerian company law is influenced by the English Law. Consequently, the English common law, and the doctrines of equity in so far as they applied to company law are applicable to Nigeria subject to local legislations. For instance, it is through such medium that the concept of the separate and independent legal personality of the incorporated company, and the ultra vires rule were received into Nigeria and have since become part of Nigerian law through local legislations.[3]

In England, there was a flood of speculative and fraudulent schemes of company flotations especially in the first two decades of the 18th Century.[4] In this sense, the company was utilised by promoters as a device more for scheming than trading. For example, the South Sea Company's scheme[5] was to acquire virtually the whole of the National debt by buying out the holders or persuading them to exchange their holdings for the company's stock. The postulation was that, the possession of an interest bearing loan owed by the state was a basis upon which the company might raise vast sums to extend its trade. The company was originally formed to incorporate the holders of the floating debt in exchange for a monopoly of trade with South America.

When the state itself became panic stricken by the flood of speculative enterprises, it reacted not by encouraging the existence and systematic growth of joint stock companies. The state rather passed a legislation which prohibited generally the use of joint stock corporations unless authorised to act as such by Act of Parliament or Royal

Charter.[6] The ultimate aim of the legislation was to suppress joint stock companies, but this aim failed. Consequently, the Bubble Act was repealed.[7] Upon repeal of the Bubble Act, three types of companies became operative viz:

(a) companies incorporated by Royal Charter;

(b) companies incorporated by special Act of Parliament; and

(c) deed of settlement companies.

The joint stock companies therefore had to be accepted by the state as a "necessary evil". The efforts of the law have thus been to do away with the qualities of the company that are capable of causing mischiefs, so that companies are less harmful to the investors and creditors.

The Ultra Vires Rule evolved amidst the efforts of the law to take the stings off corporate practice, to ensure that companies are capable of being used for economic development, without harm (or as less harm as practicable) to those that embrace this medium for doing business. This protection became more relevant with the introduction of limited liability in England, to provide greater protection for creditors and ensure that the company limits itself to its authorised objects.[8] It was thought that the Ultra Vires Rule would prevent trafficking in company registrations, and afford some protection to members and creditors.

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It is a matter for concern that while the rationale(s) for the introduction of the Ultra Vires Rule have been lauded or hailed by some authorities, same rule has been commented upon in derogatory terms by some authorities. For instance, according to professor L.C.B GOWER:[9]

> *".....the intention of the rule was indeed salutary for protecting creditors and shareholders..... it prevented trafficking in company registration. In this way, it prevented an investor in a gold mining company finding himself as an investor in a fried fish shop. It also assured creditors that their money would not be dissipated*

in unauthorized ventures."

In sharp contrast to the above comment on the Ultra Vires Rule however, negative views have been expressed of the practical utility of the rule. For instance, it was remarked of the rule thus:[10]

> *"..... the doctrine became an illusory protection for shareholders and yet it was a pitfall for third parties dealing with the company. It was no more than a trap for the unwary third party and a nuisance to the company itself."*

Many questions are sparked off by these comments on the ultra vires rule. For instance, what is this rule called Ultra Vires? What role(s) does the Ultra Vires Rule play in the corporate life or practice? How did the Ultra Vires Rule evolve and how was the rule designed to attain its rationales? How have the salutary objectives of the rule been subverted? Is the Ultra Vires Rule still necessary in corporate practice? What is the position of the latest Nigerian enactment on company law[11] regarding the Ultra Vires Rule? Has the position under Nigerian law attained the best of results? and so on.

1.2 OBJECTIVES AND SCOPE OF THE THESIS

The main objective of the thesis is to exhaustively, critically, incisively and coherently analyse, investigate or review corporate capacity and the Ultra Vires rule in historical (theoretical) and practical terms with a view to identifying the loopholes in the Ultra Vires rule; and make suggestions or recommendations for reform to attain the best of results for Nigeria regarding the Ultra Vires Rule. In the process the various questions posed above on the ultra vires rule will be addressed.

The ultimate goal is that the thesis shall contribute immensely in ridding company law of some of its dangerous propensities relative to the investors and creditors of companies so that companies shall be a more attractive medium for doing business to be fearlessly and freely embraced by all for the development of Nigeria, and the entire world.

The inquiry into corporate capacity and the Ultra Vires rule in theoretical or historical, and practical terms, and projection into the future of the Ultra Vires Rule and corporate capacity shall therefore form the main objectives and scope of this thesis.

1.3 RESEARCH METHODOLOGY

The basic method of research or investigation is doctrinal research based on available literature on the subject matter in the libraries. To this end all sources consulted for information are acknowledged, be they books, journals, Newspapers, decided cases, or statutes. The legal position as obtains in these sources are critically analysed, defects therein identified, and suggestions made for reforms that will attain the best of results on corporate capacity and the Ultra Vires rule in Nigeria.

1.4 LAYOUT OF THE THESIS

The thesis is made up of five chapters laid out in graduating sequence.

Chapter one of the thesis is captioned INTRODUCTION; and deals with preliminary matters that facilitate the understanding and better appreciation of the thesis. The chapter particularly introduces the background to the problem necessitating the research, the general objectives and scope of the research, the basis of study or research, meaning and origin of the Ultra Vires Rule and other introductory matters. This is within the realm of the fiction of corporate personality of Companies, and Allied Matters. This sets the stage for an examination of the Ultra Vires rule in practice.

Chapters two to four (2 - 4) of the thesis constitute the bedrock or main thrust of the thesis. Specifically, chapter two of the thesis deals with the operation of the Ultra Vires Rule under Common Law. By the end of this chapter, one is well placed to understand the hardships sought to be prevented by the Ultra Vires Rule at Common Law vis-a-vis those it caused.

This sets the stage for one to answer the question as to whether the Ultra Vires Rule as formulated and practiced under Common Law attained the theoretical purposes for which it was evolved; if not what then have been the efforts made especially under Nigerian Law to address the lapses of the rule or doctrine, or to set the Ultra Vires Rule at its appropriate level or perspective? The answer to this poser comes from chapter three of the thesis.

Chapter three accordingly deals with Ultra Vires Rule under the Companies and Allied Matters Act[12]. This chapter critically assesses whether the Ultra Vires Rule still exists under the Companies and Allied Matters Act 1990, and to what extent it exists as well as the lapses on Ultra Vires Rule in the Act.

Chapter four of the thesis investigates, and assesses the various reform alternatives to the Ultra Vires Rule. These are examined in all their shades to provide the basis for solution to the question whether the Ultra Vires Rule as obtains under the Companies and Allied Matters Act 1990 attains the best of results for Nigeria.

Chapter five of the thesis is the last chapter of the thesis. The chapter summarizes or highlights the major findings arising from the entire research conducted, and suggestions or recommendations proffered for further reforms. The chapter is titled: SUMMARY AND RECOMMENDATIONS.

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1.5 THE COMPANY AS A LEGAL PERSON

While it does not fit into the scope of this work to examine the historical evolution of Companies, it is nevertheless pertinent to give an insight into the company as a legal person as far as relates to this work. This shall basically enable one to identify the conceptual parameters within which the subject matter of this thesis, the Ultra Vires Rule fits or operates.

It is difficult (if not impossible) to define the term "company" in precise or all encompassing terms. This is because the term does not lend itself to any precise or strict technical definition. A loose definition of a company is that, it is an association of persons for some common purpose usually the carrying on of business or other maximum returns[13] or a body or an association of persons having a distinct legal personality[14]. But this popular or general usage of the term `company' covers both partnerships and corporations. To that extent, they do not correctly reflect the type of institution (company) with which the Ultra Vires rule is to be examined.

Besides, it is recognized that companies may be formed not necessarily for business purposes. As stated by Gower L.C.B[15] companies today may be formed for:

a) Purposes other than profits of their members; that is, for charitable or philanthropic purposes, which case incorporation is just a more modern and convenient substitute for a trust. Such companies are also recognized by the Companies and Allied Matters Act 1990 and must be limited by guarantee[16].

b) Companies formed to enable a single trader or small partnership to carry on business, otherwise called private companies, also recognized by the Nigerian Companies and Allied Matters Act 1990[17].

c) Companies formed to enable the investing public to share in an enterprise without necessarily taking part in its management called public companies and recognized as such by the Companies and Allied Matters Act 1990[18].

In another vein, a company is a specie of corporation; and it will be instructive to define a company by reference to meaning of a corporation. In this wise a corporation aggregate is:[19]

> *"A collection of many individuals united in one body under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual particularly*

of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and exercising a variety of rights more or less extensive according to the design of the institution or the power conferred upon it either at the time of its creation or at any subsequent period of its existence."

Though criticised for merely cataloguing the self evident incidents of incorporation, the definition gives a good idea of the meaning of a corporation hence a company and it is practically useful to know what a company is by taking cognizance of these incidents of a company. For, it is this distinct legal personality together with the consequences flowing therefrom that distinguish a company from other unincorporated bodies[20].

An incorporated company or one created by statute is a body corporate with a personality distinct from its members and this legal personality is often described as an artificial Legal Personality in contrast with a natural person or human being[21]. Thus a company registered under the Companies and Allied Matters Act 1990 is an entity distinct from the persons who compose it or the corporators[22]. This principle of corporate personality otherwise called "the veil of incorporation"[23] of a company was judicially enunciated upon in the case of

SALOMON V. SALOMON & CO. LTD[24] where LORD MACNAGHTEN said:[25]

"The company is at law a different person altogether from the subscribers..... and, though it may be that after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers, or 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."

The consequences of the legal personality of a company are that:[26]

a) It has perpetual succession and existence. Not being a natural person, a

company is not susceptible to the vicissitudes of the flesh hence cannot become incapacitated by illness, mental or physical nor have an allotted life span[27].

b) The company's members are not liable for its debts unless it is an unlimited company. Hence, generally, only where the company is registered as unlimited will the members be liable for its debts. Otherwise, where limited by shares or guarantee, the liability of the members is only to the extent of the shares held and unpaid by them or their respective guarantees, given at incorporation. This attribute of a company from the point of view of investors is the most fascinating feature of incorporated companies as a mode of doing business[28]. Limited Liability has the practical significance of:

   i. Defining the extent of investment risks and loss;
   ii. Providing means of escape from risk of loss to big or small traders there by insulating them against execution extending to their personal estates;
   iii. Insulating members from liability for corporate liability for corporate debts and obligations.[29]

c) The property of the members of the company are clearly distinguished from those of its members. A company has powers to acquire, hold, and dispose of property in its own right. Consequently, the shareholders of a company are not the individual owners of its property, and have no power as individuals to dispose of the company's property[30]; afortiori, the individual members (even if the largest shareholders), have no insurable interest in the property of the company[31].

d) The company also has the right to sue and be sued in the company's name. This avoids the rather circuitous course of representative actions which most unincorporated bodies must adopt[32]. Thus generally, the company alone can maintain actions in respect of harm done to it[33].

e) Also, the company has the right to the shares in it. Shares are items of property separate from the company's property and are transferable or transmissible like any other property[33a]. Shares in a company may also be mortgaged as security.[33b] The legal incident of share ownership today is that the holder is a member of

the company.[33c] Shares in a company are therefore transferable property, and which transfer is done in the manner provided in the articles of association of the company[33d] Where there is the duty to offer the shares to the members, then it is incumbent on the transferor to offer the shares to the already existing members first. This is called the right of pre-emption.[33e] A private company shall not (unless authorised by law) invite the public to subscribe for any shares or debentures of the company[33f] The Articles of Association of private companies shall specifically restrict the transfer of the company's shares.[33g] That is, a share in a company constitutes a personal proprietary interest which is transferable with the effect that the transferor drops out and the transferee drops in and assumes his rights and obligations in respect of the shares transferred[34].

The fiction that a company is a legal entity existing separate and distinct from its shareholders is a legal theory established for purposes of expedience or convenience of the company in making contracts, in holding property, in suing and being sued, in management of its affairs and to preserve the Limited Liability of its shareholders[35].

It has been noted by AKANKI E. O.[36] *that,*

> *"The extension of the concept of legal personality beyond the class of human beings has been hailed as the most noteworthy feature of the legal imagination."*

As SCHRAMTER, W. H. put it,[37]

> *"The Limited Liability corporation is the greatest single discovery of modern times, whether you judge it by its social, by its ethical, by its industrial, or in the long run, after we understand it and know how to use it by its political effects..... Even steam and electricity are far less important than the Limited Liability corporation, and they would be reduced to comparative impotence without it."*

Historically, limited liability was the last incident of incorporation to be attained in England[38]. Until 1855, there was no legislation allowing limited liability. However, incorporators desired limited liability and sought to effectuate this desire in their

agreements or deeds of settlements. Parliament consequently commissioned a study to address the demands for limited liability as it appeared that unlimited liability discouraged rich people from buying shares in enterprises in which there was no limitation of risk. The poorer investors who could take the risk to be sued for unlimited liability on the other hand were not in the position to provide capital for investment. The argument for limited liability at economic levels was therefore that it would encourage investment in stock enterprises.

The Royal Commission which subsequently handled the issue of limited liability failed to attain unanimity on the issue as greatly talented and experienced persons who gave opinions on the issue arrived at diametrically opposite conclusions that it was difficult to say on which side the weight of authority predominated.

Subsequently the limited liability Act[39] was passed providing for limited liability on complete registration on conditions, the most important of which were that:

i. The company should have at least 25 members holding at least $^{3}/_{4}$ (75%) of the nominal capital, each member having paid up at least 20%;

ii The word "limited" was the last component of the company's name. This followed Lord Bramwell's suggestion that the word limited should be the last word of a limited liability company's name; that it should appear on their note paper and documents and should be painted on their premises and engraved on their brass plates.

iii. The auditors of the company were approved by the Board of Trade.

iv. The Directors were to be personally liable if they paid dividends knowing the company to be insolvent, and the company was to be wound up if $^{3}/_{4}$ of the capital was lost.

Limited liability Act 1855 was repealed by another Act in 1856[40] which still provided for limited liability dealt away with provisional registration and replaced deed of settlement with the Memorandum and Articles of Association in Table B. Any seven

or more persons could form themselves into an incorporated company with or without limited liability (Under Nigerian Law, a company may be formed by any two or more persons)[41] by subscribing to the Memorandum and Articles of Association and complying with other registration requirements. Certain partnerships of more than 20 persons were prohibited from carrying on business for gain unless they are registered as companies and if the members fell below seven they were to become a partnership.

In granting limited liability, the English legislature appeared to have adopted or endorsed LORD BRAMWELL's propositions that those who dealt with companies knowing them to be `limited' had only themselves to blame if they burnt their fingers. In effect, the word "Limited" was intended to act as a red flag warning the public of the dangers which they faced in transacting with companies with limited liability. The above presupposes that the persons dealing with companies are versed with the practical effects of limited liability. It is however submitted that this may not be the case. For instance, to the unsophisticated third party, the expression "limited" connotes size or that the company is duly incorporated rather than limitation on liability. To these therefore the expressions "limited" or public limited company are more apt to give misleading signals than convey the true nature of the company in question. Thus to such persons, the expressions limited or public limited company is an indication of the size and economic power or that the company is duly incorporated rather than a warning for the responsibility to debts.

Historically corporate personality was attained before limited liability; and practically limited liability is neither an automatic nor a necessary incident of corporate personality. Corporate personality does not in practice always guarantee limited liability and the two are separate concepts, so that a company may be a separate legal person but the share-holders may still have an unlimited liability for it debts[42]. It would therefore appear to be fairest to the creditors and investors to be left to decide whether or not the liability in a transaction be limited, and to effectuate their desire in the agreements. Alternatively

the companies might take out insurance cover on their liabilities. It is thus submitted that the present institutionalized limited liability is better dispensed with.

The main feature of development of company law touching on limited liability has been a gradual movement away from the complete freedom of the 1856 Act towards imposing greater controls. In other words, the trend has been a gradual backward movement to the legal privilege or responsibility model of incorporation which model supports economic dirigism. The contrast is the utility or laissez-faire model of incorporation which supports unbridled free enterprise or non-interventionism.

The approach adopted by the Nigerian Companies and Allied Matters Act 1990 is to combine both the laissez-faire approach of incorporation with legal privilege, to balance freedom against responsibility[43]. This may be defended on the ground of the constitutional prescription of a mixed economy.

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Inspite of the commendations of the incorporated company, the consequences of incorporation may sometimes not be that fanciful or attractive or advantageous especially from the point of view of public interest; and the doctrine of corporate personality may seem incompatible with the dictates of common sense and justice. As stated by Yagba, T.A.T., Kanyip, B.B. and Ekwo S..A.[44] the Limited Liability system can be abused to the detriment of others in private companies as happened in SALOMON V. SALOMON & Co [45]. In that case salomon had for many years carried on a prosperous business as a leather merchant. In 1892, he decided to convert the business into a Limited Liability company. To this end Salomon & Co was formed with Salomon ,his wife and five of his children as members. Salomon was the managing director. The company purchased the business as a going concern. Seven shares were subscribed in cash by the members with the result that Salomon held 20,001 of the 20,007 shares issued; and each of the remaining six shares was held by a member of Salomon's family apparently as a nominee for him. The House of lords held that the company had been

validly formed and so, was a different person in law from salomon and therefore, the two could not be regarded as the same thing.

The courts saw the Ultra Vires Rule inter alia as a means of protecting the public and investors against abuse of the privilege of trading or doing business with limited liability[45a]. One of the consequences of incorporation therefore, is that the powers of the company are limited to carrying into effect the business or objects for which it is incorporated[45b]. It is no surprise therefore that the law allows that the veil of incorporation which creates corporate personality, distinguishing the company from its members in appropriate exceptional circumstances, to be lifted or pierced or separated or disregarded. Where this happens, the shareholders or subscribers are held personally liable for what purports to be acts of the company[46]. These circumstances or exceptions are statutory and judicial as reaction to the problems of corporate capacity. By and large these circumstances under which the veil will be lifted so as to hold the members personally liable presuppose that transactions were entered into within the corporate capacity and powers, except that injustice would be caused by insisting that the transaction binds the company and not the members or shareholders. The corporate veil may for instance be lifted where a company is a sham or puppet of the agency,between a company and its shareholders or controllers the court determines that a case warrants such treatment[47].

1.6 LEGAL CHARACTER OF THE MEMORANDUM AND ARTICLES OF ASSOCIATION

Before 1856, the company's documents were all contained in one set of regulations called the deed of settlement. The Memorandum and Articles of Association were introduced in 1856[48]. When these documents were introduced in 1856, their distinction into two was to keep the alterable and the unalterable, of the documents distinctly apart[49]. The original intention was that the memorandum should be unalterable in order to protect investors/ third parties; while the Articles of Association were to be the alterable bye-laws or the internal regulations.

It has however become possible to alter both documents one way or the other[50]. For

instance the Companies and Allied Matters Act[51] clearly permits alteration of the Memorandum and Articles of Association.

The permanence envisioned for the memorandum of Association having disappeared, it is submitted that no more need exists for keeping the documents separate or distinct; to unify these documents will ease the interpretation of their legal character and lean towards simplicity and brevity. The Ghana Company's Code has already attained this end by providing for a single document titled "Regulations"[52]. After all, even now that the distinction is maintained, the two documents are in practice printed and filed as one document and simply divided into two parts as Memorandum and Articles.

Statutorily, the legal effect of these documents when registered is that they constitute a contract between the company and its members and officers as relates to them and between members inter se, officers inter se and between members and officers[53].

Also, the Memorandum and Articles may validly confer powers on outsiders to appoint or remove a Director or other officer of the company. [54] Such outsider is allowed to exercise such powers contrary to the rule that only qua members or qua officers can exercise the rights in the contracts. Any member or officer can initiate proceedings under the provision in a representative capacity as a means of restraining corporate irregularities despite the rule that only the company can sue in respect of injuries done to the company[55]. The Companies and Allied Matters Act[55a] is in pari materia with preceeding Nigerian Companies Act[56] and the English Companies Act[57].

It had long been recognized by the courts that the Memorandum and Articles constitute a contract as stated in Section 41 (1) of the Companies and Allied Matters Act 1990. For example, in HICKMAN V. KENT[58] a provision in a company's articles for a reference of disputes between members and the company was held to be contractually binding, as this constituted a contract between the company and each member.

Also, in *RAYFIELD V. HANDS*[59] the provision in the articles was held to constitute a

contract between members inter se so that members were bound to buy shares of another member who offered same for sale to the members pursuant to the provisions of the articles binding the member to offer same for sale to the members if he wishes to transfer same.

It is however submitted that it is conceptually misleading to regard these documents as a contracts simpliciter as:

a) Section 41 itself admits of the possibility of altering the documents by process stipulated in the Act by approval of the requisite majority. In fact these documents are alterable[60] and the modes of alteration makes the documents more analogous to a constitution of a club than a strict contract[61].

b) It is clear from the Act that normal contractual remedies are not available for breach of the contract created by these documents. Damages are not usually awarded, and rectification is not also granted even where the articles are registered in the wrong form[62]; only equitable remedies of injunction and declaration are available[63].

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The flexibility of the rules as to alteration of the Memorandum and Articles created serious problems, one of which is in the area of Ultra Vires Rule. The result is that, the modern form of objects clause does not intelligibly convey to the average, small scale investor the purposes to which his money is to be put particularly when these may be easily altered by the majority[64].

1.7 ORIGIN AND MEANING OF THE ULTRA VIRES RULE/DOCTRINE

In law, persons may either be natural, or legal persons[65] - in which sense, a natural person is a human being while a legal person is anything vested by law with legal rights and duties[66]. Thus, law may grant legal personality to artificial things or persons. This arises where a group of persons together form a corporate body in our case a company. The corporate body (company here) once formed acquires a personality separate from that of its members, with some of the legal powers of natural persons[67]. The formation of

the corporate body or creating the artificial legal personality is called "Incorporation"[68]. The process of incorporation is otherwise known as registration of companies and became the mode by which companies are created, since 1844[69].

The relevance of the Ultra Vires Rule was brought to the fore when in 1855, an Act of the English parliament[70] was passed by which any company registered under the Act of 1844 might limit the liability of its members for its debts and obligations generally to the amount unpaid on their shares. This made it more expedient that the capacity of the registered company be clearly delineated to make it possible for investors and creditors to protect themselves from transactions of the company. But what is Ultra Vires in the sense of corporate practice? How did Ultra Vires evolve? What role does the Ultra Vires Rule play in corporate practice? etc.

The Ultra Vires Rule is believed to have been worked out in some details by the courts before the earliest companies Acts and to have derived from Public Law where the courts used the doctrine to explain why in order to protect public rights, they prevented public authorities from doing acts which were not authorised by the statutes under which they functioned[71]. The justification for the extension of this rule in Public Law to companies was sought in the fact that the early statutory companies such as railway and cannal companies had power to interfere with private rights for the purposes of their undertakings, and so in that respect they were much public bodies as departments of Government[72].

"Ultra Vires" is a latin expression which describes acts undertaken beyond (Ultra) the legal powers (Vires) of those who have purported to undertake them. Used in its strict sense, what Ultra Vires essentially brings to focus is whether the statutory body concerned acted within or beyond its capacity[73].

It was only in the latter part of the 19th century that it was clearly established that this

strict type of Ultra Vires applied to companies. Before 1844, the most common type of company was the deed of settlement company and this had no corporate personality - corporate personality was then enjoyed only by chartered companies to which the strict doctrine did not apply; and by the companies directly incorporated by statute which was a rare breed until the railway boom[74].

After the Joint Stock Companies Act[75] the deed of settlement companies became superseded by registered incorporated companies with Limited Liability and Memoranda of Association which had to specify their objects, hence it became pertinent for the courts to decide whether or not the Ultra Vires Rule applied to companies. The first authoritative pronouncement that the Ultra Vires Rule applied to registered companies was made by the House of Lords in the case of ASHBURY RAILWAY CARRIAGE AND IRON CO. V. RICHE[76] details of which shall be examined later[77]. But the case held that the strict type of Ultra Vires applied to registered companies.

The gist of the Ultra Vires Rule was thus that if a company incorporated by or under a statute, acted beyond the scope of the objects stated in the statute or in its memorandum of Association, such acts were void as Ultra Vires(beyond the company's capacity) and the acts could not be ratified even by a unanimous decision of the members[78] as to permit ratification would be doing the very thing which is forbidden by Acts of parliament. The statement of the Ultra Vires Rule in the ASHBURY case is in terms of the now accepted "capacity" theory[79].

By subjecting registered companies to the Ultra Vires Rule, the court imposed upon the companies a constraint which operated to confine them within the ambit of the memorandum. This has the effect of limiting the freedom enjoyed by natural persons of full capacity[80]. The Ultra Vires Rule has therefore been seen as a doctrine that delineates or limits the capacity of a registered company and is sometimes referred to as the doctrine of limited powers[81].

By the doctrine therefore, a company lacks capacity to enter into transactions outside the limits set by the declared objects of the company. This corporate capacity is defined in the statute[82] and the Memorandum of Association of the company[83].

The justification for confining a company within its permitted field of activities seems to be premised on the legal theory or permutation that incorporation is a privilege which is granted only in respect of the objects specified in the memorandum[84]. In other words, a company is a creature of statute hence its capacity be clearly delineated by the statute or the Memorandum of Association registered pursuant to the statute. The company can therefore, only carry out the objects stated in the memorandum or acts which are reasonably incidental to the stated objects. Any act or transaction carried out that is not authorised by the memorandum is Ultra Vires (that is, beyond the power of) the company[85].

Put in another way, the Ultra Vires Doctrine is to the effect that a company incorporated by registration under the relevant companies statute is incorporated by parliament for the objects stated in the Memorandum of Association so that it has power only to carry out such objects and anything else which is reasonably incidental thereto; and any act performed or transaction carried out which though legal in itself is not authorised by the objects clause in the memorandum or by statute is Ultra Vires (that is beyond the powers of the company) and void[86].

It would be observed from the foregoing analysis that the Ultra Vires Rule is one of the consequences of incorporation, rendered relevant or more important by the attainment of limited liability in companies; and the legal requirement that companies should specify in their Memorandum of Association the objects for which they are to be registered or incorporated and must confine their activities to these objects. How the Ultra Vires Rule operates in practice shall be seen shortly[87].

1.8 CONCLUSION

The background to the problem of corporate capacity and Ultra Vires Rule has been examined. The objectives of the study have been outlined with the research methodology and layout of the thesis. It is clear that a company is a legal personality, with the limited capacity as delineated by statute or the Memorandum of Association of the company. Two matters arising from this are the concept of limited liability and the Ultra Vires Rule. limited liability is not a necessary incident of incorporation. Limited liability gives rather misleading signals, and not warning as to the company's extent of liability which was envisioned for it. The meaning, origin, and context within which Ultra Vires Rule operates has been clearly established. It is also established that the legal character of the Memorandum and Articles of Association of companies once registered is that of a contract, though upon examination, they resemble rather a constitution of a club. This sets the stage for further examination of the Ultra Vires Rule bearing in mind these background matters in this chapter.

END NOTES/REFERENCES

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4. *PAUL L. DAVIES, GOWER'S Principles of Modern Company Law (1997), 6th edition, Sweet and Maxwell Ltd London, P. 31*
5. *PAUL L. DAVIES, GOWER'S Principles of Modern Company Law op. cit. P. 24*
6. *That is, the Bubble Act 1720*
7. *By the Bubble Companies Act 1825*
8. *Report of Nigeria Law Reform Commission on Company Law (1988) P. 70, Paragraph 121*
9. *Gower L.C.B; Gower's Principles of Modern Company Law, 5th edition (1992), Sweet and Maxwell Ltd, London P. 162 - 167.*
10. *Jenkin's Committee Report Commnd 1749 (1962) Paragraphs 35 - 42; Cohen Committee Report Commnd 6659 (1945) Paragraphs 11 - 12; Law Reform Commission Report on the Reform of Nigeria Company Law (1988) vol. 1 Part II (C) paragraphs 120 - 137.*
11. *Companies and Allied Matters Act CAP. 59, Laws of the Federation of Nigeria 1990.*
12. *DADA, T.O, General Principles of Law (1994) P. 133.*
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15. *Section 21 (1) (b); and S. 26, Companies and Allied Matters Act 1990.*
16. *Section 22, Ibid.*
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25. Also Stated in Section 37 of the Companies and Allied Matters Act 1990.
26. GOWER L.C.B op. cit. 4th edition P. 104 and Section 37 of the Companies and Allied Matters Act 1990.
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28. AGBADU - FISHIM, J.T; Principles of Nigerian Company Law (1998) IPS Educational Press Ilorin, Nigeria P. 21.
29. As held in PHILLIPS V. ABDOU-DIWAN (1976) 2 FRCR 24.
30. As held in MACAURA V. NORTHERN ASSURANCE CO. (1925) AC 626.
31. YAGBA T.A.T, et al op. cit. at P. 230.
32. See rule in Foss V. Harbottle (1864 - 1867) All E R 189; or (1843), HARE 461; and Section 299 (1) Companies and Allied Matters Act 1990; which provide to same effect.
33. AGBADU - FISHIM, J.T, op. cit. P. 21 - 22 and Section 22 (2), Companies and Allied Matters Act 1990

33a. T.A.T. Yagba et al p. 255

33b. Ibid sections 151 to 157 Companies and Allied matters Act 1990

33c. T.A.T. Yagba et al op. Cit p. 255

33d. Section 115 Companies and Allied Matters Act 1990

33e. E.M. Asomugha op. Cit p. 43

33f. Sec. 22 (5) (a) Companies and Allied Matters Act 1990

33g. Ibid, Section 22 (2)

34. BARNES K.D, op. cit. P. 26.

35. AKANKI, E.O, "The Relevance of Corporate Personality Principle" (1977 - 1980) 11 NLJ 9 at 19.

36. SCHRAMPTER, W.H, Law and its application to Business (1961) P. 915.

37. It was attained in 1855 per the Limited Liability Act 1855.

38. Ibid.

39. English Limited Liability Act 1855

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40 Per the Joint Stocks Companies Act 1856

41. As provided in Section 18, Companies and Allied Matters Act 1990.

42. For example, by Section 21 (1) (c), Companies and Allied Matters Act 1990, an incorporated company may be a company not having any limit on the liability of its members, termed, an unlimited company.

43. As evident in Sections 38 - 40, CAP 59, Laws of Nigeria 1990, examined in detail in Chapter 3 infra.

44 YAGBA T.A.T. et al, op. cit. P. 231 - 232

45 (1897) AC 22 HL

45a. OBADINA, A., "The New Face of Ultra Vires", in Fundamental Legal Issues in Nigeria P. 40 - 45; refered to in AGBADU - FISHIM J.T. op cit. P. 45.

45b. OROJO, J.O, Company Law and Practice in Nigeria (1992) 3rd edition, Mbeyi & Associates (Nig.) Ltd Lagos, Nigeria. P. 85.

46. BARNES, K.D; op cit. P.70.

47. MARINA NOMINEES LTD V. FEDERAL BOARD OF INLAND REVENUE (1986) 2 NWLR (pt 20) P. 40.

48. By the Joint Stocks Companies Act 1856.

49. YAGBA, T.A.T, et al, op. cit. P. 229; and SCHMITTHOFF C.M, Palmer's

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50. Even the Memorandum of Association could be altered since 1890 as first authorised by the companies (Memorandum of Association) Act 1890.

51. Per Sections 44 - 48, Companies and Allied Matters Act 1990; see also YAGBA, T.A.T. et al. P. 229.

52. Per Section 1, Ghana's Company Code 1963.

53. Section 41 (1), Companies and Allied Matters Act 1990.

54. Section 41 (3) and (4)Companies and Allied Matters Act 1990.

55. This general rule is also called the Rule in FOSS V. HARBOTTLE (Supra see footnote 25, chapter 1) having being enunciated in that case; the rule is incorporated in Section 299 (1) Companies and Allied Matters Act 1990 to the effect that only the company can sue to redress wrongs done to the company.

55a. of 1990 Per section 41 (1)

56. of 1968, Per Section 16.

57. of 1948, Per Section 14.

58. (1915) 1 ch. 181.

59. (1960) ch. 1

60. In accordance with the procedure outlined in Sections 44 - 48, Companies and Allied Matters Act 1990.

61. YAGBA T.A.T, et al, op. cit. P. 228.

62. Ibid, P. 228 - 229.

63. Sections 301 (1) and (2); and Sections 39 and 41, Companies and Allied Matters Act 1990.

64. YAGBA, T.A.T, et al, op. cit. P. 229 - 230 Citing Inter Alia, the case of National Investment & Property Ltd v. The thompson organisation (1969) 1 All NLR 138.

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66. Ibid.

67. For instance, Section 37 and 38, Companies and Allied Matters Act 1990 confer

corporate personality on a company upon registration or incorporation; and confer on the company some rights of a natural person of full capacity.

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71. PENNIGTON'S Company Law, London, Butterworths, 5th edition (1985), P. 106.
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75. English Joint Stock Companies Act 1856 19 & 20 vict. C. 47.
76. (1856) LR 7 HL 653
77. Chapter 2 infra.
78. Per CAIRNS L.C. in Ashbury Railway Carriage Co. V. Riche (Supra) P. 672.
79. PENNINGTON, op. cit. P. 107
80. AGBADU-FISHIM, J.T, op. cit. P. 45
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87. Chapters 2, 3, 4 infra

CHAPTER TWO

CORPORATE CAPACITY UNDER THE COMMON LAW

2.1 INTRODUCTION

As earlier noted[1] where a company oversteps the powers allowed it by its Memorandum and Articles of Association or/and by the Companies and Allied Matters Act, the acts thereby done are ultra vires. This sphere of authority within which companies must operate (or capacities of the company) for their acts to be within capacity are set out in the Memorandum of Association hence a company cannot properly do anything or act outside the stated objects and powers[2]. In other words, a company's capacity is limited to its objects and the powers set out in the memorandum and Articles of Association and/or by the Companies and Allied Matters Act. To ensure that the scope of powers or capacity of a company are provided for and discernible, modern statutes on company law provide that each company's Memorandum and Articles of Association must have an objects clause[3]. It should be understood clearly that the business(es) or objects set out in the Memorandum of Association of the company or/and the Companies and Allied Matters Act 1990 are those which the company may lawfully carry out but not those that the company must carry out.[4]

The position is therefore settled that in Nigerian law like English law, the company does not enjoy full legal capacity like natural persons, the company's capacity being circumscribed or defined by the objects clause which particularly performs two functions viz[5]:

(a) It affirmatively determines the purposes for which the company is created or incorporated; for the stated objects confer on the company the capacity reasonably requisite to the attainment of those purposes.

(b) It limits and restricts the capacity of the company to act save so far as its capacity is extended by statute.[6]

In the same vein Lord Parker observed that:[7]

> *"The question whether or not a transaction is ultra vires is a question of law between a company and a third party. The truth is that the statement of a company's objects in its memorandum is intended to serve a dual purpose.*
> *In the first place, it gives protection to subscribers who learn from it the purposes to which their money can be applied.*
> *In the second place, it gives protection to persons who deal with the company and who can infer from it the extent of the company's powers".*

The very fact of acknowledging the necessity of an objects clause for the foundation of ultra vires rule to be properly laid also tallies with the conclusion that those who own the companies may not necessarily be the controllers of the company and vice versa. There is therefore need to protect the owners (investors) and creditors using the device of ultra vires.

As will be seen later[8], much confusion arose at common law in the practice of the ultra vires rule. Part of the problem was caused by the fact that at inception of the ultra vires rule, objects clauses of companies were not alterable. The Ultra Vires Rule was therefore more relevant at that time. But as soon as it became possible to alter the Memorandum of Association of companies (which contains the objects clause) the justification for continued existence of the ultra vires rule became threatened.

More confusion was introduced by judges trying to distinguish between a company's objects or purposes, and its powers. It was said that objects referred to the purposes for which the company was incorporated, and powers referred to the means for accomplishing the stated objects[9]. Worst still, powers could be expressed, as well as implied, and it became possible that a company could hide under the cloak of an implied power to enter into a purpose or an object that would otherwise be ultra vires.[10] These contributed in obscuring the scope of corporate capacity. For now, suffice it to be

summed up that the scope of corporate capacity and powers under common law is to be gathered from the objects clause, and the company must act within the purposes defined in the objects clause of its Memorandum and Articles of Association or given to it by statute; and to act outside that area will be ultra vires.[11] The objects of the company are sometimes termed "substantive objects" and the powers termed "incidental and ancillary objects or powers"[12].

As the ambit of the implied powers is not clearly determinable, these contribute in obscuring the scope of capacity of companies as many more things not specifically stated in the objects clause may be drawn in and made part of the company's capacity in the guise of an "implied power" of the company. After all, when Lord Cairns L.C said[13] that the subscribers

> *"are to state the objects for which the proposed company is to be established, and the existence, the coming into existence, of the company, is to be an existence and to be a coming into existence for those objects and for those objects alone"*

The house of Lords reacted by qualifying the rule when in another case[14] it held that the ultra vires rule is a rule to be reasonably, and not unreasonably understood and applied and that whatever may fairly be regarded as incidental or consequential upon those things which the legislature had authorised (that is, those things specified in the Memorandum of Association as objects) ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires. It is against this obscurity worsened by divices to render corporate capacity elastic that Ultra Vires Rule operated under Common Law.

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2.2 EFFECTS OF THE ULTRA VIRES RULE

At common law, an ultra vires act is null and void, and cannot be ratified even by the unanimous decision of the shareholders in the general meeting of the shareholders[15]. In its application, the ultra vires rule tended to be harsh in results, and very unclear in scope

as far as the central point from which the rule may be situated is concerned. The confused scope of the rule was basically caused by the measures which businessmen employed to circumvent or evade the rule, and which were sometimes sanctioned by the courts. Thus, at evolution, the ultra vires doctrine was salutary in its intentions and did infact prevent trafficking in company registration and provided protection to investors and creditors[16]. However, the doctrine gave rise to various hardships as follows[17]:

(a) it prevented creditors who lent money to the company for unauthorised or ultra vires purposes from having any remedy against the company;

(b) it rendered it legally dangerous and imprudent for a third party to interact with the company without prior examination of the company's memorandum. Businessmen however considered this to be inconvenient. This was because third parties dealing with companies were imputed with knowledge of the capacity of the companies as contained in the Memorandum and Articles of Association of the companies. These were public documents and the law made it the third party's duty to examine them prior to transacting with the company or not to complain when they burnt their fingers by operation of ultra vires rule for the reason that they did not read or examine same hence had no actual notice of the company's capacity.

(c) by rigidly confining companies contractual capacities or competencies to those objects specified in the objects clause of the memorandum, it became difficult for the shareholders whenever they perceived new and attractive businesses which fell outside the ambit of the stated objects, to delve into them however lucrative or profitable. For example, the Companies Act 1862 (U.K)[18a] expressly prohibited the alteration of any object(s) in the memorandum of association upon which the case of ASHBURY RAILWAY CARRIAGE & IRON CO. LTD. V. RICHE (SUPRA) was based; Whereas the Nigerian Companies Act [18b], and Companies and Allied Matters Act [18c] require special resolution for any alteration of objects clause of the memorandum of association.

In view of the above it became obvious that the ultra vires rule sometimes became a nuisance to the company, and a trap for unwary third parties dealing with the company. For instance, since ultra vires transactions were void, no legal right accrued therefrom. The result was that where the third party performed his part of the ultra vires transaction, he/she could nevertheless not enforce the transaction. This put the company which overstepped its bounds at advantage over the third party. In RE INTRODUCTIONS[19] the company's stated objects were to promote exhibitions at the time of a festival in Britain. The company obtained a loan for the purpose of pig-breeding. It was held that the loan obtained was ultra vires the company. The court held further that the security given in respect of the loan was ineffective in the hands of the creditor having being given in respect of an ultra vires borrowing[20]. It was further, interesting but unfair that while a member of the company could sue for an injunction to restrain the company from entering into ultra vires transaction, a creditor could not sue to restrain the company because he had no locus standi to institute such suit. This was inspite of the fact that ultra vires transactions might deplete the company's assets out of which his debt might be paid[21]. A lender under ultra vires transactions only had available to him secondary remedies of subrogation and tracing in equity which he exercised thus[22]:

If the loan is used to satisfy intra vires creditors of the company he is subrogated to their rights against the company (though not to the securities held by them) or he may trace his loan in equity into the assets of the company. But where other property had been transferred to the company in ultra vires transactions, it was not clear whether title passed to the company. Besides if the loan or debt is for ultra vires purposes, no remedy availed.[23]

2.3 EVASION OF THE ULTRA VIRES RULE

It is no surprise therefore that shareholders resorted to various schemes or devices to evade or circumvent the Ultra Vires Rule and to make it possible and easier for them to veer into any attractive or lucrative businesses outside the Memorandum of Association of the company. This was to avoid the harsh effects of the ultra vires rule or to mitigate

the full rigours of the rule.

2.3.1 THE INFLATED OBJECTS DEVICE

One of the devices employed to evade or circumvent the ultra vires rule was the adoption of inflated objects clauses. In this regard, it became the practice for companies to inflate the objects clause by adding to its principal objects a large number of objects and powers, many of which were in fact never needed by the company[24]. In other words, draftsmen and businessmen not content to leave matters to chance indulged in the practice of inflating object clauses by specifying not only objects which will normally be implied but also some that will never be used. The aim was to ensure that the extremely wide and diverse objects and powers cover every activity which the promoters consider the company might conceivably wish to undertake either immediately or later to avert the possibility of the company's acts being ultra vires; but this attempt to ensure that all future acts of the company are intra vires negated one of the purposes of the Ultra Vires Doctrine, namely, to assure investors as to the specific business in which they are investing[25]. This practice was made possible as there is no specific prescribed limit to objects to be specified. As lately held by a Nigerian Court[26], the tradition in drawing up the memorandum of a company is to make it as comprehensive as possible. some of the clauses may be dormant, some may not be taken up immediately; some may be auxiliary to the main object while others may be undertaken immediately.

Giving impetus to the pernicious practice of inflating the company's objects clause also is the fact that not to carry out any particular object did not amount to an amendment of the objects of the company, as the company was not bound to carry out all its objects. As the Supreme Court of Nigeria declared:[27]

> *"The object clauses are no more than a list of the objects that the company must execute. It is fairly common knowledge that most companies in drawing up the objects clauses of the Memorandum of Association cover a spectrum far wider than what they can accomplish immediately..... I am inclined to the view that the*

memorandum is only binding on the company in the sense that it cannot repudiate the objects clauses, but not in the sense that the company must carry out a particular objects clause"

Under the Companies and Allied Matters Act 1990, a strong case could be made against the inclusion of a list of powers in the objects clauses, especially as the Act[28] stipulates that the form of the objects clause must be a short and succinct statement of the business pursuits of a company similar to the pattern in Table B, C, and D in schedule 1 to the Act[29].

At common law, the courts sought to stem the evasion of ultra vires rule as above by applying the "main objects" and "subsidiary or ancillary objects" rule of construction. In this connection, the courts identified the dominant object of the company otherwise known as the main object of the company and considered all the other or general objects of the company as subsidiary or ancillary objects.

The rule of construction is commonly known as the "ejusdem generis" and "main objects" rule of construction[30] and postulates that the general purposes of the company must be taken ejusdem generis (or in connection with) what is shown by the context to be the dominant or real or main objects. The result was that where the main object or purpose failed, the court declared that the substratum had gone and ordered the company to be wound up where it considered it was just and equitable to do so. For instance, in RE GERMAN DATE COFFEE CO[31], a company was incorporated with the main object of acquiring and using a German patent for making coffee from German dates. The company never obtained the German patent but bought a swedish patent and produced coffee from dates without a German patent. The court held that since the substratum of the company had failed it was not possible to carry out the main objects and the other objects were only ancillary. Failure of the main objects therefore automatically meant failure of the ancillary objects like the death of a pregnant woman with which the baby in

the womb automatically dies. The court observed further that[32]:

> *"Where on the face of the memorandum you see there is a distinct purpose which is the foundation of the company, then, although the memorandum may contain other general words which include the doing of other objects, those general words must be read as being ancillary to that which the memorandum shows to be the main purpose, and if the main purpose fails, and fails altogether, then ..... the substratum of the association fails".*

The main object in this case was to acquire and work a particular patent. But where the main object of the company was to carry on an engineering business of a general nature, selling a specified existing business acquired pursuant to one of its objects did not mean that the substratum had gone, hence winding up petition based on that ground was refused[33]. This stresses the point that where the substratum of the company has not gone, failure of one of the objects of the company will not ground a winding up.

The main objects rule applied where the objects of a company were stated or expressed in a series of paragraphs, and one paragraph commonly the first appeared to embody the main or dominant object of the company. The ejusdem generis or main objects rule of construction was also applied in Nigeria in the case of CONTINENTAL CHEMISTS V. IFEAKANDU[34]. In that case, the Continental Chemists entered into an agreement with Ifeakandu to train him as a general medical practitioner on the condition that he shall work with the chemists as a general medical doctor for a specified period upon qualifying to practice as a medical practitioner. He eventually qualified as such and worked with the hospital operated by the chemists but for a lesser duration than agreed before disagreement arose. A question arose as to whether Ifeakandu was liable for breach of contract as he withdrew his services from the chemists without having worked for the duration agreed upon. The answer to this poser depended on whether or not the contract was intra vires; which further turned on the construction of the objects set forth in the memorandum of association that defined the field of operation of the company. The

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objects of the company as stated in the Memorandum of Association of the company were:

(a) to import and export drugs

(b) to buy and sell drugs

(c) to manufacture drugs

(d) to compound drugs

(e) to enter into any business which the Directors think will increase the profits of the company.....to do all such business and things as may be incidental and conducive to the attainment of the above objects and powers or any of them.

The Supreme Court of Nigeria held that the contract was ultra vires as it did not fit into any of the objects of the company specifically stated - applying the ejusdem generis or main objects rule[35]. This is because, establishing a hospital or training a medical doctor did not fit into any of the main or dominant objects of the company which was to manufacture, compound, buy and sell drugs. The supreme court accepted the view of the court of first instance that both objects in paragraph (e) of the objects clause in the Memorandum of Association aforestated were limited by the purpose for which the company was formed as ascertained from the other objects which he thought were to be found in paragraphs (a) to (d) of the objects clause. The court arrived at this conclusion relying on earlier decisions as to the governing rule[36].

For instance, in RE GERMAN DATE COFFEE CO. Lindley L.J had said: [37]

> *"in construing this memorandum of association or any other memorandum of association in which there are general words, care must be taken to construe those words so as not to make them a trap for unwary people. General words construed literally may mean anything but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else however general the words are".*

The ejusdem generis rule postulates that where particulars of a class are enumerated

followed with general words, the general words are to be construed as being limited to the class constituted by the particular words[38].

2.3.2 THE "INDEPENDENT OBJECTS" DEVICE

To circumvent the "main objects" and ejusdem generis rule of construction, an ingenious device evolved known as the independent objects clause. This kind of clause also known as the COTMAN V. BROUGHAM Clause[39] was inserted in the memorandum of association to the effect that all the objects and powers specified shall not be restricted or limited by reference to any other clause and that each clause should be read separately and independently[40].

In COTMAN V. BROUGHAM[41] an objects clause of the company contained 30 subclauses enabling the company to carry on almost every kind of business. The objects clause concluded with a declaration that every sub-clause should be construed as a substantive (or main) clause and not limited or restricted by reference to or inference from any other sub-clause or by the name of the company and that none of the subclauses or the objects or powers therein should be deemed subsidiary merely to the objects in the first subclauses. The House of Lords held that the expression that each of the objects is to be regarded as a main and substantive object availed the company so that it was intra vires the company to underwrite and have allotted to it shares in an oil company when that did not fit into the dominant object of the company. The House of Lords sought justification for their decision on the grounds that the Registrar having accepted the memorandum in the form containing the independent objects clause, and registered the company the court had no choice but to uphold same. All the judges deplored the idea of companies being registered with an objects clause in this wide form and thought that the matter ought to have been raised by the Registrar refusing to register the company; but that since the Certificate of Incorporation had been issued it was conclusive and matters concerning the company's registration could not be gone into[42].

Under the Nigerian Companies and Allied Matters Act 1990, a certificate of incorporation issued to a company is only prima facie (and not conclusive) evidence of compliance with registration requirements[43]. This means, the legal effects of incorporation as postulated by the House of Lords in the case of COTMAN V. BROUGHAM are not the same as those under Nigerian law under the Companies and Allied Matters Act 1990[44]. The position of the Nigerian law as stated is a step in the right direction and capable of assisting Nigerian courts not to be helplessly bound to uphold the company's objects just because they have been registered in the Memorandum of Association by the Corporate Affairs Commission. In other words, under the Companies and Allied Matters Act, it is possible for the courts to go into matters pertaining to a company's registration even after a certificate of incorporation has been issued, to find out if the requirements of registration were actually complied with.

However, the usefulness of the provision of the Nigerian Companies and Allied Matters Act is difficult to ascertain. This is because, apart from giving room for proof that the company registered did not actually comply with registration requirements, the Act has not made express provision for what the court is entitled to do should it find that the requirements were not met. The question that follows is whether there is anything the court can do if a company is registered which did not actually satisfy the requirements of registration; or whether the next action upon this discovery is a prerogative of the corporate affairs commission[45]. This is moreso as a company may be wound up[46];

(a) by the court; or

(b) voluntarily; or

(c) subject to the supervision of the court.

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It is submitted that the court may properly wind up such company if the non compliance is within the circumstances in which companies may be wound up by the court for instance, where the court is the of opinion that it is just and equitable that the company be wound up[47]. Even if this were to be an appropriate remedy, the nagging question

remains as to what would be the legal status of the contracts or transactions entered into prior to incorporation as the effect would be that the company was incorporated by mistake? But what in the first place would form the basis for determining whether the objects clause of a Memorandum of Association did not comply with the requirements of the Act? The answer lies in the provision of the Act to the effect that what is required to be stated in the Memorandum of association as objects are the nature of business or businesses which the company is authorised to carry on[48]. The law should further impose a maximum number of objects for which one company may be incorporated.

2.3.3 THE ALL PURPOSE OR SUBJECTIVE OBJECTS DEVICE

Also, there was the practice of adopting an "all purpose or subjective" objects clause. In this respect, object clauses were drafted in subjective terms empowering the Directors to undertake any business that they think is profitable to the company or is advantageous and conducive to the objects of the company. Such was wide enough to permit the company to veer into businesses that were not provided for in the objects clause of their Memorandum of Association, nor incidental to those specifically provided. This rendered the capacity of companies at any point in time uncertain. The practice was thus reprehensible and could be rejected by the court on the ground that such general concluding clause would not be a statement of the objects of the company as required by law. In RE CROWN[49] NORTH J. applying the main objects rule of construction rejected a general concluding clause that the company has power to carry on any business whatever which the company might think would be profitable to the shareholders. According to NORTH J,[50]

> *"If the memorandum were to state as the object of the company that it was to carry on any business whatever which the company might think would be profitable to the shareholders in my opinion that would not be a statement as required by the Act of parliament."*

This reasoning was adopted by the Nigerian Supreme Court in CONTINENTAL

CHEMISTS V. IFEAKANDU[51]. Nevertheless, the practice of "all purpose or subjective objects clauses" was approved by the English Court of Appeal[52]. SALMON L. J. observed that:

> *"An object of the plaintiff company is to carry on any business which the Directors genuinely believe can be carried on advantageously in connection with or ancillary to the business of the company..... provided they form their view honestly, the business is within the company's objects and powers."*[53]

A by-product of such clauses is that once the Directors decide to veer into an area of business under such phrase, shareholders cannot restrain them from doing so on grounds of ultra vires, since the business by the decision of the Directors becomes intra vires. A possible explanation of the position of the law is that since the shareholders had subscribed to the Memorandum of Association in which they agreed that such a subjectively drawn clause should exist, this was a way of shifting their responsibility of fixing the company's specific objects to the decision of Directors. It may on such premise be said further that the subscribers or shareholders should thus not be heard to complain when the Directors exercise this power one way or the other. Such arguments may be logically sound for small private companies. It is however submitted that with the larger companies, owing to the dispersal of shares and its effect on the widening gap between ownership and control, and inability of some shareholders to effectively participate in appointment of Directors of the companies, it is fairer to reject such subjectively drawn objects as they are potential weapons for oppression of minority shareholders. To uphold such clauses is clearly prejudicial to the third parties who not being members of the companies will have no hand in determining who the Directors were to be and what businesses to be engaged into under such subjective clauses.

No wonder, the courts had, before the decision in BELL HOUSES LTD V. CITY WALL PROPERTIES LTD[54] introduced checks and balances to regulate application of such subjective clauses. For instance, in HUTTON V. WEST CORK RAILWAY CO.[55] the

English Court of Appeal laid down some rules that:

> *"The law does not say there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."*

So, the subjective businesses must be to the benefit of the company.

Further, the courts have held[56] that certain principles should be applied to check the excesses of the ancillary powers as follows:

a) the business should be reasonably incidental to the carrying on of the company's business;

b) the business should be bona fide; and

c) the business should be for the benefit and prosperity of the company.

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The rationale for the above checks and balances was to prevent the Directors from using shareholders' money in an obviously improvident way. The effect was to hold any business that did not pass the above test as ultra vires. The Court of Appeal in England in BELL HOUSES LTD V. CITY WALL PROPERTIES LTD[57] radically and sadly departed from the laid down checks and balances, as it held that such subjective business were still intra vires even if they failed the said tests - that is, that the test avails once the bona fide opinion of the board, in this case represented by the managing Director, the business or object could be advantageously carried on with the company's principal object, no matter how unreasonable in the objective sense that opinion might be. The decision in BELL HOUSES case suggests that an objects clause can be drafted in such a way as to allow a company to carry on any business the Directors choose[58]. To accept such startling proposition would create the following absurdities:

a) Transactions of companies will be ultra vires only if the incorporators are so naive as not to stipulate such a subjective object clause in their memorandum; but where they are wise and include a clause as such in their memorandum the company will be thereby entitled to carry on just any business provided the Directors have agreed on it. This will render the objects clause useless.

b) There will be no need for companies to state any specific objects in their objects clauses. The most elegant drafting would then be to simply state the subjective clause only to the effect that: The object of the company is to carry on any business which the Directors wish. This would also not satisfactorily state the object of the company as required by law.

It is therefore no surprise that Pennycuik J. dissenting from the Bell Houses authority in the case of CHARTER BRIDGE CORPORATION LTD V. LLOYD BANK[59] held that the test in HUTTON V. WEST CORK RAILWAY (Supra) must be applied. He observed that the proper test must be whether an intelligent and honest man in the position of a Director of a company concerned could in the whole of the existing circumstances have reasonably believed that the transaction were for the benefit of the company; and that if the answer is to the negative the Directors could be liable to compensate the company if they had exercised the power in an unusual way which leads to some loss to the company. The shareholders reserved the residual power to enforce the above view in a suit in the name of the company in which case the transaction would still be intra vires, but the Directors will bear the effect of their wrong judgement[60].

2.3.4 POSITION IN IFEAKANDU CASE

The Nigerian Courts rejected subjective clauses in the case of CONTINENTAL CHEMISTS LTD V. IFEAKANDU[61] which clause empowered the company to, inter alia:

> "*.....(e) enter into any business which the Directors think will increase the profits of the company.*"

The Supreme Court declared that this clause was "indefinite and useless"[62]. Prior to the Supreme Court's decision, the High Court in England had held in the case of BELL HOUSES LTD V. CITY WALL PROPERTIES LTD[63] that a subjective clause in that case:

> *"to carry on any other trade or Business whatsoever which can in the opinion of*

the board of Directors be advantageously carried on (by the company) in connection with, or as ancillary to any of the above business or the general business of the company,"

could not be utilized by the company unless the new business has a connection with or is ancillary to any businesses specifically stated. The Supreme Court of Nigeria in arriving at its decision in IFEAKANDU case did not expressly rely on the decision in the BELL HOUSES CASE. The court however made "mention" of the BELL HOUSES CASE as at the High Court stage and stated that its decision on ultra vires accorded with Mocatta J's decision in Bell Houses Case. According to the learned Justices of the Supreme Court of Nigeria:

"the case (Bell Houses Case) is noted here so that it may be borne in mind."[64]

But in the same year the Supreme Court decided Ifeakandu's case "in accord with" Bell Houses at High Court stage, the Court of Appeal in England reversed the decision of the High Court in Bell Houses Case allowing the subjective clause[65]. Two key issues arise from this position.

a) What was the justification in the Supreme Court of Nigeria making "mention" of a decision of High Court of England as persuasive, in its decision?

b) What is the legal position in view of the fact that the decision of the High Court in England which the Nigerian Supreme Court assured, accorded with its decision, was reversed on appeal?

Does this not show that the Supreme Court of Nigeria was wrong in its decision?

The decision has therefore been criticized[66]; and it is most likely that the Supreme Court would not now allow Dr. Ifeakandu an ultra vires defence without discussing the propriety of such a devastating defence or without weighing the demands of justice over the moribund, technical defence even without section 39 of the Companies and Allied Matters Act[67]. Besides, Nigerian Courts have now taken the position that claims of justice should not be sacrificed on the alters of technicalities[68].

Moreover, Nigerian companies legislations have been amended to effect a restrictive application of the ultra vires doctrine whereby every act of a company decided on by a Director or any other officer is deemed to be within the powers of the company[69] and the Nigerian Courts have been reluctant in allowing anyone to profit from his contributory misdeed. For instance, in the case of SHONIBARE V. WESTERN NIGERIA FINANCE CORPORATION[70], the High Court of Western State held that a party who raised the defence of ultra vires should not be allowed to benefit from a wrong which he knowingly committed. The court thus held that the plaintiff was not to be allowed to profit by his contributory misdeed[71].

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It is thus clear that the court would at least now have examined further whether Ifeakandu at the time they entered into the contract was aware of the lack of capacity of the company to enter into that contract. On a general note, the effect of the decision in IFEAKANDU'S case is that the main objects clause cannot be expressly excluded by the terms of the memorandum; that the memorandum is to be read as a whole and that no effect would be given to a statement in the objects clause that a company may engage in any business it thinks advantageous, or presumably that a statement that each object is to be read independently and not separated into main and ancillary objects[72]. As Bairaman JSC stated in the CONTINENTAL CHEMISTS CASE:

> *"it will be enough if we say that the device of what is known as the independent objects clause in Cotman V. Brougham (1918) AC 514 would not have helped the company's case. This ingenious device which is designed as an escape from the ejusdem generis and main objects construction pre supposes the existence in some subclause of the power to do the act in question; but in the case in hand, there is no such device nor is there any subclause which enables the ..... company either to educate a person as a general medical practitioner, or to run a hospital, and the contract was ultra vires the company. The company may have thought that it would be profitable to do that in conjuction with the acts of businesses authorised by its memorandum, but that does not save the contract"*[73]

It would appear that the clauses under consideration in BELL HOUSES CASE and IFEAKANDU'S CASE were not in pari materia.

In BELL HOUSES CASE, the clause provided that the company may carry on any business whatsoever which can in the opinion of the Board of Directors be advantageously carried on by the company:

> *"in connection with or ancillary to any of the above business or the present business of the company."*[74]

Thus the general clause here was expressly subjected to the objects specifically stated - that is,

> *"in connection with or ancillary to any of the above businesses....."*

Such clause is more likely to have effect except where the "above businesses" do not include what is questioned in which situation there will be no basis for using the ancillary powers of the subjective clause[75]. On the other hand, the subjective clause in IFEAKANDU'S CASE particularly first paragraph of clause (e) did not expressly limit or subject itself to the objects and powers specifically stated. The clause empowered the company to enter into:

> *"(e) any business which the Directors think will increase the profits of the company."*[76]

Such expression was indeed too general. Thus, the Nigerian Supreme Court dealt with the paragraphs in clause (e) separately and declared that the words "to enter into any business which the Directors think will increase the profits of the company" in paragraph (e) of the objects clause were "indefinite and useless".

The point being made therefore is that even if the decision of the English Court of Appeal in BELL HOUSES CASE were cited in argument in IFEAKANDU'S CASE, it is doubtful whether reliance would have been placed on it by the Supreme Court of Nigeria. Thus while the English Court of Appeal in BELL HOUSES CASE held that the test to be applied in such a situation must be subjective however unreasonable it may be, that in

IFEAKANDU'S CASE upholds the objective test, and is more commendable.

Summarising the sequence in the running battle between businessmen on one hand to make corporate capacity elastic and all availing, and the courts to circumscribe corporate capacity and make it more certain on the other hand, LORD PARKER said:[77]

> *"..... 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 money could not always be safely inferred, much less a power as that of underwriting shares in another company. 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. But even then, a person proposing to deal with a company could not absolutely be safe, for powers specified as objects might be read as ancillary and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object, and on this construction no one could quite be certain whether the court would not hold any proposed transaction to be ultra vires. At any rate, all the surrounding circumstances would require investigation. Fresh clause were formed to meet this difficulty, and the result is the modern memorandum with its multifarious list of objects and powers specified as objects and its clauses designed to prevent any specified object being read as ancillary to some other object."*

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2.4 OBSCURITY CAUSED BY IMPLIED POWERS

Another complexity introduced into the scope of corporate capacity stemmed from the recognition of a facet of objects and powers called "implied powers." As BUCKLEY L. J. said:[78]

> *"A company has no capacity to pursue objects outside those stated. It does not follow however that any act which is not expressly authorised by the memorandum is ultra vires the company.*

Anything reasonably incidental to the attainment or pursuit of the company will unless expressly prohibited be within the "implied powers of the company."[79]

While the implied powers were necessary to give the stated objects more efficacy, or render the stated objects more attainable, the scope of implied powers was unfortunately elastic and uncertain. This served to obscure the scope of the capacity of companies hence contributed in depriving the Ultra Vires Rule of realising its laudable goals. For instance, what was capable of being implied under this heading may not be anything within the contemplation of the shareholders at the time they subscribed to the Company's Memorandum and Articles of Association. Consequently, risks were implied on the shareholders which they did not intend to bear when they subscribed to the Company's Memorandum of Association. Nevertheless, LORD HERSCHELL in the case of TREVOR V. WHITWORTH[80] while agreeing that funds of a company can only be applied in carrying out its objects specified in the memorandum stated that:[81]

"..... the capital may no doubt be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations. Of this, all the persons trusting the company are aware and take the risk....."

It is respectfully submitted that the scope of implied powers or objects is far too wide to have been contemplated by the subscribers to the Company's Memorandum and Articles as the magnitude of "risk" they take thereby. To hold otherwise will deprive the investors of the protection sought to be afforded them by the Ultra Vires Rule of assuring them of the objects for which their capital will be put, and will totally obscure the scope of the Ultra Vires Rule as well as provide a carte blanch for companies to enter into any conceivable business so long as it can show that it was within "implied powers" of the company. This will render the ultra vires rule sterile, nugatory, and hollow.

Indeed, it was to avoid the uncertainties of "implied powers" that exhaustive or numerous

objects clauses which normally began with two or three paragraphs stating the main objects of the company, and then specifying some twenty or so additional standard powers of the company, were adopted[82]. An example of the operation of the "implied powers" is that a company formed to `buy, sell and deal in coal' may for the purposes of carrying out these objects, do all that are incidental and consequential on attaining the substantive objects such as:

1) Purchase or take on lease stores;
2) Open shop and agencies;
3) Buy and hire lorries;
4) Enter into service agreements with employees;
5) Draw and accept bills of exchange;
6) Borrow and give security;
7) Incur debts;
8) Make contracts for purchase supply;
9) Have a banking account;
10) Bring actions and take proceedings;
11) Compromise actions and disputes;
12) Employ agents;
13) Pay bonuses and subject to certain conditions, pensions to employees;
14) Pay dividends out of profits.

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EVE J. postulated in relation to the "implied powers" theory that the validity (that i whether intra vires or not) of a transaction had to be determined by testing th transaction against the answers to the following questions[84]:

1) Is the transaction reasonably incidental to the carrying on of the company business?
2) Is it a bona fide transaction?
3) Is it done for the benefit and to promote the prosperity of the company?

According to him, a transaction is intra vires if all the answers to the above posers are in the affirmative. In other words, if the answers to any one or more of these posers is in the negative, then the transaction is ultra vires.

A critical look at the tests or questions posed by EVE J. it is submitted, will reveal a grave difficulty in arriving at the answers to the second and third posers respectively. If it is intended that a transaction is bona fide where it is one that is entered into with no intention of defrauding the company or without bad faith but for the profitability of the company, then that is obvious and brings to the fore the difficulty of what is then the necessity for the third requirement. In other words, one would in that context expect that a transaction is bona fide (second requirement) because it is done in good faith, for the benefit and to promote the prosperity of the company. The unanswered question then is, whether Eve J.'s third requirement already stated is a surplusage.

Expectedly, EVE J.'s tests generated some controversies[85]. In one of the latter cases on the same point[86] the English Court of Appeal held that the third of Eve J.'s criteria was not relevant to application of the company's objects but only relevant to the exercise of the powers of the Directors - in other words, the third criteria had nothing to do with the capacity of the company but dealt instead with capacity of Directors, hence not relevant in determining the scope of field of operation of the company itself.

According to the court[87].

> *"That which is reasonably incidental to the attainment or pursuit of its objects will be intra vires the company notwithstanding that in the particular instance, the Directors of the company performed the act in the company's name but for purposes other than those set out in the memorandum - that is, the state of mind or knowledge of the persons managing the company's affairs or the persons dealing with it is irrelevant in considering questions of corporate capacity."*

It is therefore undoubtedly clear that the scope of "implied powers" and how to get at them at common law were highly uncertain, and contributed in rendering the capacity (and the phenomena of company as a whole) complex and unclear.

2.5 THE RULE OF CONSTRUCTIVE NOTICE

The rule applicable here was that everyone dealing with a company is presumed to have notice of contents of all public documents of the company registered with the registrar of companies, whether such persons had actual notice of these or not; and these documents included the Memorandum and Articles of Association of the company (containing the objects clause defining the capacity of the company). The effect of this was that all third parties (though not insiders) dealing with the companies were irrebuttably presumed to have notice of the company's capacity which could be deciphered from the objects clause of the Memorandum and Articles of Association. Consequently, anyone who entered into a transaction with a company was disentitled from denying or asserting any capacity of the company other than that contained in the Memorandum of Association of the company filed (as a public document) and no one was allowed to disprove knowledge of contents of such registered documents of the company. It is this presumed or imputed notice rule that is called the Rule of Constructive Notice.

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The underlying consideration for the constructive notice rule was that since the Memorandum and Articles of Association of the company registered were public documents and open to the public inspection, anyone whether a shareholder or outsider who had dealings with the company must be taken to have notice of the contents of those documents whether he had read them or not.[88] It was like saying: the fact that one knows he is dealing with a company puts him on inquiry to determine whether the company has capacity to engage in the transaction by examining its capacity, knowing fully well that companies possess limited capacities and one can only tell the extent of these by examining the Memorandum and Articles of Association. Consequently, whoever fails to carry out such inquiry to confirm the extent of the company's limited capacity is absolutely to blame and should bear the consequences of the risk taken thereby. The rule of constructive notice therefore clearly affected or had a bearing on the

application of the Ultra Vires Rule. As regard matters of internal control of the company however, there appeared to be no justification or safety in imputing knowledge relating to such matters of the company's internal control or indoor management which cannot be discovered from an examination of the documents stated. These matters termed matters of "indoor management" include[89]: whether those who are purporting to act on behalf of the company have authority; whether general or board meeting concerned in a decision was convened on proper notice; whether a quorum was formed for meetings; whether a resolution was properly put and carried etc.

2.5.1 EXCEPTION TO THE RULE OF CONSTRUCTIVE NOTICE

To impute notice or knowledge of these matters of indoor management would be at great disadvantage of third parties. Consequently, a rule was formulated to take these matters out of the realm of constructive notice, called the rule in ROYAL BRITISH BANK V. TURQUAND[90]. This rule is to the effect that an outsider dealing with a company is not to inquire whether the internal regulations of the company have been complied with; the result being that anything done within the scope of powers of a company will be taken or inferred to have been done regularly or properly[91]. The rule in. ROYAL BRITISH BANK V TURQUAND is generally believed to be predicated on business convenience, as business cannot be carried on conveniently if everybody who had dealings with a company must examine or scrutinise its internal machinery in order to ensure that the officers with whom he dealt had actual authority and acted properly[92]. In this light, Lord Simmonds said[93]:

> *"The wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order."*

Another explanation proferred as the rationale for the rule in ROYAL BRITISH BANK V. TURQUAND (Supra) is premised on estoppel. According to the hypothesis, representations in the Memorandum and Articles of Association registered amount to

representations to anyone dealing with the company, but that there is no further representation that matters of internal or indoor management based on the Articles and Memorandum of Association filed have been complied with. For example if the Memorandum and Articles disclose that the authority of an agent is subject to a condition, the company in filing the Articles does not thereby represent that the condition has been fulfilled.[94] Consequently, while third parties are estopped from denying knowledge or notice of the contents of the representations filed (the Memorandum and Articles of Association of the company), they are not estopped from denying knowledge of matters whether or not the condition precedent to the exercise of the powers have been met.

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It is submitted that the "business convenience" hypothesis is more convincing than the "estoppel" hypothesis as a basis for explaining the rationale for the rule in ROYAL BRITISH BANK V. TURQUAND (Supra). This is because, a hypothesis based on "estoppel" falls short of explaining convincingly why matters of internal or indoor management should not be brought under the umbrella of "estoppel". For instance, if "estoppel" were the basis, why not require that all resolutions and every other thing of internal or indoor management of the company be filed like the Articles and Memorandum of Association, to form the basis for representations hence estoppel? To this extent, it is respectfully submitted that the "estoppel" hypothesis is at best a sterile truism, a technical quibble that solves nothing and explains nothing. Though the rule in ROYAL BRITISH BANK V. TURQUAND circumscribed the scope of operation of the rule of constructive notice, still clear that the rule of constructive notice lived within its confines, and in that scope oiled and encouraged the stings of the Ultra Vires Rule to operate even where the third party concerned did not in fact read the documents due to reasons of inexpediency. Consequently, as part of its recommendations for reform of Ultra Vires Rule, the Jenkins committee recommended amongst other things that the constructive notice rule should be abolished, and that even actual notice of the contents of the memorandum and Articles should not deprive a third party of his right to enforce a

contract if he honestly and reasonably failed to appreciate that their provisions precluded the company or its officers on its behalf from entering into the contract[95].

It is submitted that the above recommendations lend credence to the proposition that abolition of constructive notice regarding internal or indoor management matters is based on business convenience rather than any principles of estoppel. If the basis for retaining the constructive notice rule was estoppel, where then did the Jenkins Committee displace such basis before recommending for abolition of constrictive notice rule? The above view is strengthened by the fact that even in respect of actual notice the Cohen Committee as seen above[96] recommended that the third party should not be deprived of his right to enforce a contract if he honestly and reasonably failed to appreciate that their provisions precluded the company or its officers on its behalf from entering into the contract (underlining mine). This shows an appreciation of the difficulty and inexpediency of assuming that third parties will conveniently and understandingly read the documents filed.

2.6 PRE - INCORPORATION CONTRACTS

These are contracts entered into purportedly on behalf of a company before or prior to the company being registered or incorporated, and are otherwise called "preliminary agreements"[97]. At common law, a pre-incorporation contract was not binding on the company when subsequently formed or incorporated even if the company derived benefit of the contracts before it was formed or incorporated, hence the company could neither sue nor be sued on such contracts[98]. Not being binding, pre-incorporation contracts could not even be ratified or adopted by the company when incorporated[99]. These principles constituted a clog in the wheel of business. Practically however, it is necessary that prior to incorporation of a company and as part of activities towards promoting the company or setting in motion the machinery for the incorporation of the company, the promoters enter into certain transactions or contracts with third parties "on behalf" of the yet to be incorporated company[100].

This necessity arose for instance in the case of TINNEVELLY SUGAR REFINERY CO. LTD V. MIRRLESS, WATSON AND YARYAN CO. LTD[101] where the contract was for machinery necessary for the successful take off of the company. It was held that the company in whose name the contract was entered into prior to its incorporation could not sue on the contract when subsequently formed. Also, in the case OF RE ENGLISH AND COLONIAL PRODUCE CO. LTD[102] solicitors on instructions of persons who afterwards became Directors of the company, prepared the Memorandum and Articles of Association of the company and paid the Registration Fees. The English Court of Appeal held that the company was not liable to pay the solicitors fees when subsequently incorporated.

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The effects of pre-incorporation contracts were thus oppressive to either or both the creditors and investors of the company[103]. The rationale for all these principles applied was sought in the legal theory of agency that[104]:

i. In agency, no principal can ratify a contract purportedly made on his behalf when such contract was entered into before the principal came into being or existence;
ii. A company comes into existence or is born on the date of its incorporation and to render companies liable to pre-incorporation contracts will be ridiculous, and will tantamount to overstraining the fiction of corporate personality by asserting thereby that a company exists before incorporation.

In other words, the contracts did not bind the company and it was also not entitled to ratify the contracts because at the time they were entered into by or for and on behalf of the company, the company was not a principal with contractual capacity.

According to AGOMO, C. K.[105] the application of principles of law of agency in this area of the law is to apply a "circuitous common law approach to a non common law problem" the result of which is a conflict between natural expectations of the parties concerned in a pre-incorporation contract and the law. He suggests that the problem in this area be

treated as "sui juris" and not as part of agency. It is submitted that the learned writers suggestion is correct and appropriately.

It is also submitted that the issues posed by pre-incorporation contracts are not exactly the same as those posed by Ultra Vires Rule. In Ultra Vires Rule, there is a company with some capacity in existence "for and on" whose behalf the transaction was entered into and the only point of inquiry or investigation is whether the transaction was within the capacity of the existing company or not. If the transaction is not with in the capacity, it is then Ultra Vires.

In pre-incorporation contracts, the point is that there was at the time of the transaction no company in existence with any capacity "for and on" whose behalf the transaction was entered into, so that once this is discovered, the issue of "Intra Vires" or "ultra vires" does not arise. However, it is necessary to take account of pre-incorporation contracts in an inquiry upon corporate capacity. As pre-incorporation contracts also deal with capacity of a company to contract in another context they also assist in dealing with "CORPORATE CAPACITY".

To actuate their intention, thereby circumventing the strict application of the principles of law to pre-incorporation contracts, it became fashionable for promoters of a company to enter into pre-incorporation contracts in the name of the company and to include a clause in the Company's Memorandum and Articles of Association empowering the company to enter into another agreement when subsequently incorporated. In such a case, there is a "novation" meaning that, the old contract is discharged and replaced by the new contract[106]. Applying the device of novation the Supreme Court of Nigeria held IN EDOKPOLOR & CO. LTD V. SEM EDO WIRE INDUSTRIES & ANOTHER[107] inter alia that:

> *"The inclusion of the terms of pre-incorporation agreement in the memorandum of Association of a company is an indication of a strong desire by the contracting parties that the proposed company after its incorporation should execute the terms*

of the agreement so included;..... the terms of a pre-incorporation agreement in the memorandum of Association of a company taken together with acts of the company after incorporation can be used in determining whether a new contract putting into effect the terms of the pre-incorporation contract has come into existence."

It is however clear that the device of "novation" is not a complete answer to the problems posed in this area of law. For instance, the parties may be back to square one where the company refuses to execute the new agreement when incorporated - for, it is not bound to execute such agreement. In such a case, the same position at Common Law in pre-incorporation contracts will operate to dictate the legal position.

2.7 CORPORATE SOCIAL RESPONSIBILITY

What was the common law position as to whether companies should, apart from their traditional role of maximizing profits for the shareholders, also owe and discharge social obligations?

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As aptly summed up by George Goyder[108] a socially responsible company is one where in there is complete identity of interest between the interest of the company and the interest of the society. In modern times, it has come to be accepted that the company should have social responsibility while making profits for its shareholders. In discussing this changing role of the company in an economy, David Rockefeller, President of the Chase Merchant Bank argued that[109]

"In social terms, the old concept that the owner of a business had a right to use his property as he pleased to maximize profits has evolved into the belief that ownership carries certain binding social obligations. Today's manager serves as trustee not only for the owners but for the workers and indeed for our entire society..... corporations have developed a sensitive awareness of their responsibility for maintaining an equitable balance among the claims of stockholders, employees, customers and the public at large."

At another extreme was a "traditional" view that the company exists solely for the maximization of profits for shareholders who provide the capital and bear the risk of any possible loss, and the employees of the company for instance, to be regarded merely as hired labour whose only interest in the company is the wages in consideration of which they were employed with the company. In this regard it could be understood that the business of business is business and management has no right or qualification to undertake activities to improve society etc since the general welfare of society is the business of government.

He thus equated the concept of corporate social responsibility with stealing from the shareholders. When this "traditional view" held sway as to the function of the company the company could not engage in employee welfare schemes, charitable donations, improvement of welfare of society etc. That is, company could not discharge any "social responsibilities" even if that was permitted by the Memorandum and Articles of Association of the company except they were directly or indirectly incidental to the carrying out of the company's objects or otherwise contributed to the profitable exercise of the company's business.

In this regard, it was held in the case of PARKE V. DAILY NEWS LTD,[110] inter alia, that:

1) The company's funds cannot be applied in making purely ex-gratia payment as such;
2) The courts will inquire into the motives actuating any gratuitous payments and the objects which it is intended to serve;
3) The court will uphold the validity of gratuitous payment if after inquiring it is established that the transaction was reasonably incidental to the carrying out of the company's business or if it is done bona fide for the benefit of, and to promote the prosperity of the company's corporators;
4) The onus of upholding the validity of such payment lies on those who assert it.

In all cases of corporate gifts (social responsibility) all the conditions outlined must be satisfied[111].

Similarly, in HUTTON V. WEST CORK RAILWAY, BOWEN L.J., considering whether the payment of gratuities to employees was valid in a company in the process of liquidation and then existing only for purposes of winding up said: [112]

> *"The test there ..... is ..... whether as well as being bona fide, it is done within the ordinary scope of the operation of the companies and whether it is reasonably incidental to the carrying on of the company's business for the benefit of the company..... The law does not say there are to be cakes and ale but that there are no cakes and ale except such as are required for the benefit of the company. Charity has no business to sit at boards of directors qua charity.*
> *There is however a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in the garb (..... not very philanthropic garb) charity may sit at the board but for no other purposes."*

Eve J.[113] postulated that such consideration as seen herein must be present to avail a charitable act of a company to be Intra Vires *whether they be made under an express or implied power all such grants involve an expenditure of the company's money.*
As seen in the cases cited, charitable acts were generally therefore ultra vires the company, even if expressly permitted in the Memorandum and Articles of Association of the company. Charitable acts they were Intra Vires only where designed to enhance the financial prosperity of the company and line the pockets of the shareholders. For this purpose, the company was equated with the shareholders as a whole so that nothing was of benefit to "the company" unless it was of benefit to the shareholders as a whole[114].

In EVANS V. BRUNNER MOND[115], the company was to carry on the business of chemical manufacturers. It resolved to distribute certain portion of its reserve funds to such scientific institutions for research purposes as the directors would select, to advance scientific research and increase the pool of scientists from which many of its

employees were drawn. This was held not ultra vires as the benefit to accrue from the grant of the sum was said to be direct and substantial and not too speculative or remote. One wonders why same argument or conclusion were not the case IN CONTINENTAL CHEMISTS V. IFEAKANDU (SUPRA)[116].

It was contended that companies should owe and discharge social obligations. To begin with it was contended that in a company there are three interest groups - the shareholders, the workers and the consumers and the general public; and in doing business properly and honestly the company must also meet their social obligations by bearing and discharging some social responsibilities to the workers and the general public. The view thus gained ground that companies should be responsible citizens or respond to the needs of society hence serve not only the interests of the shareholders but also the well being of employees, consumers, suppliersu creditors and the community.

Corporate social responsibility gained speedier and stronger support in United States of America. For example, in the American case OF A. P. SMITH MANUFACTURING COMPANY V. BARLOW[117] Directors of the plaintiff company chartered to manufacture waterworks equipment voted to contribute some money to Princeton University. This gift was held to be Intra Vires. In giving its unanimous decision, the Supreme Court of New Jersey Said:[118]

> *"Modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities in which they operate."*

The court also endorsed the view that any contribution which tends to maintain the present economic and social environment provides sufficient benefit to the company because the preservation of the society with its free enterprise system is necessary for the survival of the company. The case represents the recognition by the United States American Courts of the need for companies to be socially responsible.

It is to be noted that while the proposition that the only role of companies should be the maximization of profits for shareholders had underlying it the capitalist or free market enterprise or laissez - faire philosophy, the proposition that companies should in addition to profit maximization, owe and discharge social obligations is founded on the socialist philosophy which manifests in government interventionism or regulated enterprise. A hybrid or an abridgement of the two extremes is possible. In this direction, Richard Eells[119] suggested what he termed "the well tempered corporation" - as a compromise between the two extremes (already examined) which regards profit maximization as primary but also considers its social obligations.

2.8 CONCLUSION

Underlying the principles striving for supremacy in relation to the Ultra Vires Rule is the struggle between the diametrically opposing philosophy of freedom of contract or laissez faire (a by product of capitalism) postulating that the ultra vires rule be retained and applied strictly on the one hand; and the government interventionist or regulated enterprise or legal privilege philosophy (a by product of socialism) postulating that the ultra vires rule be abolished, on the other.

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Between these two extremes is the middle course that the strict ultra vires rule be relaxed and curtailed to render it harmless to the interests the rule seeks to protect - so that no danger will ensue in recognising other interest in the enterprise while considering that of profit maximization for the shareholders as primary.

Common law came to accept that, the company exists or the shareholders enjoy corporate statute only for certain limited purposes which are defined by the company's Memorandum and by status; and that consequently, the corporate status or existence of the company is lost the moment the company steps out of those purposes[120].

As practiced under the common law, the Ultra Vires Rule seen was unclear in scope, at most times harsh in consequences, and a nuisance to the company hence attempts were made to evade same by companies. Goulding J. lamented regarding one of the modes of evading the doctrine that:

> *"The entire objects clause is too loosely drawn to be of any real value to subscribers or to persons dealing with the companies*[121]*."*

In the face of all the storms generated by the Ultra Vires Rule as practiced under common law with allied principles to it, there was need to either totally abolish the Ultra Vires Rule or to reformulate it to take better account of business exigencies, permit the company to live up to social responsibilities, better protect third parties dealing with companies etc.

In other words, in practice, the Ultra Vires Rule also represented an obstacle to enterprise and worked so capriciously that it was doubted whether it offered any real protection to anyone[122]. The question then is, does anyone need the Ultra Vires Rule with its associated problems any longer? If so, in what form?

When the Cohen Committee made its findings on the doctrine of ultra vires, it was concerned with the doctrine "..... as now applied to companies....." It is submitted that this indicated that the chances of reformulating the doctrine to acceptable form still obtain.

Hon. Mr. Justice Wallace while commenting on modern problems of company law said[123]:

> *"In my opinion, I would abolish the doctrine entirely. The only restraints should be illegality or contravention of some express provision of the Act (that is, the Australian Companies Act - New South Wales). Designed originally to protect creditors, its usefulness to them has long since passed, whilst the shareholders are now resigned to life insurance companies taking over retail chain stores, sugar companies developing oil and iron deposits and so on. Under modern commercial*

conditions therefore and in the light of the almost unlimited width of memorandum the rule/doctrine is an irritating anachronism.

It is seen in this chapter that the scope of corporate capacity under the common law was obscure and unsatisfactory. This was caused by the effects of the strict application of Ultra Vires Rule, and attempts to evade or circumvent the rule.

The uncertain scope of powers of a company to be implied, and the rigid adherence to common law principles of agency in the area of pre-incorporation contracts contributed in no small measure in obscuring corporate capacity; among other factors. Thus the theoretical purposes of the Ultra Vires Rule were not attained at common law. To achieve meaningful results in the law it became necessary to solve the puzzles posed in above respects. It is on this note that one will now consider the position of present Nigerian Law[124] to see how well it has resolved the problems of corporate capacity.

END NOTES/REFERENCES

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3. For example, Section 27 Companies and Allied Matters Act 1990; and Sections 2,3 and 4 of the Nigerian Companies Act 1968.
4. OROJO, J.O, Company Law and Practice in Nigeria, (1992) 3rd edition Mbeyi & Associates (Nig) Ltd, Lagos, Nigeria P. 60.
5. Palmer's Company Law, 24th ed. Vol. 1 Stevens & Sons Ltd London (1987); C.M Schmittoff (ED). P. 117.
6. Ibid, P. 119.
7. Cotman V. Brougham (1918) AC 514 at 529.
8. Para. 2.2 infra.
9. Re Horsley Weight Ltd (1992) Ch442 at P. 449; Rolled Steel Products (Holdings) Ltd. V. British Steel Corporation (1986) Ch 246 at p.288
10. Details of this is considered in paragraph 2.2 infra.
11. Palmer's Company Law op. cit. P. 121.
12. Ibid.
13. Ashbury Railway and Carriage Company V. Riche (1875) LR 7 HL 653 at 669.
14. Lord Selborne L.C. in Attorney-General V. Great Eastern Railway Co. (1880) 5AC473 at P. 478
15. See footnote 13 above, at P. 670.
16. GOWER L.C.B, Principles of Modern Company Law, Stevens & Sons Ltd, London (5th ed.) P. 165.
17. (1991) Jus Vol. 1 No. 6 at P. 9 at 11.

18a. Section 12.

18b. Per section 16 of the Companies Act 1968.

18c. Per section 46 of the Companies and Allied Matters Act 1990.

19. (1970) Ch. 199

20. *Ibid*
21. *DEJI SASEGBON, Companies and Allied Matters Law and Practice Vol. 1 DSC Publications Limited, Nigeria 1991 P. 68 - 69.*
22. *Palmer's Company Law op. cit. P. 138.*
23. *Re - introduction (Supra): see footnote 19 above.*
24. *Palmer's Company Law op. cit. P. 128.*
25. *Nigeria Law Reform Commission Report on Company Law P. 71 Para 12 (1988).*
26. *Per Belgore J. in Lasisi V. Registrar of Companies (1974) 3 ALR Comm. 85*
27. *Edokpolor & Co Ltd V. Sem-Edo Wire Industries Ltd (1984) 7 Sc 119 at p. 139-140*
28. *Per Section 28*
29. *BARNES K.D, Cases and Materials on Nigerian Company Law (1992), Obafemi Awolowo University Press Limited, Ile-Ife, Nigeria P. 151.*
30. *Continental Chemists V. Ifeakandu (1966) 1 All NLR 1 at 5-6.*
31. *(1882) 20 ch.D 169*
32. *Ibid at P. 177 per Kay J.*
33. *Re Kitson & Co. Ltd (1946) 1 All E.R 435 C.A.*
34. *(1966) 1 ALL NLR 1.*
35. *Ibid at P. 6 declaring paragraph (e) of the objects clause as "indefinite and useless" and that if "the above objects and powers in the next paragraph do not include what is questioned then there is no basis for using the ancillary powers of the final paragraph.*
36. *Re German Date Coffee Co. (1882) 20ch. D 169 and Re crown Bank (1890) 44 ch D 634.*
37. *(1882) 20 Ch. D 169 at 188.*
38. *ADUBI C.O, Drafting and Conveyancing (1991) Five Cowrie Publishing Co. Ltd. Ikeja, Nigeria P.13.*
39. *Supra, see note 7.*
40. *Otherwise called the Cotman V. Brougham clause held to be effective in the case*

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of Cotman V. Brougham though deprecated.

41. Ibid, followed in Anglo-overseas Agencies Ltd V. Green (1960) 3 All E.R 244 upholding separate and independent objects clause.

42. SMITH, K AND KEENAN DJ, Company Law, 3rd edition (1977) PITMAN PUBLISHING at P. 359.

43. BARNES, K.D. op cit. P. 30, where he states that the controversy surrounding the conclusive evidence rule has been abolished in Nigeria and that therefore, the certificate would not prevent an inquiry into the regularity of a company's registration.

44. Section 36 (6) Companies and Allied Matters Act 1990.

45. Section 1 of the Companies and Allied Matters Act 1990 creates the Corporate Affairs Commission as body charged with incorporation and administration of Companies with functions as set out in Section 7 of the Act.

46. Section 401, Companies and Allied Matters Act 1990.

47. Section 408 (e), Companies and Allied Matters Act 1990.

48. Section 27 (1), Companies and Allied Matters Act 1990.

49. Re Crown Bank (Supra), End note 36.

50. Ibid 634 at 644.

51. Supra, as in footnote 30.

52. Bell Houses Ltd. V. City Wall Properties Ltd. (1966) 2 All E.R. 674.

53. Ibid.

54. Ibid.

55. (1883) 23 Ch.D 654.

56. As in Re Lee Behrens & Co. Ltd. (1932) 2 ch. 46; and Re W & M Roith Ltd. (1967) 1 W.L.R. 432.

57. As in End note 52

58. So said Gower L.C.B. op cit. (3rd ed.) P. 89; see also Smith, K. and Keenan D. op cit. 358.

59. (1969) 2 All E.R. 1185

60. *As held in Rolled Steel Products V. British Steel Corporation (1985) 2 WLR 908.*
61. *(1966) 1 All NLR 1*
62. *Ibid at p. 6.*
63. *Bell House case at High Court stage.*
64. *(1966) 1 All NLR 1 at P. 7.*
65. *Bell House Ltd. V. City Wall Properties Ltd. (1966) 2 WLR 1323 or (1966) 2 All E. R. 674.*
66. *ANIFALAJE, J. "The Lacunae in the Nigerian Companies Amendment Bill 1981" (1982) NCL Rev. 287; and BAKIBINGA, D. "The Utility of the Ultra Vires Doctrine: An Appraisal of the Anglo-Nigerian Position (1983) A.B.U. L.J 110.*
67. *BARNES K.D, op. cit P. 144.*
68. *For example the Supreme Court of Nigerian decision in Edokpolor & Co. Ltd V. Sem Edo Wire Industries Ltd (1984) 7 SC 119.*
69. *BARNES K.D, op. cit P. 144 and Section 39 (3) of the Companies and Allied Matters Act 1990.*
70. *(1970) 1 ALR Comm. 98.*
71. *BARNES K.D. op cit, P. 148.*
72. *Ibid at p. 143.*
73. *(1966) 1 All NLR 1 at P. 7.*
74. *(1966) 2 QB 656.*
75. *(Supra) at P. 6 as in footnote 73 above.*
76. *Ibid at p. 2 - 3.*
77. *Cotman V. Brougham (Supra) at P. 520.*
78. *Re Horsley & Weight Ltd (1982) Ch 442.*
79. *Ibid at p. 448.*
80. *(1887) 12 AC 409.*
81. *Ibid at P. 414 - 415.*
82. *CRACKNELL D.G, Company Law Textbook 5th ed. (1993 - 1994) H.L.T. Publications P. 40.*

83. Palmer's Company Law op. cit P. 127.

84. Re Lee Behrens & Co. Ltd. (1932) 2 ch. 46.

85. Re Halt (1964) Ltd. (1982) 3 All E. R. 1016 where Oliver J. disagreed with Eve J's Classifications.

86. Rolled Steel Products (Holdings) Ltd. V. British Steel Corporation (1985) 2 WLR 908.

87. ibid at 940.

88. Palmer's Company Law op. cit P. 333 Para. 27 - 29.

89. Catalogued in (1992) Jus. Vol. 3 Nos. 3 & 4 at P. 24.

90. Laid down in the case of Royal British Bank V. Turquand (1856) 6 E & B 327 cited in GOWER L.C.B. op cit P. 183.

91. GOWER L.C.B. op cit P. 183.

92. 1992 Jus. Vol. 3 Nos. 3 & 4 P. 24.

93. Morris V. Kansen (1946) A. C. 459 at 475.

94. (1992) Jus. Vol. 3 Nos. 3 & 4 P. 24.

95. Cmnd 1749 para 35 - 43, culled from GOWER L.C.B. op cit P. 178 and referred to in (1992) Jus. Vol. 3 Nos. 3 & 4 at P. 25.

96. Ibid, at P. 35-43

97. GEOFFREY MORSE, Charlesworth's Company Law, 13th ed. (1987) Stevens & Sons Ltd., London, P. 122.

98. As held in Kelner V. Baxter (1886) LR 2 CP 174.

99. Ibid.

100. (1992) Jus. Vol. 3 Nos. 8 & 9 at P. 51.

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104. OGHEFERE, Nigerian Law through the Cases, Vol. 5 P. 83; see also KELNER V. BAXTER (Supra) and Geoffrey Morse, Charlesworth's Company Law op. cit. P.

123.

AGOMO C.K., *The Status of Pre-incorporation contracts (Akanki E. O. ed, Essays on Company Law) 1992 University of Lagos Press, Lagos, Nigeria, P. 81.*

106. *The Practice worked successfully in HOWARD V. PATENT IVORY MANUFACTURING CO. (1888) 38 ch. D. 156.*
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120. *OSODE P.C, The Ultra Vires Doctrine in Contemporary Nigerian Company Law: Has the Companies Decree 1990 jettisoned it therefrom? (1991) Jus. Vol. 2 No. 6 at P. 9.*
121. *Re New Finance and Mortgage Co. Ltd. (1975) Ch. 62 at 71.*
122. *Asomugha E.M. op cit. P. 93.*
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124. *Companies and Allied Matters Act CAP. 59, Laws of the Federation of Nigeria 1990, considered in details in Chapter 3 infra.*

CHAPTER THREE

ULTRA VIRES RULE UNDER THE COMPANIES AND ALLIED MATTERS ACT 1990

3.1 INTRODUCTION

The Nigerian Law Reform Commission recommended that the Ultra Vires Rule be abolished.[1] A careful perusal of the relevant provisions of the Act[2] reveals that the Ultra Vires Rule still exists under the Companies and Allied Matters Act, but in a modified form.[3] To begin with, the Companies and Allied Matters Act has maintained or sanctioned the distinction created between objects of the company and the powers in defining the capacity of the company. Consequently, the Act provides that:[2a]

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

On the other hand the Act provides that:[2b]

> *"Except to the extent that the company's memorandum or any enactment otherwise provides every company shall for the furtherance of its authorised business, have all the powers of a natural person of full capacity.*

A reading of the above provisions together reveals among other things that in considering corporate capacity:

i. A company has all powers of a natural person of full capacity only in furtherance of the business or object(s) of the company as stated in its memorandum and articles, except it is limited or restricted in the Memorandum of Association; This seems to remove the uncertainties attendant with the "implied powers" at common law, and removes further the need to specify powers of a company as used to be done at common law. The company may specifically state powers in its Memorandum of Association if it wants to restrict the powers of a natural person regarding its business. Consequently, the company is specifically required to state the specific business or object which it proposes to carry on.[4] The Act then specifically prohibited donations to political parties.[5]

ii. The capacity of a company is confined to the objects or business(es) stated in its Memorandum of Association and/or the Act.

A company can alter its business or objects clause in the Memorandum of Association by special resolution at a meeting of which notice in writing has been duly given to all members, subject to confirmation by the court.[6] The Act seems also to disfavour the profusion or inflation of objects clause in the memorandum of a company in that it requires the precise statement of the nature of the business(es) or objects which a company is authorised to carry on or the nature of the object(s) which the company is established to carry on but not its powers.[7] Additonally, Section 68 of the Act has abolished the doctrine of constructive notice. The section provides that a person shall not be deemed to have knowledge of the contents of the Memorandum and Articles of a company or of any other particulars, documents or the contents of documents merely because such particulars or documents are registered with the Corporate Affairs Commission, or referred to in any particulars or documents so registered, or are available for inspection at an office of the company. The section has however preserved the doctrine of constructive notice in relation to register of charges - This is to avoid fraud connected with company charges and mortgage.[8] In view of the abolition of the constructive notice doctrine, it is submitted that the courts no longer need to protect outsiders from the restrictions imposed by the "indoor management rule".[9] The rule in Turquand's case[10] has however been codified in Section 69 of the Act; and some unsatisfactory common law exceptions to the rule have been abolished.[11]

Specific extent of the reforms introduced in the area of corporate capacity and the Ultra Vires Rule under the Companies and Allied Matters Act 1990 shall be examined.

3.2 ULTRA VIRES TRANSACTIONS

Section 39 of the Act deals with the effects of ultra vires acts as well as the measures that can be taken against such acts and by whom. A critical look at the provision shows that Ultra Vires Rule obtainable under the Act has been drastically "reformulated" to do

away with the harsh effects of the rule under the common law.

In this wise, Section 39 (1) generally preserves the ultra vires rule. Section 39 (3) of the Act however mitigates the harsh consequences of the rule under the common law by providing that notwithstanding the provisions of Section 39 (1) of the Act:

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

The above provision is therefore a validation of ultra vires acts of the companies.[12] This position is amplified by Section 65 (b) of the Act by providing that a company shall not escape liability for acts undertaken in connection with the business of the company merely because the business in question was not among the authorised business of the company. Coupled with the abolition of the constructive notice doctrine and substantial modification of the internal management rule by the Act[13], the practical effect becomes that third parties dealing with the company are not prejudiced by any limitation contained in the memorandum or articles of association unless they have actual knowledge of such restriction.[14] Section 39 (3) of the Act for instance, has thus taken the sting out of the Ultra Vires Rule. It is designed to remove the hardships suffered by third parties from the strict operation of the Ultra Vires Rule and its incidents, hence an ultra vires transaction is no longer absolutely void. However, the provision does not entitle the third party to compel performance of the Ultra Vires Rule contract. Rather the person dealing with the company as well as the company are estopped from raising ultra vires as defence.[15] It would appear from the language of S. 39 (3) of the Act that transactions are divided into executory and executed transactions (concluded acts),[16] so that once executed, Ultra Vires Rule cannot be raised in respect of them, but once executory, Section 39 (4) and (5) may be invoked to prohibit such acts or transactions from being

executed. These subsections have, apart from sanctioning that ultra vires acts can be restrained widened the scope of persons entitled to take action to include the holder of debenture over the company's property as well as members of the company.[17] This has taken care of the unfortunate common law position that a creditor of the company could not sue because he had no locus.

Section 39 (2) of the Companies and Allied Matters Act 1990 provides that where a company goes outside its area of operation or powers and objects such breach may be asserted in any proceedings under sections 300 - 313 of the Act or under section 39 (4) of the Act.

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Finally, section 39 (5) of the Act ensures that an injunction granted to restrain executory ultra vires acts does not occasion undue hardships on one of the parties. It therefore provides that if the court deems it equitable it may allow the party adversely affected by the injunction being a party to the contract, compensation which is for any loss or damage sustained by them by reason of the setting aside or prohibition of the performance of such contract. The section for avoidance of doubt provides further that no compensation shall be allowed for loss of anticipated profits to be derived from the performance of such contract. The rule at common law that ultra vires transactions are void hence a nullity is therefore no longer operative. These new developments in the provisions highlighted show that investors and shareholders have been assured of the safety of their investments while third parties have their hitherto disadvantaged position improved.[18] Pennington had suggested that[19]:

> *"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 Share-holders, by enabling shareholders to restrain directors from entering into proposed ultra vires contracts, and by enabling the company to recover damages from directors for losses sustained as a result of ultra vires acts already carried on"*

3.3 PRE-INCORPORATION CONTRACTS

This is expressly dealt with by the Companies and Allied Matters Act[20]. The Act in effect realises the necessity of entering into contracts by or on behalf of a company by any person prior to the incorporation of the company. It has therefore reformulated the law on the point, treated the problem as separate from rules logically deducible from legal theory or agency, which the common law insisted upon even when it became very clear that such rules were adverse to the promoters of the companies and sometimes to the companies themselves. Neither the promoters nor the company could take benefits under such contracts even if they wanted to ratify the contracts.

Section 72 (1) of the Companies and Allied Matters Act 1990 empowers the company to ratify a contract entered into by it prior to its incorporation or by any person on behalf of the company prior to its formation. The principle of agency that an agent cannot contract or do any act on behalf of a principal which is non existent at the material time and the principal cannot ratify same, as far as Nigeria is concerned now excepts the pre-incorporation contracts. Earlier dicta on the point such as that in **KELNER V. BAXTER**[21] are now merely of historical but no legal significance.

It should be observed that what Section 72 (1) of the Act gives the company is an entitlement, not a duty. Consequently, the company is not bound to ratify the transaction or contract. If the company chooses to ratify, it can validly do so - that is the much the section has provided. However, to ensure that the third party is not left without a remedy section 72 (2) provides that before the contract or transaction is ratified by the company, the person who purported to act in the name of the company or on its behalf is personally bound by the contract or other transaction and entitled to the benefit thereof. While the general import and boldness of section 72 is commendable, it is however submitted that the fact that the company is only entitled to ratify, coupled with the position of the parties where the contract is either not ratified or is yet to be ratified pose

the following problems:

i. Where the other party to the transaction did not know that the company is yet to be incorporated and entered into the transaction believing same to have been incorporated, hardship will befall him should it turn out for instance that the company was not incorporated and the company's purported agent is "insolvent" and incapable of satisfying the contract. This is moreso now that such third parties are no longer imputed with knowledge of contents of documents as the constructive notice doctrine is abolished. The party is not thereby bound to investigate and discover things for himself.

ii. According to Section 72 (2), prior to ratification by the company, the contract or transaction binds the person who purportedly acted on the company's behalf or in its name

"..... in the absence of express agreement to the contrary ....."

The above quoted part of the provision shows that it may be agreed otherwise - that is, that prior to ratification the purported agent should not be personally liable on the contract. In any event, the company will also not be liable until it ratifies the transaction - Ratification is not compulsory nor automatic. The effect of those words therefore is to take away all the assurance seemingly offered to the third party by ensuring that he falls back to the purported agent in the worst situation of the company refusing to ratify (or yet to ratify) apparent in section 72 (2) of the Act. This being the case, it will become the order of the day for

"express agreement to the contrary" to be made.

Hence, Section 72 of the Act has provided war arsenals against itself and will not function. If it is intended that the other party will refuse to endorse any "agreement to the contrary" hence that portion of the section will never come to play, then that is too obvious to be included in the statute books in the 21st Century.[22]

The effect of the law is that if the company sees that the fruits accruable or accruing from a pre-incorporation contract are sweet, it may take same but if sour, leave it with the purported agent if the company wants. This is making the position of

promoters precarious - they undertake a big risk indeed. The fact that the company is not bound to ratify therefore, fails to fully accord with the concern of the Nigerian Law Reform Commission expressed thus[23]

> *"Nigerian Law on this subject is still governed by the common law principles .... This has been a source of serious problems and hardships to promoters and third parties".*

Why should companies not be compelled to ratify pre-incorporation contracts when the purported agents of the company as promoters thereof have been imposed with fiduciary duties[24] to protect the company? For example, a promoter stands in a fidiciary relationship to the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf and shall compensate the company for any loss suffered by reason of his failure to do so.[25] The duty of disclosure imposed thereby is said to entail the primary remedy of rescission of the contract and claim for recovery of any secret profits which the promoter has made[26].

It is to be noted that Section 72 of the Companies and Allied Matters Act 1990 is of Section 13 of the Ghanian Company's Code 1963; and in pari materia with Section 36 (4) of the English Companies Act 1985.

3.4 CORPORATE SOCIAL RESPONSIBILITY

The question may be asked as to whether (and if yes, how far) the Companies and Allied Matters Act 1990 has made provisions to enable companies to discharge "corporate social responsibility" or "corporate good citizenship" or "the man in business overheads"? It is true that the Act has made provisions touching on this, but these provisions[27] are scattered here and there, and at the end of an assemblage and assessment of the provisions, it will be discovered that the Act at best permits (but does not compel) companies to be socially responsible. This is a middle course or hybrid of the extreme profits maximization theory on the one hand and the social responsibility

concept as a duty on the companies on the other hand. Also, the provisions of the Act do not expressly provide for corporate social responsibility in its complete sense, hence one has to analyse critically the relevant provisions before "implying" that corporate social responsibility is permitted under the Act.

To begin with Section 39 (1) of the Act insists that a company shall not carry on any business not authorised by its memorandum and shall not exceed the powers conferred upon the company by its memorandum or the Act. This is however qualified by section 39 (3) to the effect that inspite of subsection 1, no act of a company or conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such act, conveyance, or transfer was not done or made for the furtherance of any of the authorised business of the company or that the company was otherwise exceeding its powers or objects. The effect of this subsection is that it gives the company implied powers to exceed its powers or objects and still create binding transactions so long as property has already passed pursuant to such transaction. A company can therefore use such provision to discharge what it considers as its social responsibility, so long as no member of the company or debenture holder applies to restrain the company before the transaction is executed.

Again, Section 38(1) the Act provides inter alia that *every company shall for the furtherance of its authorised business or objects, have all the powers of a natural person of full capacity.*

However a company shall not have or exercise powers directly or indirectly to make a donation or gift of any of its property or funds to a political party or political association or for a political purpose.[28] This sub-section gives companies legal capacity of a natural person only for a specifically limited purpose which is the carrying on of its authorised business or objects. Consequently, companies cannot rely on this statutory power of a natural person as conferred by the Act to undertake unlimited charities.

However, by giving the company powers of a natural person of full capacity in furtherance of its authorised objects and further providing specifically as an exception that donations to political parties, political associations, or political purposes are prohibited, it is submitted that section 38 (1) has authorised donations to charities not specifically prohibited. It is a rule of interpretation of statutes that what is not expressly prohibited is allowed and since a natural person of full capacity would have powers to donate to charities, except specifically prohibited, the companies also having powers of a natural person of full capacity can also donate to charities in respect of their authorised objects, except to political parties, political associations or for political purpose. Section 38(1) read with section 39 (3) lends credence to the above conclusion. Any argument that the express mention of donations to political parties or political associations, or political purposes is just to make assurance double sure that such are prohibited will meet the counter argument that there is no basis for the law to decide not to specifically mention other donations to leave doubts in relation to these others. One is therefore inclined to the conclusion that those kinds of donations not specifically prohibited are permissible.

It is also worrisome that the Act does not define "political party" or "political association" or "political purpose". The difficulty posed then is that the meaning of that phrase, particularly "political purpose" remains unknown. In the light of this lack of definition and the attendant problem(s) thereby posed, a learned writer[29] observed that:[30]

> *"Sometimes, it may even be difficult to determine what amounts to political purpose..... For same is nowhere defined in it [the Act]. A donation may ex facie be humanitarian but may be construed as otherwise when made to an association or movement formed for National goals....."*

In prohibiting companies from making political donations, or gifts, the Law Reform Commission took account of the abuses of political donations and gifts in recent Nigerian history and noted that:[31]

> *"It is intolerable for the funds and assets of a company in which every shareholder*

has an interest to be used to foster the interest of a political party in which some do not believe. Even a majority need not be allowed to force such a decision on a minority. We therefore recommend that a company should be deprived of the power to make donations or gifts to political parties or associations.....".

By prohibiting corporate donations to political parties, political associations e.t.c the Nigerian legislation has clearly geared towards avoiding situations such as led to the watergate scandal[32] in America.

As for the interest of employees, Section 384 of the Act for instance provides that:

"If under his contract of service, an employee is entitled to share in the profits of the company, as an incentive, he shall be entitled to share in the profits of the company whether or not dividends have been declared". (underlining mine for emphasis).

It is indisputable that payments to an employee out of the profits of a company when dividends have not been declared is not in the interest of the shareholders, nevertheless the section enjoins that this should be done. This is a way of compelling the company to fulfil its responsibility or obligation with the employees, and not to frustrate this by simply refusing to declare dividends. Section 384 has however not enjoined nor compelled companies to be generally responsible. As the underlined part of the section above shows, it only ensures that the company keeps its words so as not to avoid its responsibility to employee(s) who is/are entitled to share in the profits of the company "under his contract of service" by not declaring profits or when for whatever reason(s) dividends are not declared. Thus the provision requires companies to recognise such employee(s) interest in the profits of the company and pay it to the employee as a responsible company.

With this provision, the common law principles as to whether such provisions are in the best interest of the shareholders before they can be validated no longer avails to render any such provision for employees ultra vires. As noted however, the section is of limited

application and will therefore not apply if there was no such entitlement arising under the employee's contract of service. In other words, the provision or section is subject to the existence of a contract of service to the effect between the company and the employee.[33] To that extent section 384 is limited in scope. The repealed Nigerian Enterprises Promotion Act[34] on the other hand made it mandatory on scheduled companies under the Act to reserve 10 percent equity shares for their workers.

Section 649 of the Act provides for powers of a company to provide for employees on cessation or transfer of business. It provides that the powers of a company include power to make provision in connection with the cessation or the transfer to any person of the whole or part of the undertaking of the company or subsidiary. This power is to be exercised "notwithstanding that its exercise is not in the best interest of the company"[35]. This section is the same as Section 74 of the U.K Act of 1980; and has the effect of overruling cases like PARKE_V. DAILY NEWS[36]. The Provision applies to "the benefit of persons employed or formerly employed by the company....." Such payments may be made out of the profits of the company which are available for dividends[37] and may be effected even through the liquidator on the winding up of the company[38].

Section 279 (3) provides that a director shall act at all times in what he believes to be "the best interest of the company as a whole". But what does "the company as a whole" signify in the above provision? Section 279 (4) of the Act clarifies the matter to some extent. It provides that the directors in performing their functions, must take account of employees in general as well as the interest of the members of the company. The two subsections read together therefore show that while the scope of "the company as a whole" may not be very certain, it at least includes the company's employees and the members (shareholders) of the company. The section however does not specifically talk about the interest of the wider society. The question is whether by virtue of the silence, corporate social responsibility to the wider society conflicts with directors' duties as provided in section 279 (3) and (4).

This is the manner the Companies and Allied Matters Act has left us in the air wondering whether, how, and to what extent (if any) corporate social responsibility avails under the Act, without express provision to this effect. Perhaps the most important statutory indication of the need to protect public interest is in the area of disclosure[39]. Also, expenditure on research development apart from being required to be disclosed in the statement of accounts, is also a deductible expense for purposes of computing tax liability[40]. These presuppose the rendering of these charities.

Inspite of the vagueness of the provisions on corporate social responsibility under the Companies and Allied Matters Act 1990, it is commendable that companies in Nigeria have taken up the initiative and make contributions to society in various ways though the extent of their commitment is another matter entirely. They have also made it a point of duty to comment on their social responsibilities in their Annual Financial Statements. For example, the Intercontinental Merchant Bank Ltd, awarded scholarships to ten children/wards of their investors for the duration of their various courses ranging between 4 and 5 years, tenable in various universities in Nigeria;[41] Ahmadu Bello University, Zaria received generous donations from some of the large companies towards its computer center.[42] Also, the Chairman, Board of Directors, Benue Cement Company Plc.[43] in the CHAIRMAN'S STATEMENT made references to the company's social responsibilities thus:[44]

> *"We are pleased to state that our company has continued to remain alive and sensitive to its social responsibilities especially to the immediate community. Our clinic continues to offer medical services to members of the local community. Our staff school is also open to non-staff children and wards. We recently established a depot at Tse Kucha among others to make our product more readily available to the direct end users ..... Our football club, the famous B.C.C. Lions has continued to make us proud and give us joy in their various exploits..... In an effort to foster good neighbourliness, our company is in regular dialogue with leaders of the local*

community on areas of mutual benefit and co-operation. Our Environmental Protection and Safety Committee (EPSC) has continued to monitor pollution and advise management on ways of controlling industrial hazards....."

3.5 EXERCISE OF CORPORATE POWERS

According to the Companies and Allied Matters Act,[45] from the date of incorporation mentioned in the Certificate of Incorporation,

"the subscribers of the memorandum together with such other persons as may fromt time to time become members of the company shall be a body corporate by the namec contained in the memorandum, capable forthwith of exercising all the powers of an incorporated company including the power to hold land, and having perpetual succession and a common seal.... "

The Companies and Allied Matters Act further defines the extent to which the company may exercise its powers[46]. The totality of these provisions is that the company is a legal personality distinct from the members who compose or constitute it, and is capable of entering into contracts and other transactions within its limited capacity.[47]

However, the company is not a natural person; it is an artificial legal person, hence must act through the agency or instrumentalities of its human officers in one name or the other.[48] The acts of the human officers and agents bind the company only where the acts are within the capacity or competence of the company (otherwise, the acts are ultra vires), hence the relationship between the exercise of corporate powers and the Ultra Vires Rule. For, while the Ultra Vires Rule defines the outer limits of the competence or otherwise of companies to enter into transactions, it is also pertinent to know who exercises the company's powers and objects within the defined capacity.

In another connection, the transaction may be within the capacity of the company, yet the question may arise as to whether the officers acting for the company have authority to act. This strictly speaking has no relationship with the Ultra Vires Rule.

According to the Companies and Allied Matters Act[49] the exercise of corporate powers is vested in:

a) members in general meeting; or
b) board of directors; or
c) officers or agents appointed by, or under authority deriving from the members in general meeting or the board of directors.

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This section is amplified in another section of the Act[50] which provides that generally any act of the members in the general meeting, the Boards of Directors, or of a Managing Director, while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person. This section does not deal with the officers or agents of the company, but the succeeding section of the Act[51] provides that the acts of the officers or agents of the company shall be deemed to be that of the company only if authorised by the board of directors or the general meeting and where done within the scope of the authority conferred.

The point being made is that, the acts of the general meeting and board of directors are generally binding on the company. Such acts are not binding only in exceptiona circumstances. On the other hand, the acts of the officers and agents are generally no binding on the company. Such acts are binding only in exceptional circumstances. Ir relation to this interesting situation, one should note also, that by Section 63 of the Act the existence of the agents or officers of the company itself depends on their being appointed by, or under authority derived from the members in the general meeting o board of directors.

While in the context of the research it is not relevant to go into further details, th provisions discussed have recognised the members in general meeting of the company the board of directors, and the agents and officers of the company as the company, an

that whatever these organs or officers or agents do in carrying on in the usual way the business of the company is regarded as the act of the company itself. As Viscount Heldane L.C said:[52]

> *".....a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who is really the directing mind and will of the corporation the very ego and centre of the personality of the corporation."*

In view of the above discussion it is necessary to note that there is a world of difference between acts that are ultra vires the company and acts that are merely outside the authority of the directors. In acts ultra vires the company, what is said in effect is that the company is incapable of doing such acts. That is, the capacity of the company itself is called to issue. In acts outside the authority of the directors, the company itself may be competent to enter into such acts hence the capacity of the company is not in doubts. What is in issue here is the authority of the directors and cases coming within this scope are otherwise termed cases of "abuse of directors' powers" or "absence of directors' authority".[53]

Also, ultra vires transactions, are not the same thing with or as illegal transactions. In illegal transactions, the question is whether a transaction is prohibited by law or is contrary to public policy, and illegal in itself. In ultra vires transactions, such transactions are in themselves perfectly legal, and have nothing obnoxious in them. The question is not as to the legality of the transactions but as to the competency or capacity of the company to enter into the transactions. Lord CAIRNS L.C had said[54] concerning this distinction that:

> *"The question is not as to the legality of the contract; the question is to the competency and power of the company to make the contract....."*

3.6 CONCLUSION

On the whole, it is clear that the Companies and Allied Matters Act 1990 has made

tremendous improvements and reforms to remove the difficulties, hardships and uncertainties attendant at common law relating to Ultra Vires Rule. This is particularly so in the area of the abolition of the rule of constructive notice, the reforms on the possible parties to Ultra Vires Rule, the scope and effect of ultra vires transactions, corporate social responsibilities etc. It is however, regrettable that inspite of the commendable work done by the Law Reform Commission, much may still have to be done details of which we shall consider in the final chapter of this work.[55] As at now suffice it to be stated that the difficulty in language used by the Act has threatened to rob the Act of all its expected noble fruits. The position of law on pre-incorporation contracts also needs be revisited, just like that on corporate social responsibility.

END NOTES/REFERENCES

1. *Working papers on the Reform of Nigerian Company Law, (1988) Review and Recommendations Vol. 1 at P. 58.*
2. *Sections 38, 39, 50, 65 (b), 68 and 69 of the Companies and Allied Matters Act 1990, in pari materia with sections 24, 25 and 141 of the Ghana Company's Code 1963.*

2a. *Companies and Allied Matters Act 1990, Per Section 39 (1)*

2b. *Ibid*

3. *Patrick C. Osode, the ultra vires Doctrine in Contemporary Nigerian Company Law: Has the Companies Decree (now Act) 1990 jettisoned it therefrom? (1991) Jus. Vol. 2 No. 6 P. 9 at P. 15.*
4. *Section 27 (1) (C) of the Companies and Allied Matters Act 1990.*
5. *Section 38 (2) of Companies and Allied Matters Act 1990 which says a company shall not have or exercise power either directly or indirectly to make a donation or gift of any of its property or funds to a political party, political association or for political purpose.*
6. *Section 46 of the Companies and Allied Matters Act 1990*
7. *Section 27 (1) (C) and Table B of schedule 1. Companies and Allied Matters Act 1990*
8. *Oretuyi S. A. ; the constitution and exercise of corporate trading powers - Essays on company law (ed.) E. O. Akanki op.cit P. 91 at P. 98.*
9. *Deji Sesegbon: Nigerian Companies and Allied Matters Law and Practice (1991) (DSC Publications Ltd) Vol. 1 Number 2 P. 124.*
10. *The rule was to the effect that a person who deals with a company in reliance on the public documents, consistent with the public documents is entitled to assume that all matters of internal management have been compiled with. If not actually complied with these were not to prejudice the rights of the third party as such.*
11. *Section 70 of the Companies and Allied Matters Act 1990 for instance abolishes the exception which used to be that the rule will not apply where document relied*

upon is a forgery.

12. Deji Sasegbon: Nigerian Companies and Allied Matters Law and Practice op cit P. 69.
13. Sections 68, 69 and 70 of the Companies and Allied Matters Act 1990.
14. Amokaye Oludayo; the doctrine of ultra vires in Nigeria (1991) Jus. Vol. 2 No. 2 P. 65.
15. Patrick C. Osode: op cit P. 15. as in footnote 3.
16. Deji Sasegbon: Nigerian Companies and Allied Matters Law and Practice op cit P. 73.
17. Section 39 (4) (b) of the Companies and Allied Matters Act 1990.
18. (1992) Jus. Vol. 3 Nos 8 & 9 P. 51.
19. Pennington's Company Law, (4th edition, 1979) P. 108.
20. Section 72 of the Companies and Allied Matters Act 1990; see also C. K. Agomo, the status of pre-incorporation contracts (ed E. O. Akanki op cit) at P. 83 - 90.
21. Kelner V. Baxter (supra).
22. But see Phonogram Ltd V. Lane (1982) QB 938 where Lord Denning M. R. said that those fine distinctions adopted by common law to show when a purported agent for a yet to be incorporated company is personally liable or not were no longer relevant, that is, the agent is personally laible however he expresses his signature. These were based on section 36 (4) of the English Companies Act 1985, in pari materia with section 72 (2) under consideration.
23. Working papers on the Reform of Nigerian Company Law Vol. 1 P. 140 Para. 20.
24. See for instance section 62 of the Companies and Allied Matters Act 1990.
25. Section 62 (1),Ibid.
26. Section 62(3), Ibid
27. Sections 38, 39, 279, 384, 649 of the Companies and Allied Matters Act 1990.
28. Section 38 (2) of the Companies and Allied Matters Act 1990 by which each member of the company voting in favour of donation in contravention of the prohibition and each officer of the company are jointly and severally liable to refund the sum to the company and to pay fine equal to such amount to be

donated

29. Smith I. O., the relevance of the ultra vires doctrine in Nigeria Company Law (1990) Jus. Vol. 1 No. 8 at P. 100 - 101.
30. Ibid.
31. Report of the Law Reform Commission on the reform of Nigerian Law 1988, P. 75 - 76.
32. Asomugha E. M., The Watergate Affairs - the involvement of business in politics: Daily Times (of Nigeria) Newspapers, August 7th 1973 P. 33 where he discussed how in the watergate Scandal in America, money belonging to a company was used for campaign expenses for one party or the other during the Richard Nixon era.
33. Deji Sasegbon: Nigerian Companies and Allied Matters Law and Practice op cit P. 626.
34. Section 6 of CAP 303 laws of the Federation of Nigeria 1990.
35. Section 649 Companies and Allied Matters Act 1990.
36. Details of which are considered in chapter 2 hereof.
37. Section 649 (4) Companies and Allied Matters Act 1990.
38. Section 518 (4) of the Companies and Allied Matters Act 1990.
39. Schedules 3, 4 and 5 particularly schedule 5 of the Companies and Allied Matters Act 1990. which requires that directors must give particulars of donations made in each year.
40. Section 22, finance (miscellaneous taxation Amendment) Decree 1993.
41. Newswatch Weekly Newsmagazine of January 1995 P. 38 captioned: Scholarship Award for Ten.
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45. Section 37 Companies and Allied Matters Act 1990.
46. Section 38 read with section 39 of Companies and Allied Matters Act 1990.

47. *Trenco (Nig) Ltd. V. African Real Estate Ltd (1978) 11 NSCC 220*
48. *Trenco (Nig) Ltd. V. African Real Estate Ltd (supra) at 228 where Aniagolu J. S.C. said ".....the company although having a corporate personality is deemed to have a human personality through its officers and agents".*
49. *Section 63 of the Companies and Allied Matters Act 1990.*
50. *Section 65 of the Companies and Allied Matters Act 1990.*
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52. *Lennards Carrying Co. V. Asiatic Petroleum Ltd (1915) AC 705 at 713 - 714.*
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CHAPTER FOUR

REFORM ALTERNATIVES OF THE ULTRA VIRES RULE

4.1 INTRODUCTION

The Ultra Vires Rule is a topical issue in company law, around which many policy matters converge. The rule has however turned out to be a curse rather than a blessing to the groups it was designed to protect[1]. The basic defects of the Ultra Vires Rule as aptly summed up by professor Oretuyi S. A.[2] are that: firstly, it unduly restricts the company from changing or engaging in activities which it finds profitable. The result of this is that profitability which is the main purpose of the trading companies is sacrificed at the alter of doctrinal concepts. Secondly the Ultra Vires Rule caused great hardships to creditors who lent money to the company on ultra vires transaction.

The Ultra Vires Rule thus ceased to be a protection to anyone and became merely a trap for the unwary third party and or nuisance to the company. In other words, the Ultra Vires Rule became an illusory protection for the shareholders and yet a pitfall for third parties dealing with the company

Various approaches to reform of the Ultra Vires Rule have been adopted by various countries to remove the harsh operation of the rule. Nigeria under the Companies and Allied Matters Act[3] has painstakenly striven to better the lot of the investors and creditors as relate to Ultra Vires Rule [4]. For instance, in Nigeria, even a dissenting member of the company can sue to restrain ultra vires transactions[5]. The desired reform of the Ultra Vires Rule may either kill the Ultra Rule or render it impotent or at least give it an entirely new look.

It should always be remembered that Section 39 of the Companies and Allied Matters Act[6] which retains the Ultra Vires Rule is more apparent than real[7]. It is against this background that the various reform alternatives to the Ultra Vires Rule will be examined.

4.2 TOTAL ABOLITION

This is one of the perspectives to the reform of the Ultra Vires Rule in the face of the pluralism of policies which the doctrine seeks to reconcile but which are not easy to reconcile. These policies are represented by investor protection, creditor protection, and the public interest protection[8].

The total abolition of the Ultra Vires Rule entails that the company is given all the powers of a natural person for all purposes like it is the position in Canada[9] and Israel[10]. This was the position of the chartered companies at common law. Where companies are endowed with all powers of a natural person of full capacity a good safeguard that should necessarily follow is to include in the law a provision making the directors of the company personally liable for breach of any restriction in the memorandum - such a provision shall avert any possible fear that total abolition of the ultra vires rule shall leave the company at the mercy of directors.

Where the Ultra Vires Rule is totally abolished it will also be unnecessary for companies to state their objects in their memorandum of association. The logical implication is that where a company does not have any specified objects and there are no restrictions or express prohibitions on the exercise of the powers by the company the Ultra Vires Rule becomes completely inapplicable[11]. Also, as done under the Australian Statute[12] a company is given the legal capacity of a natural person which in effect confers on the company the freedom to contract as natural persons of full capacity. Under the Australian Statute[13] the legal capacity of a natural person is available to the company not only for limited purposes specified in the objects clause, but such capacity is available to the company for all purposes. The Australian Statute provides further that legal capacity of the company is available to the company even where the company's memorandum contains objects or rules with express restrictions on the exercise of corporate powers[14] Any such restrictions on the powers of the company shall only be useful for plea of ultra

vires for specified range of cases which in total, concern actions involving the company and its members. That is to say, the Ultra Vires Rule in this case is only relevant in internal disputes and cannot be relied upon to the detriment of outsiders who have contracted with the company[15].

Another way of effecting total abolition of the Ultra Vires Rule is to adopt the approach of the Canadian Statute[16] which stipulates that a corporation has the capacity as well as the rights, power, and privilege of a natural person. The Act[17] further makes it optional for incorporators to choose whether or not they wish to impose any restrictions on the business that the company may enter into. The result is that where there are no restrictions or objects the companies will be endowed with the capacity of a natural person of full capacity[18] hence the Ultra Vires Rule will be completely inapplicable to them. The Act provides[19] that no act of a corporation including any transfer of property to or by a corporation is invalid by reason only that the act or transfer is contrary to the company's articles or this Act. The effect of this is that even where there are restrictions on the company's capacity and object clauses are stated, these are only internal matters and cannot be invoked to render the transaction or act of the company invalid. It can therefore be safely said that the Ultra Vires Rule has been totally abolished from the corpus of Australian Company Law, and to a limited extent, under Canadian Company Law.[20]

One would observe that while the approaches of Australian Law and Canadian Law were in the line of total abolition of the Ultra Vires Rule, the approach in Australian Law is bolder and neater than that in Canada. It is pretty difficult to understand why the Canadian Law left open the possibilities of companies having object clauses and restrictions in the Memorandum and Articles of Association, moreso, when the legal effects of the options are the same. The total abolition reform perspective to the Ultra Vires Rule is thus straightforward solution to the problems posed by the Ultra Vires Rule. This reform perspective or alternative may also be referred to as "total abolition of

limitations on capacity".[21]

English law was opposed to abolition of objects clauses of companies as a step towards total abolition of the Ultra Vires Rule probably because, such objects needed to be known to determine whether the company is a charitable company or a commercial company, which was necessary for purposes of taxation and of knowing whether the companies could dispense with "limited" as the suffix to their names[22]. To avert the problem perceived by English Law Guarantee companies could be jettisoned or merged with incorporated Trustees under part C of the Companies and Allied Matters Act 1990.

The policy obstacle in the way of total abolition of Ultra Vires Rule is that, such abolition will now constitute a threat to the members of the company who will have to bear the risks of their companies engaging in activities which such members never contemplated nor sanctioned when they subscribed to the Memorandum and Articles of Association of the companies. This is moreso as the modern shareholder has caused to be a quasi-partner and has become instead simply a supplier of capital and whether or not this brings profits depends on the energy and initiative of management from which the members are divorced[23].

It is however submitted that a strict adherence to this interest of the members or shareholders rather turns the steam of the ultra vires rule against the third parties who, as outsiders are entitled to more protection against the company, the creature of the shareholders. Total abolition of ultra vires, a reversion to companies with unlimited capacity will force the members or the shareholders to sit up, and ensure that they wrest control from management instead of misdirecting same at third parties. In other words, while total abolition of the ultra vires rule sounds like a danger to the risk takers, preservation of the rule is more a snare and delusion than protection to third parties.

Additionally, two sources of great confusion in the ultra vires rule[24] may be abolished[25] to

pave way fully for a doctrine of unlimited capacity, in which case even the question of actual notice of limitation of capacity will be totally irrelevant. It is submitted that where the doctrine of unlimited capacity exists, but companies are permitted to provide for objects and restrictions on powers in their Memorandum and Articles of Association, the consequence would be that while transactions outside the company's stated objects and powers would not be void on account of the company's incapacity, they would not bind the company unless ratified by the company in the general meeting since they would be beyond the actual and apparent authority of the company's organ which acted on its behalf[26]. This would call to aid the normal rules of agency and a question which the law has to answer here would be whether the companies would be entitled to refuse to ratify. Rules of agency should not be dogmatically applied here. The Companies in the circumstances should be held bound to ratify.

4.3 PARTIAL ABOLITION

This requires that the Ultra Vires Rule be abolished to the extent that generally, it does not apply in relation to third parties, but is retained within the company as an internal doctrine. Partial abolition of the ultra vires doctrine or rule was the approach recommended by the Cohen Committee when it recommended[27] that:

a) Every company should have all the powers of a natural person but only as regards third parties.

b) Provisions in the memorandum relating to power of companies should have legal force only as a contract between the company and its shareholders. It is submitted that this resembles the situation created by the Companies and Allied Matters Act 1990[28] where it is provided inter alia that the Memorandum and Articles when registered shall have the effect of a contract under seal between the company and its members.

c) All provisions in the memorandum relating to the powers of the company be alterable by special resolution.

While none of these proposals were adopted, the English Jenkins Committee[29] later reiterated these recommendations and recommended that this reform perspective would sufficiently protect the interest of third parties if the doctrine of constructive notice is abolished in addition.

The partial abolition reform perspective serves as a middle course between abolishing the Ultra Vires Rule totally and preserving the rule full steam[30]. Under this reform perspective attempt is therefore made to remove the consequences of exceeding any limitations on companies capacities without actually admitting that the companies have full capacity.

The difference between total abolition and partial abolition of Ultra Vires Rule therefore, is that in total abolition, everything possible is done to do away with the Ultra Vires Rule in any shade and limitations on companies capacities are sought to be burried once and for all. Under partial abolition on the other hand, the Ultra Vires Rule is not completely abolished even as against third parties. It is still preserved and is applicable against third parties in exceptional situations, and applicable within the company generally. This approach to reform of Ultra Vires Rule is the approach adopted by the Nigerian Companies and Allied Matters Act 1990[31]; which falls short of the provisions in Canada and Australia[32]. It is interesting to observe that the partial abolition approaches recommended by the English Cohen Committee and Jenkins Committee[33] were not given effect until after the entry of Britain into the European Economic Community (E.E.C.) when changes were made in the law.[34] This was re-enacted by the English Companies Act 1985[35]. This provision attempted with confusing consequences to deal in the same subsection[36] with effects of lack of capacity and with acts in excess of directors powers[37]. The section provided that:

1) In favour of a person dealing with a company in good faith, any transaction decided on by the directors is deemed to be one which is within the capacity of the company 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.

2) 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 limitations on the powers of the directors and shall be presumed to have acted in good faith unless the contrary is proved. Much uncertainties flowed from the expression "dealing with" as it relates to the provision as its meaning was not clear. It was for the third party to prove that when he entered into the transaction, he was "dealing with the company" How the third party could successfully prove this, and what he was supposed to show to establish that he was dealing with the company were far from clear. Furthermore, the section provided that the third party must have "acted in good faith" but the scope of good faith was also far from clear. For, what, if anything, apart from actual knowledge will amount to bad faith as the third party is not bound to inquire into the actual capacity of the company and is presumed to be acting in good faith unless the contrary is proved? The scope of section 35 was therefore far from clear[38]. Further attempts had to be made by English Companies Act[39] to remove the consequences of exceeding any limitations on a company's capacity without actually admitting that it had full capacity. For example, the English Companies Act 1989 did substitute for the original section 35[40] new section 32, The new section 35 (1) for instance omitted the words "in favour of a person dealing with a company" in the former section 35 (1) hence removed the uncertainties flowing from "dealing with"[41]. One would therefore agree that this approach to reform of Ultra Vires Rule has many complications or difficulties that render it less attractive a solution than the total abolition approach. In the partial abolition of Ultra Vires Rule, it is still important for companies to state their objects[42].

According to Professor Oretuyi,[43] the protection afforded members of a company[44] to restrain ultra vires transactions within its narrow confines is unrealistic. He argues that members of a company as businessmen are concerned more with profitability of the

company as a going concern; that chances of taking steps to restrain a company engaging in profitable business even outside capacity are remote. That is, that chances of acts being ultra vires are slim. He thus leans in favour of total abolition of the Ultra Vires Rule since allowing its traces to remain is prone to produce unrealistic results.

The approach adopted by the Nigerian Companies and Allied Matters Act 1990 as earlier noted[45] is the partial abolition approach or middle course approach of striving towards abolishing the Ultra Vires Rule, and at the same time retaining the rule to some extent. This is a way of striving to protect the plurality of interests that the Ultra Vires Rule seeks to take care of in a modest way and ensuring thereby that all parties (members and creditors of the companies) do not suffer under hardships from the strict application of the ultra vires rule.

The Companies and Allied Matters Act 1990 has, in this bid however, fallen prey to uncritically copying existing legislations on the matter[46] which themselves require to be revisited. Consequently, the provisions of the Companies and Allied Matters Act 1990 are obscure and inadequate hence tend to obscure the scope and relevance of the ultra vires rule in Nigeria. Underlying this problem is the interest balancing at ideological levels: the running battle between free market enterprise on the one hand and public intervention approach or regulated enterprise on the other. The Companies and Allied Matters Act 1990 has merely reversed the ultra vires rule as formulated, by attempting a compromise between the need to protect investors, and the creditors from the hardships posed by the doctrine in its strict sense.[47]

Where partial abolition of ultra vires rule obtains, the ultra vires rule nevertheless applies in exceptional circumstances such as[48]:

a) the company can plead it against a third party if the company can prove that the third party acted in bad faith;
b) if the transaction has not been approved by the directors;

c) internally, in the relationship between the directors and the shareholders or the directors and the company, the doctrine exists;

d) a third party can still claim as against the company that the latter acted ultra vires;

e) a shareholder can obtain an injunction against the company with a view to preventing it from acting ultra vires.

It was in the same vein that the Nigerian Law Reform Commission recommended as follows:[49]

i. a company should enjoy all the powers if a natural person. Specific limits upon its powers may be imposed in the Company's Articles of Incorporation;

ii. a company may not exceeds any specific restrictions upon its powers imposed by the articles;

iii. no act of company or a transfer of property involving a company should be invalid by reason only that the act or transfer contravenes restrictions in the articles;

iv. a member or debentureholder should be permitted to seek a court order to restrain a company from exceeding such restrictions;

v. where such an order is made a party (including the company) adversely affected by the cancellation of a contract shall be entitled to a judicial order determining how the resultant losses are to be borne by the parties concerned;

vi. transactions in excess of a specific restriction should not be capable of being challenged once performed nor before performance, by either contracting party.

The forgoing is the premise upon which the Companies and Allied Matters Act 1990 partially abolished the ultra vires rule as already examined[50].

4.4 SPECIFICATION OF A LIST OF OBJECTS AND POWERS

By this approach, the implied powers and objects of the company are set out in the statute so that there is no need to repeat them in the memorandum. The statute may further provide that these powers need not be set out in the memorandum[51]. The objects and powers are specifically mentioned by statute and are implied except expressly excluded by the Memorandum and Articles of Association of the company. This approach was also recommended by the Jenkins Committee as solution to the problems created by the ultra vires doctrine, and partly adopted in Newzealand[52].

Attractive as this approach is, it still leaves a number of problems unsolved. One of the attendant problems of this approach as pointed out by Professor Gower[53] is that the enumeration of powers is bound to be very lengthy and cannot contemplate all the possibilities having regard to the continuing changes and developments in business techniques; and the enumeration is likely always to end with an omnibus provision which still has to be interpreted by the court in relation to any given business activity. Professor Gower's comments were also noted by the Nigerian law reform commission before arriving at its recommendations which were in line of the Ghana Draft Companies Code Bill and of the Carribbean Company Law Bill with necessary modifications[54] details of which are examined in chapter three hereof.

4.5 CONCLUSION

Three notable reform alternatives to the Ultra Vires Rule have been examined. It is clear from this examination of the alternatives that the most attractive and straightforward alternative is total abolition of the Ultra Vires Rule. The policy implications of the total abolition Ultra Vires Rule have also been examined with a view to proffering solutions to lapses that may arise thereby. What is required to attain the best of results is total abolition of the Ultra Vires Rule. This was what the Nigerian Law Refrom Commssion have resolved should be the case but the result if the efforts of that commission, the

Companies and Allied Matters Act 1990 has not accomplished that objective[55].

Nothing will be lost by total abolition of the Ultra Vires Rule. Total abolition of the Ultra Vires Rule will among other things simplify company law, provide the best solution to the problems posed by the Ultra Vires Rule, and restore registered companies to the original position envisaged for them by the founding fathers[56].

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3. *Cap 59, Laws of the Federation of Nigeria 1990.*
4. *Section 39 of the Companies and Allied Matters Act 1990.*
5. *Ibid; and Jus. Vol. 3 No. 8 & 9 (1992) op cit P. 51.*
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7. *as in Footnote 2 above.*
8. *Farrar's Company Law, Farrar, Furey & Hannigan (1988) Butterworths London, Second edition, P. 94.*
9. *Section 16, Canadian Business Corporations Act 1975.*
10. *Amokaye Oludayo, the Doctrine of Ultra Vires in Nigeria (1991) Jus. Vol. 2 No. 2 P. 66.*
11. *(1991) Jus. Vol. 2 No. 6 P. 15.*
12. *The Corporations Act 1989, Section 162 (1).*
13. *Ibid.*
14. *Ibid, Section 162 (2)*
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16. *See footnote 2 above, and section 15 (1) of the Canada Business Corporations Act (Revised Statutes of Canada 1985).*
17. *Ibid, Section 6 (1)*
18. *Studies in Canadian Company Law, (Jacob S. Ziegel ed) 1973 P. 19 Note 32.*
19. *Section 15 (3) Canada Business Corporations Act (Revised Statute of Canada 1985).*
20. *(1991) Jus. Vol. 2 No. 6 P. 16.*
21. *Gower L.C.B. op. cit. P. 173.*
22. *Gower L.C.B. op. cit. P. 173: Companies formed not for purposes of carrying on*

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business for profit could dispense with the ...

23. Gower L.C.B. op. cit. (4th edn) P. 10.
24. Limited Liability and Constructive Notice Doctrine.
25. (1991) Jus. Vol. 2 No. 2 P. 63.
26. Paul L. Davies, Gower's Principles of Modern Company Law, (1997) Sixth edition, Sweet & Maxwell Ltd Swiss Cottage London, P. 207.
27. Cohen Committee (1953).
28. Per section 41 (1) thereof, considered in 1.6 hereof.
29. Jenkins Committee (CMD 1749) (1962).
30. Paul L. Davies, Gower's Principles of Modern Company Law, op. cit. 6th edn P. 211.
31. by dint of cumulative effects of sections 38, 39, 65 (b) e.t.c of the Companies and Allied Matters Act 1990; which are in same tenor as sections 24 and 25 of the Ghana Company's Code 1963.
32. (1991) Jus. Vol. 2 No. 6 P. 16.
33. Footnotes 19 and 20 above respectively.
34. European Economic Community Act 1972, section 9 (1)
35. Section 35 English Companies Act 1985.
36. Section 35 (1) ibid.
37. Paul L. Davies, Gower's Principles of Modern Company Law, op. cit. 6th edition P. 211.
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39. English Companies Act 1989
40. English Companies Act 1985
41. Sections 35, 35A, and 35B.
42. Paul L. Davies, Gower's Principles of Modern Company Law, 6th edition op. cit. P. 211 - 213.
43. for example, section 27 (1) (C) of the Companies and Allied Matters Act 1990

requires companies to state the nature of business or purposes that the company is authorised to carry on.

44. *Professor S.A. Oretuyi, the Constitution and Composition of Corporate Trading Powers E.O. Akanki ed, Essays on Company Law, P. 108.*
45. *Vide Section 39 (2) and (3)*
46. *footnote 23 above.*
47. *Amokaye Oludayo, the Doctrine of Ultra Vires in Nigeria op. cit. P. 66.*
48. *Palmer's Company Law, Vol. 1, 24th edn C.M. Schmittoff ed (1987) Stevens & Sons Ltd, London PP. 136 - 137, 141.*
49. *Report of Nigerian Law Reform Commission on Company Law, Para. 132 P. 73 - 74.*
50. *Chapter 3 hereof.*
51. *Nigerian Law Reform Commission Report op. cit. P. 75, Para. 135.*
52. *Newzealand Companies Act 1982 (Amended by sections 35 of their Act of 1989).*
53. *Ghana Company Law Report P. 41.*
54. *Nigerian Law Reform Commission Report op. cit. P. 75 Para. 135 and 136.*
55. *Jus. Vol. 2 No. 6 op. cit. P. 15*
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CHAPTER FIVE

SUMMARY *AND RECOMMENDATION*

5.1 INTRODUCTION

The detail examination of corporate capacity and the Ultra Vires Rule reveals how the noble aims for which the Ultra Vires Rule was introduced has been subverted. This necessited the clamour for reform of the rule to curb the abuses. The result is that, Nigeria Jettisoned the position adopted by common law and the Companies Act 1968. It is established that even the provisions of the Companies and Allied Matters Act[1] have loopholes or shortcomings. The Act still preserves the Ultra Vires Rule to some extent. This chapter summarises the basic findings in the research. Recommendations are also made for further refroms to attain the best of results for Nigeria.

5.2 SUMMARY

Corporate capacity has been analysed or examined in theoretical and practical terms. This is done vis-a-vis the ultra vires doctrine which is intertwined with the issue of corporate capacity. It is established that "Limited Liability" was not gained on a platter of gold, and that it is possible and convenient to do without it; and that the documents of incorporation though understood legally as a contract under seal, may be rationalized in terms of a constitution of a club. This is because, both documents are alterable like a constitution, and breach of them avails no damages. Thus the protection sought for investors and third parties envisioned for the Memorandum and Articles of Association is no longer real and there now exists no justification for maintaining the distinction between Memorandum and Articles of Association of a company[2].

The object clauses of the Memorandum of Association of companies define their field of operation or capacities. At Common Law, various assaults on the object clauses especially as to devices by businessmen to make them elastic, capable of covering all possible businesses and implied powers, obscured the capacities of companies. These

have also hindered companies from being socially responsible.

The undue adherence to rules of Agency in the area of pre-incorporation contracts had been a source of confusion in the area. This is because the problem is distinct and ought to be treated distinctly. Devices evolved at common law to give a practical solution to the problem thus failed to attain justice for both parties[3].

The Companies and Allied Matters Act 1990 has made far reaching provisions to sort out the problems of corporate capacity. However, the provisions are complicated and still leave some room for confusion or problems of corporate capacity. An instance is, Section 72 of the Act, which seems to make it possible at a point in time to have nobody to hold responsible for pre-incorporation contracts.

The Companies and Allied Matters Act 1990 is still only permissive as to corporate social responsibility. What is required appears to be "compulsion" to discharge social responsibilities and not just permission to do so. Gifts to political parties, political associations, or for political purpose(s) are clearly prohibited.

The exercise of corporate powers by the organs of the company strictly speaking is not the same thing with the larger issue of corporate capacity, unless it is sought to establish that an action was carried on by the company or not.

It is also clear that ultra vires is not the same as "illegality"[4]. Notable reform alternatives to the ultra vires rule have also been considered[5]. It is established that the total abolition perspective or reform alternative is the most straightforward of them all, but that the Companies and Allied Matters Act 1990 abolishes the ultra vires rule partially. To arrive at this conclusion, one has to undertake a critical analysis of the relevant provisions to be able to hazard that guess that the ultra vires doctrine still exists[6] under the Companies and Allied Matters Act 1990, and as one writer[7] puts it:

"It is in respect of this confusion that one cannot easily conclude that the doctrine of ultra vires is completely dead in Nigeria[8]."

As the statement indicates, there is a confusion indeed.

Even when one agrees that the doctrine of ultra vires still exists under the Companies and Allied Matters Act 1990, its scope and practical utility are doubtful. In one breath, the rule exists under the Act; and in another breath it does not exist. The end result of this wavering between two ends both diametrically opposed to each other is that one doubts if the rule affords protection to anybody in that situation.

The Companies and Allied Matters Act 1990 still preserves the Ultra Vires Rule. That the ultra vires has outlived its usefulness is however not in doubt.

Having examined corporate capacity and the ultra vires rule in details and from all ramifications, one arrives at the final conclusion that the provisions of the Nigerian Companies and Allied Matters Act 1990 touching on corporate capacity and the Ultra Vires Rule as innovative as they are, still leave much to be desired. In other words, the provisions do not provide the best position for companies and persons dealing with companies. In the light of these findings among others recommendations are made for further reforms that will attain the best of results for Nigeria.

5.3 RECOMMENDATIONS

The recommendations bear in mind the commendable work done by the Law Reform Commission of Nigeria leading to the enactment of the Companies and Allied Matters Act 1990 vis-a-vis the conclusions this study has arrived at. In as much as the positions of the law are arrived at from critical analysis, there is need for further reform as this indicates that the common man as well as the businessman for whom the law is intended are wont to be uncomfortable and dissatisfied with the law as it is.

Consequently, it is recommended that:

1. Section 72 (2) of the Companies and Allied Matters Act 1990 be amended by deleting therefrom the expression;

   "in the absence of express provision to the contrary."

   This will make the position of the third parties to pre-incorporation contract more assured as there will now be full assurance that they must find somebody liable under the transaction whether ratified by the company or not. It will also give more meaning to the position that if the company does not ratify (or before it ratifies) the purported agent is liable under the contract; without unnecessarily allowing the purported agent to also escape liability by inserting contrary agreement and putting the third party in precarious position before the company ratifies or if it refuses to ratify.

2. The Ultra Vires Rule should be totally abolished in Nigeria. Its presence is worthless and rather confusing. In place of the ultra vires rule, the company should be conferred with the capacity of a natural person of full age for all purposes. This will render unnecessary any rule as to notice of contents of documents whether constructive or actual. The only restraint to a company carrying out any transaction should be those applicable to natural persons of full capacity such as illegality, immorality and public policy. The objects clause may then be necessary only to the extent of determining whether the company is for illegal purposes, for purposes of registration, or whether the company is a charitable company for purposes of taxation. Guarantee companies should be merged with incorporated trustees under part C. Such a position will also allow companies the freedom to donate to charities; and to be generally socially responsible. To this end, and for avoidance of doubts, specific provision be made compelling companies to employ a given percentage of their annual profits in discharging social responsibilities.

3. Section 41 of the Companies and Allied Matters Act 1990 should be strengthened

by adding to it a subsection allowing damages to be claimable in actions pursuant to the provision, and breach of the Memorandum and Articles of Association of the company.

4. The distinction between the Memorandum of Association and Articles of Association of Companies be abolished. The distinction no longer serve any practical purpose(s).

5. "Limited Liability" be abolished. Afterall, it is not a necessary incident of corporate personality that liability of members be limited. There may be companies with corporate personality but the liability of whose members is unlimited. Also, it took a long time after corporate personality was attained before limited liability was attained upon arguments it is humbly submitted were unconvincing. The words "Limited" or "Public Limited Company" fail to act as red flag as anticipated by the advocates of Limited Liability. Also there are numerous situations where the vail may be lifted. Limited Liability should be abolished altogether. In place of Limited Liability the more logical expression "Incorporated" be adopted to reflect the reality that the company is registered as such and is thus incorporated.

   Also if the Ultra Vires Rule is abolished, Unlimited Liability of companies will provide more assurance to third parties that they will not be injured adversely by entering into transactions with the company. Shareholders will also not go to sleep after putting in their monies in companies as the threat of liability extending to unlimited extent in the event of harm to third parties will loom in the air.

6. The prohibition of donations to political parties, political associations and for political purposes be maintained. The phrases "Political Association" and "Political Purpose" should however be defined by the statute. The retention of this prohibition will help in averting situations such as the Watergate Scandal in America.[9] This will also serve as a capital maintenance device as it will prevent[10].

   i. the recurrence of such fraudulent and questionable deals as characterized the Second Republic whereby companies donated huge sums of money to finance political parties and politicians in return for contractual gains; and

ii. a situation whereby a director or shareholder uses his influence to divert corporate funds towards financing his political ambition.

The non involvement of corporate sector in politics is also commendable because[11]:

i. The gifts or donations are often made without consultation with shareholders and other interest groups within the corporation who may not necessarily be of the same political persuasion;

ii. Political donations may constitute a waste where they are not able to achieve their objectives;

iii. In most cases, political donations operate to subvert political and socio economic policies of the state or to cover up illegality, hence totally immoral and violative of the public good;

iv. Political donations can gravely undermine the economic and political stability of the nation through the exacerbation of official waste and mismanagement of public resources.[12]

5.4 CONCLUSIONS

The loopholes in corporate capacity of companies and the ultra vires rule have been identified and recommendations made for further reforms that will attain the best of results for Nigeria, in the light of various reform alternatives.

It is hoped that the recommendations made if applied will contribute in ridding company law of some of its dangerous propensities as relate to corporate capacity and the ultra vires rule. This will better protect investors and creditors of the company and render the company a more attractive form of business for speedier development.

END NOTES/REFERENCES

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2. *See Chapter 1 hereof.*
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4. *See Chapter 3 hereof.*
5. *See Chapter 4 hereof.*
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10. *OLUDAYO A., op. cit. P. 61 at P. 64*
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12. *Ibid.*

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